ADA NEWS
1996

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"News Reviews to Peruse"

Number 23 January 16, 1995

Items regarding the Americans with Disabilities Act which may be of interest to you. Please share this information with colleagues, supervisors and subordinates. The views and opinion expressed herein are solely those of the editor, except where noted, and do not represent the views of the Office of Chief Counsel or the Department of Environmental Protection. Contributions, questions or comments, including requests for accommodations needed to receive or apprehend this publication, should be addressed to Patrick Bair (Ed.).

- SEPTA SETTLEMENT - The Southeastern Pennsylvania Transportation Authority (SEPTA) recently settled a lawsuit brought against it by four advocacy groups and several individuals, which alleged that SEPTA was violating the ADA by failing to provide next-day scheduling for paratransit. Without admitting liability, SEPTA agreed to install a $1.9 million computer scheduling system, implement a system of next-day scheduling, give priority on lift-equipped vans to persons using wheelchairs and other relief.

- PREGNANCY-RELATED DISABILITY - According to EEOC regulations, pregnancy alone is not a disability under the ADA; however, the EEOC adds

that complications associated with pregnancy may be impairments. While no clear indication has yet come from the courts, your editor doubts whether a case can be made that an impairment which is solely connected with a pregnancy could survive the test for disability. An impairment which is caused by pregnancy and which continues indefinitely after the pregnancy could meet the definition.

Two recent cases illustrate the thinking on this question, at least in these two instances. In Patterson v. Xerox Corp., the employee requested accommodation for her severe back pain experienced during her pregnancy. The employer refused to grant her request for stretch breaks. The employee brought an ADA claim after her pregnancy alleging disability-related harassment and failure to accommodate. The employer moved to dismiss her claim, arguing that the employee did not have a covered disability and that her condition was a transitory impairment. The U.S. District Court for the Northern District of Illinois denied the employer's request, stating that the employee had not claimed she was disabled by her pregnancy, but by her severe back pain which substantially impaired her ability to sit. The court held that the employee had sufficiently alleged a disability to withstand the dismissal motion.

In Erickson v. Board of Governors, the same court found reproduction is a major life activity under the ADA and that infertility is a condition that substantially impairs that major life activity. The court denied an employer's motion to dismiss the ADA claim of a terminated employee who had taken sick leave to treat her infertility.

- PAST OR CURRENT DRUG USE? - The ADA excludes current drug users from coverage under the Act, but provides that past drug use can be a disability. The question arises, how long must one be drug free to qualify as a former drug addict? This question was recently addressed by the U.S. District Court for the Eastern District of Louisiana, which reviewed a case involving an employee terminated for drug use who claimed that he was not a current drug user, that he had last used drugs illegally seven weeks prior to his firing and that he was enrolled in a treatment program. Taking note that the ADA provides coverage for chemically dependent persons who are enrolled in a treatment program, the court nevertheless held that a person must have been free of illegal drugs and in recovery long enough to have become "stable." The court found seven weeks insufficient to be considered a prior drug addict.

- REQUEST FOR ACCOMMODATION REQUIRED - Some of you may remember the case Derbis v. U.S. Shoe Corp., reported in an earlier edition. In that case, an employer's decision to deny accommodation to an employee who had never revealed her disability to the employer was found not in violation of the ADA. That decision has now been confirmed by the 4th Circuit Court of Appeals.

- BRUCE, ARE YOU LISTENING? - The Washington, D.C. restaurant Planet Hollywood was recently required to install ramps to make the restaurant

accessible, resolving a complaint brought by two wheelchair-using patrons. Previously, patrons using wheelchairs had to enter through a back door, go through the kitchen and other employee-only areas and were unable to access several levels within the club. A spokesperson for the restaurant said, "we're pleased to comply and we hope other restaurants will follow our lead." Uh-huh.

- **NAME CHANGE** - The Association of ADA Coordinators (AADAC), of which this Department is an organizational member, has announced that it is changing its name to the National Association of ADA Coordinators, or NAADAC. The name change was undertaken "in order to more accurately reflect" the Association's membership.

- **NATIONAL INSTITUTE ON LIFE PLANNING FOR PERSONS WITH DISABILITIES (NILP)** - The NILP, an organization which provides assistance in various areas associated with disabilities, has announced its new Internet presence. The site can be used to access numerous other disability and life planning sites. Please see the attached announcement from NILP for details.

- **EEOC GUIDANCE DOCUMENT - INTERVIEWING** - The EEOC has recently published "ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations," a pamphlet for employers. The twenty-six page, indexed pamphlet sets out in question and answer format some of the most troublesome situations which persist in the interview process and suggests employer responses. I will provide copies of this publication on request unless requests become overwhelming.

Subject: NILP On-Line News- December- 1995 From: rfee@sonic.net (Richard W. Fee- San Francisco, USA)

NILP OnLine News
** National Institute on Life Planning for Persons with Disabilities, Inc., Sonoma State University, 1801 E. Cotati Ave.,Rohnert Park, CA 94928-6922
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December, 1995 Volume I, No. 2
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NILP OnLine News The National Institute on Life Planning for Persons with Disabilities(NILP) is pleased to announce the publication of the new NILP OnLine News bulletin which will be distributed via fax or e-mail each month. The main purpose of this informal NILP OnLine News is to bring NILP members the latest information concerning all aspects of life planning for persons with disabilities. We welcome your comments. We would also be very interested in publishing any news briefs on important life planning concerns. NILP will begin publishing a standard quarterly newsletter for members in early 1996. The quarterly newsletter will meet your traditional expectations and include regular columns on life planning, government benefits, legal issues, advocacy/ guardianship, aging and financial planning.

Richard W. Fee, Editor

Published monthly by the National Institute on Life Planning for Persons with Disabilities, Inc. CIHS-Sonoma State University, 1801 E. Cotati Ave, Rohnert Park, CA. 94928-6922 707-664-4235 Fax 707-762-2657 E-Mail: rfee@sonic.net

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Internet Page- Big News!! We are truly wired to the world!! The formal NILP Internet Page is up and running. It looks great and it provides a valuable service to families and professionals. Many organizations simply use their net pages to announce their services. Since one of our major goals is to serve as a national clearinghouse on all aspects of life planning, we decided to make the NILP page completely interactive. Anyone with access to the Web can contact NILP. Once on our page, they can ask personal questions on any life planning topic which will be answered by an expert. They simply click onto a topic such as "Government and Community Benefits," read the brief summary about the different types of benefits and then click on the NILP button. Up pops an e-mail screen where they can send a personal question. They hit the "send" button and the question goes directly to an expert, in this case, Daniel Scarborough of Disability Benefits Association, at the University of Texas. Daniel retrieves the message in his e-mail box, provides a brilliant answer, hits send and the person gets the needed information within 48-72 hours. Slick! We would like to thank the many experts who have signed up to answer questions: Legal and Structured Settlements- Michele Whitmore, Settlement Strategies, Inc., Parker, CO. Aging - James Stone, Third Age, Lexington, KY. Financial - Robert Daugherty, KYPLAN, Georgetown, KY Legal - Various attorneys. The questions come to

California and we send them onto a lawyer in the appropriate state. Government and Community Benefits - Daniel Scarborough, Disability Benefits Association, University of Texas, Austin, TX General Life Planning and Transition - Richard W. Fee, NILP. If you know of any other topics we should offer or professionals who would be willing to answer questions, please let us know. We do put in a little plug about their qualifications and services, so it is a little like a free ad for them. The Net Page offers other information which we will discuss below. The Net site is: **http://sonic.net/nilp**

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Net Professional Database

If a family needs a professional to assist them to plan for the future, they can click onto the NILP professional database. They can then request the name and other details of a qualified ChLAP planner, attorney, advocate, trust officer, etc. in their geographical area. Without a doubt, this is the hottest section thus far. We answer 5-10 requests a day. Where do we get the names of qualified professionals? Many different sources... We have ranked professionals in the following order for recommendation to families: 1. ChLAP planner- someone who has completed the formal ChLAP program- we know he or she is properly trained. 2. EPPD planners - we know this person is also trained because we trained them prior to setting up NILP. 3. Other professionals - referred to us by reputable charities and government agencies. We make it very clear to families that we do not endorse any professional. We are a good starting point. If you know of any professional we should include in our special database, please let us know. Fax or e-mail us their name, address, telephone, fax and e-mail address. Please provide a brief summary of professional experience.

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Burial Insurance- Yes, Real Life Insurance for Persons with Disabilities It is almost impossible to find a good burial policy for a person with a disability. Few life insurance companies would to take on this risk. We are working very hard to offer families a "membership" benefit of low cost burial insurance for their loved one with a disability. For the last six months, we have tried to locate companies willing to offer this type of policy. We now have a few that will provide it with no questions or minimum questions. Families pay a $35 NILP membership fee and we refer them directly to the broker who handles the policies. NILP is not an insurance company by any stretch of the imagination, but we do want to offer our members a true benefit. Can they order over the Internet? You bet! Just click onto the NILP page and hit the Burial Insurance button. If you know of any life insurance companies we should include in our listing, please let us know.

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ChLAP Training Program- December School The first professional training program for professionals who want to work in this area continues to forge ahead. We held our second 3 day pre-examination school at the Courtyard by Marriott in Washington, DC from December 5th to 7th. The following candidates completed their last examination and were awarded the ChLAP: Gordon H.

Biescar, Houston, TX Benjamin M. Braun, Columbus, OH Randee K. Cook, Greeley, CO Benjamin Franklin, Dallas, TX Robert B. Hurley, Charleston, WV Linda Kahn, Somerset, NJ Angeline J. O'Malley, Lexington, KY Cynthia Thorp, Newport News, VA David E. Toothman, Marietta, GA Ann J. Travis, Miami, FL AND Sharon Toothman completed the first Module-Social Aspects with honors. We would like to thank Patricia Williams, California attorney, for assisting with this pre- examination school. Patricia is an assembly person who was in Washington for the public policy meetings. She came over to the school and gave us a 3 hour presentation on the latest congressional changes to IDEA, ADA and Section 504. She also updated us on the congressional battles with Medicare and Medicaid. Patricia and another California attorney, Stephen Dale, are the authors and instructors in the Legal Aspects Module of the ChLAP program. We have a number of candidates working towards this professional qualification. The ChLAP program consists of 3 correspondence courses on the Social, Legal and Financial Aspects of Lifetime Assistance Planning. Candidates study the course materials and take a final examination on each module. NILP offers a free 3 day pre- examination school prior to each final examination. The school is not required.

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Special Note to Families, Charities, Government Agencies, etc. When the time comes to do your special planning or recommend someone to do the planning, ask your professional about his or her qualifications. You can rest assured that those professionals who have completed the ChLAP program know their "stuff" and have subscribed to a strict code of ethics. The ChLAP logo is important. The ChLAP logo in combination with the words "Fellow" or "Member" of NILP indicate the professional also receives the latest life planning information from NILP.

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So when is the Next Training Program? The next examinations will be held on Saturday, February 10th in San Francisco. The pre-examination schools will go from Thursday, February 8th at 1pm until the Saturday exam at 3pm. This Saturday exam will help you access cheap weekend fares and enjoy an extra day or two in San Francisco and/or Napa Valley. For more information about enrolling the ChLAP program and the next series of pre-examination schools, please call us on 707-664-4235 or by the modern e-mail method on rfee@sonic.net.

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Other NILP Services - Three Major Ones 1. Seminars and Workshops - We are more than pleased to provide informative, we might even say, thrilling life planning seminars and workshops at your next local, state or national meeting. Set the date and time and we will be there. 2. In-House ChLAP Programs - We offer in-house ChLAP pre-examination schools for agencies with 6-8 candidates. 3. Consultation Services - Our team of experts are also available to assist you with any research project. We can help your agency or company analyze their life planning service, etc. In other words, use us! We don't mind.

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NILP Membership Unlike many groups, our income streams come from training school fees and memberships fees. Therefore, we welcome your membership. Okay, you sold me. Can I join, please? Okay, but only if you send in this application along with a check. I/We hereby apply for membership in the National Institute on Life Planning for Persons with Disabilities as indicated below. I have attached a check/money order for the membership along with copies of the supporting documentation, as required. Please type

Name
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Organization/Company
Address (City, State, ZIP)
Telephone
FAX
E-MAIL

Membership Categories Type of Member Annual Dues Benefits
Sustaining Member - Individual $35 Newsletter Sustaining Member -Organization $100 Newsletter Associate Member $150 Newsletter Professional Clearinghouse, Discount Training Programs, Anyone involved in Life Planning for Persons with Disabilities Professional Member $300 Newsletter Professional Clearinghouse, Discount Training Program 900 number for professional consultation with experts, Right to use Member on professional stationery, Professional with 1 year experience in Life Planning, Resume, 2 letters of reference, Approval by Board Fellow $500 Newsletter As above, plus 2 hours of free consultation each month(no carry-over), 2 free training programs each year after ChLAP award. Right to use Fellow on professional stationery, Professional with 3 years experience in Life Planning, Completion of approved training program, Resume, 2 letters of reference, Approval by Board
Please send to: National Institute on Life Planning for Persons with Disabilities, CIHS-Sonoma State University, 1801 E. Cotati Ave, Rohnert Park, CA. 94928FAX 707-762-2657 PHONE 707-664-4235 E-MAIL rfee@sonic.net
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"News Reviews to Peruse"

Number 24 February 16, 1996

Items regarding the Americans with Disabilities Act which may be of interest to you. Please share this information with colleagues, supervisors and subordinates. The views and opinion expressed herein are solely those of the editor, except where noted, and do not represent the views of the Office of Chief Counsel or the Department of Environmental Protection. Contributions, questions or comments, including requests for accommodations needed to receive or apprehend this publication, should be addressed to Patrick H. Bair (Ed.).

- EMPLOYER "AMNESIA" - In a recently-decided First Circuit case, the appeals court held that an employer is not prohibited from asking for medical documentation of fitness to return to work from an ex-employee who had been automatically terminated from disability leave. The ex-employee had been on disability leave for a psychological condition which made it impossible for him to work. When he reapplied for work with the former employer, he was asked for certification and medical documentation of his fitness for duty and information about needed accommodations, most of which the ex-employee refused to provide. The ex-employee, alleging an illegal pre-offer medical inquiry, sued the employer when it refused to hire him. The district and appeals courts both agreed that the employer's actions had been appropriate, and that employers should not be forced to have "amnesia" with respect to former employees with known disabilities. (Grenier v. Cyanamid Plastics, 1995 U.S. App. 1st Cir)

- "MITIGATING MEASURES" - A federal district court in Kansas has taken on the EEOC by refusing to follow the Commission's guidance on disability and

the effect of "mitigating measures." The case involved a police officer dismissed for various infractions - one of which resulted in his unattended police car being stolen - who alleged in a lawsuit that his termination had been a result of his disability, diabetes. Diabetes is listed in the regulations of the EEOC as a disability. The Commission's guidance also provides that the existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices. For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine.

