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**Impact of the Americans with Disabilities Act
on Transit Operations**

This report was prepared under TCRP Project J-5, "Legal Aspects of Transit and Intermodal Transportation Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Carolyn B. Witherspoon, Donna S. Galchus, and Susan Keller. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

THE PROBLEM AND ITS SOLUTION

The nation's transit agencies need to have access to a program that can provide authoritatively researched, specific, limited-scope studies of legal issues and problems having national significance and application to their businesses. The TCRP Project J-5 is designed to provide this insight.

The intermodal approach to surface transportation requires a partnership between transit and other transportation modes.

Transit attorneys have noted that they particularly need information in several areas of transportation law, including environmental requirements; construction and procurement contract procedures and administration; civil rights and labor standards; and tort liability, risk management, and system safety.

In other areas of the law, transit programs may involve legal problems and issues that are not shared with other modes; as, for example, compliance with transit equipment and operations guidelines, FTA financing initiatives, and labor or environmental standards.

APPLICATIONS

When the study commenced, the Americans with Disabilities Act of 1990, 42 U.S.C. § 1201 (a)(1), (ADA), had been in effect 11 years. The ADA extended antidiscrimination measures to an estimated 43 million Americans. Members of the transportation community had anticipated dire consequences, including protracted litigation. While litigation may not have reached anticipated intensity, program administrators have had to deal with a number of compliance issues. The TCRP Legal Studies committee members believe that compliance would be improved if there is better understanding of the ADA requirements.

The objective of the study was to produce a legal research digest that reports on a review of applicable statutes, a survey of state and local transit providers, and an analysis of developments pertaining to employment infrastructure and service requirements. Hopefully, this report will help transit operators better understand ADA requirements and, thereby, enhance compliance.

The report should be helpful to administrators, attorneys, financial officials, human resources personnel, and planners in public transportation.

CONTENTS

I. INTRODUCTION.....	5
II. BEFORE THE ADA.....	5
III. DEFINITION OF DISABILITY.....	6
A. Physical or Mental Impairment	7
B. Major Life Activity.....	7
C. Substantially Limits	7
IV. TITLE I OF THE ADA—EMPLOYMENT	9
A. Definitions.....	9
1. Employer	9
2. Qualified Individual.....	9
3. Reasonable Accommodation	9
B. Enforcement	10
C. Prima Facie Case	10
D. ADA Case Law Regarding “Disability”	10
E. ADA Case Law Regarding “Qualified Individual”	12
F. ADA Case Law Regarding Reasonable Accommodations.....	13
G. ADA Case Law Regarding Exhaustion of Remedies/DOT Regulations	14
H. ADA Case Law Regarding Applicants.....	15
V. TITLE II OF THE ADA—PUBLIC SERVICES.....	15
A. Public Entity and Qualified Individual With a Disability.....	15
B. ADA Requirements and Regulations.....	16
1. General ADA Requirements and Regulations	16
2. ADA Requirements and Regulations Regarding Fixed Route Systems	17
3. ADA Requirements and Regulations Regarding Paratransit Service.....	19
a. Eligibility for Paratransit Service.	19
b. Comparable Service.....	20
c. Undue Financial Burden.....	22
d. Paratransit Plans.....	22
4. ADA Requirements and Regulations Regarding Demand Responsive Systems, New Facilities, and Existing Facilities	22
5. ADA Requirements and Regulations Regarding Intercity and Commuter Rail	23
C. Prima Facie Case	24
D. Enforcement and Remedies.....	25
1. Compensatory Damages	25
2. Punitive Damages	25
3. Attorney’s Fees.....	26
4. Fines	26
E. Parties To Lawsuits.....	26
1. Organizational Standing	26
2. Class Actions	27
VI. TITLE III OF THE ADA—PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES	27
A. Definitions.....	27
1. Specified Public Transportation	27
2. Demand Responsive System.....	28
3. Fixed Route System.....	28
4. Over the Road Bus.....	28
5. Private Entity.....	28
6. Public Accommodation	28

7. Commerce.....	28
B. Enforcement and Remedies	28
C. ADA Requirements	28
D. ADA Regulations	29
VII. MISCELLANEOUS PROVISIONS OF THE ADA	29
A. Construction with Other Laws.....	29
B. State Immunity	29
C. Prohibition Against Retaliation and Coercion	30
D. Attorney’s Fees	30
E. Technical Assistance	30
F. Illegal Use of Drugs	31
G. Items Not Considered Disabilities.....	31
H. Alternative Means of Dispute Resolution.....	31
VIII. SURVEY REGARDING THE IMPACT OF THE ADA ON TRANSIT AGENCIES NATIONWIDE	31
IX. CONCLUSION.....	31
APPENDIX A.....	33

IMPACT OF THE AMERICANS WITH DISABILITIES ACT ON TRANSIT OPERATIONS

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I. INTRODUCTION

In 1990, Congress found that approximately 43 million Americans had one or more physical or mental disabilities and that this number was increasing as the population as a whole was growing older.¹ To address issues of discrimination faced by many of these disabled individuals and to strengthen the federal government's role in "the elimination of discrimination,"² Congress enacted the Americans with Disabilities Act (ADA).³ The ADA extends federal protection to individuals with disabilities in the areas of employment, public accommodations, and public services. Specifically, Title I of the ADA addresses issues of discrimination within the employment context.⁴ Title II of the ADA prohibits discrimination by public entities, such as state or local governments.⁵ Title III provides protection for individuals with disabilities in public accommodations.⁶ This paper will discuss the impact that each Title of the ADA has had on transit operations.

II. BEFORE THE ADA

Implementation of the ADA in 1990 was predicted to have far reaching impacts on transit operations in the United States. However, transit operators had dealt with the issue of serving the disabled prior to the ADA

because the majority of their operations were covered by prior legislation.⁷

As early as the 1970s, the federal government sought to expand disabled Americans' access to public transportation. Section 16(a) of the Urban Mass Transportation Act⁸ enacted in 1970, now referred to as the Federal Transit Act, provided that elderly and disabled persons have the same rights as other persons to utilize mass transportation facilities and services, and mandated that special efforts be made in the planning and design of mass transportation services to insure the availability of those services to the elderly and disabled.⁹

Section 504 of the Rehabilitation Act of 1973 similarly provided that no qualified person with disabilities could, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination in any program or activity receiving federal financial assistance.¹⁰

Congress then enacted Section 165(b) of the Federal Aid Highway Act of 1973.¹¹ In 1975, this Act was amended and mandated that special efforts be made in the planning, design, construction, and operation of mass transportation facilities and services as to allow effective utilization by the elderly and the disabled.¹² Such projects receiving federal financial assistance would not be approved for federal funding unless they allowed access to mass transportation facilities, equipment, and services to the elderly or disabled.¹³

In December of 1982, Congress enacted the Surface Transportation Assistance Act of 1982 (STAA),¹⁴ in an effort to require a more active federal role in the development and enforcement of substantive standards for

¹ 42 U.S.C. § 12101(a)(1).

² *Id.*, § 12101(b). Congress stated that its purpose in enacting the ADA is:

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

³ *Id.*, §§ 12101-12213.

⁴ *Id.*, §§ 12101-117.

⁵ *Id.*, §§ 12131-134.

⁶ *Id.*, §§ 12181-89.

⁷ See Federal Transit Act (Urban Mass Transportation Act of 1964), codified as amended at 49 U.S.C. § 5301; Rehabilitation Act of 1973, codified as amended at 29 U.S.C. § 794; Federal-Aid Highway Act of 1973, 23 U.S.C. § 142 note, Pub. L. No. 93-643, 88 Stat. 2282 (1975); Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097 (1983).

⁸ 49 U.S.C. § 5301(d).

⁹ *Id.*

¹⁰ 29 U.S.C. § 794.

¹¹ 23 U.S.C. § 142 note, Pub. L. No. 93-643, 88 Stat. 2282 (1975).

¹² *Id.*

¹³ *Id.*

¹⁴ Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097 (1983). Although enacted in 1982, STAA did not become law until January 6, 1983.

servicing the disabled in federally assisted mass transit programs.¹⁵ STAA required the Department of Transportation (DOT) to issue regulations establishing minimum criteria for the provision of transportation services to the disabled.¹⁶ In response, DOT issued final regulations containing the “local option” provision, which allowed the transit system to choose whether to accommodate the disabled through making buses more accessible to the disabled, establishing a separate paratransit system, or using disabled-accessible buses for some areas and paratransit for others.¹⁷ The regulations also established a minimum service criteria for transit-only systems, paratransit systems, and mixed systems combining fixed-route transit and paratransit, which required that transit service for the disabled be comparable to service for the nondisabled in hours, days of service, service area, and fares.¹⁸ The regulations also contained a safe harbor provision, which provided that the transit systems were not required to spend more than three percent of operating costs on service for the disabled, even if, as a result, they did not meet DOT’s minimum service criteria.¹⁹ The safe harbor provision was ultimately found to be invalid.²⁰

Prior to the ADA, the antidiscrimination laws only addressed discrimination by federal agencies and recipients of federal financial assistance.²¹ Congress agreed that prior to the ADA, “individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination.”²² The ADA was ultimately enacted in 1990 based on Congressional findings that discrimination against individuals with disabilities was a major social problem.²³ The underlying purpose of the ADA was “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”²⁴ It specifically extended the protection of the Rehabilitation Act of 1973 into areas of employment, public accommodations and

services operated by private entities and public entities.²⁵

III. DEFINITION OF DISABILITY

In order to have standing to sue under the ADA, a plaintiff must fall within the statutory definition of an individual with a disability. Pursuant to the ADA, an individual is considered to be disabled if he or she is actually disabled as defined by the ADA, has a record of a disability, or is regarded as having a disability.²⁶ The ADA allows an individual who no longer has a disability but at one time suffered from one to gain protection.²⁷ This provision is intended to prevent discrimination against those with a history of a disability.²⁸ If a plaintiff cannot prove that she has a disability or record of a disability, she still may be able to prove that she was regarded as having a disability and, thus, gain protection under the ADA.²⁹

The statute defines a “disability” as “(A) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”³⁰ The existence of a disability is essentially a three-part test: (1) The plaintiff has a physical or mental impairment; (2) A major life activity is affected by the impairment; and (3) The impairment substantially limits the major life activity. Many of the terms referred to in the statute’s definition of disability are not explicitly defined, such as “impairment,” “major life activity,” and “substantially limits.” Because of the ambiguity of several of the terms, many cases have been brought before the U.S. Supreme Court trying to determine exactly who falls within the statute’s protected class.³¹

Most recently, the United States Supreme Court in *Toyota Motor Manufacturing, Kentucky Inc. v. Williams*,³² addressed the definition of a disability. The plaintiff, who suffered from carpal tunnel syndrome, sued her former employer alleging that her former employer violated the ADA when it failed to accommodate her disability and wrongfully terminated her.³³ The Supreme Court stated that in order to qualify as dis-

¹⁵ Am. Disabled for Accessible Pub. Transp. v. Skinner, 881 F.2d 1184, 1195 (3d Cir. 1989).

¹⁶ Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097.

¹⁷ 49 C.F.R. § 27.95.

¹⁸ *Id.*

¹⁹ *Id.*, § 27.97.

²⁰ Am. Disabled for Accessible Pub. Transp. 881 F.2d at 1201–1203 (3d Cir. 1989). Seven disabled individuals and disability rights organizations challenged the local option and safe harbor provisions of the regulations. The United States Court of Appeals for the Third Circuit upheld the local option provision but found that the safe harbor provision was invalid. The court held that the safe harbor provision was “arbitrary and capricious” because “under the safe harbor provision, cities could deny to the disabled the minimum quality of service mandated by Congress with impunity.” *Id.* at 1201.

²¹ See *supra* note 7.

²² 42 U.S.C. § 12101(4).

²³ *Id.*, § 12101(a)(1)-(2).

²⁴ *Id.*, § 12101(b)(1).

²⁵ See *id.*, § 12201(a). The statute explicitly states that “[e]xcept as otherwise provided in this Act, nothing in this Act shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973...or the regulations issued by Federal agencies pursuant to such title.” *Id.*

²⁶ *Id.*, § 12102(2)(A)-(C).

²⁷ *Id.*, § 12102(2)(B).

²⁸ 29 C.F.R. §§ 1630.2(k) & 1630.4.

²⁹ 42 U.S.C. § 12102(2)(C).

³⁰ *Id.*, § 12101(2).

³¹ See *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

³² 534 U.S. 184 (2002).

³³ *Toyota Motor*, 534 U.S. at 187–88.

ability under the ADA, “a claimant must initially prove that he or she has a physical or mental impairment,”³⁴ that the impairment limits a “major life activity,”³⁵ and that the limitation is of a “substantial” fashion.³⁶ In determining whether the plaintiff was disabled under the ADA, the Supreme Court found guidance in the interpretive regulations of the Rehabilitation Act of 1973 issued by the Department of Health, Education and Welfare (HEW),³⁷ and also in the Equal Employment Opportunity Commission (EEOC) regulations interpreting the ADA.³⁸

A. Physical or Mental Impairment

The Supreme Court cited the definition of “physical impairment” provided under the HEW Rehabilitation Act regulation as: “any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin and endocrine.”³⁹

B. Major Life Activity

The Court also relied on the HEW Regulations for a list of examples of “major life activities,” including, “walking, seeing, hearing...performing manual tasks.”⁴⁰ The Court defined “major life activities” as those “that are of central importance to daily life.”⁴¹ Thus, if the performance of manual tasks is to qualify as a major life activity, those tasks must be “central to daily life.”⁴² The Court explained that such a strict and limiting interpretation of these terms is necessary given Con-

gressional intent. In enacting the ADA, Congress found that 43 million Americans have one or more physical or mental impairments.⁴³ Had Congress “intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, that number...would surely have been much higher.”⁴⁴

C. Substantially Limits

The Court relied upon the EEOC regulations’ definition of the term “substantially limits.”⁴⁵ The EEOC regulations define “substantially limited” as “unable to perform a major life activity that the average person in the general population can perform” or “significantly restricted as to the condition, manner or duration under which an individual can perform a particular life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity.”⁴⁶

The Court also cited the EEOC factors for determining whether a major life activity is substantially limited, including: “the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment.”⁴⁷ In its analysis, the Court also relied on the dictionary definition of “substantial” and found that “substantial” thus clearly precludes impairments that interfere in only a minor way with the performance of manual tasks from qualifying as disabilities.⁴⁸ Ultimately, the Court established that disability determinations are to be made on a case-by-case basis, especially when the impairment is one characterized by a variety of symptoms, as in the case of carpal tunnel syndrome.⁴⁹ The Court held that the lower court had applied the wrong standard to determine whether Williams was substantially limited in the major life activity of performing manual tasks and remanded the case for determination in accordance with its decision.

A trilogy of United States Supreme Court cases decided under Title I of the ADA in June of 1999 dealt with employment discrimination and the issue of whether plaintiffs are “disabled” under the federal statutes if they have physical impairments that are

³⁴ *Id.* at 195.

³⁵ *Id.*

³⁶ *Id.* at 195.

³⁷ *Id.* at 195. The Supreme Court found that the HEW Regulations were of particular significance because at the time they were issued, HEW was the agency responsible for coordinating the implementation and enforcement of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, which prohibits discrimination against individuals with disabilities by recipients of federal financial assistance. *Id.*

³⁸ *Id.* at 194. The Supreme Court did not decide what level of deference, if any, the EEOC Regulations are due. As the Court had previously noted in *Sutton v. United Airlines, Inc.*, 527 U.S. at 471, no agency has been given the authority to issue regulations interpreting the term “disability” in the ADA. *Id.* However, the EEOC did so. *Id.* (citing 29 C.F.R. §§ 1630.2(g)-(j)). Because both parties in *Toyota Motor* accepted the EEOC Regulations as reasonable, the Supreme Court, without actually holding that they were reasonable, assumed that they were. *Id.*

³⁹ *Toyota Motor*, 534 U.S. at 194–95 (citing 45 C.F.R. § 84.3(j)(2)(i)).

⁴⁰ *Id.* (Citing 45 C.F.R. § 84.3(j)(2)(ii)).

⁴¹ *Id.* at 197.

⁴² *Id.*

⁴³ *Id.* (Citing 42 U.S.C. § 12101(a)(1)).

⁴⁴ *Id.* (Citing *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 487 (1999)).

⁴⁵ *Id.* at 195. See *Stewart v. New York City Transit Auth.*, 2001 WL 279772 (E.D. N.Y. 2001) (discussion of substantially limited); *Johnson v. Penske Truck Leasing Co.*, 2001 WL 238181 (E.D. La. 2001) (substantial limitations).

⁴⁶ *Id.* at 195 (citing 29 C.F.R. § 1630.2(j)).

⁴⁷ *Id.* at 196 (citing 29 C.F.R. § 1630.2(j)(2)(i)-(iii)).

⁴⁸ *Id.* at 197.

⁴⁹ *Id.* at 197.

mitigated by the use of corrective devices.⁵⁰ Ultimately, the decision turned on the Supreme Court's interpretation of the term "substantially limits." In this case, the Court held that the determination of whether a plaintiff is substantially limited in a major life activity should be made by examining the plaintiff in his or her present state, in light of any corrective measures that may help mitigate his or her disabilities.

Sutton is the leading ADA case of this trilogy.⁵¹ The case involved twin sisters who had applied for positions with United Air Lines as commercial airline pilots. The plaintiffs suffered from severe myopia. This condition left their uncorrected visual acuity at 20/2000 in their right eyes and 20/400 in their left eyes. In order to compensate for this condition, each plaintiff used corrective lenses which restored vision in each eye to 20/20 or better. However, the airline's minimum visual requirements for the pilots was "uncorrected visual acuity of 20/100 or better."⁵² Because the plaintiffs did not meet this standard without their corrected eye glasses, they were not offered employment.

The plaintiffs sued for disability discrimination under the ADA, alleging that United violated the ADA on the basis of an actual disability. The Tenth Circuit held that an individual is considered disabled as defined by the ADA if the alleged impairment as mitigated by corrective measures substantially affects a major life activity in fact. The United States Supreme Court agreed.⁵³

Murphy applied the *Sutton* holding to a plaintiff who suffered from high blood pressure.⁵⁴ Without medication, plaintiff's blood pressure was 250/160. In 1994 the plaintiff was hired as a mechanic at UPS. His duties included driving commercial motor vehicles. Under DOT requirements, drivers could not have any "clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial vehicle safely."⁵⁵ When the plaintiff was hired, his blood pressure did not meet DOT standards for health certification; however, he was erroneously certified. The plaintiff was later tested again and was terminated when his blood pressure was found to be above the required norm.⁵⁶

The plaintiff brought an employment disability discrimination claim under the ADA, asserting that he was terminated because of his hypertension disability. The district court held that the plaintiff's disability should be assessed with regard to his medicated state, rejecting the EEOC's Interpretive Guidance stating that mitigating measure should not be taken into con-

sideration as conflicting with the plain language of the ADA. With medication, the plaintiff's impairment did not substantially affect any major life activity. Consequently, the plaintiff was not considered disabled under the ADA.⁵⁷ Summary judgment was entered in favor of the defendant, and upheld by the Tenth Circuit and the U.S. Supreme Court.⁵⁸ In upholding the summary judgment decision, the Supreme Court held that under the ADA, the determination whether petitioner's impairment "substantially limits" one or more major life activities is made with reference to the mitigating measures he employs.⁵⁹ When medicated, petitioner's high blood pressure did not substantially limit him in any major life activity.⁶⁰

The third United States Supreme Court case, *Albertson's, Inc. v. Kirkenburg*, involved a plaintiff who suffered from amblyopia, a visual impairment.⁶¹ Although he did not use any prosthetic corrective measures, his brain had developed a mechanism for coping with his visual impairment and thus his body compensated for his disability.⁶² The plaintiff was erroneously hired as a truck driver for Albertson's, a chain of grocery stores, even though he did not meet the DOT's basic vision standard.⁶³ The plaintiff was later fired from his position when additional testing was done.⁶⁴

The plaintiff sued his employer for disability discrimination under Title I of the ADA. The district court granted Albertson's motion for summary judgment, holding that because the plaintiff could not meet DOT vision standards, he was not otherwise qualified for the position.⁶⁵ The Ninth Circuit reversed the district court's decision. The United States Supreme Court applied *Sutton* and reversed the Ninth Circuit, thereby upholding the district court's decision.⁶⁶ The Supreme Court noted that the plaintiff's level of impairment was insufficient to establish disability in and of itself.⁶⁷ As held in *Sutton*, mitigating measures must be taken into account in judging whether an individual possesses a disability. The court reasoned that there is "no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices,

⁵⁷ *Id.* See also *Williams v. Chicago Transit Auth.*, 2001 U.S. Dist. LEXIS 11081 (N.D. Ill. 2001) (holding that plaintiff was not disabled because hypertension was controlled by medication).

⁵⁸ *Murphy*, 527 U.S. at 516.

⁵⁹ *Id.*

⁶⁰ *Id.* (Because the question whether petitioner was disabled when taking medication was not before the Supreme Court, they did not consider whether he was "disabled" due to limitations that persist despite his medication or the negative side effects of his medication.)

⁶¹ *Albertson's, Inc. v. Kirkenburg*, 527 U.S. 555 (1999).

⁶² *Id.* at 565.

⁶³ *Id.* at 559.

⁶⁴ *Id.* at 560.

⁶⁵ *Id.* at 561.

⁶⁶ *Id.*

⁶⁷ *Id.* at 566.

⁵⁰ *Albertson's, Inc. v. Kirkenburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999).

⁵¹ *Sutton*, 527 U.S. at 475.

⁵² *Id.* at 476.

⁵³ *Id.* at 482.

⁵⁴ *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999).

⁵⁵ *Id.* at 519.

⁵⁶ *Id.* at 520.

and measures undertaken, whether consciously or not, with the body's own systems."⁶⁸

The underlying fact scenario was the same in all three of these cases; the plaintiffs were all claiming to be disabled even though they utilized some corrective measure to help mitigate the affects of their impairment. Because, due to the corrective measures, none of the plaintiffs were able to present evidence that they were currently substantially limited in any major life activity, the Court held in favor of the employers. The Court reasoned that because the term "substantially limits" is defined in the present tense, it indicates that plaintiffs are to be viewed in their present state, "not potentially or hypothetically—substantially limited."⁶⁹ The Court further reasoned that if an individual is currently utilizing measures that mitigate her impairment, while such individual may still undeniably have an impairment, she might not be presently substantially limited in a major life activity in light of the mitigating measures.⁷⁰

As set forth, *supra*, this extensive definition of disability applies to Title I, Title II, and Title III of the ADA.⁷¹

IV. TITLE I OF THE ADA—EMPLOYMENT

Title I of the ADA protects "qualified individuals with disabilities"⁷² from employment discrimination⁷³ by employers with at least 15 employees.⁷⁴ Title I prohibits employers from discriminating against a qualified individual with a disability with respect to any aspect

⁶⁸ *Id.* at 565–66.

