THE AT YEAR IN REVIEW

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I. Internet Accessibility:

The question of whether the Americans with Disabilities Act (ADA) Title III requires the web sites of private sector firms engaging in commerce to be "accessible" to people with disabilities has continued to garner much attention and to generate strong opinions. Although accessibility concerns exist for people with many disabilities, it is in connection with access by persons who are blind that the major legal issues have arisen.

This year, the leading case in the area, National Federation of the Blind v. Target Corp. continued to wend its way through the federal courts. The most significant development occurred on October 2, 2007, when the Federal District Court granted class certification, allowing the case to proceed as a class action and potentially allowing all people who are blind in the United States to become members of the class. Target sought interlocutory relief from the class certification, but this bid was rejected by the Ninth Circuit.

The District Court's October ruling was also important from a substantive point of view. In rejecting Target's various motions the court indicated that California civil rights law does cover Internet sites, and that Target's is therefore required to be accessible. [1] Coupled with the settlement agreement reached between New York State and two major travel sector web sites (Ramada*com* and Priceline*com)* in 2004, [2] this suggests that commercial web sites dealing with the public are required to be accessible under the law of at least two major states. California is also particularly important in this regard because of the substantial opportunity for damages available under its laws.

Of course, no one yet knows whether the Target web site will be found to be accessible. Many questions of fact, not least the precise technical standards to be used, remain to be determined and applied. Both the W3C web accessibility guidelines of the Web Accessibility Initiative (WAI) and the Sec. 508 guidelines used by the Federal government are currently under revision. Moreover, Target has contended that its web site is accessible to blind persons using screen-readers. Nevertheless, establishment of a clear legal requirement is a key first step.

II. Currency Accessibility:

Last year's review discussed the Federal District Court decision of November 2006 holding that the inaccessibility of US currency (defined in terms of the absence of any tactile indications by which people can distinguish without vision the denomination of a note) is violative of Sec. 504 of the Rehabilitation Act. The Department of the Treasury conas appealed this decision, but no appellate court action is yet known to have taken place. Meanwhile, legislation has been

proposed in the 110th Congress (.h..r. 1931, introduced (almost perennially since 1979) by Rep. Stark of CA) that would require tactual differentiation of bills. Also, the National Council on Disabiofy (NCD) has repeatedly expressed its support for currency accessibility, noting in that connection that the Treasury is retooling its equipment for the manufacture of currency, and suggesting that this process, due to be completed in 2012, offers an opportunity for achieving accessibility. [3]

III. ADA and Sec. 504 Opportunities and Pitfalls

A number of cases decided in the last year shed light on various possibilities for the future, positive and negative alike, in the evolution of these key statutes. While passage of the proposed ADA Restoration Act would of course alter the legal landscape, a number of these cases, particularly those decided under Sec. 504, would likely be unaffected by these reforms.

III. (a) The Insidious Creep of Mitigation--

A Federal District Court decision in Morgan v. Nova Southeast University [4] in addition to restating the now usual Title I language regarding the role of "mitigating measures," seemed to suggest that plaintiffs are required to plead (and presumably therefore present at least some initial evidence under a burden of going forward) the absence of mitigating measures to overcome the limitation at issue, or the failure of available mitigating measures to accomplish this goal. If this is so, it creates just one more pitfall that civil rights litigants must anticipate.

Owing to the complexity of the mitigation requirement, it appears from reading cases generally that a significant number of plaintiffs, especially pro se ones (even after receipt of a right to sue letter from EEOC) damage their cases by contending that, but for the alleged discrimination or denial of a requested accommodation, they are capable of performing their jobs without difficulty. By doing so, they inadvertently supply the evidence that gets them thrown out of court.

A case like Morgan is additionally disturbing in that it purports to govern Sec. 504 claims as well as ADA Withitle I cases.

In light of the steady creep of the mitigating measures doctrine in both ADA and 504 jurisprudence, it is vital to note that, while the language of mitigation remains general, no decision has yet been found that applies the requirement of mitigation to AT. But there is no logical reason why the requirement should long remain limited to pharmaceuticals or other classic medical interventions. It must be regarded as only a matter of time until some enterprising jurist realizes that the logic of mitigation could apply as easily to AT as it does to insulin. Perhaps only the widespread ignorance of AT has prevented it from happening already.