The Kansas court disagreed with the EEOC position, stating that to the extent it altered the ADA's definition of disability by creating a "checklist" of approved disabilities, it is invalid. The court, noting that the officer had not shown that his condition substantially limited his ability to perform any major life activity, granted the employer's dismissal motion. This decision stands in contrast to a 1994 decision of a federal appeals court in Oklahoma - Sarsycki v. UPS, 862 F.Supp. 336 (W.D.Okla. 1994) - in which that court accepted the EEOC's guidance that diabetes is a covered disability. (Deckert v. City of Ulysses, U.S. D.Kan.1995)

Compare these with the recent decision of the 7th Circuit Court of Appeals. That Court found a diabetic employee who did not monitor and control his condition, resulting in an incident for which he was fired, had no cause of action under the ADA. The Court opined that the employee was totally to blame for the incident since modern technology and proper monitoring allow most diabetics to almost eliminate the possibility of a severe reaction. The only possible accommodation was a second chance, which the Court found was not required by the Act. (Siefken v. Village of Arlington Heights, 4 AD Cases 1441 {7th Cir.1995})

- PARKING ACCOMMODATION GRANTED - In an important new decision, the 2d Circuit Court of Appeals (the circuit which includes the states of New York, Vermont and Connecticut) instructed the New York City Legal Aid Society to provide paid parking to an attorney employee with a mobility impairment. The attorney had asked for paid parking near the work site as a reasonable accommodation following her return to work from disability leave, which she took after an auto accident in which she suffered permanently disabling leg injuries. Her request was denied by Legal Aid. The 2d Circuit, which overturned a trial verdict in favor of Legal Aid, cited EEOC interpretive guidance that providing parking may be a reasonable accommodation, and stated that "employer assistance with transportation" was within the scope of the ADA as envisioned by Congress. [We are sure to hear more on this issue.] (Lyons v. Legal Aid Society, 68 F.3d 1512 {2d Cir.1995})

- KEEPING YOU UP WITH THE NET - Please note the attachments, gleaned from the Internet. You'll find notices regarding new web sites, including one for Pennsylvania parents who have children with disabilities; a new book about computer resources; a federal announcement regarding curb ramps; and a little "humor."

- **AND THE CASE WENT ON FOREVER** - Well, it's time for our regular update on EEOC v. AIC Security Investigations, a case we've been following since 1992. In our last installment ("ADA News," No. 16, June 20, 1995), I reported that the 7th Circuit Court of Appeals had dismissed a punitive damage award against Ruth Vrdolyak, the company president and the person who fired Executive Director Charles Wessel, who had inoperable brain cancer. (In June I reported in error that punitive damages had been assessed in the amount of $250,000 each against the company and Vrdolyak; in fact, the separate awards were $75,000.) Finding that individual damages are not available under the Act, the appellate court returned the case to the trial court to reaccount the damage award. The district court found that the entire $150,000 punitive damage award should be assessed against the company. Vrdolyak is the owner and sole shareholder of AIC. (EEOC v. AIC Security Investigations, 55 F.3d 1276 (7th Cir.), on remand, 1995 U.S.Dist. N.D.Ill.1995)

- **PUBLIC SCHOOLS GUIDE** - The U.S. Department of Education has published a 278-page document titled "Compliance with the Americans with Disabilities Act: A Self-Evaluation Guide for Public Elementary and Secondary Schools," in an effort to teach educators about the requirements of the ADA. The document provides guidance on establishing ADA compliance in a school, gives tips on reviewing policies and procedures, and highlights differences between and similarities to Section 504 of the Rehabilitation Act. Copies are available to school districts from their regional Disability and Business Technical Assistance Center; additional copies at $21 each are available to anyone from the U.S. Government Printing Office.

- **"FBI TOOK THE ADA TO THE NCAA"** - A Dallas newspaper is reporting that the FBI is investigating the NCAA's so-called "core" course requirements to see if they discriminate against athletes with learning disabilities in violation of the ADA. The investigation is said to stem from a complaint filed by the parents of a Chicago teen who is a champion swimmer and who was diagnosed as having learning disabilities in sixth grade. According to the NCAA, the courses the student had taken did not meet association standards, thus preventing his school-paid recruiting visit to a college.

- **PRIMA FACIE CASE FOR "REGARDED AS" DISABILITY** - The 9th Circuit has handed down criteria for what a plaintiff must prove in a lawsuit claiming discrimination based on a perception of disability. The case involved an employee who experienced severe lower back pain from a degenerative disk disease and who was returned to work despite fear that he could be at risk for further injury if he performed certain heavy work. He was subsequently terminated based on that risk. The Court found the employee had stated a prima facie case since, though he had no disability, the employer regarded him as having a disability. The Court went on to state an employer cannot terminate an employee because of a physical impairment which might endanger the employee's health at some future point if the employee continues his job. (Jimeno v. Mobil Oil Corp., 9th Cir.1995)

- COMPANY'S BEST EFFORTS - The 9th Circuit Court, in another case, found that an employer had acted reasonably when it tried to find a new job following a restructuring for an employee with epilepsy and, when a new job could not be found which did not aggravate the employee's condition, offered to return the employee to his former job. The employee rejected the return and sued. The Court found that the employer had done all it needed to and that it was not required to create a new position for the employee. (Sharpe v. AT&T, 9th Cir.1995)

- LIGHT DUTY NOT REQUIRED - An employer is not required to create a light duty position, permanent or temporary, in order to accommodate an employee with a disability, according to a federal district court in Georgia. The Court reviewed the matter of an employee who returned to light-duty work following a back injury, was later placed on unpaid leave, then returned again to a less demanding position. Not satisfied, the employee sued, claiming the employer had failed to reasonably accommodate him. (Mott v. Synthetic Industries, 4 AD Cases 1393, DC NGa.1995)

ATTACHMENTS

Subject: New Medical Breakthroughs web site From:
webdoctor@ivanhoe.com

A 72-year-old California man is alive only because of a heart transplant he almost didn't get. Doctors can now repair diseased hearts for transplant and give them to senior citizens. This is one of many such ground breaking news stories to be found at a new Medical Breakthroughs web site at **http://www.ivanhoe.com**.

Since health information affects all of our lives, were cross- posting this message so this vital medical news reaches the people who need it most.

The free Medical Breakthroughs site has 3 new reports every Monday, as well as a keyword search of archives, interviews with experts, a First-To-Know e-mail Bulletin, and Quicktime video clips of the news reports. The stories are reported by an independent news organization that's been producing medical news for 15 years.

We invite you to visit, and be sure to tell us what medical topics you'd like to see, or if someone you know was helped by information you found on our site.

WebDoctor Ivanhoe Broadcast News, Inc. webdoctor@ivanhoe.com

Subject: Pennsylvania
From: **famserv@omni.voicenet.com** (Larry Fiebert)

Organization: Family Service of Montgomery County

If you are a Pennsylvania parent of a child with developmental disabilities, hearing, vision, motor, or cognitive disabilities, mental retardation, or other chronic health conditions and would like to participate in an Internet support group (via e-mail) we would like to hear from you.

Family services, the non-profit agency that I work for obtained a small seed to get such a group off the ground. We currently have 50+ participants. If you are interested in giving and receiving support, information, advice, and resources as well as an opportunity to discuss issues such as parenting, inclusion, medical concerns, stress, siblings, etc. with others who may be dealing with some of the same concerns we would love to have you join us.
To obtain more information and the subscribe commands, please contact me. In your message let us know what kind of disability your child is dealing with, and what newsgroup you read this in as I have posted it to several.

Looking forward to hearing from many Pennsylvania parents of children with special needs.

Larry Fiebert, LSW, BCD Assistant Director Family Services 180 W. Germantown Pike Suite B-3 Norristown, PA 19401 (610) 272-1520 e-mail: **famserv@mail.voicenet.com**

Subject: 10 Reason to Marry a Crip
From: **mmf1@ix.netcom.com** (Mary Fowler)
Organization: Netcom

Ten Reasons to Marry a Guy with a Disability

10. You won't have to feed parking meters.
9. You get discounts at restaurants (if the 2 of you can get in) 8. You can take the family dog into hotels and restaurants.
7. His parents will be thrilled when they hear that you said "Yes". (They won't have to worry about him)
6. He has a really neat computer that's easy to use.
5. He has a steady income (small but steady).
4. He'll carry all your packages.
3. You get to learn another language.
2. He is your knight in shining armor (chrome).
1. You won't be bored.

Copyright Mary Fowler 1996

-- Please note: Mary Fowler is employed with the Oakland Mayor's Commission on Disabled Persons. Her husband, James Gonsalves, uses a wheelchair.

ADAPTING PC'S FOR DISABILITIES BOOK/CDROM

-- An Electronic Bill of Rights: Adapting PCS for Disabilities

Reading, MA - For persons with disabilities, a properly equipped computer breaks barriers to information access and communication. Adapting PCs for Disabilities is a complete guide to assessing an individual's needs and outfitting a PC with the latest assistive hardware and software. Individuals with disabilities and governmental and educational agencies will need a copy of this book--it's a practical reference not only to what is possible with a PC, but what is affordable and readily available.

The book's CD features:

o over 60 demos of adaptive software packages
o the complete text of the print book in ASCII o a handy text file viewer
o megabytes of articles and newsletters on assistive technology
o complete text of the ADA and more
o Internet newsgroups and web page resources

Add adaptive products to your PC quickly, affordably, and easily-Adapting PCS for Disabilities shows you how!

Joseph Lazzaro is the Technology Director for the Massachusetts Commission for the Blind, author of numerous articles on computers and technology, and an emerging science fiction writer.

Addison-Wesley is a worldwide publishing company based in Reading, Massachusetts. The Trade Computer Books Group publishes high- quality books for business users, programmers, and computer enthusiasts.

Adapting PCS for Disabilities book/CD package is available from your local bookstore at a suggested retail price of $39.95. ISBN 0-201-48354-8 paperback, 320 pages. --

DEPARTMENT OF JUSTICE NOTICE OF EXTENDED PUBLIC COMMENT PERIOD ON CURB RAMPS.

On November 27, 1995, the Department of Justice published a notice of proposed rulemaking to amend the Department's regulation implementing title II of the Americans with Disabilities Act of 1990 (ADA) to provide an extension of time for State and local governments to meet their obligation to install curb ramps at existing pedestrian walkways. The public comment period for the proposed rule was scheduled to close on January 26, 1996.

From December 16, 1995 to January 5, 1996, Department of Justice employees were furloughed because of the Federal budget controversy. The government shutdown forced the closing of the ADA Information Line and prevented the Disability Rights Section from receiving or processing requests for copies of the proposed rule. Due to the length of the furlough, the Department is extending the comment period to ensure that all interested individuals are able to obtain copies of the rule and to provide comments. Public comments will now be accepted until March 1, 1996.

A formal notice of this extension will be published in the Federal Register within the next two weeks.

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"News Reviews to Peruse"

Number 25 March 15, 1996

Items regarding the Americans with Disabilities Act which may be of interest to you. Please share this information with colleagues, supervisors and subordinates. The views and opinion expressed herein are solely those of the editor, except where noted, and do not represent the views of the Office of Chief Counsel or the Department of Environmental Protection. Contributions, questions or comments, including requests for accommodations needed to receive or apprehend this publication, should be addressed to Patrick H. Bair (Ed.).

- HIGH COST OF COMPLIANCE - According to a preliminary report released by the Advisory Commission on Intergovernmental Relations, the ADA's requirements should be suspended or made voluntarily for communities without the fiscal ability to comply. The Unfunded Mandates Reform Act of 1995 excluded the ADA from its coverage, but instructed the Commission to conduct a study of laws generally regarded by state and local officials as unfunded mandates. Commission member and Philadelphia mayor Ed Rendell (see related item below) praised the ADA but said the law is too vague to ensure compliance and that the cost of compliance is too high.

The Committee recommended that the law be modified to focus on flexible goals and goal attainment schedules rather than rigid requirements; extend deadlines for compliance; permit only the U.S. Attorney General to enforce the ADA or designate a single federal ADA enforcement agency; provide federal funding to retrofit existing facilities; and increase technical assistance. Also under the Commission's recommended changes, no individual would be permitted to sue a state or local government for noncompliance. Reacting to

the report for the disabilities community, Paralyzed Veterans of America attorney Robert Herman stated that replacing requirements with goals would turn the clock back on the disabilities rights movement. "To revert to goal attainment is to revert to the way things were before the ADA," said Herman.

- CUBBIES AND DISABILITIES - The Chicago Cubs have settled a Title III lawsuit with four individuals who use wheelchairs and the Chicago-based Legal Clinic for the Disabled by agreeing to make changes at Wrigley Field, home of the Cubs. The changes will make the 82-year-old ballpark more accessible by this baseball season. Plans are currently under way to provide a minimum of 88 accessible seats and 120 companion seats in three levels, install an elevator, install appropriate signage, and make concession stands, ticket windows, parking, public telephones, bathrooms and water fountains more accessible. The Cubs will also pay $20,000 in court costs to the plaintiffs. An attorney for the organization characterized making the 1914 structure located in crowded downtown Chicago accessible an incredible challenge.