⁶⁹ *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 482 (1999). The Court further stated "[a] 'disability' exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would be substantially limiting if mitigating measures were not taken.'" *Id.*

⁷⁰ *Id.* at 483.

⁷¹ *Toyota Motor*, 534 U.S. at 200. "[T]he Act's definition of 'disability' applies not only to Title I of the Act, 42 U.S.C. §§ 12111-12117 (1994 ed.), which deals with employment, but also to the other portions of the Act, which deal with subjects such as public transportation, §§ 12141-12150, 42 U.S.C. §§ 12161-12165 (1994 ed. and Supp. V.), and privately provided public accommodations, §§ 12181-12189...." *Id.*

⁷² 42 U.S.C. § 12111-12117. "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a).

⁷³ *Id.*, § 12112(a), stating that discrimination "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment" is a violation of the ADA. *Id.* For actions that would be considered discriminatory, *see id.* § 12112(a)-(b); 29 C.F.R. § 1630.4.

⁷⁴ "The term 'employer' means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year...." *Id.* § 12111(5)(A).

of the employment process.⁷⁵ Title I applies to employment issues in transit operations.

A. Definitions

1. Employer

Title I of the ADA defines "employer" as a person engaged in an industry affecting commerce⁷⁶ who has 15 or more employees.⁷⁷

2. Qualified Individual

In addition to proving that a plaintiff is "disabled," the plaintiff must also prove that he or she is otherwise qualified for the desired employment positions and able to perform the fundamental duties of the job.⁷⁸ Under the statutory definition, a "qualified individual with a disability" is an "individual with a disability who, with or without a 'reasonable accommodation,' can perform the essential functions of the employment position that such individual holds or desires."⁷⁹ Courts consider an employer's judgment in determining "what functions of a job are essential."⁸⁰

3. Reasonable Accommodation

If a covered entity has a disabled employee or applicant who is otherwise qualified for the position in question, that individual may request that the covered entity make some modification to the work environment or office methods. The ADA mandates that the employer make any "reasonable accommodations" necessary to assist such individual in performing the essential functions of the position and enable her to enjoy the equal opportunities that are available to other employees.⁸¹ However, an employer is only required to reasonably accommodate an individual with a disability. An employer is not required to make accommodations if they would pose an undue burden, such as extreme costs.⁸²

⁷⁵ *Id.*, §§ 12101-12117.

⁷⁶ *Id.*, § 12181(1). Title I does not define commerce. However, Title III defines commerce as "travel, trade, traffic, commerce, transportation, or communication—(A) among the several States; (B) between any foreign country or any territory or possession and any State; or (C) between points in the same State but through another State or Foreign country." *Id.*

⁷⁷ *Id.*, § 12111(5).

⁷⁸ *Id.*, § 12111(8).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*, § 12112(b)(5)(A). It is considered a form of discrimination for an employer to deny "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." *Id.*

⁸² *Id.*, § 12111(10).

A “reasonable accommodation” may include making existing facilities used by employees readily accessible to and usable by individuals with disabilities through job restructuring, such as part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, qualified readers and interpreters, and other similar accommodations.⁸³ The ADA does not require an employer to violate the seniority system to make a reasonable accommodation.⁸⁴ To determine the appropriate reasonable accommodation, it may be necessary for the employer to initiate an informal, interactive process with the employee in need of the accommodation, identifying the limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.⁸⁵

B. Enforcement

The EEOC, which enforces the provisions of Title I,⁸⁶ has issued guidelines regarding the enforcement of the ADA.⁸⁷ The powers, remedies, and procedures set forth in Title VII of the Civil Rights Act⁸⁸ are available to the EEOC in enforcing the provisions of Title I of the ADA.⁸⁹ Claimants must pursue administrative remedies prior to filing a claim under Title I of the ADA.⁹⁰

C. Prima Facie Case

In order to establish a *prima facie* case of disability discrimination under the ADA, an employee must show: (1) that he is a disabled person within the meaning of the ADA; (2) that he is qualified, with or without a reasonable accommodation, to perform the essential functions of the job; and (3) that the employer terminated

him or discriminated against him based on his disability.⁹¹

D. ADA Case Law Regarding “Disability”

Many courts have discussed whether an individual meets the definition of disabled as defined by the ADA in the context of transit operations. As stated above, the ADA defines a disability as “(A) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”⁹² A plaintiff seeking redress under the ADA must first establish that he or she is, in fact, disabled as defined by the ADA.

Simply because a person has a physical impairment does not qualify that person as disabled. Instead, that impairment must substantially limit one or more major life activities. For example, in *Tice v. Centre Area Transportation Authority*,⁹³ the United States Court of Appeals for the Third Circuit held that a former transportation authority employee who was unable to continue driving a bus following his back injury was not substantially limited in the major life activity of working. The court reasoned that to be substantially limited in the major life activity of working, one must be precluded from more than one type of job, a specialized job, or a particular job choice. The plaintiff was only precluded from working as a bus driver and could not offer any evidence to suggest that his back injuries caused him any difficulties beyond their interference with bus driving. Consequently, he was not “substantially limited” in a “major life activity” and did not meet the definition of “disabled.”⁹⁴

Similarly, in *Duncan v. Washington Metropolitan Area Transit Authority*,⁹⁵ the plaintiff suffered a series of back injuries and was unable to perform heavy lifting required for his job. After being placed on leave, the defendant alleged that no light lifting jobs were available and the plaintiff was discharged. The plaintiff alleged the defendant engaged in disability discrimination by discharging him based upon his disability and

⁸³ *Id.*, § 12111(9).

⁸⁴ *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002) (holding that an employer’s showing that a requested accommodation conflicts with seniority rules is ordinarily sufficient to show, as a matter of law, that an accommodation is not reasonable. However, the employer remains free to present evidence of special circumstances that makes a seniority rule exception reasonable in a particular case).

⁸⁵ 29 C.F.R. § 1630.2(o)(3). *See Serv. v. Union Pac. R.R.*, 153 F. Supp. 2d 1187 (E.D. Cal. 2001) (accommodating sensitivity to smoke residue).

⁸⁶ 42 U.S.C. § 12117(a).

⁸⁷ 29 C.F.R. § 1630 *et seq.*

⁸⁸ 42 U.S.C. § 2000(e) *et seq.*

⁸⁹ *Id.*, § 12117(a). “The powers, the remedies, and procedures set forth in Sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this Title shall be the powers, remedies and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of this Act....” *Id.*

⁹⁰ *Id.*

⁹¹ *Christopher v. Laidlaw Transit, Inc.*, 899 F. Supp. 1224 (S.D. N.Y. 1995); *see Kellogg v. Union Pac. R.R.*, 233 F.3d 1083 (8th Cir. 2000) (discussion of claim of “regarded as” disabled under the ADA); *Despears v. Milwaukee County*, 63 F.3d 635 (7th Cir. 1995) (holding that plaintiff failed to prove *prima facie* case that demotion was based on his disability of alcoholism but rather on fact that he was driving drunk).

⁹² 42 U.S.C. § 12102(2); *see Presta v. Southwestern Penn. Transp. Auth.*, 1998 WL 310735 (E.D. Pa. 1998) (ability to get along with others, in this case, not recognized as a major life activity).

⁹³ 247 F.3d 506 (3d Cir. 2001).

⁹⁴ *Id.* *See also Beaudoin v. Customized Transp.*, 149 F. Supp. 2d 305 (E.D. Mich. 2000) (recognizing working as a major life activity). *But see, Toyota Motor*, 534 U.S. 184 (2002). (The United States Supreme Court has yet to decide whether working could be a major life activity.)

⁹⁵ 240 F.3d 1110 (D.C. Cir. 2001).

by failing to accommodate his disability. The Washington Area Metropolitan Transit Authority argued that the plaintiff failed to establish that his back condition substantially limited his ability to work and, consequently, he was not disabled. The court assumed that working was a major life activity and noted that “whether an impairment substantially limits the major life activity of working depends primarily on the availability of jobs for which the impaired person qualifies.”⁹⁶ The court held that, while plaintiff’s degenerative disc disease was admittedly a physical impairment, the plaintiff failed to show that such impairment substantially limited him in the major life activity of working. The plaintiff failed to produce evidence concerning the number and types of available jobs, and the mere possibility that no appropriate jobs existed was insufficient to sustain plaintiff’s burden of showing that he was disqualified from a substantial class or broad range of jobs.⁹⁷

In *Brown v. Triboro Coach Corporation*,⁹⁸ the New York court held that a bus driver’s sleep apnea condition did not substantially limit the major life activity of working or breathing, so as to qualify as “disabled” under the ADA. Further, the employee could not establish that he was terminated based on that disability because he was retained through the period of treatment for that condition, and he was not terminated until he violated the company’s drug policy.⁹⁹

In another case involving a bus driver, *Hill v. Kansas City Transportation Authority*,¹⁰⁰ the employee was terminated after twice falling asleep during the non-driving portion of his job. The driver brought suit under the ADA alleging that the impairment of drowsiness caused by taking hypertension medication in conjunction with prescribed pain relievers for work-related injuries was a disability. The Eighth Circuit Court of Appeals held that, while an essential function of a bus driver’s job is the ability to stay awake, the plaintiff presented no evidence in the record that her physical condition compelled her to take a combination of medications that persistently affected her ability to stay awake on the job.¹⁰¹ Therefore, she failed to present sufficient evidence that this alleged physical impairment substantially limited her major life activity of working. Consequently, the employer did not violate the ADA by terminating her for sleeping on the job.¹⁰²

In *Irby v. New York Transit Auth.*,¹⁰³ a former bus operator was terminated for excessive absences and improper documentation of absences. She brought an

action under the ADA alleging she suffered from polycystic kidney and polycystic liver disease, which caused her to be absent from work at least 2 to 3 days per month.¹⁰⁴ The court granted the employer’s motion for summary judgment, finding that the employee was not disabled because she did not have a substantial limitation of a major life activity.

Alternatively, an employee may seek protection under the ADA even if he is not disabled if he can establish that he was perceived as disabled. For example, in *Coleman v. Southern Pacific Transportation Company*,¹⁰⁵ the plaintiff was denied employment as a train crew member based upon his monocular vision. On his application he said that his vision was good. However, after extending an offer of employment, the defendant employer tested the plaintiff’s vision and discovered his monocular vision. The plaintiff’s offer of employment was revoked, and he brought suit under the ADA. The defendant moved for summary judgment arguing that the plaintiff was not entitled to protection under the ADA because he did not have a disability within the meaning of the ADA. The plaintiff filed a cross motion for partial summary judgment on the issue of whether he had a disability. The issue presented to the court was whether the plaintiff was disabled. The court found that although the plaintiff was not actually disabled, the employer had viewed the plaintiff’s impairment as precluding him from working in an environment in which mobile forms of equipment could injure him and, therefore, had treated his impairment as constituting a substantial limitation on a major life activity.¹⁰⁶ The court held that the plaintiff was disabled because the defendant regarded him as having a “substantially limiting” impairment.¹⁰⁷ Consequently, the defendant’s motion for summary judgment was denied and the plaintiff’s motion for partial summary judgment was granted.

However, in *Parry v. Mohawk Motors of Michigan, Inc.*,¹⁰⁸ the plaintiff unsuccessfully argued he was perceived as disabled. The plaintiff, a truck driver, was administered a random drug test by his employer. Although the test came back negative, there was a problem in the collection of the specimen and a second test was administered. The plaintiff was ultimately terminated because he took his employer’s truck/tractor across state lines without permission. The plaintiff sued alleging that he had been terminated because the employer perceived him as having a disability, i.e., drug dependency. While the ADA does protect individuals who are erroneously regarded as current illegal drug users, the plaintiff failed to present any evidence that his employer regarded him as such. Thus, the plaintiff was unable to establish a *prima facie* case of disability

⁹⁶ *Id.* at 1114.

⁹⁷ *Id.*

⁹⁸ 153 F. Supp. 2d 172 (E.D. N.Y. 2001).

⁹⁹ *Id.* See also *Martin v. Barnesville Exempted Vill. Sch. Dist. Bd. of Educ.*, 209 F.3d 931 (6th Cir. 2000) (rejection for driver position not because of plaintiff’s alcoholism).

¹⁰⁰ 181 F.3d 891 (8th Cir. 1999).

¹⁰¹ *Id.* at 894.

¹⁰² *Id.* at 894.

¹⁰³ 2000 U.S. Dist. LEXIS 15822 (S.D. N.Y. 2000).

¹⁰⁴ *Id.*

¹⁰⁵ 997 F. Supp. 1197 (D. Ariz. 1998).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ 236 F.3d 299 (6th Cir. 2000), *cert. denied*, 533 U.S. 951 (2001).

discrimination. Further, the defendant proffered a legitimate nondiscriminatory reason for the plaintiff's termination, the misuse of the defendant's truck/trailer.

E. ADA Case Law Regarding "Qualified Individual"

Many courts have grappled with the issue of whether an employee is a "qualified individual with a disability" as defined in the Act in the context of a transit operation. For example, in *Kapche v. City of San Antonio*,¹⁰⁹ the plaintiff, an insulin-dependent diabetic, applied for employment as a police officer with the San Antonio Police Department. In accordance with the department's policy, the plaintiff engaged in a three-step application process, consisting of a written examination, a background check, and a physical/mental examination. Following the plaintiff's medical exam, the police department was notified that the plaintiff had insulin-dependent diabetes and that such a condition was disqualifying for the position of police cadet. Therefore, the department removed Kapche from its eligibility list. Following the exhaustion of his state administrative remedies, the plaintiff brought suit in federal court. He alleged that the San Antonio Police Department refused to hire him in violation of the ADA because of a physical condition that did not impair his ability to reasonably perform a job. The issue presented before the court was whether the plaintiff was an "otherwise qualified individual" with a disability. The defendant moved for summary judgment, arguing that the plaintiff was not otherwise qualified for the job, and the district court granted the motion. The district court held that, as a matter of law, the plaintiff was not qualified to be a police officer because his diabetic condition "presents a genuine substantial risk of injury to both himself and others" due to the driving requirement of the job.¹¹⁰

The plaintiff appealed the decision to the Fifth Circuit. In reviewing the district court's position, the Fifth Circuit departed from its precedent in *Daugherty v. City of El Paso*,¹¹¹ which held that an employer may exclude an insulin-dependent diabetic from a job that requires driving without ever conducting an individualized assessment of the applicant's actual ability to perform the job safely. In essence, under prior decisions an insulin-dependent diabetic was deemed, *per se*, a direct threat as a matter of law. The Fifth Circuit reversed and wrote:

[W]e conclude, the time has come for a reevaluation of the facts that supported our prior *per se* holdings in *Chandler* and *Daugherty*. To this end, we vacate the district court's grant of summary judgment in favor of the city and remand for a determination whether today there exists new or improved technology—not available at the time these cases were decided—that could now permit

insulin-dependent diabetic drivers in general, and [the plaintiff] in particular, to operate a vehicle safely.¹¹²

Consequently, despite the fact that a person is an insulin-dependent diabetic, he may still be deemed an "otherwise qualified individual" with a disability with respect to a driving position.

The Eighth Circuit Court of Appeals addressed the issue of whether a railroad employee was a qualified individual under the ADA in *Pickens v. Soo Line Railroad Company*.¹¹³ The plaintiff was injured while working for the railroad as a conductor. He took off 3 years with disability leave, then returned to find that he could not work the same job due to medical restrictions. He was given a less stressful job, but after 3 days concluded that it was too strenuous and refused to continue in that position. At this point Pickens requested that his physician lift the medical restrictions so that he could return to his original job as a conductor. However, Pickens found the job to be too strenuous. Pickens regularly made himself unavailable for work by exercising his right to "lay off" under the railroad's collective bargaining agreement, seeking medical releases and then returning to work when he chose. The plaintiff admitted to the railroad that he had misrepresented the status of his health and that he would disregard safety and common sense. The plaintiff was subsequently fired and sued under the ADA.

The jury returned a verdict in favor of the plaintiff, which the trial court set aside. The Eighth Circuit Court of Appeals affirmed. The court held that the plaintiff was not a qualified person with a disability. The court pointed to the fact that the plaintiff could not choose to come to work when he felt like working. In this regard the railroad had attempted to accommodate the plaintiff by assigning him to perform the switchman's job. In that position, he could work within his medical restrictions for 2 days per week, but be paid for a full 5-day work week. However, this attempt at accommodation failed when the plaintiff refused to perform this job. Moreover, he had his physician falsify that he was able to perform full-time work because he did not want to be limited to the part-time list of conductors.¹¹⁴

In *Redding v. Chicago Transit Authority*,¹¹⁵ a bus driver brought suit under the ADA alleging that she was wrongfully terminated based on her cocaine addiction. Addressing the issue of drug use, the court held that the plaintiff, who tested positive for cocaine while performing her duties, was not an otherwise qualified individual with a disability under the ADA because she was a current drug user. The ADA specifically excludes from its protection "any employee or applicant who is

¹¹² *Kapche v. City of San Antonio*, 176 F.3d at 840, 847 (5th Cir. 1999).

¹¹³ 264 F.3d 773 (8th Cir. 2001).

¹¹⁴ *Id.* at 778.

¹¹⁵ 2000 WL 1468322 (N.D. Ill. 2000).

¹⁰⁹ 176 F.3d 840 (5th Cir. 1999).

¹¹⁰ *Id.* at 845.

¹¹¹ 56 F.3d 695 (5th Cir. 1995).

currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use."¹¹⁶

F. ADA Case Law Regarding Reasonable Accommodations

Under the ADA, employers are obligated to determine whether a disabled employee can perform the essential functions of the job with a reasonable accommodation. This is a particularly difficult issue for transit operators because safety is a major focus. Several courts have addressed the issue of reasonable accommodation in the context of transit operations.¹¹⁷

In *Christopher v. Laidlaw Transit, Inc.*,¹¹⁸ the federal district court upheld the termination of an insulin-dependent diabetic employee, finding that an employer is not required to provide disabled employees with alternative employment when the employee is unable to meet the demands of the current position. In that case, the bus driver employee was terminated after having an incident of hypoglycemic shock. The employee was not driving a bus at the time, and no one was injured. However, the New York State Department of Transportation Regulations prohibited insulin-dependent diabetics from driving a commercial vehicle weighing more than 10,001 pounds or designed to carry 15 or more passengers.¹¹⁹

The parties agreed that the employee was disabled, and the employee did not dispute that he was unable to drive a bus. He, however, argued that the employer should have made a reasonable accommodation by re-training him for maintenance work. The court held that generally an employer is not required to provide disabled employees with alternative employment when the employee is unable to meet the demands of his present position.¹²⁰ Rather, an employer is required to reasona-

bly accommodate an employee's disability so as to enable him to perform the functions of the position he currently holds.¹²¹ In analyzing whether an accommodation is reasonable, courts consider whether the employer could modify the position to eliminate safety risks, and also consider the type of alternative employment the employer normally provides its nondisabled employees under its existing policies.¹²² Because the plaintiff alleged neither that the employer could reasonably accommodate him in the position for which he was hired nor that he was treated any differently from the employer's nondisabled employees, the court held that the plaintiff failed to state a claim.¹²³

Similarly, in *Boykin v. ATC/Vancon of Colorado, L.P.*,¹²⁴ the plaintiff argued that he was denied transfer and, therefore, denied a reasonable accommodation. The plaintiff, who had a history of suffering from transient ischemic attacks (TIA), began working part-time for the defendant while also enrolled as a full-time college student. The defendant's physician revoked the plaintiff's medical certification for commercial driving after the plaintiff suffered a TIA while driving a bus. Plaintiff requested an accommodation, but declined the position that the defendant had available because it conflicted with his school schedule. Plaintiff brought suit under the ADA, alleging that the employer failed to provide a reasonable accommodation by offering him the newly created dispatcher position. However, this position did not become available until 6 months after the plaintiff's termination. The district court granted summary judgment, which the plaintiff appealed. The appellate court affirmed and held that the defendant did not violate the ADA by not offering the plaintiff the newly created dispatcher position. Further, the plaintiff failed to show that a reasonable accommodation was

¹¹⁶ 42 U.S.C. § 12114.

¹¹⁷ *McLean v. Department of Transp.*, 2000 WL 297176 (S.D. N.Y. 2000) (not required to eliminate job's essential functions); *Deppe v. United Airlines*, 217 F.3d 1262 (9th Cir. 2000) (discussion of accommodations in case involving claim by the plaintiff that he was regarded as disabled); *Gile v. United Airlines, Inc.*, 213 F.3d 365 (7th Cir. 2000) (no effort made to accommodate the plaintiff's requests for a shift transfer).

¹¹⁸ 899 F. Supp. 1224 (S.D. N.Y. 1995).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1227. *But see* 42 U.S.C. § 12111(9)(B) (providing that under the ADA, a reasonable accommodation may include reassignment to a vacant position for which the employee is qualified); *Feliciano v. Rhode Island*, 160 F.3d 780, 785–86 (1st Cir. 1998) ("[The employee] produced no evidence to show that she could perform the essential functions of [her] position with or without reasonable accommodation....The determination that [the employee] cannot perform the essential functions of her job...does not end the analysis....Section 12111(9)(B) of the ADA states that 'reasonable accommodation' may include reassignment to a vacant position.") (citations omitted); *Stone v. City of Mount Vernon*, 118 F.3d 92, 100 (2d Cir. 1997) (refusing to hold unreasonable as a matter of law a requested reassignment of a partially paralyzed firefighter to the fire department's administrative bureau), *cert. denied*, 522 U.S.