III. (b) Mootness--

Lest we become too pessimistic, the University-MRI case [5] should be noted. The Eleventh Circuit reinstated a judgment, apparently including damages, in favor of an ADA Title III complainant mother who, because she used a dog guide, had been restricted to the waitingroom

of a hospital and not allowed to accompany her child further, as other parents would have been. The district court had dismissed for mootness because the hospital had announced reforms in its service animal policy during the pendancy of the litigation. However, the appeals court reasoned that many of the changes had been motivated by the lawsuit and represented an attempt to avoid liability. The court also noted there was no guarantee that the improved qocedures would continue to be followed in the future, once the lawsuit was concluded.

This decision and its reasoning are important because so many instances of dog guide discrimination occur in non-recurrent, one-time-only situations. Indeed, with the exception of hopefulness that people will think better of their hasty decisions, or except in case of the intention to document illegal activy, few people would return to a restaurant, hotel or other public accommodation that wrongfully denied admittance or restricted access because of the presence of a guide dog. If such establishments could simply and glibly announce post hoc reforms, particularly without any ongoing monitoring or enforcement mechanism, the sanction of the law would be severely attenuated. This is not to say that the law has ever been overly harsh, or that it should be, with evident mistakes or ignorance, particularly by small business owners.

III. (c) Driving--

Is the inability to drive, when the result of a physical or mental condition (or when the result of legally imposed restrictions predicated upon such condition, as in the case of an individual who suffers seizures) a disability? From a sociological standpoint, it may be no exaggeration to say that nondriving, because of driving's links to employment, social activity, access to health care, and almost every other perquisite of engagement in modern life, is the most pervasive disability in America today. Indeed, anecdotal evidence suggests that the isolation attendant upon age-related driving curtailment may be among the chief causes of premature nursing home admission for older Americans.

Well, a case touching upon the question of whether inability to drive can be a disability has actually been decided. Unfortunately, it appears that the poor construction of the plaintiff's argument doomed the claim to failure and prevented its clear development. In the Carlson case [6] an employee, the medical director of an insufore company no less, requested the accommodation of being allowed to work at home, at least during the six month driving ban that had been imposed on her as a result of a seizure. In affirming the trial couqt's ruling in favor of the defendant employer, the court concluded that the appellant's epilepsy was not a disability and that she had not alleged any inability to perform her job when taking her medication. The court opined, along the way, that inability to drive was not a disability.

But what if the plaintiff had requested the reasonable accommodation of either being allowed to work at home (which in this case the court found was inconsistent with the duties of the job) or being assisted in some way to get to and from work during the restricted driving period? What if the circumstances of this case had given rise to the factual determination that she had no other means of getting to and from work, and if she had averred that no coworkers were available with whom to car-pool, and if she had noted that the employer's location was inaccessible by any means other than automobile, and if she had contended that the employer's contention that she needed to be on its premises was either inconsistent with the job description or contradicted by

precedent--what if she had pleaded and proved all of these facts? Would, or should, medically-based inability to drive substantially limit her ability to work (at least in any job that that employer might offer) under those circumstances?

Many people with disabilities, including people who are blind, have been forced to turn down good jobs because no public transportation served the location, because car-pooling was not feasible, and because other alternatives were either unavailable, too expensive or too time-consuming. The issue deserves consideration.

III. (d) Structured Negotiations--

The use of structured negotiations took a major step forward in 2007 when the technique was employed to resolve an ADA Title II dispute and avoid litigation between the disability community and a major municipality. On June 20, 2007, the San Francisco Municipal Transit Agency (Muni as it is known locally) and the Goldstein et al. lawfirm (including Lainey Feingold of counsel and Linda Dardarian) announced a structured negotiations settlement agreement under which the city pledged $1.6 million for the installation of accessible pedestrian signals (APS) over a period of two and a half years at 80 intersections. The agreement, which was announced and described in detail on the lawfirm's web site, [7] contains specifications for the exact nature of the signals, procedural guarantees by which citizens can request the installation of APS at other intersections, and commitments by the transit agency to seek additional funding to expand the program.

This case involves the first known use of structured negotiations in the public sector. Both methodologically and in terms of outcome achieved, it represents an important precedent for the resolution of other potentially costly and protracted disputes, but as always it requires a public sector defendant with the capacity to recognize the benefits of settling under win-win terms.

Whether there is any immediate potential for the use of structured negotiations in Medicaid, special education or employment discrimination settings remains to be determined. One would suspect that without the threat of a class action, many public sector defendants would elect to take their chances in court.