- ACCOMMODATION A TWO-WAY PROCESS - According to the 7th U.S. Circuit Court of Appeals, the party which causes a breakdown in discussions about possible accommodations is responsible for any resultant failure to accommodate. After a secretary refused to allow her employer to talk with her doctor about possible accommodations for her osteoarthritis and depression and canceled a scheduled meeting to discuss accommodations, and following a history of attempts to accommodate by the employer, the secretary sued charging failure to accommodate. The trial court granted the employer's motion for summary judgment which argued that the employer never understood exactly what accommodations the employee needed or wanted. The Appeals Court affirmed, stating that "liability for failure to provide reasonable accommodations ensues only where the employer bears responsibility for the breakdown." Beck v. University of Wisconsin Board of Regents, 1996 U.S. App. LEXIS 1111 (7th Cir. 1996)

- LONG-TERM DISABILITY BENEFITS - A federal district court in Illinois has declared that an employee's qualifying for certain long-term disability benefits may disqualify that employee from ADA coverage. In a recent decision, the court examined a case involving an employee-plaintiff who was receiving disability benefits for her severe depression under a long-term disability policy. She was informed that her plan was being modified to limit benefits for certain mental and nervous disorders, while not affecting coverage for other disabilities. The employee filed a claim with the EEOC contending that the modification violated the ADA (see related "Mason Tenders" item below). The Commission, seeking to enjoin the change on behalf of the employee, argued that although the employee's total and permanent disabilities prevented her from working, she was still qualified for the purpose of receiving benefits. The court denied the requested injunction, stating that since the employee had stated on her disability application that she could not perform any of the functions of her job with or without a reasonable accommodation, she was not a "qualified person with a disability" and, therefore, was not entitled to the ADA's protection. Some may recall that a similar statement on an application was used in McNemary v. Disney

Stores (Issue No. 21, Nov. 1995) to bar ADA eligibility. See also a related item in this issue "Lifting Not a Major Life Activity?." EEOC v. CNA Insurance Cos., 1996 U.S.Dist. LEXIS 601 (N.D.Ill. 1996)

- TOBACCO SENSITIVITY NOT A DISABILITY - The Northern Illinois court also decided a case in which it found that an employee's severe reaction to tobacco smoke was not a disability. The employee, who had chronic severe rhinitis, informed her employer that her condition was aggravated by cigarette smoke in its office. The employer told the employee nothing could be done and that she should look for another job. The employee sued, alleging a refusal to reasonably accommodate. The court held she did not have a covered disability, rejecting her claim that she was substantially limited in the major life activity of working. (The 4th Circuit Court of Appeals has also held that an allergy to tobacco smoke is not a disability.) Homeyer v. Stanley Tulchin Associates Inc., 1995 U.S.Dist. LEXIS 17114 (N.D.Ill. 1995)

- INTERPRETER NEEDED - Failure to provide a qualified sign language interpreter at a meeting where an employee's honesty is questioned may be a failure to provide a reasonable accommodation, according to a New York court. The Marriott Marquis Hotel in New York City was denied summary judgment in a case involving the hotel's dismissal of a deaf hotel worker. At the first predisciplinary meeting with the employee, who was accused of violating company policy regarding the handling of money, a manager who knew "some ASL" (American Sign Language) made several mistakes in interpreting for the employee. The employee was fired and sued the hotel charging the employer's failure to provide a qualified interpreter at the meeting violated the ADA. (The hotel, which employs approximately 50 people who are deaf or hearing impaired, formerly had a full-time interpreter.) The court refused Marriott's motion to dismiss, stating that there was no evidence that the employee had not acted reasonably under the circumstances, and that "misunderstandings that emerged at that first meeting ... set a tone of mistrust of [the employee] that inalterably led to his discharge." Mohamed v. Marriott International, 1995 U.S.Dist. LEXIS 15762 (S.D.N.Y. 1995)

As this case illustrates, the ADA requires employers to provide a sign language interpreter whenever needed as a reasonable accommodation and not an undue burden. The need may arise in job interviews, training, staff meetings or employee parties, according to the EEOC, as well as employee evaluations, counseling sessions or predisciplinary conferences. The level of training required of an interpreter in any specific situation depends mostly on the nature of the communications expected; the more complex the subject nature the more highly trained must be the interpreter. Whatever the setting, effective communications is required. Information on contracting for Department sign language interpreting services can be obtained through the Office of Affirmative Action/Contract Compliance.

- STANDING IS ESSENTIAL FUNCTION - An employee brought suit against her employer Wal-Mart when her request for accommodation was refused. The employee, diagnosed with chronic tendinitis, asked for permission to sit

while performing her "greeter" duties. Wal-Mart refused, stating that standing was essential for greeters to be "aggressively hospitable," monitor the large entryway and perform other duties, but offered alternative accommodations. In granting Wal-Mart's motion to dismiss, the Colorado District Court found that the employee failed to disprove that standing was an essential function. (An employer's written essential job functions are presumptively valid and must be disproved by a litigant - an excellent reason to have written EJF's!) Just as significant, the court found that the employee - who was restricted from standing more than five hours per shift and needed 15-minute breaks every two hours - was not significantly restricted in performing a broad range of jobs; thus was not substantially limited in performing any major life activity, including working; and, therefore, did not have a disability for purposes of the ADA. Kuehl v. Wal-Mart Stores, 1995 U.S.Dist. LEXIS 17220 (D.Colo. 1995)

- EMPLOYEE'S ALCOHOLISM DOES NOT EXCUSE MISCONDUCT - The City of Pittsburgh did not discriminate against its employee by discharging him for driving a city-owned vehicle while under the influence of alcohol, despite the employee's disability of alcoholism, because the city maintained a legitimate non- discriminatory basis for the discharge. The city discharged the employee, who was involved in an accident while DUI, without offering him participation in an employee assistance program ("EAP") to combat alcohol dependency. The city's human relations commission found that the city had discriminated against the employee on the basis of his disability, but that decision was reversed on appeal by the Commonwealth Court of Pennsylvania. The Court found that the city had properly relied on the employee's misconduct, which demonstrated a lack of responsibility and dependability. The Court ruled that the city's decision not to offer entry into the EAP was not arbitrary or a pretext for discrimination because the city was able to show that the EAP was offered only to employees who acknowledged their dependency; the discharged employee denied having a drinking problem. City of Pittsburgh, Dept. of Public Works v. Foster, 669 A.2d 492 (1995)

- $1 MILLION SETTLEMENT IN MASON TENDERS - In settlement of a case which has been around as long as the ADA, the Mason Tenders District Council Welfare Fund, which provides employee health insurance benefits, has agreed to pay $1 million for excluding AIDS from coverage under its self-insured health insurance plan. A covered employee with AIDS filed a complaint against Mason Tenders with the EEOC in November 1992. The EEOC ruled in 1993 that Mason Tenders had violated the ADA by eliminating AIDS coverage from its health plan. That ruling provoked a suit by Mason Tenders against the EEOC and the employee, which prompted a counter-suit by the defendants. The ADA does not prohibit employers from excluding specified illnesses from health coverage, so long as the exclusion is based on underwriting or classifying risks and not on disability discrimination. AIDS/HIV is typically targeted for exclusion, although treatment for cancer, neonatal intensive care, traumatic head injuries and heart disease is frequently just as expensive as that for AIDS.

- ACCESSIBLE TELEPHONE SERVICES - Employers of 15 or more persons would

be required to install only wireline telephones which are hearing-aid compatible and have volume control if a recently proposed FCC rule is adopted. Employers would not be required to replace or retrofit existing equipment, except possibly as a reasonable accommodation or to make a program accessible, though it will be "presumed" that all wireline telephones are hearing-aid accessible by January 1, 2000. No date has been set for the volume control requirement. 60 Fed.Reg. 63667, 12/12/95

- STREETS OF PHILADELPHIA (REDUX) - In a proposed settlement of a class action lawsuit (see Issue No. 19, Sept. '95), the City of Philadelphia has agreed to install curb ramps throughout the city by December 31, 2001. The city plans to allocate more than $4 million annually to install the ramps on 10,372 city intersections. The city admits no liability in the settlement, which is pending approval by the U.S. District Court for the Eastern District of Pennsylvania. Koch v. City of Philadelphia, C.A. No. 95-CV-4270 (E.D.Pa. 1995)

In a related development, the U.S. Justice Department has proposed extending the Title II deadline to January 26, 2000 for curb cuts in walkways servicing state and local government facilities, transportation, places of public accommodation, other places of employment and residences of individuals with disabilities. The deadline for installation of all other ramps would be extended to January 26, 2005 under the Justice proposal. The extension of these deadlines was urged on the Department by several U.S. legislators (see Issue No. 17, July 1995).

- NCAA FOLLOW-UP - As reported in last issue and just in time for "March Madness," the NCAA has come under Justice Department scrutiny for its "core course" requirement for student athletes, which may adversely impact students with learning disabilities. The NCAA reports that it is reviewing the effect of the requirement. A recommendation has been made that the association hire an LD consultant and "loosen up" what it considers core course classes for LD students. Also mentioned is the possibility of allowing students to make up core course credit during the summer following their senior year, not permitted under the current rules.

- LIFTING NOT A MAJOR LIFE ACTIVITY? - The U.S. District Court for Kansas has ruled that lifting is not a major life activity ("MLA") and, therefore, a former Boeing sheet metal worker who could not lift due to her carpal tunnel syndrome did not have a disability. The court asserted that the employee-plaintiff's claim, which asserted a substantial limitation on the ability to perform manual tasks, "interprets the ADA too broadly by reading too much into the term `major life activity.'" Second, the court dismissed her claim that she had a substantial limitation on the MLA of working, opining that she could still work a broad range of other jobs. Next, the court stated that no reasonable accommodation was possible, rejecting the employee's argument that she could perform her old job with the installation of foot controls. Finally, the court determined that the employee was barred from arguing that she was able to perform other work in light of her testimony to the contrary in reaching a workers' compensation settlement.

This decision is reminiscent of that in McKay v. Toyota Motor Manufacturing (see Issue No. 14, Apr. 1995), in which a federal district court in Kentucky likewise found an assembly line worker's carpal tunnel syndrome to not be a disability. Lamury v. The Boeing Co., 1995 U.S.Dist. LEXIS 16262 (D.Kans. 1995)

- DIABETES NOT A DISABILITY 'PER SE' - The same Kansas federal court ruled in a September 1995 decision that a discharged police officer with diabetes does not have a disability under the ADA, since his diabetic condition did not substantially limit any of his major life activities. In taking issue with the EEOC's interpretive guidance which lists diabetes as a disability, the court is in agreement with the April 1994 decision of a federal court in Texas, Coghlan v. H.J. Heinz Co. (reported in Issue No. 10, Dec. 1995). (In Sarsycki v. United Parcel Service, (3 AD Cases 1039, D.WOkla., 8/31/94) a federal court in Oklahoma accepted the EEOC guidance without comment.) Noting that the officer had been involved in numerous incidents of negligence but had never asked for accommodation, and that his personal physician had stated that he was "physically fit and led an active life," the Kansas court found that the officer failed to prove that his diabetes "independently impairs any of his major life functions." The court also rejected the officer's contention that his employer failed to keep his condition confidential, finding the city had acted properly with respect to the information and that it was the officer himself who failed to maintain confidentiality. Deckert v. City of Ulysses, Kansas, 4 AD Cases 1569, D.C.Kans., 9/6/95

- LEARNING IMPAIRMENT OR POOR PERFORMANCE? - A draftsman discharged for making major mistakes in his work failed to convince the Kansas court that his learning impairment should be regarded as a disability. The employee alleged that his performance problems were a result of memory and vision defects he suffered in a 1971 plane crash. The court granted summary judgment to the employer, finding that the employee had not shown that his learning impairment substantially limited his ability to perform any major life activity, including working, as he was capable of performing a number of jobs even though not suited to be a draftsman. The court observed that "the ADA does not guarantee an individual will get the job he or she wants." Riblett v. The Boeing Co., D.C.Kans., 94-1055-PFK, 9/22/95

- NEW ACCESSIBILITY GUIDELINES - The Access Board has announced that it is forming a new committee to study accessibility guidelines for new and altered play facilities (such as swings, sandboxes and slides). 60 Fed.Reg. 66538

- INTERNATIONAL SYMBOL OF ACCESSIBILITY - The ADA Accessibility Guidelines specifies when and where signs displaying the international symbol of accessibility (the stick figure in a wheelchair)

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must be used but requires no particular color scheme for the signs. However, the ADAAG does provide finish and contrast requirements in Section 4.30.5. Characters and symbols must contrast with their background - light on dark, or dark on light - and are most visible when the contrast is at least 70 percent.

- "SHIFT WORK SLEEP DISORDER" - A federal court in North Carolina found in a September 1995 decision that a night-shift police officer who was diagnosed as having "shift work sleep disorder" is not covered by the ADA, since the disorder is not a disability under the law. According to the court, evidence showed that the officer did not experience any effects of his work schedule not experienced by the "overwhelming majority" of night workers. Williams v. City of Charlotte, D.W.N.C. No. 3:94CV179-P, 9/29/95

- MAKING ORDER OF BIPOLAR DISORDER - In what at first glance seem to be contrasting decisions, a jury in Washington state has granted a $912,000 judgment to a woman with bipolar disorder (formerly known as manic-depression) fired from her job, while a man with a similar condition was found to have been lawfully discharged by an arbiter in Louisiana. In the Washington case, the jury found that the employee's requests for accommodation had been ignored by the employer, and that her disorder was a "substantial factor" in her dismissal. The case was heard under a Washington state statute which is similar to the ADA. Weaver v. KPLZ, Wash.Super.Ct. No. 93-2-31639, 9/26/95

In the arbitration case, the employee had been counseled, warned and suspended for his aggressive behavior and tendency to threaten and intimidate fellow employees. The record before the arbitrator showed that, despite being under a doctor's care, the employee frequently reduced or abandoned his medication. After a long series of incidents involving other employees, the employee was fired. The employee grieved the discharge, promising that, if reinstated, he would faithfully take his medication, undergo testing to determine the proper level, attend counseling and pay all costs of treatment. Upholding the discharge, the arbiter stated that an employer should not tolerate an employee who threatens the safety of others and that the employee never showed himself capable of controlling his outbursts or keeping his promises to change his behavior. In re Rohm and Haas Texas Inc. and Oil, Chemical and Atomic Workers Local 4-367, 104 La. 974, 5/10/95

- MODELING COMPLIANCE - Sears, Roebuck company has agreed to make its modeling course for children ages 8 through 17 accessible to children with disabilities. The agreement is the culmination of an ADA complaint filed with the Justice Department by sixth-grader Summer Nicole Peavy, who uses a wheelchair and who was denied entry into Sears' "Model's Club Program." Under terms of the agreement, Summer will be admitted to the program without cost to her. Sears will train instructors about the ADA, ensure that ramps and walkways used in the program comply with the Act, and include children

with disabilities in its promotional material for the program.

On that mention of "Summer," this edition ends. I hope the nice weather lasts long enough for each of you to enjoy it!

Think Spring!

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"News Reviews to Peruse"

Number 26 April 15, 1996

Items regarding the Americans with Disabilities Act which may be of interest to you. Please share this information with colleagues, supervisors and subordinates. The views and opinion expressed herein are solely those of the editor, except where noted, and do not represent the views of the Office of Chief Counsel or the Department of Environmental Protection. Contributions, questions or comments, including requests for accommodations needed to receive or apprehend this publication, should be addressed to Patrick H. Bair (Ed.).

- **APRIL IS NATIONAL OCCUPATIONAL THERAPY MONTH**

- **CURB CUT DELAY OPPOSED** - According to the Justice Department, ninety-five percent of comments submitted are in opposition to the Department's proposal, reported in last issue, to extend the deadline for installing curb cuts by municipalities. Many comments emphasized the safety advantages of installing ramps as well as the economic benefit of allowing persons with disabilities freer access to the workplace. Not surprisingly, the majority of comments from local and state governments were in favor of the delay.