1112, (1998); *Gaul v. Lucent Tech., Inc.*, 134 F.3d 576, 578, 580 (3d Cir. 1998) (employee who "cannot perform his former duties" must, if the required accommodation is a transfer to another department or supervisor, "demonstrate that there were vacant, funded positions whose essential duties he was capable of performing, with or without reasonable accommodation") (quotations omitted); *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1187 (6th Cir. 1996) ("it is true that employers may be required, as a reasonable accommodation, to transfer a disabled employee to a vacant position for which he or she is qualified"); *Dalton v. Subaru-Isuzu Auto., Inc.*, 141 F.3d 667, 677 (7th Cir. 1998)

(It is well established that under the ADA, the employer's duty reasonably to accommodate a disabled employee includes reassignment of the employee to a vacant position for which she is qualified. The option of reassignment is particularly important when the employee is unable to perform the essential functions of his or her current job, either with or without accommodation or when accommodation would pose an undue hardship for the employer).

¹²¹ *Christopher v. Laidlaw Transit, Inc.*, 899 F. Supp. at 1228.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ 247 F.3d 1061 (10th Cir. 2001).

possible and would have led to a reassignment position. Finally, the defendant was required under the ADA to attempt to accommodate the plaintiff due to his disability, not the plaintiff's school schedule.¹²⁵

Employers are not required to change the essential function of a job to reasonably accommodate an individual. In *EEOC v. United Airlines*,¹²⁶ the EEOC sued on behalf of a customer service representative with a 20-pound lifting restriction. Lifting was found to be an essential function of the position.¹²⁷ The court specifically noted that coworker help would not always be available. Further, the court noted that "(a) an employer is not required by the ADA to reallocate job duties in order to change the essential function of a job...an accommodation that would result in other employees having to work harder or longer hours is not required..."¹²⁸ The court also found that United did not have to create a new position as a reasonable accommodation.¹²⁹

A requested reasonable accommodation must have some nexus to the qualifying disability. For example, in *Felix v. New York City Transit Authority*,¹³⁰ the plaintiff filed a complaint alleging that her former employer, the New York City Transit Authority, discriminated against her in violation of the ADA. Specifically, the plaintiff alleged that the defendant unlawfully terminated her employment and failed to reasonably accommodate her disability. The plaintiff was hired by the defendant and worked in a token booth located in the subway station where she sold tokens, commuter passes and fare cards, and provided information to passengers. After the plaintiff witnessed the result of a fire bomb that killed a coworker, the plaintiff suffered from insomnia and post traumatic stress disorder. She was subsequently terminated for having failed to perform the full duties of her position for a consecutive 1-year period.¹³¹

The plaintiff argued that her termination was in violation of the ADA in that she sought a reasonable accommodation to be moved from subway work to an office position. The court held that the plaintiff could not prove a causal connection between her major life activity that was impaired, sleep, and her actual work limitations of no subway work. Because there was no nexus or causal connection between the plaintiff's ADA-qualifying limitation and the reasonable accommodation sought, the employee could not invoke the protections of the ADA.¹³²

¹²⁵ *Id.* at 1065–66.

¹²⁶ 1999 U.S. App. LEXIS 13347 (10th Cir., June 17, 1999).

¹²⁷ *Id.* at *14.

¹²⁸ *Id.* at *15.

¹²⁹ *Id.*

¹³⁰ 154 F. Supp. 2d 640 (S.D. N.Y. 2001), *aff'd*, 2003 U.S. App. LEXIS 6051 (2d. Cir., March 31, 2003).

¹³¹ *Id.* at 645.

¹³² *Id.* at 660.

G. ADA Case Law Regarding Exhaustion of Remedies/DOT Regulations

In addition to exhausting the ADA's administrative remedies prior to filing an ADA lawsuit,¹³³ a plaintiff may also be required to exhaust additional administrative remedies provided by the DOT prior to filing such a suit. Congress has delegated to the Secretary of Transportation broad regulatory powers in the area of commercial motor vehicle safety.¹³⁴ These powers include the authority to prescribe qualifications for drivers of commercial motor vehicles. Accordingly, DOT has promulgated the "Federal Motor Carrier Safety Regulations,"¹³⁵ which "establish minimum qualifications for persons who drive commercial motor vehicles as, for, or on behalf of motor carriers."¹³⁶ Under these regulations, a person "shall not drive a commercial motor vehicle unless he is physically qualified to do so" and has been certified by a "licensed medical examiner" as "physically qualified." The regulations set forth the factors that medical examiners must consider when determining if a driver is physically qualified. These regulations also provide appeal procedures for situations in which a driver is found to be unqualified under DOT physical qualification standards. In particular, in instances of "disagreement between the physician for the driver and the physician for the motor carrier concerning the driver's qualifications," the regulations allow the driver to obtain a formal opinion from the Director of the Office of Bus and Truck Standards and Operations.¹³⁷ Within 60 days after service of the determination, the driver or motor carrier may appeal the decision to the Assistant Administrator of the Federal Motor Carrier Safety Administration.¹³⁸

In *Cobb v. PAM Transport, Inc.*,¹³⁹ the plaintiff filed an action pursuant to the ADA contending that the defendant, a commercial motor carrier, terminated his employment based upon the defendant's perceptions of plaintiff as disabled. The plaintiff was originally certified by a physician to be physically qualified to be a commercial truck driver under the relevant DOT regulations, and was officially hired by the defendant and began an assignment as a driver/trainer. The plaintiff then informed the defendant that he had a medical condition in his past as a teenager, but that the condi-

¹³³ 42 U.S.C. § 12117(a).

¹³⁴ See 49 U.S.C. § 31102(b)(1). "Commercial motor vehicle" means a self-propelled or towed vehicle used on the highway in commerce principally to transport passengers or cargo, if the vehicle: a) has a gross vehicle weight rating of at least 10,000 pounds; b) is designed to transport more than 10 passengers including the driver; or c) is used in transporting material found by the Secretary of Transportation to be hazardous. *Id.*, § 31101(1).

¹³⁵ 49 C.F.R. pt. 390.

¹³⁶ *Id.*, § 391.

¹³⁷ *Id.*, § 391.47(b)(2).

¹³⁸ *Id.*, § 386.13(a).

¹³⁹ No. 4:02CV00255 (E.D. Ark. July 30, 2002).

tion no longer required medication or active treatment. Consequently, the plaintiff was then re-examined by a physician selected by the defendant. That physician found that the plaintiff was not physically qualified to work as a commercial truck driver, and the plaintiff was discharged by the defendant. The plaintiff then filed suit against the defendant alleging disability discrimination under the ADA.

The district court dismissed the plaintiff's claim for failure to exhaust his administrative remedies.¹⁴⁰ Specifically, the plaintiff failed to take advantage of the appeals procedure set forth in 49 C.F.R. § 391.47. This failure, the court held, precluded the plaintiff from proceeding with his ADA claim. The court reasoned that Congress, by delegating to the Secretary of Transportation extensive powers to determine the fitness of commercial motor carriers, has indicated its intent that such determinations properly lie with DOT in the first instance.¹⁴¹

H. ADA Case Law Regarding Applicants

After the passage of the ADA, transit operators have had to address issues concerning the potential employment of individuals with disabilities. With regard to a pre-offer, pre-employment inquiry, the ADA provides that "[e]xcept as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability."¹⁴² Paragraph 3, as mentioned above, states that "[a] covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition the offer of employment on the results of such examination..." in particular circumstances.¹⁴³ However, the ADA further provides that "[a] covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions."¹⁴⁴

In *Prado v. Continental Air Transport Company, Inc.*,¹⁴⁵ an applicant for the position of driver for a passenger transportation company failed to pass a physical examination as required by DOT and was not offered

employment. He sued, alleging that he was discriminated against based on his disability, muscular atrophy, and that the company violated the ADA when it required him to undergo a medical examination without a conditional offer of employment. The court held that the company did not commit a *per se* violation of the ADA by requiring the applicant to undergo a medical exam before making a conditional offer of employment, and that given the applicant's failure to obtain required DOT certification, he was never qualified for the position of driver. Consequently, the company did not deny him employment in violation of the ADA.

In *Equal Employment Opportunity Commission v. Texas Bus Lines*,¹⁴⁶ the EEOC brought an action against defendant employer pursuant to the ADA when the employer did not hire a qualified applicant for a bus driver position. The employer's physician, who conducted the pre-employment examinations, refused to issue the required medical examiner's certificate only because the applicant was morbidly obese, despite the fact that no other relevant medical problems were found. The court held that obesity, by itself, did not disqualify an individual from obtaining a medical certificate, nor was it an actual "disability" under the ADA. Therefore, the employer was not justified in relying on the physician's unsupported assessment, and the employer impermissibly discriminated against the applicant on the basis of a "perceived disability" in violation of the ADA. However, the employment application's "physical defect" inquiry did not violate the ADA because health problems that might affect the applicant's driving ability were relevant, job-related, and consistent with business necessity and the ADA.¹⁴⁷

V. TITLE II OF THE ADA—PUBLIC SERVICES

Title II of the ADA prohibits public entities from discriminating against an individual with a disability in connection with the provision of public services, including transportation services.¹⁴⁸ Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."¹⁴⁹

A. Public Entity and Qualified Individual With a Disability

Title II of the ADA defines a "public entity" as any state or local government; any department, agency, special purpose district, or other instrumentality of a

¹⁴⁰ *Id.*

¹⁴¹ *Id.* See 49 U.S.C. § 31144(b) (directing the Secretary of Transportation to "maintain by regulation a procedure for determining the safety fitness of an owner or operator"); see also, *Campbell v. Fed. Express Corp.*, 918 F. Supp. 912 (D. Md. 1996) (holding that exhaustion of DOT procedures should be required before a plaintiff may pursue an ADA claim); *Prado v. Cont'l Air Transp. Co.*, 982 F. Supp. 1304 (N.D. Ill. 1997) (holding the plaintiff was precluded from pursuing his ADA claim that he was physically qualified for the job because he failed to exhaust DOT administrative process).

¹⁴² U.S.C. §§ 12112(d)(2)(A).

¹⁴³ *Id.*, §§ 12112(d)(3).

¹⁴⁴ *Id.*, §§ 12112(d)(2)(B).

¹⁴⁵ *Prado*, 982 F. Supp. at 1304.

¹⁴⁶ 923 F. Supp. 965 (S.D. Tex. 1996).

¹⁴⁷ *Id.* at 981.

¹⁴⁸ 42 U.S.C. §§ 12131-12165; see *O'Connor v. Metro Ride, Inc.*, 87 F. Supp. 2d 894 (D. Minn. 2000) (Defendant not public entity; court could, however, enjoin private entity under regulations 49 C.F.R. § 37.5(a), 37.21(a), 37.23(a)).

¹⁴⁹ 42 U.S.C. § 12132.

state or local government; and the National Railroad Passenger Corporation and any commuter authority.¹⁵⁰

Title II defines a “qualified individual with a disability” as an individual with a disability who, “with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”¹⁵¹

Many courts have determined whether a person is considered disabled in the context of transit operations under Title II of the ADA. In *Hamlyn v. Rock Island County Metropolitan Mass Transit District*,¹⁵² the United States District Court for the Central District of Illinois held that a person who is “disabled” for other ADA related purposes is also “disabled” for purposes of the ADA’s public transit provisions, in that all disabled persons are entitled to equal treatment regardless of the cause of their disability. The *Hamlyn* plaintiff, who suffered from AIDS, sought to be included in a county program reducing bus fares for disabled passengers.¹⁵³ The program’s application form, however, stated that an applicant whose sole disability was AIDS did not qualify.¹⁵⁴ The court held that AIDS is a disability under the ADA,¹⁵⁵ and the ADA prohibits a transit agency from excluding from the program those persons disabled by AIDS.¹⁵⁶

*Weinreich v. Los Angeles County Metropolitan Transit Authority*¹⁵⁷ addressed whether a plaintiff should be required to pay to prove he is a qualified individual with a disability. In 1982, the plaintiff qualified for and participated in the defendant transit agency’s reduced fare program after receiving a doctor’s certification of permanent disability due to back pain.¹⁵⁸ In 1992, the transit agency then promulgated a rule requiring disabled participants to provide updated medical information every 3 years recertifying that they were disabled. In 1993, the plaintiff sought an exemption from this rule on the grounds that he could not afford to pay a doctor to recertify his condition. The transit agency refused to grant an exemption. The plaintiff could not provide recertification, and the transit agency refused to renew the plaintiff’s eligibility for the program. The plaintiff then filed suit under the ADA asserting that the ADA mandated “reasonable modifications whenever a state imposes a requirement that prevents qualified disabled people from having ‘meaningful access’ to a

state-provided benefit.”¹⁵⁹ The court disagreed, holding that the plaintiff’s lack of access to the reduced fare program was based not upon his disability or perception of disability, but upon his failure to prove his disability. The failure to provide the disability was based upon his financial condition, not his disability. The court held that the defendant had no obligation under the ADA to “reasonably accommodate [the plaintiff’s] financial inability to provide updated recertification of his disability.”¹⁶⁰

B. ADA Requirements and Regulations¹⁶¹

1. General ADA Requirements and Regulations

Title II of the ADA prescribed certain requirements mandating that public entities offering transportation services ensure that the services be accessible by the disabled. In addition, the ADA required the Secretary of Transportation to issue regulations implementing these transit-related requirements.¹⁶² In 1991, the Secretary of Transportation issued such regulations with the stated purpose of implementing the transportation and related provisions of Title II and Title III of the ADA.¹⁶³ The regulations apply to the following entities:

- Any public entity that provides designated public transportation or intercity or commuter rail transportation;¹⁶⁴
- Any private entity that provides specified public transportation;¹⁶⁵
- Any private entity that is not primarily engaged in the business of transporting people but operates a demand responsive or fixed route system;¹⁶⁶
- Entities receiving federal financial assistance from DOT;¹⁶⁷
- Services under contract (public entities contracting with private entities);¹⁶⁸
- University transportation systems (public and private);¹⁶⁹
- Private elementary and secondary school education systems;¹⁷⁰
- Taxi services, if they are providing demand responsive services;¹⁷¹

¹⁵⁹ *Id.* at 979.

¹⁶⁰ *Id.* at 978.

¹⁶¹ 42 U.S.C. § 12149(a). The ADA required the Secretary of Transportation to issue regulations implementing the ADA’s transit-related provisions. *Id.* These regulations are found in 49 C.F.R. §§ 37 and 38 and are discussed, *supra*.

¹⁶² *Id.*, § 12149(a).

¹⁶³ 49 C.F.R. § 37.1.

¹⁶⁴ *Id.*, § 37.21(a)(1).

¹⁶⁵ *Id.*, § 37.21(a)(2).

¹⁶⁶ *Id.*, § 37.21(a)(3).

¹⁶⁷ *Id.*, § 37.21(b).

¹⁶⁸ *Id.*, § 37.23.

¹⁶⁹ *Id.*, § 37.25.

¹⁷⁰ *Id.*, § 37.27.

¹⁷¹ *Id.*, § 37.29.

¹⁵⁰ *Id.*, § 12131.

¹⁵¹ *Id.*, § 12131(2).

¹⁵² 986 F. Supp. 1126 (C.D. Ill. 1997).

¹⁵³ *Id.* at 1129.

¹⁵⁴ *Id.* at 1129-30.

¹⁵⁵ *Id.* at 1130 (citing ADA legislative history, regulations, and cases).

¹⁵⁶ *Id.* at 1130.

¹⁵⁷ 114 F.3d 976 (9th Cir. 1997).

¹⁵⁸ *Id.* at 978.

- Vanpools operated by private entities and providing demand-responsive services to the public;¹⁷²
- Airport transportation systems.¹⁷³

In addition to issuing regulations implementing Title II and Title III of the ADA, the Secretary of Transportation issued the following policies of nondiscrimination:

- No entity shall discriminate against an individual with a disability in connection with the provision of transportation services.¹⁷⁴
- No entity shall deny, on the basis of disability, any individual with a disability the opportunity to use the entity's transportation service for the general public, if the individual is capable of using that service.¹⁷⁵
- An entity shall not require an individual with a disability to use designated priority seats, if the individual does not choose to use these seats.¹⁷⁶
- An entity shall not impose special charges, not authorized by the regulations, on individuals with disabilities for providing services required by this part or otherwise necessary to accommodate them.¹⁷⁷
- An entity shall not require that an individual with disabilities be accommodated by an attendant.¹⁷⁸
- Private entities that are primarily engaged in the business of transporting people and whose operations affect commerce shall not discriminate against any individual on the basis of disability in the full and equal enjoyment of specified transportation services.¹⁷⁹
- An entity shall not refuse to serve an individual with a disability or require anything contrary to this part

¹⁷² *Id.*, § 37.31.

¹⁷³ *Id.*, § 37.33.

¹⁷⁴ *Id.*, § 37.5(a).

¹⁷⁵ *Id.*, § 37.5(b). See *Tandy v. City of Wichita*, 208 F. Supp. 2d 1214 (D. Kan. 2002). The court held that the transit agency's policy of allowing its drivers discretion as to whether to allow disabled riders access to an accessible bus on an inaccessible route violates 49 C.F.R. § 37.5(b). *Id.*

The difficulty with [the agency's] policy is that the disabled "individual is capable of using" the service of an accessible bus even if it is on an inaccessible route. As such, [the agency], by denying disabled individuals the opportunity to use such accessible buses, is violating the civil rights of the disabled user.

Id. at 1224. The court recognized that the agency had viable concerns about the potential impact of accessing an inaccessible route; however, the court found that the final decision to access or to not access the route must lie with the disabled individual. *Id.* The transit agency must, therefore, inform a disabled rider of the potential ramifications of accessing an inaccessible route, including the fact that no special transportation will be offered to retrieve the disabled rider should they encounter an inaccessible bus on a return trip or additional leg of their journey. The disabled rider must then be allowed to decide whether to access the route or not. *Id.*

¹⁷⁶ 49 C.F.R. § 37.5(c).

¹⁷⁷ *Id.*, § 37.5(d).

¹⁷⁸ *Id.*, § 37.5(e).

¹⁷⁹ *Id.*, § 37.5(f).

because its insurance company conditions coverage or rates on the absence of individuals with disabilities.¹⁸⁰

- It is not discrimination under this part for an entity to refuse to provide service to an individual with disabilities because that individual engages in violent, seriously disruptive, or illegal conduct. However, an entity shall not refuse to provide service to an individual with disabilities solely because the individual's disability results in appearance or involuntary behavior that may offend, annoy, or inconvenience employees of the entity or other persons.¹⁸¹

2. ADA Requirements and Regulations Regarding Fixed Route Systems

Title II of the ADA prescribes requirements for public entities operating fixed route systems.¹⁸² The term, "fixed route systems," means a system of providing designated public transportation on which a vehicle is operated along a prescribed route according to a fixed schedule.¹⁸³ The ADA provides that any public entity that purchases or leases a new bus, rapid rail vehicle, light rail vehicle, or any other new vehicle to be used on such a system, must make the vehicle "readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs."¹⁸⁴ Title II specifically mandates lifts for wheelchairs on every new public transit bus. Transit systems may not evade ADA requirements by purchasing used vehicles that are not accessible. A transit agency may not purchase or lease inaccessible used buses or trains unless it "makes demonstrated good faith efforts to purchase or lease a used vehicle for use on such systems" that is accessible.¹⁸⁵

The DOT regulations provide minimum guidelines and requirements for accessibility standards for those transportation vehicles that are required by the ADA to be accessible.¹⁸⁶ The regulations apply to buses and vans,¹⁸⁷ rapid rail vehicles,¹⁸⁸ light rail vehicles,¹⁸⁹

¹⁸⁰ *Id.*, § 37.5(g).

¹⁸¹ *Id.*, § 37.5(h).

¹⁸² 42 U.S.C. § 12142.

¹⁸³ *Id.*, § 12141(3)

¹⁸⁴ *Id.*, § 12142(a).

Wheelchair means a mobility aid belonging to any class of three or four wheeled devices, usable indoors, designed for and used by individuals with mobility impairment, whether operated manually or powered. A "common wheelchair" is such a device which does not exceed 30 inches in width and 48 inches in length measured at two inches above the ground, and does not weigh more than 600 pounds when occupied.

49 C.F.R. § 37.3.

¹⁸⁵ 42 U.S.C. § 12142(b).

¹⁸⁶ 49 C.F.R. § 38.1. The regulations do allow for departure from particular technical and scoping requirements of the guidelines where the alternative designs and technologies used will provide substantially equivalent or greater access to and usability of the vehicle. Such departures are considered on a case-by-case basis. *Id.*, § 38.2.

¹⁸⁷ *Id.*, § 38.21–39.

commuter rail cars,¹⁹⁰ intercity rail cars,¹⁹¹ and over-the-road bus systems.¹⁹² They also apply to vehicles not within one of the aforementioned categories but required, nonetheless, to be accessible to the disabled. The regulations provide specifications for such items as doorway width, lighting, priority seating, slip-resistant floors, handrails, and mobility aid accessibility.¹⁹³

The regulations further provide that transit operators must maintain those facilities and vehicles features that ensure accessibility by the disabled.¹⁹⁴ Although the regulations do allow for temporary interruptions due to maintenance or repair, the transit operators must take reasonable steps to accommodate those that would otherwise use the unavailable feature. The regulations also provide that public entities “shall establish a system of regular and frequent maintenance checks of lifts [on non-rail vehicles] sufficient to determine if they are operative.”¹⁹⁵

The failure to maintain accessible equipment has been the topic of many lawsuits. For example, in *Midgett v. Tri-County Transportation Metropolitan District of Oregon*,¹⁹⁶ a wheelchair user filed suit alleging that he was unable to travel to work by bus because the local transit agency failed to adequately train its bus operators and failed to maintain its wheelchair lifts, thereby impeding his mobility in violation of the ADA. The plaintiff presented evidence that on one morning he was unable to board a bus because the bus’s wheelchair lift was inoperable due to cold weather.¹⁹⁷ Later that day, the plaintiff was unable to board two other buses due to similar maintenance problems. The court denied that plaintiff’s request for injunctive relief, holding that the requested corrective action had already been taken by the agency.¹⁹⁸ Second, although the plaintiff had encountered occasional lift problems, when viewed in the larger context of the entire fixed route system, these occasional problems did not violate the ADA.

¹⁸⁸ *Id.*, § 38.51–.63. A rapid rail vehicle is defined as a subway type transit vehicle that operates on exclusive private rights-of-way with high level platform stations. *Id.*, § 37.3.

¹⁸⁹ *Id.*, § 38.71–.87. A light rail vehicle is defined as a street car type vehicle that is operated on city streets, semi-exclusive rights-of-way, or exclusive rights-of-way. *Id.*, § 37.3.