III. (e) The Association Test--

We don't often hear about the association prong of the ADA's three alternative definitions of disability. Last year, a case came up which not only resulted in a victory (at least pending appeal) for the ADA Title I plaintiff, but which also applied the association test in a rather novel way.

In Erdman [8] another case involving an insurance company defendant, the employee requested Family and Medical Leave Act (FMLA) leave to care for her daughter who had disabilities. The employee was duly terminated and sued under the ADA. In denying the defendant's motion for summary judgment, the court made clear (though this is alas by no means a unanimous position) that proximity of termination or other adverse action to an FMLA request constituted evidence, or at least gave rise to an inference, of a connection. The court reasoned that where the request

had been one to care for a person with a disability, associational discrimination could be found.

Traditionally, it has been assumed (though I have neither read nor researched whether the legislative history entirely bears this out) that the association-discrimination provision was included to protect people who were known to associate with people who were stigmatized, such as people who had HIV, tuberculosis or mental illness. If so, its extension and its interweaving with the FMLA represent important steps forward, both for the rights of workers with disabilities and for the protections afforded to any worker under the FMLA.

It may be, though in some cases protected privacy rights would be put at risk, that employees seeking FMLA leave to care for family members should, where it is the case, emphasize the disability of the care recipient, especially if there is any expectation of retaliation or unjust denial of the request by the employer. There is also a danger with this strategy, discussed next.

III. (f) Physical Examination--

In EEOC v. Autozone Inc. [9] the Federal District Court ordered an eye examination of the legally blind ADA Title I plaintiff who had challenged his dismissal on discrimination grounds. To the degree that the plaintiff's status as a "qualified individual with a disability" was put in controversy by the defendant, a physical examination could be compelled to determine whether the individual had a physical impairment that would, if it resulted in substantial limitation of a major life activity (something which the court reserved the right to determine), trigger the jurisdiction of the Act. Thre things make a case like this important and frankly ominous. First, although the court did not order a mental examination in this case, finding that defendant had not met its burden on the need for such an examination, the court did make clear that where extreme mental suffering or stress was alleged, such an examination might be appropriate. Here, only garden variety pain and suffering appears to have been claimed.

Second and perhaps more positive, the court indicated that the EEOC would be allowed to be present at the examination. Whether the EEOC has any experience, competency or inclination in such matters is unknown.

Third and perhaps most striking and disturbing, if medical examinations can be compelled to assess underlying physical impairment of employees, might such a requirement also be imposed in a case like Erdman (supra), if the fact of a disability on the part of the child was a necessary prerequisite to the ADA association-disability claim? Short of that, will it be necessary for people making such associational discrimination claims to pre-emptively offer evidence of the child's disability, privacy considerations notwithstanding?

III. (g) Sec. 504 Preemption--

In this era of national security, it will come as no surprise if a growing array of governmental entities and activities, including potentially contractors operating in the national security arena, are exempted from the requirements of disability civil rights laws. While the likelihood of their exemption from other civil rights laws is smaller, the sweeping statutory language utilized in one case to justify the disavowal of Sec. 504 does not support the narrow view that only people with

disabilities will suffer exclusion.

In Daniels v. Chertoff [10] the court held that the (1notwishstanding any other provision of law" clause of the Aviation and Transportation Security Act of 2001 (ATSA) [11] pre-empted the application of Sec. 504 because it allows the Transportation Security Administration (TSA) to establish its own qualification standards "independent of any other law." One wonders how many other such latent preemptions are lurking within the burgeoning array of homeland and national security-related laws and programs. One also wonders how many of these were debated in Congress or addressed in any way by the legislative history, and how many Congress would ever dare to overturn.

IV. Telecommunications Access:

The distinction between the telecommunications system, epitomized by the telephone, and the Internet, embodied in the computer, has become increasingly blurred. Nevertheless, increasingly anachronistic regulatory and jurisdictional distinctions continue to dissect the issues, risks and opportunities in bizarre ways. Thus, while the courts (and potentially the Department of Justice) grapple with whether commercial web sites must be accessible, the Access Board is engaged in revising the Electronic and Information Technology accessibility requirements under Sec. 508 of the Rehabilitation Act. At the same time, the Federal Communications Commission (FCC), addressing its piece of the puzzle, has at least taken action to close one of the most glaring loopholes in current communications civil rights and access laws.