- **KUDOS TO DALLAS HYATT REGENCY** - The National Council on Disability, in search of a facility accessible to a wide range of disabilities for its National Disability Policy Summit this month, found its search to be an exercise in frustration. According to a Council representative, the search for an appropriate facility took more time than any other aspect of planning

the summit. Until the Dallas hotel was investigated, that is. The Hyatt, located in downtown Dallas, is fast gaining a reputation in the disabilities community for sensitivity to the community's members. The hotel has devoted 28 guest rooms out of 939 for guests with mobility, visual or hearing disabilities. Amenities include roll-in showers and accessible tubs, touch-sensitive controls for lights and temperature, lowered peepholes and coat racks, closed caption TV decoders, telephones and door alarms which can be perceived by sight as well as sound, vibrating alarms clocks, Braille menus and signage, ramps and lifts, doors with accessible hardware, and accessible recreational facilities. The hotel has been completely renovated since 1993, when the hotel was the target of a Justice Department investigation in response to a complaint from the Spina Bifida Association.

The theme of the by-invitation-only NCD summit, scheduled for April 27-29, is "Achieving Independence: Challenge for the 21st Century, A Decade of Progress in Disability Policy: Setting an Agenda for the Future." Summit topics will include employment, education, transportation, civil rights, health insurance and health care, housing, policy and program coordination, technology, long-term services, income maintenance and international/foreign policy. Support for the summit is being provided in part by McDonald's Corp. and the Washington, D.C. law firm of Meyer Brown and Platt.

- COLLECTIVE BARGAINING RIGHTS AND THE ADA - The U.S. Seventh Circuit Court of Appeals is hearing an appeal on the question of the supremacy of an employee's seniority rights from a union contract over the ADA's reasonable accommodation obligation. A Conrail employee has alleged he was denied an accommodation because it conflicted with a seniority provision of his collective bargaining agreement. The EEOC, in an amicus brief filed with the Court, argues that a per se rule that a union contract will always prevail over a claim for reasonable accommodation is contrary to the ADA. Conrail argues that legislative history demonstrates that Congress never intended "bumping" another employee to accommodate an employee with a disability to be permitted. Eckles v. Consolidated Rail Corp., CA 7, No. 95-2856

- ACCOMMODATION COSTS - A follow-up study on the costs of accommodations made by Sears, Roebuck and Co. found that Sears' average cost of accommodation made between 1993 and 1995 to be $45. The study, performed by the Annenberg Washington Program originally in 1994, found the average cost prior to 1993 to be $121. The new study also found that of more than 70 workplace accommodations studied at Sears, 99 percent required little or no cost. Eighty percent of informal complaints and 98 percent of formal complaints at Sears were resolved effectively without resort to litigation. The report highlights that every Sears manager interviewed for the report understood that the ADA is an antidiscrimination law, not a preferential treatment law. Free copies of the report - "Communicating the Americans With Disabilities Act: Transcending Compliance, 1996, Follow-up Report" - are available in accessible formats from Annenberg Senior Fellow Peter David Blanck at (319) 335-9043 or by fax at (319) 335-9019.

- EEOC APPOINTMENTS - Peggy Mastroianni, who has served as the EEOC's

director of ADA policy since 1991, has been appointed by Chairman Gilbert Casellas to be the agency's associate legal counsel. In her new position, Mastroianni will develop Commission policy on the ADA, Title VII of the Civil Rights Act and the Age Discrimination in Employment Act (ADEA). Her replacement as legal counsel for ADA policy is Lyn J. McDermott.

Also at the EEOC, it was announced that ADA policy attorney David K. Fram will be departing the agency to join the staff of the National Employment Law Institute as Director of ADA and EEO Training. In addition to his other duties at the NELI, Fram will continue his frequent public speaking appearances. Those of us who have been fortunate to hear David speak are glad to hear this news!

- DEADLINE FOR COMMENT ON AIRLINES EXTENDED - Because of the number of comments received in response to the Paralysis Society of America's survey to determine airline compliance with the Air Carrier Access Act, the deadline for comment has been extended to September 1996. If you wish to participate in the survey, or know someone who might, calls should be placed to 1-800-643-8245, or a message can be sent via the Internet to **http://www.computek.net/access95/**.

- NEW ADA PUBLICATION - Your editor has received his first copy of "ADA in Action," a publication of the Mid-Atlantic ADA Information Center. The Winter 1996 issue (Vol. II, No. 1) contains an article on "HIV/AIDS in the Workplace," book and video reviews, and updates on cases, the EEOC, and the DOJ. The Center is a publicly-funded ADA assistance center located in Arlington, VA, offering free technical assistance, ADA regulations and materiel, training and informational seminars. A number of events are being planned by the Center, including a program on disability awareness in cooperation with the Northeast Pennsylvania Center for Independent Living in Scranton. For more information on the Center or to subscribe to its free publication, call 1-800-949-4232(Voice/TDD).

- AIDS/HIV INFORMATION - For a "Manager's Kit" or a "Labor Leader's Kit" produced by the Centers for Disease Control and Prevention (CDC) to assist in developing workplace strategies for addressing HIV/AIDS issues, interested persons should contact: the CDC National AIDS Clearinghouse, Business and Labor Resource Service at 1-800-458-5231; the National Association of People With AIDS at 202-898-0414; or the National Leadership Coalition on AIDS at 202-429-0930.

The Department of Justice has published its own guide for employers and local and state governments on AIDS/HIV issues. Copies can be obtained by calling 1-800-514-0301 (voice) or 1-800-514-0383 (TDD).

- PROOF OF DISABILITY - A federal district court in Georgia has ruled that possession of a state-issued handicap parking placard is insufficient to prove that an employee needed a parking accommodation from her employer. The employer had asked for proof of disability in support of the employee's

asserted right to use designated employer parking. The employee had returned to work following an automobile accident with no restrictions on her ability to work. Dumas v. Keebler Co., 5 AD Cases 69, DC MGa, No. 5:95-CV-242-3, 11/14/95

- EXEMPLARY EMPLOYER - Blue Cross of Western Pennsylvania has received the 1995 Employer of the Year Award from the Governor's Committee on Employment of People with Disabilities for its role in providing career opportunities for people with disabilities.

- Attached you'll find articles which may be of interest to you:

- "National Library Service Information on the Internet"

- Equal Access to Software and Information (EASI) "News for You," Vol. 6, No. 1, March 1996

- ITD "Online Information and Networking"

Welcome Spring!

DEPARTMENT: LIBRARIES

NATIONAL LIBRARY SERVICE (NLS) INFORMATION ON THE INTERNET

Judith Dixon, Ph.D. National Library Service

The Library of Congress provides access to information about its resources and services over the Internet. The National Library Service for the Blind and Physically Handicapped (NLS) is represented with its Union Catalog and with other NLS publications.

The Union Catalog and the catalog of books in process are available through a search system called LOCIS. LOCIS and other publications are accessible through the Library of Congress's gopher, called LC MARVEL; the Library of Congress's World Wide Web site; and through the Library's ftp site. These services are described below.

LC MARVEL

The Library of Congress Machine-Assisted Realization of the Virtual Electronic Library (LC MARVEL) is a Campus-Wide Information System that combines the vast amounts of information available about the Library with easy access to diverse electronic resources on the Internet. Its goal is to serve members of Congress, Library of Congress staff, and constituents throughout the world. Documents are, for the most part, in ASCII text.

LC MARVEL can be accessed in several ways:

1. From another gopher server;
2. By using gopher client software and pointing to marvel.loc.gov, port 70; and
3. By using a World wide Web browser and connecting to gopher://marvel.loc.gov/.

Main Menu

The Main Menu of LC MARVEL consists of the following selections:

1. About LC MARVEL
2. Events, Facilities, Publications, and Services
3. Research and Reference (Public Services)
4. Libraries and Publishers (Technical Services)
5. Copyright
6. Library of Congress Online Systems
7. Employee Information
8. U.S. Congress
9. Government Information
10. Global Electronic Library (by Subject)
11. Internet Resources
12. What's New on LC MARVEL
13. Search LC MARVEL

Menus

From the main menu select option #2: Events, Facilities, Publications, and Services. Then select option #6: Services to Blind and Physically Handicapped Individuals, and follow the available options to see NLS publications and databases.

World Wide Web

NLS has established a homepage on the World Wide Web. This hypertext document is available on the Library of Congress web site at: **http://lcweb.loc.gov/nls**

It includes an audio sample of a talking book and links to NLS information available on LC MARVEL and to regional and subregional libraries in the NLS network that offer information on the Internet. This page can also be accessed from the main Library of Congress homepage under "Research and Collections Services."

FTP Site

A limited number of files are also available through the Library's anonymous site. The address of the FTP host is ftp.loc.gov (or 140.147.2.69). The directory /pub/nls includes a SCORPIO search guide and subdirectories containing NLS bimonthly listings and annual catalogs.

E-mail

Internet users may also send messages to NLS. The NLS Internet address is nls@loc.gov.

EASI NEWS FOR YOU (EASI: Equal Access to Software and Information, an affiliate of AAHE) Special National Science Foundation Edition Spring, 1996 Vol. 6, #1

(Also available on the EASI web **http://www.rit.edu/~easi** in an interactive format)

PAGE 1

EASI ENTERS SECOND YEAR OF NSF PROJECT WITH PLENTY TO OFFER

As EASI moves into the second year of its National Science Foundation project to compile and disseminate materials on access to the fields of science, engineering and mathematics, chair of the organization and director of the project, Dr. Norman Coombs reports that a wide variety of materials have already been made available. "We're a little more than a year into the project, and so far I'm pleased with our progress. In December we did an awareness mailing to 5,000 science, engineering and math department heads at colleges and universities, we've got a Web page up on sem issues, we've released the first videotape of the 'EASI Street to Science, Engineering and Mathematics' trilogy of videos. The second one will be released by the end of this month, and we've begun shooting the third video already. "In addition, we're sponsoring the CSUN mini-conference on science, engineering and math issues, and we're getting ready to pilot our online sem course the first week in April. "We've really gotten to the point where the research and compilation that we did during the first year is paying off in resources that we can offer now." _____________

LEARN THE EASI WAY -- ONLINE, ANYTIME AND ANYWHERE

Historically people with disabilities have faced both social and technical barriers that have deterred them from studying or working in the fields of science, engineering and mathematics. While the barriers can be daunting, researchers are developing new tools that help people with disabilities work in these technical fields. EASI has developed on online workshop that focuses on access to science, engineering and mathematics. The course, called EASI-SEM , discusses access barriers and also describes simple access solutions and new technologies such as AsTeR, Dotsplus, and tactile graphics. The course development was funded by a National Science Foundation grant and includes videotapes and manuals developed for the project. The course facilitator is Carmela Cunningham, and the grant's team of consultants will provide continuing technical support. The two-week course will begin on June 3, with another course beginning on Oct. 14. The cost is $95 for the course plus $75 for the three videotapes. EASI also has other online workshops that focus on adaptive computing technology, disability law, and tools to assist educators who work with people with hearing impairments. All courses are provided over the Internet using e-mail and can be taken from anywhere and at any time. Previous workshops have reached more than 500 subscribers in two dozen countries.

ADAPT-IT

This three-week course is ideal for administrators, teachers, librarians, computer support staff, ADA compliance officers and service providers. It focuses on how to set up computing technology and services for individuals with disabilities. There are components on the law, workstation access, compensatory computing tools, making computers accessible and planning services. This workshop also teaches participants how and where to locate the most recent, relevant information on disabilities located on the Internet. Taught by Carmela Cunningham, Dick Banks and Norman Coombs, people who have written and consulted extensively on adaptive technology and information access. April 22, July 8, September 16, November 4. $125.

ADAPT-IT II

This three-week, advanced course on adaptive technology focuses on the technical questions that arise with the rapid move to Windows and Windows 95. The rapidly changing face of the World Wide Web and developments related to structured electronic texts present another set of challenges for people with disabilities. Participants must have at least an intermediate proficiency with operating systems, adaptive hardware and software and a familiarity with the World Wide Web and modern Web browsers. Useful for adaptive technologists, computer support staff or systems administrators. Taught by Dick Banks, adaptive technologist. June 10, October 14 $125.

DISABILITY LAW: THE AMERICANS WITH DISABILITIES ACT

This two-week course includes an overview of the ADA, Equal Employment Opportunity Commission (EEOC) terms, and the Civil Rights Act of 1991. Taught by Adam Klein of Levy Davis Maher & Klein, a law firm that specializes in employment disability cases. Useful to employers, affirmative action officials, human resource staff and individuals who want to know their rights. April 29, July 15, September 23, November 11. $75.

THE INTERPRETING CLASSROOM AND YOUR COMPUTER

This three-week workshop will explore computers and the Internet as tools for enhancing the classroom for interpreting educators. The workshop will demonstrate the uses of e-mail, listservs and bulletin boards as sources of valuable information. The workshop will be taught by Chris Monikowski, of the National Technical Institute for the Deaf and Elizabeth Winston, research director at the Educational Linguistics Research Center. March 27, July 15, October 7 $150.

DEAFNESS AND HEARING LOSS: AN INTRODUCTION

Deafness or significant hearing loss mean different things to different people. This can be confusing for a supervisor or administrator. This workshop is for those who have interaction with students, clients or employees who are deaf or hard of hearing. The course will assist them in knowing how to understand and to meet the unique needs of individuals with hearing impairments. Useful for professionals in education and business as

well as for parents or other advocates for people with hearing impairments. Taught by Jimmie Joan Wilson, a faculty member and support specialist in the National Technical Institute for the Deaf of the Rochester Institute of Technology. June 10, September 30, November 11 $75. For further information on any online courses, contact Carmela Cunningham at: carmelac@aol.com or call: 714-830-0301 or fax: 714-830-2159.

CSUN MINI CONFERENCE FOCUSES ON SCIENCE, ENGINEERING AND MATH ISSUES

As part of the California State University Northridge 10th Annual Conference on Technology and Persons with Disabilities, EASI consultants will conduct a one-day mini-conference on science, engineering and mathematics. The five presentations will be held on Thursday, March 21 and will be GIVEN by EASI's NSF project consultants. Presentations include: "Technology for Students with Learning Disabilities," by Carolyn Gardner, Linn-Benton Community College and Dr. Noell Gregg, University of Georgia. "How to Convert Text and Symbolic Information Into Braille," by Terri Hedgpeth, Arizona State University. "Audio System for Technical Readings: Interactive Computer Access to Science, Engineering and Math Documents," by T.V. Raman, Adobe Systems. "Teaching Science, Engineering and Mathematics to Deaf Students: The Role of Technology in Instruction and Teacher Preparation," Harry Lang, National Technical Institute for the Deaf. "Tactile Figures for Blind Students of Science, Engineering and Math," by John Gardner, Oregon State University and Dave Skrivanke, Repro Tronics. "Teaching Lab Courses to Students with Disabilities," by Sheryl Burgstahler, University of Washington and David Lunney, East Carolina University.