¹⁹⁰ *Id.*, § 38.91–.109. A commuter rail car transit system is defined as a rail passenger car obtained by a commuter authority for use in commuter rail transportation. *Id.*, § 37.3.

¹⁹¹ *Id.*, § 38.111–.127. An intercity rail car transit system is defined as transportation provided by Amtrak. *Id.*, § 37.3.

¹⁹² *Id.*, § 38.151–.161. An over-the-road bus transit system is a bus characterized by an elevated passenger deck located over a baggage compartment. *Id.*, § 37.3.

¹⁹³ *Id.*, § 38.1 et seq.

¹⁹⁴ *Id.*, § 37.161.

¹⁹⁵ *Id.*, § 37.163(b).

¹⁹⁶ 74 F. Supp. 2d 1008 (D. Or. 1999).

¹⁹⁷ *Id.* at 1010.

¹⁹⁸ *Id.* at 1018.

Conversely, in *Martin v. Metropolitan Atlanta Rapid Transit Authority*,¹⁹⁹ the court held that the plaintiffs had presented credible evidence that the defendant transit authority had a widespread and systemic problem of inoperable wheelchair lifts.²⁰⁰ The court noted that it was persuaded by the evidence that many breakdowns in service resulted in stranded passengers and were due to the defendant’s failure to inspect the lifts, failure to timely repair them, and failure to provide alternative transportation.

Similarly, in *Tandy v. City of Wichita*,²⁰¹ the plaintiff brought suit alleging she was denied access to the transit system due to an inoperable lift. The plaintiff sought injunctive relief pursuant to Title II of the ADA, seeking an order requiring the defendant to maintain its vehicles so they would be readily accessible to and usable by individuals with disabilities.²⁰² The court noted that isolated lift failures do not constitute an ADA violation. However, a pattern of lift breakdowns can constitute a violation. The court found that the plaintiff raised a triable issue as to the rate of mechanical failures within the Wichita Transit System so as to constitute a pattern of breakdown, as opposed to isolated incidents within a statistical median range.²⁰³ Consequently, the district court denied the defendant’s motion for summary judgment on that issue.

On a separate issue, the plaintiff alleged that when riding on a Wichita Transit bus, the driver refused to secure his wheelchair. The plaintiff sought injunctive relief requiring Wichita Transit to provide ADA training to its drivers in order to ensure that all instances of such occurrences would be eliminated. It was uncontroverted that Wichita Transit had in place an extensive ADA training program instructing drivers that they are required to call out stops, utilize the wheelchair lift, and secure the wheelchairs once on board. Plaintiff did not allege that the training programs utilized by Wichita Transit were deficient in any way. Therefore the court concluded, as a matter of law, that injuries caused by the actions of individual drivers in contravention of his or her extensive ADA training would not be redressed by an injunction. Furthermore, given the extensive training program and the penalties attached to ADA violations by Wichita Transit, the court concluded that injunctive relief was an inappropriate means to address an individual driver, as opposed to a systematic, issue. The court, therefore, granted summary judgment to the defendant as to the plaintiff’s request for injunctive relief.

The court also addressed the issue of whether fixed route systems are required to be fully accessible by the disabled.²⁰⁴ The plaintiffs alleged that the ADA required Wichita Transit’s fixed route system to be 100

¹⁹⁹ 225 F. Supp. 2d 1362 (N.D. Ga. 2002).

²⁰⁰ *Id.* at 1378.

²⁰¹ 208 F. Supp. 2d 1214 (D. Kan. 2002).

²⁰² *Id.* at 1224.

²⁰³ *Id.* at 1225.

²⁰⁴ 208 F. Supp. 2d 1214 (D. Kan. 2002).

percent accessible by the disabled. The court, however, disagreed with the plaintiffs.²⁰⁵ It reasoned that Title 42 U.S.C. § 12142 identifies certain practices by public transportation providers that are considered discriminatory. In particular, the ADA deems it discriminatory for a public entity operating a fixed route system to provide disabled individuals with services that are inferior to those provided to the nondisabled. However, the court found that nothing in the ADA regulations mandates 100 percent fixed route accessibility. In fact, the regulations contemplate the use of paratransit service to complement the accessible fixed route system. The court specifically found that the ADA contemplates that transit systems likely will have inaccessible routes. In such circumstances, disabled persons are eligible for paratransit services. Moreover, the court found “that the ADA allows both fixed route and paratransit systems to work alongside each other to provide paratransit access for disabled individuals that is, not identical, but ‘comparable to the level of service provided to individuals without disabilities who used a fixed route system.’”²⁰⁶

3. ADA Requirements and Regulations Regarding Paratransit Service

Title II of the ADA requires all government agencies operating fixed route systems to also provide paratransit service for disabled individuals incapable of using conventional public transit.²⁰⁷ Paratransit services must be provided to disabled individuals who: (1) are unable, due to disability, to board, ride, or disembark from buses or trains without the assistance of another individual (other than the operator of a wheelchair lift or other boarding assistance device);²⁰⁸ (2) need a wheelchair lift or other boarding assistance device to board, ride, or disembark from any accessible vehicle if the individual wants to travel at a time when fixed route accessible vehicles are unavailable;²⁰⁹ or (3) can travel on a bus or train but cannot, due to their disability, travel to a bus or train stop.²¹⁰ Paratransit services must also be provided to persons traveling with disabled individuals eligible for paratransit service.²¹¹ At least one individual may always travel with a disabled individual and additional individuals may also do so if space is available.²¹² The regulations establish that the one guaranteed companion is in addition to any personal attendant required by a rider, so that a disabled rider may travel with one personal attendant

and one additional companion.²¹³ Conversely, a disabled individual may not be required to travel with an attendant.²¹⁴

a. Eligibility for Paratransit Service.—An individual, in order to be eligible to use a paratransit system, must be unable, as the result of a disability (physical or mental impairment), and without the assistance of another individual, to board, ride, or disembark from any vehicle on the system that is readily accessible to and usable for individuals with disabilities.²¹⁵ Further, any individual with a disability who needs the assistance of a wheelchair lift or other boarding assistance device and is able, with such assistance, to board, ride, or disembark from any accessible vehicle is eligible to ride a paratransit system.²¹⁶ However, the individual must travel: (1) on a route on the system; and (2) during the hours of operation of the system at a time, or within a reasonable period of such time, when the vehicle is not being used to provide designated public transportation on the route.²¹⁷

Each public entity required to provide complementary paratransit services must establish a process for determining paratransit eligibility.²¹⁸ The process shall strictly limit ADA paratransit eligibility to those individuals considered paratransit eligible.²¹⁹ All information about the process, materials necessary to apply for eligibility, and notices and determinations concerning eligibility shall be made available in accessible formats upon request.²²⁰ If the entity determines that the individual is ineligible, the entity must set forth in writing the reasons for the finding.²²¹ If the entity finds that the individual is paratransit eligible, it must provide documentation to the eligible individual stating that he or she is “ADA paratransit eligible.”²²² The entity may require recertification of the eligibility of ADA paratransit eligible individuals at reasonable intervals.²²³ The entity must establish an administrative appeal process through which individuals who are denied eligibility can obtain review of the denial.²²⁴

Courts have been called to review transit agencies’ eligibility determinations. For example, in *Sell v. New Jersey Transit Corporation*,²²⁵ the plaintiff, who was

²⁰⁵ *Id.* at 1222.

²⁰⁶ *Id.* at 1222.

²⁰⁷ 42 U.S.C. § 12143; 49 C.F.R. 37.121.

²⁰⁸ 42 U.S.C. § 12143(c)(1)(A)(ii). An individual may be paratransit-eligible for some bus routes but not for others, depending on whether an accessible bus is available for a particular bus route. 49 C.F.R. § 37.123, app. D.

²⁰⁹ 42 U.S.C. § 13143(c)(1)(A)(ii).

²¹⁰ *Id.*, § 12143(c)(1)(A)(iii).

²¹¹ *Id.*, § 12143(c)(1)(B) & (C).

²¹² *Id.*

²¹³ 49 C.F.R. § 37.123(f)(i).

²¹⁴ *Id.*, § 37.123, app. D.

²¹⁵ *Id.*, § 37.123(e)(1).

²¹⁶ *Id.*

²¹⁷ *Id.*, § 37.123(e)(2).

²¹⁸ *Id.*, § 37.125.

²¹⁹ *Id.*, § 37.125(a).

²²⁰ *Id.*, § 37.125(b).

²²¹ *Id.*, § 37.125(c).

²²² *Id.*, § 37.125(e).

²²³ *Id.*, § 37.125(f); see *Weinreich v. Los Angeles County Metro Transit Auth.*, 114 F.3d at 978, 979 (holding that a transit agency is under no obligation to reasonably accommodate a party’s financial inability to provide updated recertification of his or her disability).

²²⁴ 49 C.F.R., § 37.125(g).

²²⁵ 689 A.2d 1386 (N.J. Super. App. Div. 1997).

mentally retarded, challenged the decision of the transit agency denying him eligibility for paratransit service. The plaintiff first claimed that he was unable to use fixed route transit because he could not always recognize his stop.²²⁶ However, the plaintiff had provided evidence that he actually had been utilizing the fixed route transit. The New Jersey Superior Court held that the plaintiff did not prove, as required by the regulations, that he was "unable, as a result of a...mental impairment...to...ride...any vehicle on the system which is readily accessible to and usable by individuals with disabilities."²²⁷ The plaintiff then claimed that even if he was able to use fixed route service, he could not walk safely from his residence to the nearest bus stop because the nearest bus stop was 3 miles away. Further, there were no sidewalks along the route. The transit agency, however, found that the plaintiff in fact lived only half a mile from the bus stop and could safely walk along a grass median to the stop. The court agreed with the transit agency and affirmed its findings.

The plaintiff in *Pfister v. City of Madison*²²⁸ also challenged the transit agency's determination that she was ineligible for paratransit services. The plaintiff applied for paratransit service on the grounds that her impaired vision, mobility impairments, and migraine headaches prevented her from traveling to a boarding location or from a disembarking location on a fixed route system. The city denied the plaintiff's application, and the court affirmed. The court held that there was sufficient evidence that people with more severe impairments were utilizing fixed route transit. This was further supported by "testimony from a paratransit driver that on several occasions [the plaintiff] had asked to be dropped off at one location and would then make her way to her ultimate destination on her own, and that this involved traveling several blocks."²²⁹

b. Comparable Service.—Paratransit service must be "sufficient to provide to [disabled] individuals a level of service...comparable to the level of designated public transportation services provided to individuals without disabilities" using such systems.²³⁰ Specifically, paratransit systems should have response times comparable to those of fixed route service.²³¹ Paratransit systems should also have service areas that are comparable to

²²⁶ *Id.* at 1391.

²²⁷ *Id.* at 1391 (citing 49 C.F.R. § 37.123(e)(1)).

²²⁸ 198 Wis. 2d 387 (1995), 1995 Wis. App. Lexis 1365 (Wis. App. 1995).

²²⁹ *Id.*

²³⁰ 42 U.S.C. § 12143(a). See *Tandy v. City of Wichita*, 208 F. Supp. 2d 1214 (D. Kan. 2002) (holding that the ADA does not require 100 percent fixed route accessibility, but instead requires that the transit system, including paratransit services, provide the disabled with services that are comparable to the services offered to the nondisabled).

²³¹ 42 U.S.C. § 12143(a) (Paratransit users should have "response time, which is comparable, to the extent practicable, to the level of designated public transportation services provided to individuals without disabilities").

those of the fixed route service.²³² Further, the hours and days of paratransit service must be the same as the entity's fixed route service.²³³

The regulations have set forth specific criteria to ensure that paratransit service is comparable to that of fixed route service. For example, the regulations set forth specific provisions for responses to request for service and, in particular, the timing of service following a request. Paratransit operators must schedule and offer paratransit service to any ADA paratransit-eligible person at any requested time on any particular day in response to a request for service made the previous day.²³⁴ The operators may permit advance reservations up to 14 days in advance of an individual's desired trips.²³⁵ Reservation services must be available during at least all normal business hours of the entity's administrative offices.²³⁶ The transit operators cannot require an individual to schedule a trip to begin more than 1 hour before or after the individual's desired departure time.²³⁷ Transit operators may use real-time scheduling in providing complementary paratransit service.²³⁸ The entity may also use a subscription service.²³⁹

The regulations also address the issue of fares. Fares shall not exceed twice the fare that would be charged to an individual paying full fare for a trip of similar length at a similar time of day on the entity's fixed route system.²⁴⁰ Personal care attendants may not be charged.²⁴¹

In addition, the regulations place certain restrictions on the ability of a transit operator to limit the availability of paratransit service. The paratransit operator is not permitted to restrict the purpose of the trip,²⁴² cannot restrict the number of trips an individual will be provided,²⁴³ and cannot utilize waiting lists for access to the paratransit service.²⁴⁴ In addition, the entity cannot

²³² *Id.*, § 13143(c)(2) (requiring "the provision of paratransit and special transportation services required under this section in the service area of each public entity which operates a fixed route system"). Specifically, a transit agency shall provide service to any place within 3/4 of a mile of a bus or train stop in its jurisdiction. 49 C.F.R. §§ 37.131 (2002).

²³³ 49 C.F.R. § 37.131(e).

²³⁴ *Id.*, § 37.131(b). See *Brinn v. Tidewater Transp. Dist. Comm'n*, 242 F.3d 227 (4th Cir. 2001). (Defendant had initially refused requests to schedule next day paratransit services. Litigation over attorney fees after settlement).

²³⁵ 49 C.F.R. § 37.131(b)(4).

²³⁶ *Id.*, § 37.131(b)(1).

²³⁷ *Id.*, § 37.131(b)(2).

²³⁸ *Id.*, § 37.131(b)(3).

²³⁹ *Id.*, § 37.133(a).

²⁴⁰ *Id.*, § 37.131(c).

²⁴¹ *Id.*, § 37.131(c)(3).

²⁴² *Id.*, § 37.131(d).

²⁴³ *Id.*, § 37.131(f)(1).

²⁴⁴ *Id.*, § 37.131(f)(2); see *Anderson v. Rochester-Genesee Reg'l. Transp. Auth.*, 206 F.R.D. 56, 69 (W.D. N.Y. 2001) (holding that 49 C.F.R. § 37.131(f)(2) is ambiguous as to

limit the availability of complementary paratransit services by “any operational pattern or practice that significantly limits the availability of service to ADA paratransit eligible persons.”²⁴⁵ These patterns or practices include: (1) a substantial number of significantly untimely pickups; (2) a substantial number of trip denials or missed trips; or (3) a substantial number of trips with trip lengths.²⁴⁶

The issue of whether a paratransit service is considered “comparable” to that of fixed route service has been the issue of much litigation. In *Anderson v. Rochester-Genesee Regional Transportation Authority*,²⁴⁷ the defendant transit authority argued that the ADA paratransit requirements do not require 100 percent compliance with the ADA to constitute comparable service.²⁴⁸ The plaintiffs brought suit alleging that the defendants violated the ADA by failing to provide next day paratransit service. The defendant did not deny that it failed to provide such service, but argued that it was still in compliance under the ADA as the ADA does not require that 100 percent of the next day requests be granted. Instead, the defendant asserted that to be comparable, it only had to provide “some level” of next day service. The court disagreed with the defendant and held that the defendant’s position was squarely contradicted by the regulations themselves and mandated full compliance in providing next day service.²⁴⁹

Martin v. Metropolitan Atlanta Rapid Transit Authority (MARTA),²⁵⁰ addressed another “comparable” paratransit service issue—the timing requirements of paratransit services. In *Martin*, several plaintiffs filed suit seeking both injunctive and declaratory relief against MARTA for its failure to provide comparable paratransit service to individuals with disabilities. Specifically, one of the plaintiffs alleged that on several occasions she was picked up late, often as much as 2 hours late.²⁵¹ Another plaintiff alleged that the pickup times were often changed without notice. The plaintiff’s complaints were further corroborated by a Federal Transit Administration (FTA) assessment of MARTA’s paratransit service.²⁵² The assessment concluded that the paratransit service staffing was inadequate and that such inadequacies impacted the scheduling of trips, ready times, no show policies, and trip times. The court found that the plaintiff’s testimony, coupled with the FTA assessment, was compelling evidence that MARTA did not provide comparable paratransit services. Accordingly, the court entered a preliminary in-

junction to ensure MARTA’s compliance with the ADA timing requirements.

Similarly, in *Liberty Resources, Inc. v. Southeastern Pennsylvania Transportation Authority*,²⁵³ a public transportation authority was found to have violated Title II of the ADA by failing to provide next-day service to all ADA-eligible patrons and by constraining paratransit service by operating in a pattern or practice that significantly limited the availability of rides to ADA-eligible patrons.²⁵⁴ The public transportation authority was issuing a substantial number of trip denials and operating a system that failed to attempt to provide rides to all disabled riders. In a 13-month period, nearly 30,000 eligible patrons were denied rides. The court granted the plaintiff’s request for injunctive relief, holding that the defendant was in violation of both the response time provision and the capacity constraint provision of the ADA. The court held that more than five trip denials on any day that were not caused by forces outside the control of the transit provider represented a substantial number and constituted an ADA violation.

Conversely, in *Bacal v. Southeastern Pennsylvania Transportation Authority*,²⁵⁵ the court found that the plaintiffs did not prove that the transit agency had failed to provide comparable next day service.²⁵⁶ In *Bacal*, a class of individuals eligible for paratransit services under the ADA filed a motion for contempt against the transportation authority for allegedly violating the parties’ prior consent decree.²⁵⁷ The plaintiffs claimed that the transportation authority had failed to provide comparable next day paratransit services in accordance with the ADA and the consent decree.²⁵⁸ The court considered the evidence that the transit authority provided approximately 25,140 next day rides during the 6-month relevant time period and approximately 38 trip denials.²⁵⁹ Based upon that evidence, the court held that the plaintiffs failed to establish that the violations were more than isolated incidents or that the transit authority had systematically and continually violated the consent decree with respect to paratransit performance of next day services.²⁶⁰

whether it prohibits waiting lists for eligibility for paratransit services or for individual rides).

²⁴⁵ 49 C.F.R. § 37.131(f)(3).

²⁴⁶ *Id.*, § 37.131(f)(3)(i).

²⁴⁷ *Anderson*, 206 F.R.D. at 56.

²⁴⁸ *Id.* at 62.

²⁴⁹ *Id.* at 63.

²⁵⁰ 225 F. Supp. 2d 1362 (N.D. Ga. 2002).

²⁵¹ *Id.* at 1370.

²⁵² *Id.* at 1381.

²⁵³ 155 F. Supp. 2d 242 (E.D. Pa. 2001), *vacated as moot*, 2002 U.S. App. LEXIS 27344 (3d Cir. December 23, 2002).

²⁵⁴ *Id.* at 257.

²⁵⁵ 1998 U.S. Dist. LEXIS 8700, at *41 (E.D. Pa. May 29, 1998).

²⁵⁶ *Id.*

²⁵⁷ *Id.* at *7–8.

²⁵⁸ *Id.* at *41.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

c. Undue Financial Burden.—The government was not blind to the enormous financial burden it was placing on transit operators in enacting the paratransit service requirements of the ADA. Specifically, transit operators need not comply with all of the paratransit service requirements if doing so “would impose an undue financial burden on the agency.”²⁶¹ Instead, transit systems may apply for a waiver from all or some of the ADA paratransit service requirements on the basis that compliance would impose an undue financial burden.²⁶²

The FTA will determine whether to grant a waiver for undue financial burden and will do so on a case-by-case basis.²⁶³ The Administrator may consider a wide variety of factors in deciding whether to grant or deny an “undue burden” waiver.²⁶⁴ These factors include, but are not limited to: (1) potential reduction in fixed route and special services;²⁶⁵ (2) a comparison of the use of paratransit services and fixed route services;²⁶⁶ (3) the potential for increases in fares;²⁶⁷ (4) the resources available to implement complementary paratransit service over the period covered by the plan;²⁶⁸ (5) the percentage of budget needed to implement the plan, both as a percentage of operating budget and a percentage of entire budget;²⁶⁹ (6) the current levels of accessible fixed route and paratransit services;²⁷⁰ (7) coordination among area transportation providers;²⁷¹ (8) evidence of increased efficiencies, that have been or could be effectuated, that would benefit the level and quality of available resources for paratransit service;²⁷² and (9) other unique circumstances that affect the ability of the entity to provide paratransit services.²⁷³

d. Paratransit Plans.—Transit systems must prepare paratransit plans after a public hearing and public comment,²⁷⁴ and submit plans annually to DOT for its approval.²⁷⁵ Should DOT find that a plan does not satisfy ADA requirements, it must disapprove the plan, and the transit system must submit a modified plan.²⁷⁶

A transit system must comply with its own paratransit plan,²⁷⁷ even if the paratransit plan exceeds the re-

quirements of the ADA. In *O'Connor v. Metro Ride, Inc.*,²⁷⁸ a disabled couple sued a transit provider for personal injuries suffered after a paratransit driver left them at the end of their driveway instead of helping them into the house.²⁷⁹ The plaintiffs brought suit against the transit agency alleging that the transit provider violated the ADA by failing to provide door-to-door service. The transit provider argued that the ADA did not require it to provide plaintiffs with door-to-door service, because the ADA and DOT regulations require only “origin to destination” service.²⁸⁰ The court held that because the defendants had agreed to provide door-to-door service in the paratransit plan they submitted to DOT, they were liable for failing to provide such service. In so holding, the court relied upon 42 U.S.C. § 12143(e)(4) of the ADA, which provides that the term “discrimination” includes the failure “to provide paratransit or other special transportation services in accordance with the plan or modified plan the public entity submitted to the [DOT]....”²⁸¹

4. ADA Requirements and Regulations Regarding Demand Responsive Systems, New Facilities, and Existing Facilities

ADA provisions governing demand-responsive systems,²⁸² new transit facilities,²⁸³ and alterations to existing transit facilities²⁸⁴ are similar to those for fixed route and paratransit systems. For example, the ADA requires demand-responsive systems to make new vehicles accessible to the disabled,²⁸⁵ and requires new transit facilities²⁸⁶ and alterations of existing facilities²⁸⁷ to be accessible to the disabled. Public and private entities that either construct or alter transportation facilities must ensure that the facilities are readily accessible.²⁸⁸

The ADA directed the Access Board²⁸⁹ to issue “minimum guidelines” to supplement the Board’s ex-

²⁶¹ 42 U.S.C. § 12143(c)(4).