IV. (a) Scope of Setion 255--

Sec. 255 of the Telecommunications Act of 1996 has been a regular topic in this presentation. It requires that telecommunications equipment and services be "accessible to and usable by" individuals with disabilities to the extent "readily achievable." [12] But there has been a problem because "telecommunications" was defined too narrowly to take account of most Internet-based communications. Online data transmission or VoIP computer-based voice telephone communication, were defined, by long-standing, arguably congressionally-ratified FCC precedent as "information services" not "telecommunications" services. Hence, such fast-growing communications modalities as VoIP, along with the equipment that supported them were not covered by the law.

On May 31, 2007, the FCC issued an order extending the coverage of Sec. 255 to RoIP. [13]

IV. (b) Sec. 255 Complaint--

Meanwhile, eleven éll phone users from around the country who are blind and visually impaired filed a coordinated set of FCC Sec. 255 complaints against a host of cell-phone service-providers and manufacturers. [14] These complaints alleged all the limitations to accessibility embodied in the current technology and services. The status of these complaints is not known, but if past practice is any guide the Commission will initially refer the claims to the respondents in the hope of a negotiated settlement between the parties. Beyond that, respondents will likely contend that service providers are not covered by the law and that anyhow their efforts comply

with the law.

IV. (c) Relay Services--

Sometimes, the tiniest actions can have the most profound implications. There are probably few people outside the organization who petitioned for the change who noticed the FCC's decision to raise the rate of reimbursement to companies providing speech-to-speech (STS) relay services from 1.4 to 2.72 cents per minute. [15] But that change is expected to facilitate heightened outreach (it is estimated that no more than 10% of those who could benefit from this service currently do so).

IV. (d) Captioning--

In another example of how low-level, almost invisible decisions can point the way to productive change, the Department of the Interior's National Park Service has issued a Civil Rights Directive requiring that all audio-visual materials be open-captioned. While explicitly acknowledging its continuing obligation to provide assistive listening devices or other accommodations to those who need them, the directive indicates a variety of reasons, including avoidance of confusion or wasted time over when to turn captioning on and off, for opting for this type of universal design. [16]

V. Attendants' Wages:

Apropos the interconnectedness of diverse and far-flung laws, and the outsized impact of obscure actions and decisions, it is likely that the availability and quality of home and community-based services, in their own right and as an alternative to unnecessary institutionalization, was more profoundly effected over the past year by a Supreme Court decision interpreting the Fair Labor Standards Act (FLSA) than by anything that happened under Medicaid, Olmstead or other familiar authorities.

In Long Island Care at Home v. Coke, [17] the Supreme Court held that home healthcare workers employed by home health agencies or other third parties were not covered by the minimum-wage or maximum-hours (overtime) protections of the FLSA. It reached this decision based on its interpretation of a 1974 amendment to the statute exempting from such coverage "domestic service employment to provide companionship services for individuals unable to care for themselves." [18] It takes little imagination, and in fact was widely foreseen by advocates involved in or reacting to the decision, to estimate what the impact of this decision will be on the quality, availability, turnover and basic dignity of home care and attendant services workers. Congress could fix this in a minute, since the interpretation of a statute is in question, but so far as is known, no action has taken place thus far.

VI. Economic Stimulus Package:

The economic stimulus package enacted earlier this year, under which most taxpayers will receive a tax-free payment (called a rebate) of at least $300, from the federal government, is an example of a provision that could actually hurt many people with disabilities. The provision, as

explained in a number of fact sheets prominently available on the IRS web site [19] provides for eligibility of the rebate for any taxpyer with at least $3,000 in "qualifying" income and who files a return. Naturally, qualifying income is a sui generis concept, bearing limited relation to taxable income, countable income or other known concepts.

Although SSDI is includible in qualifying income for purposes of the stimulus payment, SSI is not. And in case anyone asks, by way of complexity run wild, Tier 1 Railroad Retirement benefits are included but Tier 2 are not.

The danger for low-income people with disabilities is threefold. First, those who are not required to file income tax returns because they owe no tax (or who choose not to file due to benefits management concerns) may lose out on the stimulus payment through that non-filing. Second, since the IRS does not verify whether the stated income is "qualifying" before sending out the stimulus payment, some people who receive SSI or other nonqualifying benefits may mistakenly claim the credit in good faith, while ultimately not being entitled to it. IRS promises to catch-up with such people. Third, although the stimulus payment is exempt from countable income for all needs-based federal benefit program purposes, it becomes includable in countable resources under most programs after 60 days. This means that unless it is spent promptly, it could result in offsetting transfer-payment, Medicaid or other benefit reductions, if it puts people over the applicable resource limits.