EASI ONLINE: INFORMATION AND ADVICE

A high school science teacher is trying to figure out what kind of screen reader will do the best job for his students with learning disabilities, and an analyst from an investment company needs information on voice recognition programs. A librarian from a college in the Midwest needs help determining what kind of hardware and software will most effectively help people with disabilities use the library. A new graduate, who happens to be blind, has just been offered his first job. His prospective employer is willing to make all the necessary accommodations, but the job's in a different city, and he's not sure whether to take it. He's looking for advice from others who have been in the same position. They all find what they're looking for on one of EASI's three electronic lists that focuses on providing information, support and a forum for people with disabilities. The lists were established to discuss adaptive computing technology and information access, and they do. But in the process, the people on the lists have established relationships with one another and no one is too shy to ask -- or offer -- personal experience and advice. The EASI lists include more than 1,800 subscribers from colleges, universities, businesses and non-profit organizations around the world. Most times an inquiry will get about four to six answers from people who are somehow involved with adaptive computing

technology. But sometimes a question will provoke a debate that continues on for several days and involves people from all over the United States, Canada, and several other countries. The three lists that EASI administers are EASI, AXSLIB-L and ABLE-JOB. The EASI list focuses on general discussion about adaptive equipment, access issues and other disability and computer topics. AXSLIB-L focuses on library access issues, and ABLE-JOB discusses work transitions and job accommodations. To join the EASI list, send a message to: **listserv@sjuvm.stjohns.edu** Leave the subject line blank. In the body of the text type: sub easi "first name last name" (put your name in quotes as shown.). Send questions to **nmcb@nmsu.edu** To join the library discussion list, send to the same address, the message: sub axslib-l followed by your first and last name in quotes as shown above. To join the job accommodations list, send to the same address, the message: sub able-job followed by your first and last name as shown above. EASI information and publications are also available on EASI's home page on the World Wide Web. URL: **http://www.rit.edu/~easi**

EASI ON THE WEB

EASI established a home page on the World Wide Web in spring of last year. One of the prominent features of the page is the science, engineering and mathematics section, where you can find information on new technologies and programs. All of EASI's publications and information on projects and activities can be found on the Web Site, along with information about related projects and institutions, new disability-related legislation, and social issues. The page is updated frequently. EASI's home page URL is: **http://www.rit.edu/~easi**

COMPUTER ACCESS AND SUPPORT ARE COVERED IN NEW ORYX BOOK

"Adaptive Computing Technology and Information Access," a book based on the EASI Seminar Series will be released by Oryx Press in August. The book was co-written by Carmela Cunningham and Dr. Norman Coombs. The focus of the book is setting up adaptive computing support services for people with disabilities, and although the book is aimed at colleges and universities, most of the strategies carry over into the workplace. The 200-page book has stories of individuals who use adaptive technology, practical information on how to set up and enhance labs, strategies on how to administer, plan and fund adaptive tech programs, and an extensive resource section. There are also comprehensive chapters on science, engineering and math access, K-12 and workplace transitions, and library and electronic information access issues.

LIBRARY ACCESS FOCUS OF SPECIAL PUBLICATIONS

The Library Hi Tech Journal will publish a special section called "Libraries and the Empowerment of Persons with Disabilities." The issue is a compilation of articles that are also found in the current issue of EASI's electronic journal, "Information Technology & Disabilities." The journal tackles such issues as making libraries physically and informationally accessible. The Hi Tech Journal will be available in April. EASI's version

is available now. Get the table of contents at URL: **http://www.rit.ed./~easi/easijrnl/itdv02n4contents.html**

EASI STREET TO SCIENCE, ENGINEERING AND MATH

As part of its National Science Foundation project, EASI is creating a trilogy of videotapes and accompanying manuals that focus on access to science, engineering and mathematics. The "EASI Street to Science, Engineering and Math" series focuses on the barriers that people with disabilities encounter when they work and study in the technical fields and how to make the educational and business environment accessible to people with various kinds of disabilities. The first tape, which is already available, focuses on general adaptive computing technology as the foundation for providing access in any field. The second videotape, which will be available in late March, focuses on math and graphics. The manual that accompanies this videotape will have sections on AsTeR, Dotsplus, and Braille and the Nemeth Code. The third videotape, which will be available in July 1996 is a guide to accessible laboratory equipment. "The EASI Guide to Adaptive Computing Technology," is the first of the series. This videotape is a general overview that focuses on general adapted computing tools, and how those tools open doors for people with disabilities. The 22-minute video provides a brief overview of the types of technological solutions that provide access to computers and -- through computers -- to every field of endeavor. The handbook that accompanies the video gives descriptions of commonly used adaptive hardware and software, a list of resources for more information about adaptive computing, vendor names and phone numbers, contacts for state Tech Act offices and suggestions for further reading about how to provide access to science, engineering and mathematics. The handbook also includes an overview of the barriers that exist for people who are trying to study and work in the science, engineering and mathematics fields, and a brief section on sensitivity issues. "The EASI Guide to Adaptive Computing" focuses on discussions of adapted computing equipment such as: one-handed keyboards, on-screen keyboard emulators, single switch input devices, tongue-touch keypads, optical scanners, speech synthesizers, voice recognition and other types of adaptive equipment. Cost of the videotape is $30. For information on how to obtain a copy of the videotape and handbook, contact Carmela Cunningham at: carmelac@aol.com or fax: 714-830-2159. Or write: EASI, Post Office Box 1095, El Toro, California 92630.

BOOK REVIEW
by Tom McNulty
Reprinted from Library Hi-Tech Journal News
Adapting PCS for Disabilities by Joseph J. Lazzaro

Over the past few years, there has been no shortage of new books on technology and disability. As the world of libraries becomes increasingly dependent upon electronic means of organizing, retrieving and delivering information, access to the personal computer means independence for students,

professionals, and other library users; this independent access is even more important to the user with a disability. Many librarians are aware of the technologies available to disabled individuals, but the world of access technology has grown so quickly that few of us know how or where to begin to integrate the technology into our libraries. Adapting PCS for Disabilities, by Joseph J. Lazzaro, provides an excellent overview of personal computers and the myriad hardware and software products available for users with disabilities. Adapting PCS opens with a description of the basic components of the microcomputer. Even the computer user with some experience might benefit from the clear, easy-to-understand definitions of expansion slots and circuit cards, parallel and serial ports, the motherboard, etc. This concise but thorough basic information is followed by a series of chapters organized not by disability group, but rather by the nature of the obstacle posed by the computer. Computers are basically input-output devices. Some disabilities, like low vision and blindness, pose output problems. Unable to see the traditional monitor -- the output device used by the vast majority of individuals -- these computer users need an audible or tactual solution. People who can't use the computer's standard input device -- the keyboard -- need work-arounds such as voice input in order to become independent computer users. These are just a few of the access solutions described in the book's main chapters -- "Adapting the Keyboard" and "Adapting the Video Monitor." In addition to the PC adaptive solutions indicated by the title, separate sections on adaptive communication (for the individual with speech and/or hearing disabilities) as well as computer workstation ergonomics make this an indispensable work for the complete novice. The exhaustive description and contact information for major producers of access technologies, as well as the CD-ROM full of software, further extends the usefulness of this primer to the more experienced teachers, librarians and rehabilitation professionals in this fast-changing field.

EASI RECEPTION AT CSUN

If you're attending the CSUN Tenth Annual "Technology and Persons with Disabilities" conference in Los Angeles this week, stop by and meet some of the people you've only talked to via e-mail. EASI will be hosting its third annual reception at the CSUN conference at the Marriott Hotel on March 20 from 7 to 9 p.m. The reception will be held in the Chicago Room. Dr. Norm Coombs, chair of EASI, Carmela Cunningham, EASI editor, Dick Banks, EASI Lists manager, and other EASI members will be on hand to welcome you.

SUPPORTERS HELP EASI ACCOMPLISH GOALS

If EASI has helped you in the past, now is your chance to help EASI. You can make a tax-deductible contribution to the organization to help support projects such as offering free publications, electronic discussion lists, Web page maintenance and other EASI activities. EASI has received support from several individuals and organizations in the past and gratefully acknowledges that generous support. Past and present sponsors and contributors include:

the National Science Foundation, the American Association for Higher Education, EDUCOM, Apple Computers, Inc., the Rochester Institute of Technology, the University of California, Los Angeles, the University of California, Irvine, the University of Washington, St. Johns University, the Bell-Atlantic Charitable Foundation, the NEC Foundation of America and Arkenstone, Inc. If you are interested in making a tax-deductible contribution to EASI, please contact Carmela Cunningham at carmelac@aol.com or 714-830-0301. You may also send donations for EASI to: American Association for Higher Education c/o Kristin May. One Dupont Circle, Suite 360, Washington, D.C. 20036-1110. If you would like to charge your donation to your VISA or MasterCard, please send a note including your: name, address, phone number, type of card, account number and expiration date amount of contribution and your signature.

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DEPARTMENT: ONLINE INFORMATION AND NETWORKING

Steve Noble, Recording for the Blind & Dyslexic **slnobl01@ulkyvm.louisville.edu**

RFB&D NEWS

Recording for the Blind and Dyslexic's online catalog was moved in December to a new Internet host site, making the old r2d2 address inoperative. The new address is wais.jvnc.net 4445. Be sure to include the port number 4445 in your telnet command. You can also gopher to wais.jvnc.net and go through the Publishers Online menu, or use the EASI gopher via sjuvm.stjohns.edu.

RFB&D may be reached on the Internet by sending e-mail to our information center at **INFO@RFBD.ORG**

DISCUSSION LISTS
Blind-Jobs-L

Blind-Jobs-L is a new mailing list for anyone interested in the discussion of jobs and employment related issues for persons who are blind. To subscribe, send email to:

majordomo@winnie.freenet.mb.ca

leave the subject line blank, and send the following message:
SUBSCRIBE BLIND-JOBS-L

ACCESS

The Media Access mailing list is devoted to the discussion of alternate access to all forms of media, and includes such topics as film and video captioning, audio description, and computer based information.

To subscribe, send email to: **listmanager@hookup.net**
leave the subject line blank, and send the following message:
SUBSCRIBE ACCESS

WORLD WIDE WEB
NFB

The National Federation for the Blind is now on the Internet. Services available online include access to NFB's monthly publication, _The Braille Monitor_, and two quarterly publications, _Future Reflections_ and _Voice of the Diabetic_. Numerous other NFB publications and a variety of technological information also can be found at the NFB site. The web address is:

http://www.nfb.org If you do not have Web access, you may also reach the NFB via FTP at the address nfb.org.

Focus on News

There are currently a number of excellent news information resources available on the Web. Many of these make extensive use of graphical information, including photos and maps, but nearly all of them contain a major proportion of simple text. Here are a few sites of interest:

CNN at **http://www.cnn.com**

This is one of the widest ranging sites, but also has a lot of graphics. Contains world news, U.S. news, business, sports, entertainment, weather, and other headings;

The Electronic Telegraph at **http://www.telegraph.co.uk**

This London-based news service includes much the same types of stories as CNN, but without the usual U.S. slant on the news. Of particular interests to some may be the European cricket, rugby, and soccer scores. This service requires first-time users to register online; Reuters News Media at **http://www.yahoo.com/headlines/current/news**

The Reuters service is an excellent Web site for news and makes only minimal use of graphics. Story headings are laid out in such a way that fast retrieval of breaking news stories is fairly simple; Yahoo News Directory at **http://www.yahoo.com/news/**

This site is the ultimate news source. It provides literally hundreds of links to international, national and local news sources across the globe. At last glance, this site listed 252 newspapers, 281 newswires, 21 sports publications, 56 K-12 newsletters, and 187 university papers-- just to mention a few subdivisions.

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"News Reviews to Peruse"

Number 27 May 15, 1996

Items regarding the Americans with Disabilities Act which may be of interest to you. Please share this information with colleagues, supervisors and subordinates. The views and opinion expressed herein are solely those of the editor, except where noted, and do not represent the views of the Office of Chief Counsel or the Department of Environmental Protection. Contributions, questions or comments, including requests for accommodations needed to receive or apprehend this publication, should be addressed to Patrick H. Bair (Ed.).

Hello! Today (Tuesday) is a beautiful day, and presages more to come. Spring is here and Summer can't be far behind - the birds and buds are on the trees and the demonstrators are on the Capitol plaza. Life is good; for you, too, I hope!

- NAADAC & DEP - TOGETHER AGAIN - Thanks to the efforts of DEP ADA Coordinator Audrey Kembel, the Department is once again an active member of the National Association of ADA Coordinators. Membership in NAADAC gives DEP access to the association's conferences, libraries, membership and other services. The NAADAC Fall Conference is currently in the works for October 2-4 in Pittsburgh, co-sponsored by Penn State University and the State Senate.

Speaking of NAADAC, an article in the association's April newsletter reported on EEOC Commissioner Paul Miller's unscheduled address to the NAADAC conference in San Diego. Miller highlighted the efforts of the EEOC to

extend its outreach on ADA issues and indicated that the EEOC wanted to work closely with the NAADAC on those issues. A formal meeting in Washington with the NAADAC Executive Director and others is being planned.

Finally, David Fram, an attorney and former advisor with the EEOC's Policy Division has been named to the NAADAC's Board of Directors. Mr. Fram, one of the authors of the Title I ADA Technical Assistance Manual and a fine author and public speaker, is currently Director of Training for the National Employment Law Institute.

- ADA NOT A "SAFE HARBOR" FOR DRUG USE - A Court in Louisiana has stated that, while the ADA provides a "safe harbor" for persons in rehabilitation from drug dependency, it does not protect persons who are enrolled in programs but still using illegal drugs. The case involved a State employee fired when he was found with an illegal drug while driving a State vehicle. The employee claimed a drug-addiction disability and claimed he was enrolled in a program. The Court rejected the argument, holding the ADA provision applies only to long-term recovery programs and requires that the employee be stable and drug-free for a considerable period of time. (Baustian v. State of Louisiana, 4 AD Cases 1692, DC ELa No. 95-1072, 10/4/95)

Meanwhile, the U.S. Supreme Court has let stand a decision making it easier for employers in the Ninth Circuit to terminate employees who are guilty of drug-related misconduct. After an investigation, the employer fired 17 employees for their involvement in a sales and distribution network, mostly of marijuana. The employees sued alleging that they had been fired for their drug addiction disability. The Ninth Circuit Court of Appeals held that the employees had failed to prove that the employer's reasons for firing them were a pretext for discrimination. (Collings v. Longview Fibre Co., US SupCt, No. 95-764, 1/8/96)

These two decisions are generally consistent with previous court decisions on the question of how long a drug user must be "drug-free" in order to be covered by the ADA.