²⁶² *Id.*

²⁶³ 49 C.F.R. § 37.153(a).

²⁶⁴ *Id.*, § 37.155(a).

²⁶⁵ *Id.*, § 37.155(a)(1) and (3).

²⁶⁶ *Id.*, § 37.155(a)(2).

²⁶⁷ *Id.*, § 37.155(a)(4).

²⁶⁸ *Id.*, § 37.155(a)(5).

²⁶⁹ *Id.*, § 37.155(a)(6).

²⁷⁰ *Id.*, § 37.155(a)(7).

²⁷¹ *Id.*, § 37.155(a)(8).

²⁷² *Id.*, § 37.155(a)(9).

²⁷³ *Id.*, § 37.155(a)(10).

²⁷⁴ 42 U.S.C. § 12143(c)(6).

²⁷⁵ *Id.*, §§ 12143(c)(7) & (d)(1).

²⁷⁶ *Id.*, § 12143(d).

²⁷⁷ *Id.*, § 12143(e); *See Anderson v. Rochester-Genesee Reg'l Transp. Auth.*, 205 F. Supp. 2d 106, 107 (W.D. N.Y. 2002) (holding that transportation authority violated ADA by failing

to provide paratransit service in accordance with plan submitted to DOT.)

²⁷⁸ 87 F. Supp. 2d 894 (D. Minn. 2000).

²⁷⁹ *Id.* at 896.

²⁸⁰ *Id.* at 900 (citing 49 C.F.R. § 37.129).

²⁸¹ *Id.* (Citing 42 U.S.C. § 12143(e)(4)).

²⁸² 42 U.S.C. § 12141(1) (Demand-responsive system is “any system of providing...public transportation which is not a fixed route system.”).

²⁸³ 49 C.F.R. § 37.3. DOT regulations define facilities as “all or any portion of buildings, structures, sites, complexes, equipment, roads, walks, passageways, parking lots, or any other real or personal property....” *Id.*

²⁸⁴ 42 U.S.C. § 12147.

²⁸⁵ *Id.*, § 12144.

²⁸⁶ *Id.*, § 12146.

²⁸⁷ *Id.*, § 12147(a).

²⁸⁸ 49 C.F.R. §§ 37.4, 37.43, 37.45.

²⁸⁹ The Access Board is a federal agency that was created by the Rehabilitation Act of 1973. 29 U.S.C. § 792(a). The Board is composed of 25 members: 13 public members appointed by

isting Minimum Guidelines and Requirements for Accessible Design. Appendix A to 49 C.F.R. § 37 provides the Access Board's ADA Accessibility Guidelines for Building and Facilities (ADA Accessibility Guidelines), which set forth the ADA's minimum requirements for accessibility.²⁹⁰ The ADA Accessibility Guidelines are to be applied during the design, construction, and alteration of buildings and facilities covered by Titles II and III of the ADA. They set forth the specific accessible elements, spaces, scope, and technical requirements for transportation facilities. They also include specifications and regulations for such items as curb ramps, stairs, elevators, windows, doors, drinking fountains, water closets, toilet stalls, urinals, sinks, handrails, space and reach allowances, accessible routes, telephones, and wheelchair lifts.²⁹¹

The ADA required that "key" rail stations²⁹² be made accessible to the disabled by July 26, 1993.²⁹³ Disabled individuals and their advocates have brought litigation to force modification of key rail facilities. For example, in *Cupolo v. Bay Area Rapid Transit*,²⁹⁴ the plaintiffs, a class of individuals with mobility disabilities, brought suit alleging that the defendant failed to make key stations in a rapid rail and light rail system readily accessible in violation of the ADA.²⁹⁵ Specifically, many plaintiffs alleged that they were repeatedly unable to use the elevators at the defendant's key stations. The defendant's own report indicated that more than 1,400 "elevator incidents" occurred between January 1, 1996, and March 5, 1997, including 76 separate incidents in which passengers were trapped inside elevators.²⁹⁶ The court held that the transit agency's problems constituted a pattern of unreliable service.²⁹⁷ Therefore, the plaintiffs were entitled to a preliminary injunction re-

quiring the defendant to bring public use elevators at its key stations into compliance with the ADA.²⁹⁸

Similarly, in *Martin v. Metropolitan Atlanta Rapid Transit Authority (MARTA)*,²⁹⁹ the plaintiffs brought suit alleging various violations of the ADA, including that MARTA discriminated against the disabled by failing to maintain the elevators in its key rapid rail stations.³⁰⁰ Specifically, the plaintiffs alleged that the elevators were frequently out of order.³⁰¹ Further, MARTA did not post alternative route information to those disabled patrons that needed the elevators.³⁰² The court noted *Cupolo, supra*, for the proposition that a pattern of unreliable elevator service constitutes a violation of the ADA. The court, however, found that the plaintiffs had failed to establish such a pattern, and denied the plaintiffs' motion for injunctive relief.³⁰³

In *American Council of the Blind v. Washington Metropolitan Area Transit Authority*,³⁰⁴ an advocacy group for the visually impaired sought a declaration that the transit authority's proposed system, or requested equivalent facilitation,³⁰⁵ did not comply with the ADA's accessibility standards for platform edges in train stations. The plaintiffs claimed that the filing of their lawsuit resulted in the installation of a system that conformed with the requirements of the ADA.³⁰⁶ The court rejected this notion and held that the action was moot, as the transit authority had abandoned attempts to obtain approval of its equivalent system and installed a system required under the guidelines.³⁰⁷ The court found that the defendants' explanation that they had chosen to conform with the required system following the failure of their equivalent facilitation was reasonable.³⁰⁸

5. ADA Requirements and Regulations Regarding Intercity and Commuter Rail

ADA provisions governing intercity and commuter rail systems also echo those for fixed route and para-transit services. For example, the ADA requires inter-

the President, as well as officials of 12 federal agencies or departments. *Id.* The Board's mission focuses on the elimination of architectural, transportation, communication, and attitudinal barriers confronting people with disabilities. 29 U.S.C. § 792(b).

²⁹⁰ *Id.*, § 37, App. A.

²⁹¹ *Id.*

²⁹² The transit agency shall designate which stations on its system are key stations. In doing so, the transit agency may consider the following criteria: (1) stations where passenger boarding exceeds 15 percent of average station boarding; (2) transfer stations and major interchange points; (3) end stations; and (4) stations serving major activity centers. 49 C.F.R. § 37.47.

²⁹³ 42 U.S.C. § 12147(b)(2)(A). This deadline may be extended, however, for "extraordinary expensive structural changes." *Id.*, § 12147(b)(2)(B) (allowing extensions for up to 30 years as long as 2/3 of key stations are accessible within 20 years).

²⁹⁴ 5 F. Supp. 2d 1078 (N.D. Cal. 1997).

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 1081.

²⁹⁷ *Id.* at 1083.

²⁹⁸ *Id.*

²⁹⁹ 255 F. Supp. 2d 1362 (N.D. Ga. 2002).

³⁰⁰ *Id.* at 1380.

³⁰¹ *Id.* at 1369.

³⁰² *Id.*

³⁰³ *Id.* at 1380.

³⁰⁴ 133 F. Supp. 2d 66 (D.D.C. 2001).

³⁰⁵ A transit authority may apply for a grant of "equivalent facilitation" to be excused from complying with certain design or technology specifications. 49 C.F.R. § 37.9. The Federal Transit Administration may grant an equivalent facilitation if the alternative design or technology that the transit authority seeks provides "substantially equivalent or greater access to and usability of the facility." *Id.* Pt. 37, app. A, § 2.2.

³⁰⁶ *Id.* at 71.

³⁰⁷ *Id.* at 75.

³⁰⁸ *Id.* at 73.

city rail transportation³⁰⁹ to make new intercity cars accessible to the disabled.³¹⁰ The ADA further provides that intercity rail systems operating multi-car trains have at least one vehicle per train that is accessible to individuals with disabilities, including individuals who use wheelchairs.³¹¹ New intercity rail transportation stations must be made accessible to individuals with disabilities.³¹² Further, existing intercity rail transportation stations must be made accessible to individuals with disabilities.³¹³ The period for compliance for all stations in the intercity rail transportation system to be accessible to individuals with disabilities is by January 26, 2011, 20 years after the effective date of the ADA.

Likewise, commuter rail transportation systems must also comply with the one-car-per train rule, requiring trains to have at least one accessible vehicle per train,³¹⁴ requiring that any new cars be accessible,³¹⁵ and requiring that a good faith effort be made in the acquisition of accessible used cars.³¹⁶ Commuter rail systems were required to make their “key stations”³¹⁷ accessible by July 26, 1993.³¹⁸

In *Molloy v. Metropolitan Transportation Authority*,³¹⁹ a group of individuals and organizations representing the interests of blind and visually impaired riders challenged a commuter rail decision to remove human ticket clerks from numerous commuter rail stations, and to substitute ticket vending machines at a majority of those stations.³²⁰ The plaintiffs sought a preliminary injunction alleging that the staff reduction plan violated the provisions of the ADA, which makes it unlawful for a transit operator to alter an existing commuter rail station in such a way as to make the station inaccessible to the disabled. The railroad ar-

³⁰⁹ The term “intercity rail transportation” means transportation provided by the National Railroad Passenger Corporation. 42 U.S.C. § 12161(3).

³¹⁰ *Id.*, § 12162(a)(2).

³¹¹ *Id.*, § 12162(a).

³¹² *Id.*, § 12162(e)(1).

³¹³ *Id.*, § 12162(e)(2).

³¹⁴ *Id.*, § 12162(b).

³¹⁵ *Id.*, § 12162(b)(2).

³¹⁶ *Id.*, § 12162(b)(2)(B).

³¹⁷ *Id.*, § 12162(e)(2)(A)(iii).

(Each commuter authority shall designate the key stations in its commuter rail transportation system in consultation with individuals with disabilities and organizations representing such individuals, taking into consideration such factors as high ridership and whether such stations serve as a transfer or feeder station. Before the final designation of key stations under this clause, a commuter authority shall hold a public hearing).

³¹⁸ *Id.*, § 12162(e)(2)(A)(ii)(II). The time limit may be extended by the Secretary of Transportation up to 20 years after July 26, 1990, in a case where the raising of the entire passenger platform is the only means available of attaining accessibility or where other extraordinary expensive structural changes are necessary. *Id.*

³¹⁹ 94 F.3d 808 (2d Cir. 1996).

³²⁰ *Id.* at 810.

gued in response that the ADA was inapplicable because no “alterations” to its facilities occurred.³²¹

The court first addressed the removal of the ticket clerks, and held that such staffing changes did not constitute “alterations” within the meaning of the ADA. First, the language of the ADA, which refers to “alterations” to stations or facilities,³²² refers to physical alterations to a structure rather than a change in personnel.³²³ This interpretation was further supported by DOT regulations, which list numerous examples of “alterations,” all of which involve physical changes to facilities rather than personnel changes.³²⁴ The court also considered that the ticket clerks only worked at the stations from 7:00 a.m. to 1:00 p.m., so if the removal of ticket clerks constituted “an alteration”, then “every day at 1:00 the station would be altered in contravention of the statute.”³²⁵

The court then addressed the issue of installation of the vending machines, and held that was clearly an alteration to the station because it was a physical modification requiring additional wiring and communication lights. The court, nevertheless, declined to grant the injunction because the plaintiffs failed to establish irreparable harm if the installation was not enjoined. The court found that plaintiffs could purchase tickets through other means available.³²⁶

In *Hassan v. Slater*,³²⁷ a disabled commuter alleged that a transit agency’s decision to close a nearby commuter rail station violated the ADA. After the station’s closure, the nearest station was 4 miles from the plaintiff’s home, which was too far for the plaintiff to walk. The plaintiff could not afford a taxi cab ride to the station on a regular basis. The court denied the plaintiff’s motion for preliminary injunction. It held that “it does not appear that the ADA requires the [transit agency] to keep all of its stations open ...[r]ather, the ADA only requires that [it] make new stations and its designated key stations readily accessible to and usable by people with disabilities.”³²⁸ The transit agency’s decision to close the station did not breach the ADA requirement, because “the Station closing affects all potential users, not merely disabled users.”³²⁹

C. Prima Facie Case

There are three methods of making a prima facie case of discrimination under Title II of the ADA. Discrimination may be established by evidence that (1) the defendant intentionally acted on the basis of the disability;

³²¹ *Id.* at 812.

³²² 42 U.S.C. § 12162(e); *see also id.*, § 12147(a).

³²³ *Molloy v. Metropolitan Transp. Auth.*, 94 F.3d 808, 811 (2d Cir. 1996).

³²⁴ *Id.* at 811–12.

³²⁵ *Id.* at 812.

³²⁶ *Id.* at 813.

³²⁷ 41 F. Supp. 2d 343 (E.D. N.Y. 1995), *aff’d*, 199 F.3d 1322 (2d Cir. 1999).

³²⁸ *Id.* at 351.

³²⁹ *Id.*

(2) the defendant refused to provide a reasonable modification; or 3) the defendant's rule disproportionately impacts disabled people.³³⁰ Intent to discriminate on the basis of disability, however, is not necessary to make out a prima facie case of discrimination under Title II.³³¹ Rather, proof of discriminatory intent is necessary only to justify a court's award of compensatory damages.³³²

D. Enforcement and Remedies

1. Compensatory Damages

Title II of the ADA provides for a private cause of action to enforce its provisions.³³³ Specifically, Title II of the ADA provides that the remedies set forth in the Rehabilitation Act of 1973³³⁴ shall govern actions involving discrimination relating to government programs.³³⁵ Title II provides for compensatory damages for an intentional violation of the public service provisions of the ADA.³³⁶ In *Midgett v. Tri-County Metropolitan Transit District of Oregon*,³³⁷ the United States District Court for the District of Oregon addressed the question of when damages were an appropriate remedy for violations of the ADA's public transit provision. The plaintiff, who had multiple sclerosis and used a wheelchair for mobility, was considered a "qualified person with a disability" under the ADA.³³⁸ He filed suit alleging that he would like to travel to work by bus, but because of the defendant's alleged failure to adequately train its bus operators and failure to maintain the wheelchair lifts, "his efforts to use public transportation have been impeded."³³⁹ The court found that the plaintiff presented no evidence from which a rational inference of discriminatory intent could be drawn. Specifically, the court held that "compensatory damages are not available under Title II of the ADA absent a show-

ing of discriminatory intent or, at a minimum, deliberate indifference."³⁴⁰ No evidence of discriminatory intent was proven; therefore, the court granted summary judgment as to plaintiff's claim for compensatory damages.³⁴¹

Many courts have addressed the issue of whether compensatory damages are appropriate for unintentional discrimination under the ADA.³⁴² Although instructive, they do not specifically address transit operations.

2. Punitive Damages

There are no provisions in Title II of the ADA for punitive damages.³⁴³ In *Barnes v. Gorman*,³⁴⁴ the Supreme Court unanimously determined that punitive damages are not available under Title II of the Americans with Disabilities Act³⁴⁵ or the Rehabilitation Act of 1973.³⁴⁶ In *Barnes*, the plaintiff, a paraplegic, suffered injuries when, after arrested, he was transported to a police station in a van that was not equipped to accommodate the disabled. He then filed suit against the police officials and officers alleging discrimination on the basis of his disability, in violation of Title II of the ADA, by failing to maintain appropriate policies for the arrest and transportation of the disabled. A jury awarded the plaintiff compensatory and punitive damages. The district court vacated the judgment as to punitive damages, holding that they were unavailable in private suits under Title II of the ADA. The Eighth Circuit Court of Appeals reversed, holding that punitive damages are available under the general rule that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief" for violation of a federal right.³⁴⁷

The United States Supreme Court reversed the Eighth Circuit's decision. The Court noted that while previous cases under the ADA and the Rehabilitation

³³⁰ Access Living of Metro Chicago v. Chicago Transit Auth., 2001 U.S. Dist. LEXIS 6041, at *22 (N.D. Ill. May 9, 2001).

³³¹ *Id.*

³³² *Id.* (Citing *Alexander v. Sandoval*, 532 U.S. 275 (2001)) (stating that private individuals may not recover compensatory damages under Title VII except for intentional discrimination); see 42 U.S.C. § 12133 (providing that "the remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202"); 29 U.S.C. § 794(a)(2) (2002) (damages available under Rehabilitation Act shall be remedies set forth in Title VII of the Civil Rights Act of 1964).

³³³ 42 U.S.C. § 12133.

³³⁴ 29 U.S.C. § 794(a).

³³⁵ 42 U.S.C. § 12133.

³³⁶ *Midgett v. Tri-County Metro. Transp. Dist. of Or.*, 74 F. Supp. 2d 1008 (D. Or. 1999).

³³⁷ *Id.* at 1018.

³³⁸ *Id.* at 1010.

³³⁹ *Id.*

³⁴⁰ *Id.* at 1018.

³⁴¹ *Id.*

³⁴² See, e.g., *Ferguson v. City of Phoenix*, 157 F.3d 668, 674 (9th Cir. 1998) (intentional discrimination must be shown in order to recover compensatory damages under Title II of the ADA); *Wood v. President and Tr. of Spring Hill Coll.*, 978 F.2d 1214, 1219–20 (11th Cir. 1992); *Tafoya v. Bobroff*, 865 F. Supp. 742 (D. N.M. 1994) (stating that courts have generally held that intentional discrimination is a prerequisite to damages under 42 U.S.C. § 12133); *Tyler v. City of Manhattan*, 849 F. Supp. 1442 (D. Kan. 1994) (holding that the plaintiff could not recover compensatory damages because he did not allege that intentional discrimination caused his emotional distress, mental anguish, and humiliation).

³⁴³ *Johnson v. City of Saline*, 151 F.3d 564 (6th Cir. 1998) (holding punitive damages are not available under § 504 of the Rehabilitation Act, and so are not available under Title II of the ADA); *Barnes v. Gorman*, 536 U.S. 181 (2000).

³⁴⁴ *Barnes*, 536 U.S. at 187–88.

³⁴⁵ 42 U.S.C. § 12132.

³⁴⁶ 29 U.S.C. § 794.

³⁴⁷ *Barnes*, 536 U.S. at 184.

Act have recognized a private cause of action and have recognized that “any appropriate relief” is available, there has been no articulation of the meaning of “appropriate relief.” The Court answered this question by analogy to the relief available in suits brought pursuant to Titles IX and VI. These statutes invoke Congress’s power under the Spending Clause to place conditions on the grant of federal funds and have been characterized as “much in the nature of a contract: in return for federal funds.”³⁴⁸ Accordingly, the contract-law characterization defines the scope of the conduct for which funding recipients may be liable for money damages. “A funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract.”³⁴⁹ Punitive damages are generally not available for breach of contract. The Court noted that funding recipients likely would not have agreed to accept funding if punitive damages were available over remedies.³⁵⁰ Accordingly, punitive damages are not available under Title II of the ADA.³⁵¹ The Court specifically stated that it was not basing its decision on the traditional presumption against the imposition of punitive damages on government entities.

3. Attorney’s Fees

Attorney’s fees are generally available under the ADA to the prevailing party.³⁵² Title II of the ADA provides that: “In any action for administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion may allow the prevailing party, other than the United States, reasonable attorney’s fees....”³⁵³

The issue of attorney’s fees was presented in *Brinn v. Tidewater Transportation District Commission*.³⁵⁴ The plaintiff alleged that the defendant unlawfully refused a request to schedule next day paratransit services as required by the ADA and the Rehabilitation Act of 1973.³⁵⁵ The plaintiff sought an injunction requiring the defendant to bring its provision of next day paratransit service into full compliance with the ADA and the Rehabilitation Act.³⁵⁶ The parties ultimately entered into a settlement agreement under which the defendant agreed both to provide the relief sought in the complaint and to produce monthly monitoring reports of its compliance with these terms.³⁵⁷ The district court incorporated the settlement agreement into a court order and ultimately entered a permanent injunction

based on the terms of the settlement agreement. The plaintiff then moved for an award of attorney’s fees as “prevailing” plaintiff under the ADA and the Rehabilitation Act.³⁵⁸ The district court awarded the plaintiff \$29,506.24 in attorney’s fees and costs.³⁵⁹ The defendant appealed, arguing that the plaintiff was not a “prevailing” party. The circuit court relied upon *Farrar v. Hobby*,³⁶⁰ in which the United States Supreme Court held that “a plaintiff is considered a ‘prevailing party’” if “actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.”³⁶¹ The court found that the plaintiff was a prevailing party and affirmed the district court’s award of attorney’s fees.

4. Fines

The DOT issued a rule in 1998 authorizing the imposition of fines against over-the-road buses for violations of Title II of the ADA. The American Bus Association challenged the money-damages scheme, alleging that DOT lacked statutory authority to implement it.³⁶² The D.C. Circuit agreed and found that Congress had “not granted DOT the power to impose money damages on bus companies that fail to provide accessible service to disabled passengers.”³⁶³

E. Parties To Lawsuits

1. Organizational Standing

Many courts have grappled with the issue of who is considered a proper party to bring suit to enforce the accessibility provisions of the ADA. One case concerned whether a nonprofit corporation had standing to pursue claims for disabled clients. Specifically, a nonprofit corporation with disabled clients sought to assure access to mass transportation facilities for disabled individuals.³⁶⁴ The defendant contended that the plaintiff nonprofit corporation was not, itself, a person with a disability and, so, was not entitled to bring a claim under the ADA. The court found that the nonprofit corporation had standing to bring an action against the transit company under the ADA.³⁶⁵ The court reasoned that the plaintiff was an organization with the purpose of assisting individuals to obtain equal access for its clients and that its ability to provide this service to its

³⁴⁸ *Id.* (Citations omitted).

³⁴⁹ *Id.* at 187.

³⁵⁰ *Id.* at 188.

³⁵¹ *Id.* at 189.

³⁵² 42 U.S.C. § 12205.

³⁵³ *Id.*

³⁵⁴ *Brinn*, 242 F.3d at 227.

³⁵⁵ *Id.* at 230.

³⁵⁶ *Id.*

³⁵⁷ *Id.* at 231.

³⁵⁸ *Id.* at 229.

³⁵⁹ *Id.*

³⁶⁰ 506 U.S. 103, 111–12 (1992).

³⁶¹ *Id.* at 111–12.