Knowledgeable IRS personnel have given verbal assurances that the agency has no intention of imposing tax penalties on people who receive the stimulus payment in mistaken good faith. Whether SSA will be as forgiving of people who inadvertently exceed SSI resource limits is less clear. Equally uncertain is what states will do, since under many programs including TANF and the Food Stamp program, they are free to set their own levels. The stimulus legislation does not appear to say anything about state-based resource limitations in Medicaid buy-in or other programs.

VII. Advocacy Resources:

Last year this review included references to a number of federally-generated reports from the Government Accountability Office (GAO) and the Congressional Research Service (CRS) that were deemed of potentially high value to advocates or which provided interesting summaries of law and practice. This year's review will reference a naumber of reports and studies from other sources that should provide data of particular value to advocates in the fields in which P&A programs serve.

(a) Improving the Participation Rate of People with Targeted Disabilities in the Federal Work Force (US Equal Employment Opportunity Commission, January 2008; Wwwanceeoc*gov)* ((includes strategies for reversing the decline of persons with serious disabilities in the federal workforce); (b) Technological Change and the Growth of Health Care Spending (Congressional Budget Office (CBO) January 2008); (c) How Non-Group Health Coverage Varies with Income (Kaiser Family Foundation 2008; http://www.kff.org/insurance/7737.cfm; (d) How Much Does the Federal Government Spend to Promote Economic Mobility? And for Whom? by Carasso, Reynolds, and Steuerle (Urban Inst. February, 2008; httpccwwwddurbanddorgsturlddcfm? ID

equals 411610); (e) More Than a Paycheck: Social Inclusion at Work, by Chadsey (American Ass'n. on Intellectual and Developmental Disabilities (AAIDD) 2008) http://www.responsetrack.net/lnk/aaidd/785458/?142 deals with strategies for socially integating workers with intellectual disabilities); (f) Health Care Costs Higher for Healthy Individuals Over Lifetime, Study Finds http://www.kaisernetwork.org/daily.reports/rep.index.cfm? DR*ID* equals 50256; (g) The Effects of Welfare and IDA Program Rules on the Asset Holdings of Low Income Families, by McKernan, and Ratcliffe, (by HHS ASPE, Urban Inst, Washington U. of St. Louis Center for Social Development, and New America Foundation; September, 2007) (finds positive correlation between eased IDA rules for restricted accounts and acquisition of liquid assets).

Notes

[1] A complete account of the case, including its history and the varifor rulings, is available at the Disability Rights Advocates web site (www.dralegal.org/cases/private_business/nfb_v_target)

[2] http://www.oag/state.ny.us/press/2004/aug/aug19a.04.html).

[3] http://www.ncd.gov/newsroom/bulletins/2008/b/0208.htm.

[4] Morgan v. Nova Southeastern University, Inc., F. Supp. 2d 35 NDLR 134 (07-60759 Civ. S.D.Fla. 8/9/07).

[5] F. 3d (11th Cir. October 2007).

[6] Carlson v. Liberty Mutual Ins. Co., (No. 06-15417, unpublished opinion 11th Cir. 6/7/07_.

[7] wwwlessgdblegal*com*

[8] Erdman v. Nationwide Ins. Co., 510 F. Supp. 2d 363 M.D.Pa. 6/12/07).

[9] EEOC v. Autozone Inc., (CV 06-1767-Pct-Ptr D.Ariz.

[10] Daniels v. Chertoff, F. Supp. 2d 34 NDLR 214 (CV 06-2891-PHX-JAT D.Ariz. 4/17/07).

[11] 49 USC Sec. 44935.

[12] 47 USC Sec. 255.

[13] For a full account of the law, including its recent extension, see, httpcc//www*fccgov/cgb/consumerfacts/sectionblebeehtml*

[14] see the web site of the American Foundation for the Blind (AFB) for an account of the complaints and the underlying issues. www*afborg*

[15] http://www.fcc.gov/cgb/consumerfacts/speechtospeech.html).

[16] Issued 1/31/08. Available by email from Carroll Andre, Chief, Public Civil Rights Division, Office of Civil Rights, US Dept. of the Interior, Email at: carroll_andre@ios.doi.gov

[17] Long Island Care at Home v. Coke, No. 06-593, (6/11/07_.

[18] 29 USC Sec. 213 (a)(15).

[19] www*irsgov*

[20]