- YMCA LIFEGUARD POLICY CHALLENGED - A $20 million lawsuit was brought by 32-year-old David Schultz, who has been deaf since birth, against the YMCA when the association revoked his lifeguard certification because of his deafness. The YMCA contends its 1994 policy requiring lifeguard candidates to be able to hear is necessary to ensure the safety of its pools and that the ability to "hear noises and distress signals" is an essential function of a lifeguard. Schultz, who was also certified by the American Red Cross and the Professional Association of Diving Instructors, counters by saying that his deafness has, in fact, made him "more attentive." The suit, brought under various disability-related statutes including Titles II and III of the ADA, Section 504 of the Rehabilitation Act and a Massachusetts statute, seeks an injunction against the policy and the award of monetary damages.

- ADA PRICE TAG - According to a recent Government Accounting Office

survey, more money will be spent by public elementary and secondary schools to comply with the ADA and Section 504 of the Rehabilitation Act than for any other federal mandate. Approximately $5.2 billion out of a total $11 billion spent in the next three years will be spent to comply with the disability laws. Respondents to the survey indicate that over the past three years, their schools have spent an average of $40,000 on accessibility (though figures vary widely). In a previous report, the GAO estimated that as much as 35 percent of barrier removal efforts were unnecessary, and were initiated due primarily to misunderstanding of the law's requirements.

- SWIFT REMEDIAL ACTION PAYS OFF - Werner Bus Lines avoided what could have been a sizable judgment against it by the swift action of its corporate president. The lawsuit ensued as a result of a Werner bus driver, backed up by a corporate vice president, denying a blind couple with guide dogs access to his bus. In response, Werner's president personally apologized to the couple by phone, letter and on a television newscast; issued a corrective memo to all drivers, spoke to drivers at their next scheduled meeting and added a section on accommodation to the drivers' handbook; and invited the Montgomery County Association for the Blind to address the drivers. In dismissing the couple's suit, the U.S. District Court for the Eastern District of Pennsylvania determined that no risk of future harm existed in light of the president's actions and given the infrequency with which the couple utilized the service. (O'Brien v. Werner Bus Lines, 1996 U.S. Dist. LEXIS 2119, E.D.Pa.)

While we're on the subject of buses, President Clinton extended the time for operators of over-the-road buses to comply with the ADA's accessibility requirements by signing the National Highway System Designation Act of 1995 in November. Based partly on the Transportation Department's failure to issue final regulations, the deadline for compliance was extended to 1998 for large and 2000 for small operators.

- INTERPRETERS OR NOT? - On many college and university campuses this year, "real-time" captioning is taking the place of sign language interpreters at lectures. In the former, a stenographer sits next to a deaf or hearing impaired student. The stenographer records the lecturer using stenography equipment and the text appears on a laptop computer screen the student can read. A student with a speech impairment can type questions into the laptop for the stenographer to ask. This system has the benefit of creating a computer "document" of everything said in class and is superior to interpreting in cases of higher-level scientific courses involving complex concepts. In addition, it appears to be more economical than hiring interpreters, especially in longer classes where more than one interpreter is required. Science marches on!

- MEDIA ACCESSIBILITY - The Telecommunications Reform Act of 1996, signed into law February 8, requires television broadcasters to make their programming accessible to people with vision and hearing impairments through use of closed captioning or visual description. The law requires the FCC to establish regulations and implementation schedules within 18 months to ensure

video programming is accessible.

- **OSCAR TREND?** - Do you realize that in the past eight years, the Academy Award for lead male actor has been awarded six times for a portrayal of a person with a disability? It's true - Al Pacino for a blind veteran, Daniel Day-Lewis as a quadriplegic painter, Tom Hanks for an attorney with AIDS one year and a person with mental retardation the next, Dustin Hoffman as a person with autism and Nicholas Cage's portrayal of an alcoholic.

- **SENIORITY NOT RESERVED** - An employer's duty to provide reasonable accommodation for a truck driver did not include a responsibility to reinstate the driver with seniority. The trucker - who had multiple sclerosis - was reassigned to a non- union janitorial position as an accommodation. When he was cleared four years later to return to driving, he was hired as a new employee with no seniority. When he was laid off in a reduction in force two years later, he sued under the ADA, arguing that because of his disability he had lost 20 years seniority. The U.S. Court of Appeals for the Seventh Circuit affirmed the lower court's dismissal based on the trucker's failure to file his complaint within the applicable statute of limitations. In dicta, the Court added "[i]f you are removed from a union position ... you lose the seniority accrued ... seniority does not vest." (Kennedy v. Chemical Waste Management Inc., CA7, No. 95-2987, 95-3221, 3/19/96)

- **MOHAMED V. MARRIOTT UPDATE** - A federal District Court in New York has ordered the sign language interpreting abilities of a Marriott human resources manager evaluated to determine whether her interpreting in a pre-termination conference with an employee was, in fact, a reasonable accommodation. In this case first reported in the March edition, the employee, who has a hearing impairment, was fired for stealing after questioning by the employer and the HR manager. The employee alleges in his complaint that the HR manager made several significant mistakes in interpreting, including attributing a statement to him that he had stolen the money to pay his credit card debt. The Court has also denied Marriott's motion to dismiss the claim. (Mohamed v. Marriott International Inc., DC SNY, No. 94 Civ. 2336, 3/7/96)

- **ARBITRATION CLAUSE BARS CLAIM** - The Fourth Circuit Court of Appeals has affirmed the decision of a lower court that an employee's failure to invoke a contractual grievance-arbitration mechanism served as a bar to her ADA lawsuit. [The preclusive effect of these clauses is presently one of the hottest issues in labor and employment law.] While on leave for a work-related injury, the employee's job was eliminated. She sued, alleging among other things that the failure to offer her a light-duty position violated the ADA. Although the union contract stated that all disputes "may" be referred to arbitration, the Court found that such language is merely intended to give an employee "the choice between arbitration and abandonment of his claim." (Austin v. Owens-Brockway Glass Container Inc., 5 AD Cases 488, CA4, 3/12/96)

Well, my attempt at "humor" a few issues back went over like the proverbial lead balloon; not to be deterred, here's another attempt to put a smile on your face. Ciao! ("Chow?") =8->

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There's a guy with a Doberman pinscher and a guy with a Chihuahua. The guy with the Doberman pinscher says to the guy with a Chihuahua, "Let's go over to that restaurant and get something to eat."

The guy with the Chihuahua says, "We can't go in there. We've got dogs with us."

The guy with the Doberman pinscher says, "Just follow my lead."

They walk over to the restaurant, the guy with the Doberman pinscher puts on a pair of dark glasses, and he starts to walk in.

A guy at the door says, "Sorry, mac, no pets allowed."

The guy with the Doberman pinscher says, "You don't understand. This is my seeing-eye dog."

The guy at the door says, "A Doberman pinscher?"

He says, "Yes, they're using them now, they're very good."

The guy at the door says, "Come on in."

The guy with the Chihuahua figures, "What the heck," so he puts on a pair of dark glasses and starts to walk in.

The guy at the door says, "Sorry, pal, no pets allowed."

The guy with the Chihuahua says, "You don't understand. This is my seeing-eye dog."

The guy at the door says, "A Chihuahua?"

The guy with the Chihuahua says, "You mean they gave me a Chihuahua?"

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"News Reviews to Peruse"

Number 28 June 15, 1996

Items regarding the Americans with Disabilities Act which may be of interest to you. Please share this information with colleagues, supervisors and subordinates. The views and opinions expressed herein are solely those of the editor, except where noted, and do not represent the views of the Office of Chief Counsel or the Department of Environmental Protection. Comments, contributions or questions, including requests for accommodations needed to receive or apprehend this publication, should be addressed to Patrick H. Bair (Ed.).

- COMING SOON TO A THEATER NEAR YOU - Accessibility! The United Artists Theater Circuit, as part of a settlement with the Department of Justice, has agreed to make its more than 400 theaters (and 2300 screens) accessible. Under the settlement, UA has agreed to provide sufficient integrated spaces so that wheelchair-using patrons can sit with family and friends; install ramps; install aisle seats with folding or removable armrests; and modify restrooms, concession stands, public telephones and drinking fountains. U.S. Attorney General for Civil Rights Deval Patrick, observing that UA had set out to do "not just the lawful thing but the right thing," called the settlement "a model for the entire industry." Patrick added that Justice is currently investigating other chains and individual theaters for compliance with the ADA.

- CUTBACKS AT JAN - As a result of federal budget cutbacks, the Job Accommodation Network has been forced to temporarily shutdown its electronic bulletin board and limit the number of copies of publications it provides to callers. The JAN, funded by the President's Committee on Employment of

People with Disabilities and located on the campus of West Virginia University, provides free advice via a toll free telephone number on how to accommodate persons with disabilities. JAN's toll free number is 800-526-7234. It's web site can normally be found at **http://janweb.icdi.wvu.edu.** (See attachment for a JAN "true story.")

- NEW INTERNET SITE - The Thompson Publishing Group, publisher of the ADA Compliance Guide, has announced its new web site at **www.thompson.com**.

- CHRYSLER POLICY UNLAWFUL - A Chrysler Company policy that excluded any applicant with high blood sugar from hiring has been ruled unlawful by the U.S. District Court for Eastern Michigan. The blanket policy, challenged in a lawsuit by an electrician/applicant who has diabetes, was found to be over broad. The plant physician did not conduct an "individualized assessment" of the applicant's ability to safely perform essential functions. (EEOC v. Chrysler, C.A. No. 94-CV-74979-DT, E.D. Mich. 1996)

- TEXT TELEPHONE NOT AN UNDUE HARDSHIP - A Maryland Court has denied the claim by the Better Business Bureau of Greater Maryland that providing a text telephone (TT) for its hearing-impaired membership coordinator was an undue hardship under the ADA. The Bureau had claimed that the TT would slow operations and that members were unfamiliar with the use of a relay system. Calling the last argument "offensive," the court found no evidence that the TT or relay system is awkward or that the Bureau's membership is unfamiliar with relay systems.

- SMOKE-FREE ENVIRONMENT NOT PER SE UNREASONABLE - A federal court in New York has refused to dismiss the claim of a correctional officer who asked for a no-smoke work environment as a reasonable accommodation for his respiratory problems. The correctional facility had moved to dismiss the officer's claim on the basis that he did not have a disability. Citing Staron v. McDonald's Corp. (reported in "ADA News" No. 16, June 1995), the court denied the motion, stating "it is plain that Congress did not intend to isolate the effects of smoking from the protections of the ADA." (Muller v. Costello, U.S. Dist., N.D.N.Y. 196)

In another prison-related case, the 10th U.S. Circuit Court of Appeals affirmed the dismissal of a lawsuit brought under Title I of the ADA by a prison inmate. The Court held that the ADA does not apply to prisoners' employment.

- NOTICE OF DISABILITY - The 11th U.S. Circuit Court of Appeals has affirmed a decision that dismissed a lawsuit brought by an job applicant denied assistance to take a written pre-employment test because the applicant failed to give adequate notice of her disability to the prospective employer. The applicant, who has a learning disability, informed the prospective employer that she was illiterate and had taken special education courses, but did not say she had a learning disability. According to the Court's opinion,

> While illiteracy is a serious problem, it does not always follow that someone who is illiterate is necessarily suffering (sic) from a physical or mental impairment. Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations under the ADA.

(Moriskey v. Broward County, U.S. App., 11th Cir. 1996)

- NCAA UPDATE - The National Collegiate Athletic Association has suspended its requirement that high school student athletes get their credentials approved by the NCAA clearinghouse to have early visits to colleges. The suspension is seen as a reaction to the complaint lodged with the Justice Department, and a subsequent letter from Justice to the NCAA, regarding the effect the NCAA's core curriculum requirements have on student athletes with learning disabilities. (See "ADA News," Nos. 24 & 25, Feb./Mar. 1996)

- ACCESSIBILITY OF PUBLIC SERVICES - According to an article in the June "ADA Compliance Guide Monthly Bulletin," "public services must be accessible not only in facilities owned by a local or state government but also at private businesses that help make public services available, such as stores that sell mass transit tokens." (Your editor, being unaware of any, contacted the publisher for support for this statement. While the authority is not stated clearly in, e.g. a law, regulation or court opinion, it is likely given several secondary authorities that this statement is accurate.) This statement was used to illustrate a recent settlement by SEPTA of a suit brought against it by two individuals and Disabled in Action of Pennsylvania. By the settlement, SEPTA agreed to ensure all new sales outlets are accessible, provide notice to 44 stores that sell SEPTA tokens that their premises are inaccessible, and require the stores to install ramps or their involvement with SEPTA will be terminated.

- INTERPRETER FOR CPR COURSE - The San Francisco Bay Area Red Cross has agreed to provide a qualified interpreter for a cardiopulmonary resuscitation course, in settlement of a Justice Department claim brought on behalf of a deaf individual.

- CORRECTION - It was reported in last month's newsletter that the NAADAC Conference planned for October in Pittsburgh is co-sponsored by Penn State University and the State Senate. This information was extracted from the NAADAC Bulletin. It has now been brought to the attention of your editor that the Pennsylvania Senate is NOT sponsoring of this event.

<u>ATTACHMENT</u> - FROM THE JAN CHRONICLES

Sometimes, common sense is all that is needed to come up with a suitable accommodation. The following is a true story related by Deborah Hendricks, JAN Assistant Manager:

A consultant received a call form a business man who had just hired a telephone sales representative. He said, "This man has a total hearing loss in his right ear and I need to know how I can accommodate him to use the phone." The consultant was quiet for a second, then said, "Well, can he hear all right out of his left ear?" The businessman said, "Oh yeah, he's got no problem hearing out of his left ear."

The consultant asked, "Well, don't you think he'll know to use the phone on his left ear?" There was dead silence on the other end of the line, then the man said, "You know, I'm sitting here with the telephone up to my right ear. All I could think of was, how in the world is this guy going to be able to do this? It never once dawned on me you just turn it around the other way."

It's okay to laugh, but which one of us hasn't been in that businessman's position at some time?

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"News Reviews to Peruse"

Number 29   July 15, 1996

Items regarding the Americans with Disabilities Act which may be of interest to you. Please share this information with colleagues, supervisors and subordinates. The views and opinion expressed herein are solely those of the editor, except where noted, and do not represent the views of the Office of Chief Counsel or the Department of Environmental Protection. Contributions, questions or comments, including requests for accommodations needed to receive or apprehend this publication, should be addressed to Patrick H. Bair (Ed.).