³⁶² *American Bus Ass’n v. Slater*, 231 F.3d 1 (D.C. Cir. 2000).

³⁶³ *Id.* at 14.

³⁶⁴ *Raver v. Capitol Area Transit*, 887 F. Supp. 96 (M.D. Pa. 1995).

³⁶⁵ *Id.* at 98.

clients has been harmed by the alleged violation of the ADA.³⁶⁶

Likewise, in *Access Living of Metropolitan Chicago v. Chicago Transit Authority*,³⁶⁷ the court held that the plaintiff, a nonprofit organization, had standing to bring suit against the defendant based on alleged violations of Title II of the ADA. The plaintiff is a nonprofit organization founded for the purpose of acting on behalf of people with disabilities in the Chicago area, including working to remove barriers that interfere with the civil rights of people with disabilities to live independently in the communities of their choice, and advocating on behalf of people with disabilities regarding access to work, transportation, education, recreation, and health care in the City of Chicago.³⁶⁸ The defendant moved for summary judgment, arguing that the plaintiff lacked standing to assert the rights of disabled patrons.³⁶⁹ The defendant relied on *Kessler Institute for Rehabilitation, Inc. v. Mayor and Council of the Borough of Essex Fells*,³⁷⁰ in which the district court held that an organization that serves the interests of disabled persons lacked standing under the ADA.³⁷¹

The *Access Living* court, however, agreed with the majority of courts and found that organizations serving the needs of disabled persons have standing to bring claims under the ADA, though they are not themselves individuals with disabilities.³⁷² The court reasoned that a majority of other courts addressing the issue had found that an organization does have standing to sue under the ADA, if organizational or representational standing requirements under the United States Constitution are met.³⁷³

2. Class Actions

The courts have been willing to certify class actions concerning the denial of services under the ADA. For example, a court certified a class of eligible Southeastern Pennsylvania Transportation Authority (SEPTA) paratransit riders who had or would be denied para-

transit services comparable to the level of service provided to individuals without disabilities who use SEPTA's fixed route bus system.³⁷⁴ Similarly, in *Anderson v. Rochester-Genesee Regional Transportation Authority*,³⁷⁵ the court conditionally certified a class of plaintiffs defined as "all persons who are now or in the future will be eligible for ADA paratransit services in the geographical area served by defendants."³⁷⁶

In another case, the "numerosity" prerequisite for class certification³⁷⁷ was met as to a proposed class seeking injunctive and declaratory relief on behalf of all individuals with disabilities who were eligible or might become eligible by the city and metropolitan transit authority.³⁷⁸ The parties were aware of at least 12,000 individuals who were certified to use the services provided, and while not every disabled person living in the geographical area necessarily used the services, they would benefit from the settlement if they sought to use the services in the future.³⁷⁹

VI. TITLE III OF THE ADA—PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

In a similar fashion to Title II, Title III prohibits private entities from discriminating against an individual with a disability in connection with services, facilities, or accommodations or any place of public accommodation by any person who owns, leases, or operates a place of public accommodation.³⁸⁰ Title III applies to private entities supplying public transportation services.³⁸¹ Specifically, Section 304 of Title III provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce."³⁸²

A. Definitions

1. Specified Public Transportation

The term "specified public transportation" means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special services (including charter service) on a regular and continuing basis.³⁸³

³⁶⁶ *Id.*

³⁶⁷ 2001 U.S. Dist. LEXIS 6041 (N.D. Ill. May 8, 2001).

³⁶⁸ *Id.* at *2-3.

³⁶⁹ *Id.* at *7.

³⁷⁰ 876 F. Supp. 641 (D. N.J. 1985).

³⁷¹ *Access Living of Metro. Chicago v. Chicago Transit Auth.*, 2001 U.S. Dist. LEXIS 6041 at *7 (N.D. Ill. May 8, 2001) (citing *Kessler Institute*, 876 F. Supp. at 653).

³⁷² *Access Living*, 2001 U.S. Dist. LEXIS 6041 at *7.

³⁷³ *Id.* (Citing *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 48 (2d Cir. 1997)) (finding agency had standing to assert a claim under both the ADA and the Rehabilitation Act); *Pathway Psychological Support Ctr. v. Town of Leonardton*, 1989 U.S. Dist. LEXIS 22443 at *2 (D. M.D. July 30, 1995) ("Courts have ruled that the ADA confers the right to sue upon entities who are injured by discrimination because of their association with disabled persons."); *Oak Ridge Care Ctr., Inc. v. Racine County*, 896 F. Supp. 867, 872-73 (E.D. Wis. 1994) (organization acting as agent of disabled persons has standing to bring action under ADA).

³⁷⁴ *Bacal v. Southeastern Pennsylvania Transp. Auth.*, 1995 U.S. Dist. LEXIS 6609 (E.D. Pa. May 6, 1995).

³⁷⁵ 206 F.R.D. 56 (W.D. N.Y. 2001).

³⁷⁶ *Id.* at 70.

³⁷⁷ FED. R. CIV. P. 23.

³⁷⁸ *Neff v. Via Metro. Transit Auth.*, 179 F.R.D. 185 (W.D. Tex. 1998).

³⁷⁹ *Id.* at 193.

³⁸⁰ 42 U.S.C. § 12181-12189.

³⁸¹ *Id.* at § 12184.

³⁸² *Id.*, § 12184.

³⁸³ *Id.*, § 12181(10).

2. Demand Responsive System

The term “demand responsive system” means any system of providing transportation of individuals by a vehicle other than a system that is a fixed route system.³⁸⁴

3. Fixed Route System

The term “fixed route system” means a system of providing transportation of individuals (other than by aircraft) on which a vehicle is operated along a prescribed route according to a fixed schedule.³⁸⁵

4. Over the Road Bus

The term “over the road bus” means a bus characterized by an elevated passenger deck located over a baggage compartment.³⁸⁶

5. Private Entity

The term “private entity” means any entity other than a public entity (as defined in Section 12131(1) of this title).³⁸⁷

6. Public Accommodation

The term “public accommodation” encompasses private entities for purposes of Title III if the operations of these private entities affect commerce. Private entities that constitute public accommodation include a terminal, depot, or other station used for specified public transportation.³⁸⁸

7. Commerce

Commerce means travel, trade, traffic, commerce, transportation, or communication among the several states; between any foreign country or any territory or possession of any state; or between points in the same state but through another state or foreign country.³⁸⁹

B. Enforcement and Remedies

Title III allows for injunctive relief in private causes of action, but does not allow for monetary damages.³⁹⁰ Title III provides that the remedies and procedures set

forth in 42 U.S.C. § 2000a-3-a³⁹¹ are the remedies and procedures available under Title III.³⁹²

Title III also provides that the Attorney General may investigate alleged violations of Title III and undertake periodic reviews of compliance of covered entities under Title III.³⁹³ If the Attorney General has reasonable cause to believe that any person or group of persons is engaging in discrimination or any person or group of persons has been discriminated against in violation of Title III, the Attorney General may commence a civil action in any appropriate United States District Court.³⁹⁴ In an action brought by the Attorney General, a court may grant equitable relief, including granting temporary, preliminary, or permanent relief providing an auxiliary aid or service; modifying policy, practice, or procedure; or making facilities readily accessible and usable by individuals with disabilities.³⁹⁵ The courts may also award appropriate relief, including monetary damages,³⁹⁶ to persons aggrieved when requested by the Attorney General.³⁹⁷ Further, the courts may assess a civil penalty against an entity engaged in the pattern or practice of discrimination.³⁹⁸

C. ADA Requirements

Section 304 of Title III specifically prohibits discrimination in specified public transportation services provided by private entities.³⁹⁹ As set forth in Section 304, discrimination includes:

³⁹¹ 42 U.S.C. § 2000a-3 provides the following remedies for violations:

a civil action for preventative relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of a civil action without the payment of fees, costs, or security.

³⁹² *Id.*, § 12188(a)(1).

³⁹³ *Id.*, § 12188(b)(1)(A)(i).

³⁹⁴ *Id.*, § 12188(b)(1)(B).

³⁹⁵ *Id.*, § 12188(b)(2)(A)(i)-(iii).

³⁹⁶ The term “monetary damages” does not include punitive damages. *Id.*, § 12188(b)(4).

³⁹⁷ *Id.*, § 12188(b)(2)(B).

³⁹⁸ *Id.*, § 12188(b)(2)(C).

³⁹⁹ *Id.*, § 12184; see *James v. Peter Pan Transit Mgmt., Inc.*, 1999 U.S. Dist. LEXIS 2565 (E.D. N.C. January 20, 1999). Plaintiff brought action against defendants the City of Raleigh and Peter Pan Transit Management, Inc., which was a private contractor hired by the city to provide transit services by the city, alleging that the city violated Title II and the transit company violated Title III by failing to adequately maintain and repair its wheelchair lifts and adequately train its employees to operate the lift. Court denied defendant’s motion for summary judgment because the plaintiff submitted sufficient evidence that the defendants had failed to check wheelchair lifts to determine if they were operable, failed to properly re-

³⁸⁴ *Id.*, § 12181(3).

³⁸⁵ *Id.*, § 12181(4).

³⁸⁶ *Id.*, § 12181(5).

³⁸⁷ *Id.*, § 12181(6). The term public entity means any state or local government; any department, agency, special purpose district or other instrumentality of the state or states or local government; and the National Railroad Passenger Corporation and any commuter authority. *Id.*, § 12131(1).

³⁸⁸ *Id.*, § 12181(7)(G).

³⁸⁹ *Id.*, § 12181(1).

³⁹⁰ *Id.*, § 12188; *Cole v. Nat’l Collegiate Athletic Ass’n*, 157 F. Supp. 2d 729 (E.D. Mich. 2001). See *O’Connor v. Metro. Ride, Inc.*, 87 F. Supp. 2d 894, 899 (D.C. Minn. 2000).

1. The imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully enjoying the specified public transportation services provided by the entity;⁴⁰⁰
2. The failure of such entity to make reasonable modifications in policies, practices, or procedures when such modifications are necessary to afford accommodation to individuals with disabilities, unless the entity can demonstrate that making such modification would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;⁴⁰¹
3. Failure to take steps necessary to ensure that no individual with a disability is excluded, denied service, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless an entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered; and⁴⁰²
4. The failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals, where such removal is readily achievable.⁴⁰³

Section 304 also provides that the purchase or lease of a new vehicle,⁴⁰⁴ over the road bus,⁴⁰⁵ new van,⁴⁰⁶ or new rail passenger car⁴⁰⁷ must be made readily accessible to or usable by individuals with disabilities. Further, new facilities and alterations of existing facilities must be accessible to the disabled.⁴⁰⁸

D. ADA Regulations

Like Title II, Title III of the ADA required the office of the Secretary of Transportation to issue regulations implementing the transit-related provisions, which it did in 1991.⁴⁰⁹ These regulations, referred to as DOT regulations, apply to Title II and Title III and were discussed *supra*.

VII. MISCELLANEOUS PROVISIONS OF THE ADA

Title V of the ADA provides numerous miscellaneous provisions that apply to Titles I, II, and III of the ADA.

A. Construction with Other Laws

Section 501 provides that the ADA shall not be construed to limit any standards as set forth in the Rehabilitation Act of 1973,⁴¹⁰ or regulations issued by federal agencies pursuant to the Rehabilitation Act of 1973.⁴¹¹ With relation to other laws, the ADA is not to be construed in such a manner that it limits the “remedies, rights, and procedures” of federal or state laws that provide more rights to disabled persons than the ADA itself.⁴¹²

B. State Immunity

Section 502 provides that a state shall not be immune under the Eleventh Amendment to the Constitution of the United States from an action in federal or state court for violation of the ADA.⁴¹³ Based upon this statute, Congress expressly abrogated the Eleventh Amendment immunity afforded to the states.⁴¹⁴ The statute further provides that in any action against a state for violation of the ADA, the same remedies are available in that action against the state as are available in an action against any public or private entity other than a state.⁴¹⁵

In *Board of Trustees of University of Alabama v. Garrett*, the United States Supreme Court, however, ruled that with respect to Title I of the ADA, Congress exceeded its authority to abrogate the states’ Eleventh Amendment immunity.⁴¹⁶ Congress may abrogate such immunity when it: (1) unequivocally intends to do so, and (2) acts pursuant to a valid grant of constitutional authority.⁴¹⁷ The Supreme Court found that while Congress clearly intended to abrogate the states’ immunity, it did not do so pursuant to a valid grant of constitutional authority.⁴¹⁸ Consequently, the Supreme Court held that the states cannot be held liable for monetary damages under the ADA. The Supreme Court did note that although states may not be sued for monetary damages under Title I, individuals are not without federal recourse against discrimination.⁴¹⁹ Title I of the

pair vehicles with defective lifts, and did not train drivers to operate lifts. The court further held that the city was not relieved of its ADA obligations simply because the contractor was a private entity to provide a public service. *Id.*

⁴⁰⁰ 42 U.S.C., § 12184(b)(1)(a).

⁴⁰¹ *Id.*, § 12184(b)(2)(A) (citing 42 U.S.C. § 12182(b)(2)(A)(ii)).

⁴⁰² *Id.*, § 12184(b)(2)(B) (citing 42 U.S.C. § 12182(b)(2)(A)(iii)).

⁴⁰³ *Id.*, § 12184(b)(2)(C).

⁴⁰⁴ *Id.*, § 12184(b)(3).

⁴⁰⁵ *Id.*, § 12184(b)(4)(A).

⁴⁰⁶ *Id.*, § 12184(b)(5).

⁴⁰⁷ *Id.*, § 12184(b)(6).

⁴⁰⁸ *Id.*, § 12183.

⁴⁰⁹ *Id.*, § 12186.

⁴¹⁰ 29 U.S.C. § 790, *et seq.*

⁴¹¹ 42 U.S.C. § 12201(a).

⁴¹² *Id.*, § 12201(b).

⁴¹³ *Id.*, § 12202.

⁴¹⁴ The Eleventh Amendment immunizes states against damages when the state has waived immunity or Congress has validly abrogated the immunity. *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

⁴¹⁵ 42 U.S.C. § 12202.

⁴¹⁶ *Garrett*, 531 U.S. at 364; *see* *Burkhart v. Washington Metro. Transit Auth.*, 112 F.3d 1207 (D.C. Cir. 1997) (discussing sovereign immunity).

⁴¹⁷ *Garrett*, 531 U.S. at 363.

⁴¹⁸ *Id.* at 365.

⁴¹⁹ *Id.* at 374.

ADA still prescribes standards applicable to the states. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief.⁴²⁰ In addition, the Supreme Court noted that “state laws protecting the rights of persons with disabilities in employment and other aspects of life provide independent avenues of redress.”⁴²¹

The United States Supreme Court specifically limited its finding in the *Garrett* case to Title I cases, and has not yet decided the issue of whether actions by private citizens against the states under Title II of the ADA are also barred by the Eleventh Amendment. The courts are still split as to whether such actions are barred by the Eleventh Amendment or whether Congress validly abrogated the states’ immunity.⁴²²

Government officials cannot be sued in their individual capacities. Further, some courts have held that individual defendants are not employers within the meaning of the Act and, therefore, cannot be sued.⁴²³

C. Prohibition Against Retaliation and Coercion

Section 503 provides that it is unlawful to engage in retaliation or discriminate against an individual because that individual has opposed any act or practice made unlawful by the ADA or because an individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the ADA.⁴²⁴ Similarly, it is unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, the rights granted and protected by the ADA.⁴²⁵

⁴²⁰ *Id.* at 374 (citing *Ex Parte Young*, 209 U.S. 123 (1908)).

⁴²¹ *Id.* at 374.

⁴²² See *Walker v. Snyder*, 213 F.3d 344, 347 (7th Cir. 2000), *cert. denied*, 531 U.S. 1190 (2001) (holding that actions against states for monetary damages under Title II are barred by sovereign immunity); *Robinson v. University of Akron School of Law*, 307 F.3d 409 (6th Cir. 2002) (holding that Congress did not validly abrogate state sovereign immunity under Title II of ADA when ADA used to enforce Equal Protection clause; however, Congress did validly abrogate state sovereign immunity in cases where Title II of the ADA is used to enforce the due process clause); *Wessel v. Glendening*, 306 F.3d 203 (4th Cir. 2002) (holding that Congress, in enacting Title II of the ADA, did not validly abrogate the states’ Eleventh Amendment immunity); *Kiman v. N. H. Dep’t of Corr.*, 301 F.3d 13 (1st Cir. 2002) (holding that Title II of the ADA abrogates the sovereign immunity of the state); *Thomas v. Nakatani*, 309 F.3d 1203 (9th Cir. Nov. 6, 2002) (holding that Congress validly abrogated state sovereign immunity when it enacted Title II of the ADA).

⁴²³ *Thompson v. City of Arlington*, 838 F. Supp. 1137 (N.D. Tex. 1993); see *Curran v. All-Waste Sys., Inc.*, 2000 U.S. App. LEXIS 11025 (2d Cir. 2000) (ADA suit against individual defendants dismissed).

⁴²⁴ 42 U.S.C. § 12203(a).

⁴²⁵ *Id.*, § 12203(b).

In *Wray v. National Railroad Passenger Corp.*,⁴²⁶ the plaintiffs filed an action against the defendant alleging that the defendant violated Section 503 of the ADA. The plaintiffs, who were passengers on an Amtrak train and described by the court as elderly and feeble, were initially allowed to sit in two of the 13 disability accessible seats. It was discovered, however, that the seats had been reserved by others, and the conductor asked the plaintiffs to move upstairs to regular seating.⁴²⁷ When the plaintiffs refused, the conductor allegedly instructed them to move or he would call the police. Plaintiffs allege that the defendant violated the provision of the ADA that makes it unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise and enjoyment of a right protected by the ADA. Plaintiffs’ principal argument in support of their claim was that when the conductor asked them to move out of the disability accessible seats, he coerced them.⁴²⁸

The court found that the plaintiffs were not exercising any rights protected by the ADA, and therefore were not able to establish a violation of 42 U.S.C. § 12203. The court reasoned that the ADA does not grant plaintiffs the right to sit in the disabled seating section, notwithstanding that they did not have a reservation and that there were more disabled passengers than there were available seats. The court found that the defendant’s reservation system was a reasonable response to the problem of access demand, and the ADA did not give the plaintiffs the right to override it.⁴²⁹

D. Attorney’s Fees

Section 505 of the ADA provides that attorney’s fees may be allowed to the prevailing party, other than the United States, in proceedings commenced pursuant to the ADA.⁴³⁰ The attorney’s fees include litigation expenses and costs.⁴³¹ Section 505 further provides that the United States shall be liable for attorney’s fees just as a private individual would.⁴³²

E. Technical Assistance

Section 506 of the ADA provides that the Attorney General shall develop a plan to assist entities covered under the ADA and other federal agencies in understanding the responsibilities imposed upon them by the ADA.⁴³³

⁴²⁶ 10 F. Supp. 2d 1036 (D. Wis. 1998).

⁴²⁷ *Id.* at 1038.

⁴²⁸ *Id.* at 1040.

⁴²⁹ *Id.*

⁴³⁰ 42 U.S.C. § 12205; See *Brinn v. Tidewater Transp. Dist. Comm’n*, 242 F.3d 227 (4th Cir. 2001).

⁴³¹ 42 U.S.C. § 12205.

⁴³² *Id.*

⁴³³ *Id.*, § 12206.

F. Illegal Use of Drugs⁴³⁴

Section 510 of the ADA provides that the term “individual with a disability” does not include an individual who is currently engaging in the illegal use of a drug.⁴³⁵ However, this does not exclude as an individual with a disability an individual who 1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; 2) is participating in a supervised rehabilitation program and is no longer engaging in drug use; or 3) is erroneously regarded as engaging in such use, but is not engaging in such use.⁴³⁶

Section 510 further provides that it is not a violation of the ADA for a covered entity to adopt or administer reasonable policies or procedures, including drug testing, designed to ensure that an individual is no longer engaging in the illegal use of drugs.⁴³⁷

G. Items Not Considered Disabilities

Section 508 of the ADA provides that the term “disabled” or “disability” shall not apply to an individual solely because that individual is a transvestite.⁴³⁸

Section 511 of the ADA provides that the term “disability” shall not include the following: homosexuality and bisexuality; transvestism, transexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairment, or other sexual behavior disorders; compulsive gambling, kleptomania, or pyromania; or psychoactive substance use disorders resulting from current illegal use of drugs.⁴³⁹

H. Alternative Means of Dispute Resolution

Where appropriate and to the extent authorized by law, the ADA encourages the alternative means of dispute resolution, including settlement negotiations, conciliations, facilitation, mediation, and arbitration, in an effort to resolve disputes arising under the ADA.⁴⁴⁰

VIII. SURVEY REGARDING THE IMPACT OF THE ADA ON TRANSIT AGENCIES NATIONWIDE

Attached as an appendix is a report prepared by the University of Arkansas at Little Rock’s Institute for

Economic Advancement (IEA). The report provides a summary and analysis of data gathered by IEA from transit agencies through mail surveys, expert-panel discussions, and a focus group session, all of which focused on transit agencies and their experiences regarding the ADA. Specifically, the report provides comprehensive statistical data regarding the ADA’s effect on transit operations.

Based upon the report, transit operations agencies appear to have an excellent record when it comes to legal cases involving ADA issues, as a majority indicated not being involved in any ADA legal cases. An overwhelming majority of those transit operators that were surveyed indicated that they had implemented policies to avoid ADA legal issues. Among those transit operators surveyed, common themes of concern regarding ADA compliance emerged, including: 1) lack of standard wheelchair securement; 2) funding that is not in line with the increase in paratransit demand; 3) trip denials; 4) lack of standardization of paratransit certification; 5) a source of easily accessible ADA rules and regulations; and 6) more education for employees, the transit customer with special needs, and the public.

IX. CONCLUSION

Many transit operators had addressed the issue of service to the disabled prior to the ADA, as a majority of their operations were covered by prior legislation that sought to protect the rights of the disabled while increasing their accessibility.⁴⁴¹ However, the antidiscrimination laws prior to the ADA only addressed discrimination by federal agencies and recipients of federal funding and were often ancillary to federal funding legislation.⁴⁴² Further, the prior legislation provided little recourse to disabled individuals to redress discrimination.⁴⁴³ The ADA indeed has had a broader impact than prior legislation, as the ADA is a comprehensive Act devoted solely to the eradication of disability discrimination.⁴⁴⁴ Unlike prior legislation, the ADA specifically proscribes discrimination of private and public entities regardless of the receipt of federal financial assistance. The ADA further extended the federal government’s protection of the rights of the disabled into areas of employment and public and private accommodations operated by public and private entities alike.