- TERMINATING BENEFITS NOT DISCRIMINATORY - A federal district court in Kansas has held that terminating the benefits of an employee who was accommodated by allowing her to work part time is not a violation of the ADA. The employee, who has chronic fatigue syndrome, was permitted a reduced schedule as a reasonable accommodation. The employer's benefits policy provides that employees who work less than 30 hours per week are not entitled to health benefits. The court stated that nothing indicated that the employee was being discriminated against on the basis of her disability, but that she was being treated like all other employees. (Tenbrink v. Federal Home Loan Bank, DCKan., No. 94-4236-SAC, 2/6/96)

- SUPREME COURT REPORT - The U.S. Supreme Court heard argument in April on two important cases involving disability law. In Lane v. Pena (US SupCt, No. 95-365, 4/15/96), the Court is asked to decide whether a student dismissed from the Merchant Marine Academy because of his diabetes can collect monetary damages from the federal government. In the other case, the

Court will address the question whether an accommodation under the ADA must be made even where it conflicts with the provisions of a collective bargaining agreement. This case involves an employee with epilepsy who was given a day shift job where he could work at ground level as an accommodation. He was later "bumped" from that position by another employee exercising the seniority provision of the collective bargaining agreement. The EEOC has entered the case on the side of the employee. (Eckles v. Consolidated Rail, CA 7, No. 95-2856, 4/5/96)(reported in "ADA News" No. 26, 4/15/96)

- **RISK OF RELAPSE EVALUATED** - Two federal courts recently examined questions regarding an employer's ability under disabilities laws to consider past substance abuse as a job-related criterion. In New York, the Second Circuit U.S. Court of Appeals ruled that a transit worker was not protected by the Rehabilitation Act because his past record of substance abuse - which included a relapse after previous treatment - and the opinion of two psychiatrists that the employee had a significant chance, "indeed a likelihood," of relapse, gave his employer reasonable grounds to doubt his ability to perform the job. The employee had been terminated after a succession of progressive disciplinary measures for chronic absenteeism, which he admitted was a result of his addiction. In an earlier review of this case, the Second Circuit stated that "conduct which is associated with or which is a manifestation of a handicap is quite relevant, as distinct from the handicap itself, in assessing whether a worker is 'otherwise qualified.'" (Teahan v. Metro-North Commuter Railroad Co., CA 2, No. 95- 7123, 3/26/96)

In the second case, the U.S. District Court for the Eastern District of Louisiana ruled that a hospital could require a neurosurgeon who is a recovering alcoholic to undergo a medical evaluation of his risk of relapse prior to the reinstatement of his staff privileges. The Court found that the hospital had not acted "unreasonably" in requiring the evaluation, as "a doctor working while severely depressed or impaired by alcohol poses a 'direct threat' of 'actual risk' of harm to others" (citing to ADA regulations construing "direct threat" under Title I of the ADA). (Judice v. Hospital Service District No. 1 of the Parish of Terrebonne, DC ELa, No. 95-986, 3/13/96)

- **AFFIRMATIVE ACTION RULES NOT CHANGED** - The Labor Department has abandoned planned changes to requirements for affirmative action plans by federal contractors. The changes would have reduced the number of contractors required under the Rehabilitation Act to have formal affirmative action plans by raising the threshold for the requirement.

- **PRIOR INCONSISTENT STATEMENTS** - Several courts have ruled on or are considering the question of the effect of prior statements made by persons seeking relief under the ADA. In Texas, an employee who claimed to have a mental disability due in part to harassment by his supervisor was found to be a "qualified individual with a disability" based, in part, on his application for long-term disability benefits. By his "own admission," according to the court, he was "totally disabled." (Hatfield v. Quantum Chemical Corp., 5 AD

Cases 765, STex., 4/2/96) A federal district court in Colorado similarly found it "logically impossible" for an employee to be sufficiently disabled to qualify for long-term disability benefits and yet be capable of performing the essential functions of her job. (Cline v. Western Horseman, 5 AD Cases 714, DC Colo., 4/19/96)

Closer to home, the Third Circuit U.S. Court of Appeals (which includes Pennsylvania) will review the decision of a federal district court which denied recovery under the ADA to a fired employee who had stated on Social Security and disability benefits applications that he was "totally and permanently disabled." (The decision of the district court was reported in "ADA News" No. 21, 11/15/95.) The EEOC, which has filed a friend of the court brief, argues that the inquiry under the ADA differs in "fundamental ways" from the inquiry applicable to the award of disability benefits. (McNemar v. Disney Stores, 4 AD Cases 897, DC EPa., 1995)(For another similar case, see "ADA News" No. 25, 3/15/96.)

- CLAIMANT MUST COOPERATE WITH EMPLOYER - A federal district court in Texas has dismissed the ADA claim of an employee who was fired because her disability could not be accommodated by her employer. The employee - whose diagnosed sarcoidosis made her unable to work around chemicals - was fired because the employer had no jobs which did not involve exposure to chemicals or chemical fumes. The court noted that the employee never requested a specific accommodation, refused to authorize release of information about her condition by her physician to the employer, never identified the alternative job she wanted, and never identified the chemicals that her condition required her to avoid. The court observed further that, in any event, there was no reasonable accommodation that would have been effective. (It's just intuition, but I don't think we've heard the last about this case.) (McAlpin v. National Semiconductor Corp., DC NTex., No. 4:95-CV-480-A, 4/17/96)

- DOG QUARANTINE UNLAWFUL? - Hawaii's 120-day quarantine requirement for all dogs entering the state may violate the ADA, according to the U.S. Court of Appeals for the Ninth Circuit. The decision overturns the summary judgment granted the rabies-free state by the lower court. The appeals court found that, without reasonable modification to the quarantine, persons who depend on assistance animals are effectively deprived of the benefits of Hawaii's services and activities. (Crowder v. Kitagawa, CA 9, No. 94-15403, 4/30/96)

- IMPERMISSIBLE INTERVIEW QUESTIONS - Questions about an applicant's workers' compensation history are the most frequently asked illegal questions in job interviews, according to a recent study. Questions regarding workers' compensation may not be asked of an applicant OR of an applicant's references or past employers.

- ACCESSIBLE AIRPORTS - "Access Travel: Airports, A Guide to Accessibility of Terminals," a booklet published by the Airports Council International - North America, contains a graphical listing of domestic and foreign airports accessible to persons with disabilities. Copies are available at no charge from the Consumer Information Center, Pueblo, CO

81009. (The Internet web site for the CIC is at **http://www. pueblo.gsa.gov/**) "New Horizons for the Air Traveler with a Disability" - which contains general information about air travel for persons with disabilities is also available from the CIC. Northwest Airlines provides its own booklet on the subject entitled "Air Travel for People With Disabilities," available free on request to Northwest Airlines Distribution Center, 8711 Lyndale Ave. South, Minneapolis, MN 55420-0073.

- ACCESSIBLE OLYMPICS - Calling the Olympic Stadium in Atlanta, Georgia "the most accessible stadium in the world" and "a model for all future stadiums," U.S. Assistant Attorney General Deval Patrick announced an agreement May 15 between the Justice Department and the Atlanta Committee for the Olympic Games that ensures the stadium and four other venues will be completed in compliance with the ADA. The Atlanta Stadium will also play host to the Paralympics, set to begin August 15. After the games, the stadium will be converted for use by the Atlanta Braves.

- AFFIRMATIVE STEPS TO ACCOMMODATE REQUIRED - The U.S. District Court for the Eastern District of Pennsylvania has recently decided a case under Title II of the ADA involving access to a public facility. A person with severe arthritis and degenerative disc disease was summoned to appear before the Montgomery County court on a domestic matter. He informed court officials that his condition prevented him from waiting in court more than three hours and, based on a previous experience where he was forced to wait two to three hours, requested assurances that he would be accommodated. When none were forthcoming, he refused to appear in response to the summons and sued the county under the ADA for failing to make an accommodation for his disability. The federal court ruled that the county was required to provide "formal assurance about the particular accommodations which would be made for his disabilities or that he would not be required to remain beyond the limit of his endurance." (Adelman v. Dunmire, 1996 LEXIS 2810, EDPa. 1996)

- "TODAY'S WORD BUILDER" - A speaker at a recent National Employment Law Institute meeting in Washington, discussing the broad range of accommodations requested by employees under the ADA, referred to the accommodation requested by an employee who claimed her supervisor was causing her disability as a "bossectomy." Hmmmmm.

Thanks for reading. See you next month!

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"News Reviews to Peruse"

Number 30 August 15, 1996

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- THIRD CIRCUIT AFFIRMS MCNEMAR - The Court of Appeals for the Third Circuit, which includes Pennsylvania, has affirmed a lower court decision reported on in an earlier edition of this newsletter, McNemar v. The Disney Store. By its decision, the Third Circuit has established that an ADA claim can be barred by statements made by a claimant on federal and state benefit forms. Subsequent to his discharge, the claimant in this case stated on various benefit forms that he was "totally disabled." The employer, in defending against the claimant's ADA lawsuit, successfully argued that based on these statements, the individual was not a "qualified" person under the ADA. (A "qualified" person under the ADA is someone who can perform the essential functions of a job with or without a reasonable accommodation. A person who is totally disabled would not meet this definition and, thus, is not entitled to protection under the Act.) The EEOC filed a friend of the court brief arguing McNemar's claim should be allowed. More on this recently-announced decision in the next issue. (McNemar v. The Disney Store, CA3, NO. 95-1590, 7/31/96)

In two other decisions regarding similar inconsistent statements, courts have followed previous holdings in ruling against the employee. In a Ninth Circuit Court of Appeals decision, the court affirmed a lower court decision that found an employee "not qualified" based on her statements on benefits forms to the effect that she was "completely disabled for all work-related purposes." (Kennedy v. Applause, CA9, No. 95-55017, 7/31/96) Likewise, a federal district court in Oregon ruled that an employee who continues to collect benefits under her employer's long-term disability policy and from Social Security was not "qualified" under the Act. (Miller v. U.S. Bankcorp, 5 AD Cases 968, DC Ore, 1996) This employer defense is becoming increasingly troublesome for employees who bring claims under the ADA.

- ADA SLOWLY BUT SURELY MAKING A DIFFERENCE - According to a report of the President's Committee on Employment of People with Disabilities - issued on July 26, 1996, the Act's sixth anniversary - the Census Bureau has reported that the number of employed persons with severe disabilities increased from 2.91 million in 1991 to 3.71 million in 1994. This represents an increase of 800,000 persons.

- TITLE III INTERPRETATION - A federal district court in California has ruled against an insurance company that moved for dismissal of a claim against it alleging the company had canceled a man's policy even though he is in excellent health but because his wife is HIV-positive. The court rejected the company's claim that Title II is meant to apply only to "handicap-based discrimination that prevents physical, equal access" to places of public accommodation. (Kotev v. First Colony Life Insurance Co., DC CCalif, No. CV 96-2044 WJR, 5/30/96)

- SERVICE ANIMALS - "Commonly Asked Questions About Service Animals in Places of Business" is a new one-page question and answer sheet published by the U.S. Department of Justice. I can provide a limited number of copies to any of you who are interested, or you can call the Justice Department at 1-800-514-0301 (voice) or 1-800-514-0383 (TT). (BNA ADA Manual, 8/8/96)

- DETECTABLE WARNINGS - The deadline for installation of detectable warnings at curb ramps, reflecting pools and hazardous vehicle areas has been extended from July 26, 1996 to July 26, 1998. Installation of these detectable warnings has become the subject of some controversy, as they appear in some cases to actually interfere with persons with some disabilities.

- JUSTICE HOMEPAGE - The U.S. Department of Justice now has an ADA homepage at **http://www.usdoj.gov/crt/ADA/**.

- "NOT" THE PHRASE OF THE MONTH - After introducing you to the newly-coined word "bossectomy" last month, I know I am at risk of establishing a tradition. Nevertheless, since I consider myself something of a wordsmith, I cannot avoid sharing a good example when one comes across my

desk. Speaking at the recent National Employment Law Institute's ADA Briefing in Washington, D.C., Washington employment attorney Chris Bell said that for a Human Resource professional, coordinating efforts to comply with the ADA, the Family and Medical Leave Act (FMLA) and worker's compensation laws is like "entering the Bermuda Triangle of employment law." Of course, what's one HR professional, more or less?

- NO ACCOMMODATION REQUESTED - According to a recent decision by the U.S. Court of Appeal for the Fifth Circuit, an employee who informed his employer that he had been diagnosed with bipolar disorder but did not ask for any accommodation had no cause of action under the ADA from his subsequent discharge. The employee asked his supervisor to "find out some of the manifestations of this disease," but the court found that the ADA does not require an employer to assume that a person with a disability also has a limitation. The court found it "incumbent on the ADA plaintiff to assert not only a disability, but also any limitation resulting therefrom. ... [I]t is the employee's initial request for an accommodation which triggers the employer's obligation" to participate in the accommodation process. (Taylor v. Principal Financial Group, CA5, No. 95-50291, 6/26/96)

- SPECIAL PARKING ARRANGEMENT NOT NECESSARY - The Eleventh Circuit federal Court of Appeals has decided that a driver with a disability who attends meetings in a county government building, but who is not a county employee, has no right to use a parking lot reserved for county employees, even though that lot is closest to the building. According to the court, nothing in Title II of the ADA gives drivers with disabilities access to parking areas that would be unavailable to them if they did not have a disability. (Kornblau v. Dade County, CA11, 5 ADA Cases 963, 6/20/96)

- ACCESSIBILITY DATA MANAGEMENT SYSTEM - or ADMS, is the computer tool used by the federal government to manage its accessibility programs nationwide. ADMS unifies information from various agencies and provides a common database on accessibility of facilities, programs and activities under their management. Users can search ADMS by individual needs and requirements. More information about ADMS is available on the Internet at **http://www.pn.usbr.gov/adms/adms.html.**

- FEDS, TOO, ARE NOW EXPERIENCING THE ADA - Most of you have grown quite knowledgeable and skilled at noting and addressing ADA-related challenges in the past several years. For that reason, you will be happy to know that the U.S. Congress is now in the process of catching up to us. Under the Congressional Accountability Act, Title I of the ADA now applies to Congress; Titles II and II will also apply effective January 1, 1997.

- ACCESSIBLE LOTTERY OUTLETS - Pennsylvania lottery outlets must be accessible by mid-1998 or risk losing their licenses, according to an agreement worked out in settlement of a lawsuit brought against the Commonwealth by disability groups. The agreement effectively bars outlets from claiming that accessibility is not "readily achievable," as recently

occurred in a similar Texas case. (von Schmetterling v. Commonwealth of Pennsylvania, DCEPa, No. 95-CV-599, 6/3/96)

Enjoy the remainder of your summer - see you in September!