The ADA, coupled with the implementing regulations, has had a significant impact on transit operators, as they are charged with ensuring equality to the disabled in numerous areas, including employment and accessibility to transportation services and facilities, all the while working within strict financial confines. The complete impact of the ADA, however, is not yet known, as it continues to evolve as new issues arise and courts

⁴³⁴ The term “illegal use of drugs” means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. § 812]. Such term does not include the use of a drug taken under supervision by a licensed health care professional or other uses authorized by the Controlled Substances Act or other provisions of federal law. 42 U.S.C. § 12210(d)(1).

⁴³⁵ *Id.*, § 12210.

⁴³⁶ *Id.*, § 12210(b).

⁴³⁷ *Id.*, § 12210(b).

⁴³⁸ *Id.*, § 12208.

⁴³⁹ *Id.*, § 12211.

⁴⁴⁰ *Id.*, § 12212.

⁴⁴¹ *See supra* note 7.

⁴⁴² *Id.*

⁴⁴³ 42 U.S.C. § 12101(a)(4).

⁴⁴⁴ *Id.*, § 12101(b).

analyze and interpret its provisions. It is certain that the task of ADA compliance may grow more difficult for transit operators in the future as the number of disabled Americans increases,⁴⁴⁵ thereby increasing the demand for transit services for the disabled.

⁴⁴⁵ *Id.*, § 12101(a)(1).

APPENDIX A

the

IMPACT

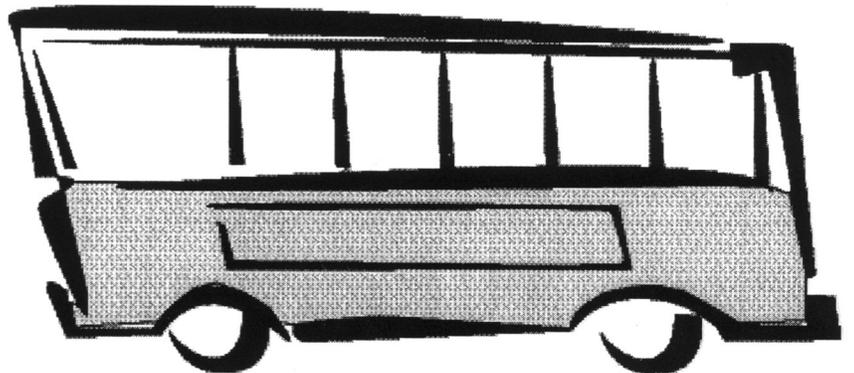
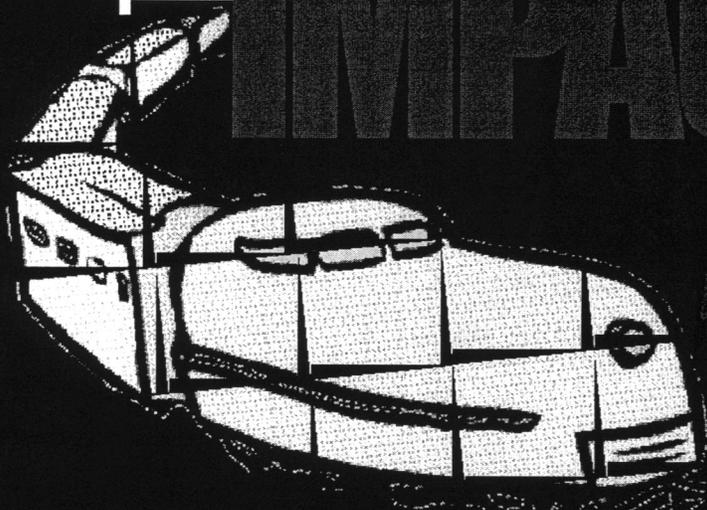
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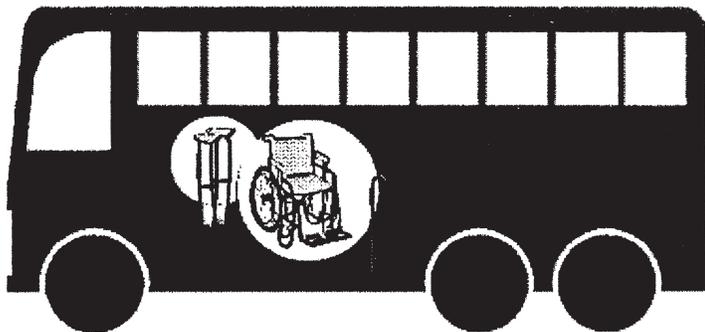
**Americans
with
Disabilities**

on

Transit Agencies

Nationwide 2002





SURVEY METHODOLOGY

The information in this report was gathered from a one-time mail survey sent to 317 transit agencies nationwide on May 22, 2002 by the Transportation Research Board (TRB). One hundred and six transit operation agencies responded to the mail survey for an overall response/return rate of thirty-three percent (33%). For all questions that were answered by 106 respondents the potential sampling error is (+/-) 7.8%. If you have a 7.8% confidence interval at the 95% confidence level this basically says if you conducted the same survey 100 times, 95 out of the 100 administrations should yield results within (+/-) 7.8%. Results for questions answered by significantly fewer than 106 have a potential for a larger variation.

The questionnaire development stage was implemented to assist in identifying issues to address in the mail survey. This two-phase questionnaire development process obtained input from both regional and national transit operator perspectives. The process utilized an email discussion guide related to ADA issues and their impact on transit agencies sent to transit organization subject matter experts across the nation and a focus group that was conducted with attendees at the annual South West Transit Association (SWTA). The information gathered through these avenues was then used to compose a first draft mail

questionnaire which was then amended to the final form by officials at the TRB. Summary reports of the expert panel discussion and the SWTA focus group are included in the appendix section of this report.

REPORT NOTES

For ease of reading, the results are presented in a tabular format with accompanying narratives. Due to computerized rounding it is possible not all tables will equal 100 percent. The number of respondents (and/or responses) from which percentages were calculated is provided within each tabular presentation. A notation of DK/NA indicated that respondents indicated either 'Don't Know' or gave no answer. Select respondent comments (*these are noted by a different type font and print color*) have been

incorporated into the body of the report.

SURVEY RESULTS

Agency Type/Service Area

The majority of responses to this multiple response question indicate that bus and paratransit (43.6% and 37.9% respectively) are the most common types of transit agencies noted. Other types (7.5%) of transit agencies include commuter rail, ferry, highway, incline, neighborhood shuttle, vanpool, and heavy rail.

Table 1

Type of Transit agency	
Bus	43.6%
Paratransit	37.9%
Subway	1.8%
Light Rail	4.4%
Trolley	4.8%
Other	7.5%
<i>Multiple response question</i>	
Total Responses=227	
Total Respondents=106	

Table 2

Transit organization service area	
Urban	52.8%
Suburban	10.5%
Rural	0.9%
Other	33.9%
DK/NA	1.9%
Total Respondents=106	

The majority of respondents (52.8%) indicated that their transit organization service area was in an urban setting. Thirty-

four percent (34%) of the respondents indicating 'Other' noted that their service area included various combinations of statewide, regional, urban, suburban, and rural settings (see Table 3).

Table 3

Transit organization service area other (specify)	
Urban & Suburban	39%
All Categories	25%
Urban & Rural	22%
Suburban & Rural	8%
Regional	3%
Statewide	3%
Total Respondents=36	

ADA Legal Issues-Organization

As Table 4 indicates when respondents were asked to comment on ADA legal cases involving their organization/agency, the majority (71.7%) indicated not being involved in any ADA legal cases.

A set of follow up questions were asked of respondents (28.3%) indicating their organization/agency had

indeed been involved in an ADA legal dispute. A complete listing of specific disputes is listed in the appendix section of

Table 4

Has your transit agency been involved in legal cases based on the 1990 ADA?	
Yes	28.3%
No	71.7%
Total Respondents=106	

this report.

We have worked very hard to achieve an excellent relationship with the disabled community and we continue to devote time and effort to keep our communications open and misunderstandings at a minimum. However, there is one area in which litigation seems to be constant, and that is attributable to a lack of standardization in the tie down of mobility devices. As you must know, there are hundreds of different styles and designs of wheel chairs, scooters, mobility devices of every size, cost and description, and no two of them have any commonality in tie down locations, design, or ease of access.

Table 5 portrays the fact that ten percent (10%) of the respondents answering this question indicated that the judgment was resolved in favor of their agency.

However, the majority (77%) of transit operators involved in ADA legal issues indicate their case was resolved by a means "other" than a judgment for either themselves or the plaintiff.

Table 5

How was this case resolved?	
Judgement for the transit agency	10%
Judgment for the plaintiff	7%
Other	77%
DK/NA	7%
Total Respondents=30	

'Other' case resolutions include:

- Dismissal
- Pending
- WMATA victory on appeal
- Verdict for WMATA retrial
- Settlement
- Five year consent decree
- Ongoing
- Plaintiff could not provide proof of complaint
- Under discovery

Table 6 clearly indicates that respondents answering the follow up question regarding changes

Table 6

Were changes implemented at your organization as a result of this case?	
Yes	47%
No	47%
DK/NA	6%
Total Respondents=30	

implemented due to ADA legal cases were evenly split regarding whether or not changes had occurred.

The multiple response follow up question pertaining to what specific

changes the agency had made due to the ADA legal dispute highlighted the fact that training/education and policy changes were the most often noted (32.3% and 29% respectively) by respondents answering this question.

Table 7

What were the changes?	
Equipment	16.1%
Policy	29.0%
Scheduling rides	9.7%
Training/education	32.3%
Other	12.9%
<i>Multiple response question</i>	
Total Responses=31	
Total Respondents=14	

When all respondents were asked whether or not their transit agency had implemented policies to avoid ADA legal issues, an overwhelming seventy-five percent (74.5%) of all respondents indicated 'Yes' (see **Table 8**).

Table 9 reveals that respondents with policies implemented to avoid legal issues equally note policy, equipment, and training/education as changes made by their agency.

'Other' changes that were noted by the respondents in reference to proactive changes made to avoid ADA legal issues include changes in marketing and facilities, additional funding, establishing certification process, expanded hours of operation, more monitoring of operations,

Table 8

Has your transit agency implemented policies to avoid legal issues pursuant to 1990 ADA?	
Yes	74.5%
No	25.5%
Total Respondents=106	

public outreach campaigns, and employee accommodations.

Over three-fourths (80.2%) of the surveyed respondents indicated that 'no change' in the number of ADA legal cases (in the past 5 years) against their organization had been

Table 9

What were the changes?	
Equipment	25.1%
Policy	25.5%
Scheduling rides	18.8%
Training/education	25.1%
Other	5.4%
<i>Multiple response question</i>	
Total Responses=239	
Total Respondents=79	

noted (see **Table 10** for complete details).

Transit operators indicating a percentage increase in ADA cases over the past five years (11.3% of the total 106 respondents) were given the opportunity to quantify the

increase. Six-percent (5.7% of the total 106 respondents) of the respondents specified their organization's percentage increase in ADA cases. Percentage increase responses in the number of ADA cases ranged from one-half percent increase to 100% increase. On average these respondents reported a sixty-three percent (62.5%) increase in ADA cases over the past five years. Conversely transit operators specifying a percentage decrease (2.8% of the total 106 respondents) in their organization's number of ADA cases over the past five years, indicated the average decrease to be approximately eighty-three percent (83.3%). The range of reported percentage decreases in ADA legal cases went from a low of 50% up to 100%.

When respondents indicating either an increase or decrease were asked to comment on what accounted for the change in the number of ADA related legal cases some central themes emerged. Respondents indicating an upward trend in ADA cases over the past five years, cited the following reasons for an increase: active constituencies, more awareness of public of their rights under ADA, not offering the customer due process, increased demand, more lucrative remedies under amended law, and employees becoming more aware of the law. Comments referring to a decrease in the number of ADA related legal cases include: self-evaluation, awareness, communication, implementing corrective measures, changes in company policies, increase in equipment, departmental effort to bring ferry system under compliance, strict ADA compliance, and restructuring services.

Table 10

Over the past 5 years, have you noted a change in the number of ADA legal cases affecting your organization?	
Increase	11.3%
Decrease	5.7%
No Change	80.2%
DK/NA	2.8%
Total Respondents=106	

Table 11

Has any contracted carrier been involved in ADA legal case?	
Yes	4.7%
No	89.6%
DK/NA	5.7%
Total Respondents=106	

ADA Legal Issues- Contracted Carriers

Respondents were asked about ADA legal cases regarding contracted carriers, the majority (89.6%) indicated that the carriers have not been involved in ADA legal cases. A set of follow

up questions to the five-percent (4.7%) of respondents indicating a carrier had been involved in an ADA legal case revealed that disputes focused around capacity constraints, trip denials, denial of paratransit eligibility, and cases involving service animals. The resolution of the cases was revealed to be an even split between judgment for the plaintiff and transit agencies, one ongoing, and one settlement decree.

Changes that were implemented as a result of the legal cases include changes in equipment, policy, scheduling, and training/education. Another change mentioned was no longer using a contracted carrier.

Future Trends

Respondents were very forthcoming when asked what they viewed as the most challenging issue that the transit industry would face in the next 5 years. Commonly voiced concerns include securing non-standard mobility devices, funding/resources, providing paratransit on demand, and keeping up with changing technology.

The most pressing issue we find is having enough resources (vehicles and funding) to properly serve all the needs presented by the disabled population. As the aged population increases we only see larger numbers of disabled needing services.

Accessibility of information for persons with cognitive or visual impairments - especially as transit systems rely more and more on the Internet for access to route and schedule information.

Increased litigation against transit systems where bus drivers do not effectively announce all required stops.

There are still a substantial number of persons with disabilities that still do not understand what transportation under ADA really means. Until this population is educated, there still will be legal issues to deal with.

CONCLUSION

Transit operations agencies appear to have an excellent record when it comes to legal cases involving ADA issues. Both those who have been involved in legal actions and those that simply seek to avoid them hold common themes of concern. These commonalties also surfaced in the expert panel discussion and the focus group held with SWTA attendees. Issues raised include: lack of standard wheelchair securement, funding that is not staying in line with the increase in paratransit demand, trip denials, lack of standardization of paratransit certification, a source of easily assessable ADA rules and regulations, and more education for employees, the transit customer with special needs, and the public.

Local agencies care, know their responsibilities, know how to accomplish those responsibilities, but the local agencies can be forced into cutting other service or looking like they are not efficient in providing other service because of the ADA.

COMMENTS

Question 1a. What was the dispute involved in this legal case?

1. Employee alleged discrimination based on disability; same employee alleged retaliation for filing the first claim.
2. Reasonable accommodation for employee.
3. Allegations of violations of the ADA in the provision of fixed route service.
4. Inaccessible fixed-route bus passed up a rider in a wheelchair.
5. Failure to accommodate.
6. Two types of cases: 1) Quality of service on bus lines; 2) Reasonable accommodation for employees.
7. More than one case. Capacity constraints on paratransit-trip denials; service-related (long trips, door-to-door); subscription service; employment discrimination.

8. Five cases: 1) wanted injunctive relief to speed up installment of truncated domes. 2) reasonable accommodation in employment (3 different cases). 3) deaf/mute passenger assaulted by bus operator. ADA issues involved training of bus operator and transit police officer.
9. Blind customer claimed NFTA rail stations were not ADA compliant. This individual fell into the trackbed.
10. Two cases, regarding paratransit eligibility.
11. Reverse discrimination.
12. Paratransit eligibility.
13. Calling out stops.
14. Ferry operator filed a complaint against the agency alleging that he was discriminated by his emotional and mental disabilities.
15. Trip denials.
16. Multiple alleged violations in providing both paratransit and fixed route service, such as failure to make stop announcements, lack of functioning wheelchair equipment and lifts, etc.
17. Disputes vary. There have been 27 agency and court complaints from employees.
18. Four different cases; 1) wheelchair securement and stop announcements; 2) wheelchair securement; 3) denial of paratransit eligibility; 4) failure to provide boarding assistance and interference with a service animal.
19. Four cases; 1) Alleges discrimination under ADA. 2) Alleges unlawful employment practices under ADA. 3) Alleges wrongful termination under ADA. 4) Alleges he is denied access to T-elevators and buses because of faulty equipment.
20. Multiple cases: Numerous Title 1 cases (employment); stop announcements/visually impaired plaintiffs; wheelchair securement disputes; passbys/rudeness/discrimination; mentally impaired plaintiff claims denial of service/altercation; disabled-pass dispute.
21. Sued alleging failure to provide adequate ADA parking spot signage and accessible ticket counter at a Capital Metro park and ride.
22. A FTA complaint was filed based on the refusal to allow a disabled passenger's dog on board NCTD bus.
23. ADA appeal -thought they should have door to door rather than to/from bus stop; scheduling of trips. 100% compliance on all bus routes. Make our public buses and bus transportation system accessible to customers with disabilities.
24. Service animal access and identification

25. I've completed the TAB survey form we received today, but felt I had to add some additional comments, as there seems to be no end in sight to legal issues involving the ADA.

In 1994 SunLine became the first transit property to switch from a very old fleet of diesel buses to a brand new fleet of CNG (compressed natural gas) buses. We were able to offer every ADA requirement in our fleet, which was a huge improvement over our old fleet, most, of which did not have lift equipment, or if they did, a lift that actually worked! We were, and remain, very pleased that we were able to offer probably the greatest right that all of us should have -the right to breathe clean air. We continue to be a strong advocate of alternative fuel and all vehicles operated by our agency are alternately fueled.

Now that we have a fleet of reliable buses, with high quality, factory installed amenities, our lifts work regularly and dependably and this has fairly well solved our issues with ADA riders. We are very pleased that we have been so successful in our efforts to be ADA compliant with 100% of our fleet. We have worked very hard to achieve an excellent relationship with the disabled community and we continue to devote time and effort to keep our communications open and misunderstandings at a minimum.

However, there is one area in which litigation seems to be constant, and that is attributable to a lack of standardization in the tie down of mobility devices. As you must know, there are hundreds of different styles and designs of wheel chairs, scooters, mobility devices of every size, cost and description, and no two of them have any commonality in tie down locations, design, or ease of access.

By having no standards of any kind, no uniformity of tie downs, it is all but impossible for us to train all of our 100+ drivers on proper use of the tie down straps. Probably 1/3 of our current liability litigation cases involve chairs that came loose in sudden brake incidents, or passengers that slipped out of the wheel chair under sudden brake incidents, and in each of these instances, we could find no fault by our drivers. Believe me, we looked! There have been instances of injuries or property damage when a driver did not tie down properly, but those cases were attributable to driver error, even though it is impossible for a driver to be familiar with every chair design and the many options for strapping them down.

Somewhere along the line, I feel we must work together to resolve this issue or public transit will gain a reputation for injuring the disabled even further, and pay out huge sums in damages that could and should be better spent in adding transit services. I'm not sure where this should start. Is there a manufacturers group that could self impose standards? Should the ADA be amended to require "yellow" loops at the four "corners" of mobility devices that accept a standard hook? There are more questions than answers, that's for sure. But something must be done to find a solution to this growing problem.

There seem to be more and more "designer" chairs invented and manufactured by very small companies based on individual concerns or needs and many of these are quite expensive. Yet they do not have any

standard method of being tied down. Many of these specialty chair riders become very possessive of their chairs, as they should be, and get into verbal sparring matches with a driver attempting to tie down the chair. Creating these types of confrontations does not increase the mobility of the disabled.

If some type of standardization could be introduced, boarding and securing mobility devices could be done quickly and safely, increasing the mobility for all aboard public transit and greatly increase the safety of the disabled. We should start now to solve this challenge.

Question 5. Considering the next 5 years, what do you foresee as the most challenging issue (with potential legal ramifications) faced by transit organizations in meeting the needs of customers with special needs (i.e., disabled) in your area?

1. How to provide ADA services with no additional federal financial assistance.
2. We don't foresee any particular "customer" issues, but the ADA does represent another window of opportunity for employees.
3. If the number of certified ADA customers increase, UTA would need to expand the number of vehicles and operators to meet that need. The funding to support the possible increase is questionable.
4. Our aging population is increasing and putting more demand on our system requiring more dollars.
5. Financing necessary service levels.
6. It will continue to be a challenge to monitor and eliminate trip denials.
7. Future demand is our biggest concern. Where will the funds come from to meet the level of service that will be required of transit systems?
8. Trying to meet the guidelines of zero denials.
9. The most pressing issue we find in having enough resources (vehicles and funding) to properly serve all the needs presented by the disabled population. As the aged population increases we only see larger numbers of disabled needing services.
10. Continued rising costs – expanding city area, replacement of and addition to fleet, accessibility costs (curb cuts, concrete pads).
11. The continued growth in demand for paratransit service and cost of providing service.
12. We have no problems; we have excellent equipment and well-trained drivers.
13. Defining "disabled" in the changing legal arena created by ADA.
14. Requests for provision of next day service; progression to same day service.
15. Capacity constraints.
16. Adequacy of paratransit capacity.
17. Providing enough complimentary paratransit service to meet demands.

18. Cost of service.
19. Finding the funds to keep service growing as fixed route service expands.
20. The continuing problem of securement of mobility devices.
21. Obtaining funding to purchase mini-buses for ADA service.
22. Nationwide cases involving "0 denial rate". In a demand response operation denials are inevitable. A "0 denial rate" ruling would dramatically increase costs and decrease efficiency. Also, an extremely slow boarding disabled passenger on a fixed schedule route bus can ruin that bus's schedule, and create a passenger loss due to that route run's unreliability. Operators cannot "force" said slow boarding passenger to use ADA paratransit.
23. Inconsistency between state law and federal law.
24. Expanding curbside to curbside service to meet the growing transportation needs of ADA certified clients.
25. Funding.
26. The definition of what is an acceptable denial rate; how to transport non-standard mobility devices, i.e. large wheelchairs and scooters.
27. Next day service – potential turn downs.
28. Incredible increase in demand for paratransit service! How are we supposed to continue funding it without cutting our regular service? Our paratransit budget has increased 40% in just 3 years.
29. Keep up with the demand of paratransit service and ADA requirements with limited resources.
30. N/A on ADA issues. However, we have a growing demand from the disabled and elderly communities. We also have commuter express service. Therefore, we are not mandated by ADA to complement paratransit service. The county just offers it as a public service.
31. Cost of paratransit services and increasing demand for ADA services.
32. Accessibility issues relating to low-floor buses (e.g., ramp deployment restrictions, operator responsibility to assist passengers up the ramp, revision of vehicle specification requirements, etc.).

Accessibility of information for persons with cognitive or visual impairment: - especially as transit systems rely more and more on the Internet for access to route and schedule information.

Wheelchair securement. Liability resulting from improper securement or the inability to secure oversized wheelchairs. Legality of European style backward facing securement on buses and rail cars.

Legality of curbside-to-bus stops paratransit service -i.e., using paratransit as a feeder to accessible mainline service, as opposed to operating curbside-to-curbside.

Enforcement of vehicle identification requirements -how to satisfy the requirement that some mechanism be provided to enable vision-impaired persons at a bus stop to differentiate between buses on different routes that all serve the same stop.

Increased litigation against transit systems where bus drivers do not effectively announce all required stops. And, of course, the perennial issue of trip denials in paratransit.

33. Meeting increased demand with limited resources.
34. Financing transportation services for those special needs individuals who qualify for specialized transportation.
35. Service area boundary issues.
36. Our ability to obtain sufficient capital and operating funds to purchase, deploy and operate additional revenue and ancillary equipment to meet the consistently rising demand for transportation.
37. MAX (light rail) system becomes more complex -trains that serve anyone station may have multiple destinations -customers with visual disabilities will require clear, reliable, audible information. Customers with visual disabilities may also require clear pathfinding within station and transit center landscapes -even to point of locating optimal place on MAX platforms to position self for access to doors of train.

Size of MAX stations limit length of trains to two Light Rail Vehicles per train. This limitation will begin to constrain access to system as transit-oriented developments continue to build-out, ridership continues to increase, and we crowd multiple lines of service onto limited mainline track space. Among the citizens and businesses moving toward the MAX alignment will be increasing number of people with mobility disabilities. Increasing the value of bicycle access to metro area and transit system is parallel development. It is possible that we may experience capacity constraints.

Sustained, heavy growth of the LIFT program with a proportionate increase in costs, coupled with recognition that LIFT program costs are higher than fixed route. Tri-Met is actively seeking ways to continue to provide high quality, cost effective service, however, it will continue to be a challenge.
38. Keeping abreast of improving technologies.
39. Obtaining operating funds for transit operators to provide service as required under ADA.
40. Sufficient budget for paratransit without establishing a denial policy or reducing other transit (fixed-route) service; Bus drivers announcing all key bus stops.
41. Meeting increasing need for paratransit service; meeting ADA street announcement compliance requirements; funding.
42. No denial criteria.
43. The ability to provide all trips with no denials will be the challenge – legally and financially.
44. Funding for demand for paratransit service as our population ages.
45. Avoiding denials of transportation requests.
46. Our experience is that the legal ramifications will remain centered on paratransit eligibility (assuming that equipment and property accessibility requirements have been met).
47. Trip denial; eligibility.
48. Capacity constraints; budgets.
49. Interfacing with ITS technologies.
50. We are taking steps to provide ticketing services by Internet and also mechanize by computers and electronic means. These actions will provide services more reachable to users and customers with physical disabilities, and will expedite the services addressed to sell and reserve the tickets in our passenger and cargo ferries.
51. There are still a substantial number of persons with disabilities that still do not understand what transportation under ADA really means. Until this population is educated, there still will be legal issues to deal with.
52. Recertification, implementations of no show/late cancel policy.
53. Being able to maintain fixed route service with adequate coverage and meeting customer expectations; providing appropriate passenger boarding facilities.
54. More service demand than we can afford to meet.
55. Meeting the “social service” related needs of an increasing number of disabled riders, while also meeting the “mess transit” needs of the general population – costs of doing both, equally well.
56. Changing from door-to-door to curb-to-curb; implementing trip by trip eligibility; continuing 3rd party eligibility certification.
57. Expanding the paratransit service coverage area, yet still not being able to serve all areas of the jurisdiction.
58. Funding for the necessary technologically sophisticated equipment now available for the disabled, extensive retraining of employees to stress importance of compliance.
59. Provided the financial resources to meet the growing demand for paratransit services.
60. Paratransit demand is increasing on average of 10% over past ten years. The challenge will be the ever-increasing cost for providing this and the eventual need to reduce fixed-route service or secure additional revenue.
61. Lack of funding to provide for accessibility modifications at station facilities. Elevators, detectable warnings and other access improvements add considerable expense to projects. While we support these types of improvements and want stations to be accessible, allocating funds towards ADA access often occurs at the cost of necessary service related improvements.
62. Money for expanded demand associated with complimentary paratransit operations.
63. The transitory from a paper to the functional/mobility assessment of participants and the education of those participants about what conditions qualify for ADA trip certification.
64. “Undo capacity constraints” – meeting 100% demand at all times.
65. ADA services capacity issues.
66. Continuing rise in demand in the face of inadequate federal capital assistance for rolling stock replacements/additions.
67. Capacity constraints.
68. Increasing demand for ADA paratransit service.
69. Ability to meet the increasing demand.

70. Wheelchair securement – especially 1) nonstandard wheelchairs; 2) operator assistance issues; 3) multiple (e.g. mental and orthopedic) disabilities.
71. Special needs passengers in general are becoming more demanding and in some cases what service above and beyond what is being provided on fixed route. There is confusion when traveling between two or more jurisdictions. Also because fixed route services is very limited in outer suburban areas of Phoenix metro region, citizens of these outer cities think they are being left out.
72. The most challenging issues facing the industry are in funding. Wheelchair lifts are being replaced with ramps on low floor buses making services more reliable.
73. Meeting the needs of the customers with needs exceeding the law awareness education and sensitivity training of staff; increased ridership; funding issues; accessible amenities.
74. Handling the increase in ridership without violating program parameters, i.e., capacity constraints, trip denials, on-time performance, etc.
75. Keeping up with the growing disabled community and cost associated with that demand or lack thereof.
76. The most challenging issue faced by transit agencies in meeting the needs of customers with disabilities is training/education to proficiency in order to change people's attitudes as it relates to service providers and recipients.
77. Serving the blind/visually impaired.
78. The ADA announcement requirement (digitized recordings or manual) appears to be the leading concern in a regional (commuter rail/light rail and bus) application.
79. Retrofit existing rail stations.
80. Accommodating non-standard wheelchairs.
81. We have and will continue to use the ADA hotline for any questions or concerns that may arise on future compliance issues.
82. Meeting the transportation needs of individuals with limited funds and budgets. Individuals using wheelchairs larger than the ADA regulations.
83. Growing elderly and disabled population. Sprawl and dispersal of origins and destinations.
84. The issue of mental/behavioral illnesses on disabilities and whether these are qualifying disabilities for ADA paratransit service.
85. Continuing to acquire, maintain and stay current with advanced technology assisting customers with disabilities, particularly in the areas of fare technology and communications equipment.
86. The denial rate for ADA comparable paratransit service.
87. The cost of meeting the paratransit and other ADA requirements is increasingly large and is an unfunded mandate. The challenge will be to efficiently run compliant ADA programs.
88. The money it takes to run paratransit services.
89. ADA paratransit trip denials, considering projections of growing demand and funding limitations – reductions.
90. The Greater Attleboro Taunton Regional Transit Authority has had a travel training program in force for over ten years. GATRA has travel trained over 400 persons with special needs to ride public fixed-route transportation independently to school, work, and social events. Funding for this program has been an on-going challenge.
91. Wheelchair securement, so many new types of wheelchairs and manufacturer's do not test securement.
92. In our organization, none.

OTHER COMMENTS

1. With regards to Question 2, we modified our service back in 1991 to bring it into compliance with the regulations that were issued at that time. We have not modified service because of possible legal action be a user.
2. Cognitively impaired persons traveling alone...responsible decision-making.
3. This is a hidden, not easily explained, operations cost, which is not funded by the federal government who requires it. Local agencies care, know their responsibilities, know how to accomplish those responsibilities, but the local agencies can be forced into cutting other service or looking like they are not efficient in providing other service because of the ADA.
4. The demand for paratransit service is growing at a pace that is faster than the growth of paratransit resources.
5. I foresee several challenging issues for transit organizations in meeting the needs of customers with special needs over the next several years.

The most significant (challenge) continues to be obtaining sufficient capital and operating funds to purchase, deploy and operate additional revenue and ancillary equipment to meet the consistently rising demand for ADA transportation accommodations.

Other issues include:

Conflicting demands for accommodation by various disabled passengers and their advocacy groups. Examples include the sight impaired vs. those using mobility devices, persons with severe allergies/sensitivities or who are fearful of animals (or overly curious) sharing rides with service animals.

Passengers demanding accommodations exceeding the ADA accessibility standards, especially as they relate to mobility devices (size, combined weight, etc.). We continue to see more mobility devices that exceed the specified "footprint" such that use of lifts, ramps or reasonably being able to maneuver within the designated (and compliant) path of travel or securement position is extremely difficult, if not impossible. Weights of the devices also seem to continue to increase as does the size and weight of the persons attempting to utilize the lifts. It would be reasonable, and a definite advantage to the person

attempting to utilize the mobility device, to require manufacturers and their sales agents to inform the purchaser of the ADA standards for size, weight etc. both verbally and by means of a decal permanently displayed on the device.

6. This organization is not a transit system itself, but rather a private company operating transit and paratransit service under contract to public transit systems.
7. We have not changed policies or procedures in response to perceived legal threat, but we have made small changes in response to changes in regulations or interpretation (by FTA) of regulations.
8. Like most broad remedial statutes, the ADA presents a range of possibilities for abuse. The disabled as a community have rallied behind good-faith efforts to implement accessibility improvements, rather than endorsing the practice of “milking” the ADA through abusive litigation based on hypertechnical violations of obscure regulatory provisions. However, the more mercenary approach is favored by some individual lawyers and riders, which presents a growing problem.

It is important to see the body of disability law as an organic whole and not look with blinders on one aspect alone. For example, some of the technical minutiae of ADA regulations are being invoked under California’s Unruh Act, which provides that a violation of the ADA is automatically an Unruh Act violation. Since the Unruh Act provides for minimum damages of \$4,000 per instance, this creates a snowball effect in which repeated but truly petty infractions of arcane ADA regulations can give rise to mountainous liability exposure under California law. If two bus routes overlap for 20 blocks, so that each block is deemed a transfer point, is the transit agency liable for \$80,000 when one driver fails to call out stops on one run?

Another prime example is the requirement that bus drivers physically assist wheelchair users with boarding and exiting. Our agency has numerous bus drivers with disabilities (particularly under the broad definition of “disability” under California law), a large number of wheelchair-using riders, and a service area with many hills. Requiring drivers to render physically strenuous assistance creates risks that bus drivers may suffer industrial injuries and/or lose their jobs. This old problem is now being aggravated as new low-floor bus designs call on drivers to assist on ramps instead of using power lifts to achieve wheelchair access, and as greater use of unorthodox wheelchair designs calls for increased stooping, bending and reaching in securing wheelchairs. Generally speaking, wheelchair securement is the thorniest ADA problem confronting drivers in everyday work.

The growing recognition of mental and emotional impairments as protected disabilities is being misused to support contentions that abusive and disruptive passenger behavior must be tolerated as mere symptomology of a protected disability. Most disabled people recognize that no disability creates carte blanche to abuse others. Some lawyers have yet to come to the same realization. The extent to which a bus driver must tolerate abuse by a patron that may or may not be disability-related can present thorny “line-drawing” issues in the context of a particular set of facts.

We have seen a variety of miscellaneous issues such as passengers boarding live, loose snakes as “service animals.” The unofficial, informal FTA interpretation of “service animal” is elastic enough to include any pet, as long as its owner chooses to characterize the enjoyment of the pet’s company as “emotional support” in dealing with an unspecified “disability.” The official regulatory definition of “service animal” is slightly better but still vulnerable to abuse by those who feel a bus should be Noah’s Ark.

9. Implementing the use of new destination signs that ensure partially sighted customers are better able to see the signs.
10. From a single agency perspective, SDTI is currently recording between 3,500 and 5,000 senior/disabled lift uses a month, an increase of over 100% from 1997. Our greatest challenge will be to continue accommodating passengers in wheelchairs without a delay incurred by the wheelchair space limitations of our high floor light rail vehicles.
11. We have had threats of lawsuit and complaints to the FTA. These have been resolved short of legal action.

APPENDIX

Summary Report Expert Panel Transit Operators Email-Based Discussion Fall 2001

During October and November of 2001 the University of Arkansas at Little Rock's Institute for Economic Advancement conducted an expert-panel discussion via email with transit agency individuals who were **not** located in states that are members of the South West Transit Association (SWTA). The purpose driving this discussion was to learn how American with Disabilities Act (ADA) issues are impacting transit organizations. Additionally, this information will be used in conjunction with the results of a focus group conducted with transit operators belonging to SWTA as the groundwork in designing a mail survey that will be administered to transit operators nationwide. The panel consisted of both metro and rural based transit operations.

IEA based the selection for the email discussion on geographic regions of the country (i.e., northeast, southwest, midwest, and west) and on type of transit agency (i.e., metropolitan or rural). Potential participants were contacted (via email and telephone) for screening and explanation purposes and then emailed the discussion guide. A total of 6 transit agency representatives agreed to participate in the discussion. The breakout of transit service areas was 5 urban areas and 1 rural area. Below are the main points that emerged from this discussion.

- Funding
- Training/Education
- Safety
- Information

FUNDING

Participants were in accord that funding is a major concern when considering the impact the ADA has had on their industry. Funding surfaced on several levels of the discussion. Participants indicated operating costs associated with paratransit services have dramatically increased.

Paratransit Cost Issues

Typical comments made by these participants included:

...meeting ALL of the steadily growing demand, providing sufficient operating funds for this astronomically expensive service...

Operating costs have skyrocketed due specifically to the ADA paratransit requirement.

Paratransit is currently 18.7% of the total transit budget while representing only 1.22% of total public ridership.

Insurance/Equipment Cost Issues

Additionally, participants indicated that funding was a challenge to their organizations in the form of rising insurance costs and the repair/replacement of aging equipment.

Typical comments made by these participants included:

Insurance and repair costs have become costs, which can double or triple each year.

The age of our fleet has caused major time lost and financial burdens in maintaining an uninterrupted service.

TRAINING/EDUCATION

Participants are in agreement on the need for a clear easily available source of information on ADA requirements. Furthermore, educational issues regarding the ADA were a common theme among discussants. Education was viewed as a necessary component not only for the employee but also for the community that the transit agency serves.

Typical comments made by these participants included:

Education is important both in sensitivity training and the full scope of the ADA requirements.

It is important to educate the community on the rights and responsibilities of persons with special needs.

Proper training, including empathy awareness, with ongoing in-service meetings for retraining.

Overcoming the 'Western Mentality' of anti-transit and pro-automobile mind set.

SAFETY

The desire for safety is a major focal point with participants from all areas of the transportation industry. Several participants noted the need for a universal system to secure mobility devices and the desire to protect drivers and passengers from the possibility of communicable diseases.

Typical comments made by these participants included:

Wheelchair standards at last count there were over 1,300 different units we are supposed to transport. Some designs are not engineered for safety.

Universal tie down locations points (are needed) on wheelchairs.

The issues of 'mixing' infectious passengers, (what) length are we expected to go to in protecting our drivers and other passengers?

INFORMATION

The need for easily accessible and consistently interpreted information regarding ADA requirements and regulations is a recurring theme for discussion participants. Participants voice a common concern in their lack of ability to feel secure when understanding the complex issues associated with the ADA and how it affects the decisions made regarding their clients.

Typical comments made by these participants included:

Website clearinghouse for (ADA) information, regulations and guidelines, ...online real time training...

(Reduce) shifting interpretations of regulatory requirements by regulators.

CONCLUSION

This discussion was used to highlight ADA issues that are having a major impact on transit organizations in the United States. While the makeup of the panel was heavily weighted toward large urban areas of the country, common themes appeared for all geographical regions of the nation. Participants are concerned with whether or not their funding will be able to keep up with rising costs due to rapidly expanding paratransit populations. Additionally, the inevitable replacement of aging equipment and climbing insurance expenses adds to the budgetary

concerns held by the panel members. Training/education and the need for understandable ADA information were also a recurring theme as was the need for universal safety features on personal mobility devices. Transit organizations, whether midwest, eastern or rural have the same concerns for giving their clients covered by ADA regulations, timely, compassionate, and safe service.

Summary Report SWTA Focus Group January 29, 2002

On January 29, 2002 the University of Arkansas at Little Rock's Institute for Economic Advancement conducted a focus group session with transit operations individuals attending the Southwest Transit Association conference in Little Rock, Arkansas. The purpose of this session is to learn how American with Disabilities Act (ADA) issues are impacting transit organizations and what, if any, legal cases or issues are occurring related to the ADA. Additionally, this information will be used in conjunction with an email-based sampling of transit operators from across the nation as the groundwork in designing a mail survey that will be administered to transit operators nationwide. The focus group was conducted with 6 transit operations people from paratransit (4) and fixed route bus operations (2).

A main thrust of the focus group discussion revolved around instances of legal cases arising from ADA related issues. Participants on the whole had very little experience with legal situations related to ADA issues. This line of discussion did lead to concrete examples of potential legal problems and concerns the operations individuals have regarding ADA regulations.

The following are the key points of this session.

- Safety
- Financial
- Information

SAFETY

Safety emerged as a major concern among all the focus group participants. The issue of safety was discussed with regard to both the passenger and the driver.

Passenger Safety Issues

The need for a universal, manufacturer installed, tie-down on mobility devices. A recurring theme that was mentioned by all participants disclosed that newer/larger mobility devices do not have an accessible means for securing them to the paratransit or fixed route vehicle. Transit operators are required to secure all mobility devices before transporting passengers. This has lead many operators to face the dilemma of denying rides until a mobility device is used that does have a method for securing it to the vehicle. Operators place themselves at legal risk from either not providing for the safety of the handicapped passenger by providing a secure tie-down or by denying a ride to a handicapped passenger altogether.

Typical comments made by these participants included:

The size of one passenger's electric wheelchair keeps the client from being secured in the van: he must use a smaller wheelchair that is not the one he prefers...so the passenger is unhappy.

Some mobility devices are too big; there is no uniform locking device to ensure safe transport.

Personal Care Attendants (PCA) to assist severely handicapped individuals. Participants noted concern for the safety of severely handicapped passengers who require, but do not have, a Personal Care Attendant (PCA). The function of a PCA is to assist the passenger in embarking and disembarking the vehicle, monitoring mechanical devices (i.e., respirators and catheters). Additionally the PCA helps mentally handicapped passengers maintain a calm demeanor while riding on the vehicle, thus protecting other passengers and allowing the driver to remain focused on maintaining control of the vehicle.

Typical comments made by these participants included:

People aren't able to maneuver themselves in a wheelchair. I would like to see more clients required to have a PCA to assist in transport.

We need additional funding to have a PCA on the bus to help ADA passengers.

The need to reform the certification process for passengers. It was noted that there is no standard certification process for handicapped passengers. Some participants commented that the certification process was an in-house procedure. In the case of in-house certification a checklist is completed by the passenger seeking certification and they are required to provide a doctor's name in the event more information is

required. In these cases the certification is left to the discretion of the transit organization. Other participants noted that the certification process is out-sourced to a private company. Generally it was noted that the out-sourced application process for passengers seeking certification is more complex and a physician is responsible for the final certification decision.

Typical comments made by these participants included:

Where do you draw the line on is this person too disabled for our system?

Doctors need to be more involved in the certification process.

Driver Safety Issues

Access to certification information. Participants were clear in expressing that a lack of information regarding the certification conditions of passengers is putting drivers at risk.

Typical comments made by these participants included:

The problem with not having access to information on mental disabilities and the dangers to drivers and other passengers. You don't know who they are until it is too late.

PCA to assist with loading, restraint of severely handicapped. Several participants generated the idea of either requiring a PCA to accompany the severely handicapped (both physically and mentally) or hiring a full-time PCA as a transit employee. Anecdotal information was given to support driver sustained injuries obtained when attempting to load passengers without assistance, mentally ill passengers becoming unruly and disruptive, and drivers working with non-standard mobility devices.

Typical comments made by these participants included:

Drivers are being injured trying to assist disabled clients.

Drivers are being injured due to ADA clients not having their equipment properly secured prior to loading.

FINANCIAL

Financial concerns, while important to participants, did not emerge as an overwhelming concern. This issue surfaced when participants discussed the

main impact the ADA regulations had on their operations. Participants were quick to point out that ridership has exhibited a large increase, while revenues have not kept pace. Additionally this issue came to light when addressing the safety concerns of hiring a full time PCA to ride at all times and the need to build sidewalks and shelters for passengers. The sidewalk issue was agreed upon by several of the small-urban operators who noted that passengers are hampered in their efforts to board the vehicle due to a lack of sidewalks or poorly constructed sidewalks (this point also can be reflected as a passenger/driver safety issue).

Typical comments made by these participants included:

Costs will increase as the elderly population rises.

At this time we are going beyond what the ADA requires, but fear that a shrinking tax base will cause cut backs will cause us to only serve those areas closely defined by the ADA.

INFORMATION

A commonly held and strongly voiced opinion of the transit operators in attendance revealed that there is a lack of easily understood information from the ADA and no clear entity to contact for information on ADA issues that arise. There was a strong consensus among participants with regard to dissatisfaction with their ability to obtain answers for questions that arise in the routine business of being ADA compliant.

Typical comments made by these participants included:

I worry about setting off a 'red flag' when calling the Office of Civil Rights with questions.

There are no easily understood brochures on ADA regulation.

Sometimes you call and they take a lot of time researching the answer before they can give you an answer. The issues are so complicated.

CONCLUSION

The central point of this focus group session was to determine what types of legal cases transit operators were experiencing and not only the resolution of these cases but also what changes were occurring as a result. The results of the discussion demonstrated that ADA legal cases are not prevalent with this particular group of participants. A more recurring theme was the fear of legal cases if the issues of passenger/driver safety, financial concerns, and information access are not addressed in the transit industry. Transit organizations express a desire to serve their clientele well and feel that they are being hampered in doing so by a lack of information, money and uniform equipment.

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