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"News Reviews to Peruse"

Number 31 September 15, 1996

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- ASSOCIATION DISCRIMINATION - In what is described as the first case in which an employer has been found liable under the ADA for discrimination based solely on association, a federal district court in Oklahoma has found a restaurant's firing of a waiter to be in violation of the Act. The Court found that the waiter was fired because of his association with a man who has AIDS, which is recognized as a disability under the ADA. (The ADA prohibits discrimination based on someone's "relationship or association" with a person with a disability. 42 U.S.C. § 12102(b)(4)) (Saladin v. Turner, C.A. No. 94-C-702-K, N.D.Okla.1996)

- DISABILITY OR "EPISODIC CONDITION?" - Bipolar disorder, many kinds of cancer, heart disease and other impairments may be inactive for long periods of time before emerging. Known as "episodic conditions," they are considered disabilities by the EEOC if, when active, they substantially limit a major life activity. The 5th U.S. Circuit Court of Appeals (TX/LA/MS) has recently

questioned the EEOC's position. In an appeal in a case brought by a woman with breast cancer against her employer, the Court affirmed the decision of the lower court to grant judgment for the employer, finding that the woman did not have a covered disability. Recognizing that her ability to work had been affected by her impairment, the Court nevertheless found no substantial limitation in the major life activity of working. (Ellison v. Software Spectrum Inc., CA5, 1996 U.S. App. LEXIS 12537)

- ARCHITECTS FOUND LIABLE - For the first time, a penalty has been assessed under the ADA against an architect who failed to design a building in compliance with the ADA Accessibility Guidelines. The $8,000 penalty has been assessed against Wylie Bradley and the firm of Wylie, Chambers and Frye in settlement of a claim in which Wylie was accused of designing a new two-story medical office building in Hershey, PA, with no elevator. The building's owner agreed to a $10,000 penalty. Title III of the ADA allows an exception to the elevator requirement for buildings under three stories, but the exception does not apply to the professional office of a health care provider.

- SENIORITY TRUMPS ADA - In a case introduced in the July edition of the "ADA News" (No. 29, 7/15/96), the U.S. Court of Appeals for the Seventh Circuit (IL/IN/WI) has ruled that Congress did not intend that reasonable accommodation under the ADA should infringe upon seniority rights granted under a collective bargaining agreement ("CBA"). A railroad worker with epilepsy tried to exercise a waiver provision in his CBA which would have allowed him to bump a more senior employee as an accommodation for his disability. The union blocked the attempt. Denying the employee's ADA claim, the Court saw the dispute not as between an employee and his employer and union, but as between the rights of the employee and those of his fellow employees. (It is unclear to what extent the decision is also based on the clearly stated intent of Congress that bumping of other employees is not required to effectuate a reasonable accommodation. Ed.) (Eckles v. Consolidated Rail Corp., CA7, No. 95-2856, 8/14/96)

- RESPIRATORY AILMENT AGGRAVATED BY SMOKE - An employee who claimed that her respiratory condition was aggravated by smoke in the workplace may have a claim under the ADA, according to the Seventh Circuit U.S. Court of Appeals. The federal appeals court reviewed a decision in which the lower court found that, because the employee could have secured another job in a smoke-free building, she was not substantially impaired in the major life activity of working. The appeals court found that a separate basis for ADA protection could be established if the employee could prove that she was substantially limited in the major life activity of breathing. The appeals court also stated that the lower court had gathered insufficient empirical data to justify its conclusion that the employee could find other comparable work. (Homeyer v. Stanley Tulchin Assoc., CA7, 1996, 5 AD Cases 1198)

- **EEOC BUDGET BOOST** - Citing the unacceptable backlog in EEOC cases, Del. Eleanor Holmes Norton (DC) and Rep. J.C. Watts (OK) succeeded in convincing the House to approve a $7 million increase FY 1997 over the agency's 1996 budget. In the last 15 years, EEOC staff has dwindled from 3390 to 2813 employees, despite a considerable increase in the workload of the agency due to the passage of the ADA and the 1991 Civil Rights Act.

Since July 1992, the EEOC has resolved 52,400 charges of disability-based discrimination and has recovered nearly $105 million in back pay and benefits for charging parties through administrative enforcement and $3 million through litigation. Between July 1992 and June 30, 1996, the agency received 68,203 charges of disability-based discrimination.

- **NO NOTICE OF DISABILITY, NO ADA CLAIM** - The U.S. Court of Appeals for the Sixth Circuit (KY/MI/OH/TN) sustained a lower court decision which held that a terminated employee had no claim under the ADA where she had not informed the employer of her disability prior to her discharge. The employee became agitated and ran crying from her employer's building on being given a final warning about her unsatisfactory performance. The employee, who was terminated for leaving work without proper permission, was diagnosed as having a major depressive episode. She sued her employer under the ADA, claiming the employer had refused to reasonably accommodate her. (Simpkins v. Specialty Envelope, CA6, No. 95-3370, 7/18/96)

- **MANDATORY ARBITRATION (CONTINUED)** - A continuing question in employment discrimination law is whether an employee who is covered by a contract (usually a collective bargaining agreement) which requires employees to submit employment-related disputes for arbitration may nevertheless sue the employer under discrimination laws such as Title VII and the ADA without the dispute first being arbitrated. Two federal district courts have recently gone in opposite directions on this question. A court in Indiana has held that the existence of a CBA with a grievance/arbitration clause does NOT preclude an employee from pursuing his independent statutory rights in a judicial forum. (Pryner v. Tractor Supply Co., DC SInd., No. IP 95-211-C-T/G, 5/28/96) On the other hand, a court in Florida decided that the ADA lawsuit of a registered nurse - who had signed an agreement with her employer that she would submit employment-related complaints to final and binding arbitration - was barred from pursuing her legal claim. The Florida Court stated that the doctrine announced by the 4th Circuit Court of Appeals (MD/VA/WV/NC/SC) in Austin v. Owens-Brockway Glass Container, (CA4, 5 AD Cases 488) - which held that a union-represented employee's Title VII and ADA claims were properly dismissed where she had not exhausted the CBA's arbitration procedures - provided convincing authority that ADA claims must be submitted to arbitration if the employee had a pre-existing agreement to arbitrate. (Connors v. Amisub (North Ridge Hospital), DC SFla., No. 96-6188-CIV, 5/30/96)

- **"ACCOMMODATING EMPLOYEES WITH MENTAL DISABILITIES"** - The attached

conference report appeared in the July 11, 1996 edition of BNA's "Fair Employment Practices" newsletter.

Thanks to Jeanette Hulse for her assistance in producing this edition. Look for the next edition of the "ADA News" October 15.

"Accommodating Mental Impairments Under the ADA"

In today's stressful workplaces and with the mental pressures on employees caused by their home and family lives, employers will find themselves facing more Americans With Disabilities Act claims as individuals with mental impairments seek jobs or workplace accommodations, said consultant Richard Pimentel of Milt Wright & Associates, Chatworth, Calif., and attorney Michael J. Lotito of Jackson, Lewis, Schnitzler & Krupman in San Francisco.

To avoid ADA lawsuits brought by employees claiming mental disabilities, employers must help their workers by reasonably accommodating such disabilities, Pimentel and Lotito urged at the Society of Human Resource Management's annual conference in Chicago June 25.

Mental Impairment under ADA

If employers continue to ignore their responsibilities to help their employees and fail to accommodate their mental impairments, they are going to get caught up in ADA cases, Lotito warned.

Although employers run the risk of a negligent-hiring lawsuit if they hire someone who later causes mayhem or kills someone in the course of employment, Lotito said that singling out a mentally impaired employee also can be risky under ADA. Employers need to train their workers about mental ailments, sensitivity to the issue, and where their responsibilities under ADA begin, he added.

Because many mental disabilities - from serious mental illness to lesser neuroses - often are not readily apparent, it is difficult for an employer to know when its responsibility to accommodate "kicks in," Lotito said. An employer must have knowledge of the mental disability in order to deal with it, he noted.

Employers are often confused about how to accommodate a mentally disabled person, and although these accommodations usually are less expensive than those for a physically disabled person, they are accompanied by problems caused by ignorance and fear, Lotito pointed out.

Suggested ADA Accommodations

Reasonable accommodations of employees with mental disabilities include any type of modification of the job duties, work procedures, or workplace environment that would help a "qualified individual with a disability to have an equal employment opportunity," Lotito explained. Some basic accommodations that have been sufficient to meet the standards of ADA include:

- Permitting time off for counseling;

- Giving on-the-job peer counseling;
- Providing self-paced workloads and flexible work hours;
- Allowing telecommuting using company-provided equipment;
- Offering job-sharing so workers who cannot handle a full schedule can still retain some benefits and be connected to the working community;
- Fostering tolerance of "different" behavior;
- Modifying workstations to limit distractions;
- Offering health insurance that does not exclude pre-existing conditions; and
- Offering sensitivity training.

Unfortunately for employers, ADA's "greatest strength is its greatest weakness" - each situation is evaluated on a case by case basis, Lotito said. This means that employers must also look closely at each situation involving an employee with a mental disability. Some mental conditions produce behavior that is unacceptable, he noted, but if this behavior can be shown to be caused by the mental condition, must the employer accommodate? At this point, the law says "yes," Lotito responded.

Part of this analysis is the question of whether or not the employee constitutes a direct threat to the rest of the workforce, Lotito said, which means, is there a significant risk of substantial harm to the health or safety of the employee or others that cannot be eliminated or reduced by reasonable accommodation? The "more significant the harm, the less likelihood that you have to demonstrate" actual violence is going to occur to be safe from an ADA suit, he explained.

Finally, Lotito noted, employers should remember that "there is no such thing as a medical question under ADA; there are only legal questions."

Best Practices

While questions remain about the developing law under ADA, the best employers are beginning to train their managers and supervisors about how to treat their workers better, Pimentel said. Employers are expanding the idea of "creative benefits," as, for example, by using the employee assistance program for more than just substance abuse treatment, he said.

Training is critical as employees begin to see that the only "job security is the individual's skills," but most important, however, is the lesson most employers should learn - that the "best way to get people to give you what you want is for employers to help employees develop skills" they need, Pimentel concluded.

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"News Reviews to Peruse"

Number 32 October 15, 1996

Items regarding the Americans with Disabilities Act which may be of interest to you. Please share this information with colleagues, supervisors and subordinates. The views and opinions expressed herein are solely those of the editor, except where noted, and do not represent the views of the Office of Chief Counsel or the Department of Environmental Protection. Comments, contributions or questions, including requests for accommodations needed to receive or apprehend this publication, should be addressed to Patrick H. Bair (Ed.).

- **LIGHT DUTY POSITIONS** - According to the latest guidance from the EEOC, an employer which creates light duty positions for employees with occupational injuries is NOT required to similarly create light duty positions as ADA accommodations for employees with disabilities who have not been injured on the job. However, an employer which "reserves" vacant positions for employees who have been injured on the job must consider reassigning an employee with a disability which was not a result of a work-related injury to one of those vacancies.

- **NEW IN LEGISLATION** - An employer would not be required to hire an applicant with a history of drug or alcohol abuse for a "safety-sensitive" job under a new federal law introduced in August. The Drug-Free Workplace and Public Safety Assurance Act of 1996 (HR 4017) would amend the ADA to allow employers to deny employment permanently to an applicant with a drug history and up to ten years for any with a history of alcohol abuse. A

"safety-sensitive" job would be one that, if performed improperly, would pose a significant risk of physical harm to people or substantial damage to real or personal property.

- **TAAC-NET** - The Telecommunications Access Advisory Committee of the Access Board, created to address issues of barriers to persons with disabilities in telecommunications services and to recommend solutions, has announced the creation of a listserv. Comments can be made to TAAC at **taac-l@trace.wisc.edu**; requests to subscribe to the committee's information should be addressed to **listproc@trace.wisc.edu**.

- **"MITIGATING MEASURES"** - If a person has a medical condition which may be a disability, but the effects of the condition are totally or substantially controlled by medication ("mitigating measures"), is the person a person with a disability under the ADA, i.e. is the person substantially limited in performing any major life activity? This is the question addressed in two recent federal decisions, one in Wisconsin and another in the Fourth Circuit. In the first case, a federal district court found that a claimant's insulin-dependent diabetes did not substantially limit any major life activity, despite contrary guidance from the EEOC. (EEOC guidelines state that a determination whether an individual is covered by the ADA be made "without regard to mitigating measures such as medicines," and consider diabetes a "disability per se.") In dismissing the claim, the court cited Roth v. Lutheran General Hospital (4 AD Cases 936, CA7, 1995), in which the U.S. Court for the Seventh Circuit (WI, IL, IN) stated that "the mere use of a mitigating measure does not automatically prove the presence of a disability." (Schluter v. Industrial Coils, Inc., DC WWisc, No. 95-C-660-C, 6/14/96)

In an ongoing case, the U.S. Court of Appeals for the Fourth Circuit (MD, WV, VA, NC, SC) is being asked to decide if a person with controlled hypothyroidism is substantially limited. The lower court dismissed the claim, finding that since the condition was controlled by medication, no substantial limitation existed. The EEOC has filed an amicus brief arguing that controlled hypothyroidism is a disability under the ADA, regardless of the use of mitigating measures. (Ferguson v. Western Carolina Regional Sewer Authority, CA4, No. 96-1277, 5/24/96)

- **NEW JUSTICE ADA WEBSITE** - The U.S. Department of Justice has unveiled its new "ADA Homepage" at **www.usdoj.gov/crt/ADA/adahom1/htm**. Various DOJ ADA-related documents can be downloaded from the site; some examples are attached following the newsletter.

- **COMPATIBLE TELEPHONES** - Under rules promulgated by the FCC pursuant to the Hearing Aid Compatibility Act of 1988, telephones in employers' common areas (e.g., lobbies, libraries, reception areas, etc.) must be "hearing aid compatible," i.e., have "electro-magnetic coil compatibility" and volume control. The FCC rules also require that all employees' workstation telephones be similarly compatible by January 1, 2000 (2005 for telephones

purchased from 1985 through 1989). All newly purchased telephones must be compatible. Until 2000, employers must provide "safe harbor" telephones: at least one hearing aid compatible phone "within a reasonable and accessible distance," generally one per floor.

- **VIDEO RELAY SERVICES** - Video communications technology (similar to that being demonstrated by the Department) is being touted by the FCC and Sprint Communications as part of the next wave in telecommunications accessibility. Sprint has developed "video relay" technology, demonstrating it at the FCC's recent celebration of the ADA's anniversary. "Telephone relay services," which enable persons using TDD/TTs to communicate telephonically with non-disabled users, were required of telecommunications carriers by the ADA.

For those not familiar with traditional audio relay services, the service is used by callers with hearing or speech disabilities who cannot use traditional voice telephones. The caller contacts a relay operator using a text telephone (TT, or TDD) and types in her part of the conversation, which the operator receives and then reads to the recipient. The relay operator types the recipient's oral responses to the caller. With video relay, the caller stands before a small camera in a laptop or television monitor and signs, with the operator interpreting for the other caller. Because American Sign Language (ASL) is the primary means of communication for many with hearing impairments, video relay has the advantage of freeing the user from typing and communicating more naturally. The cost of this system presently is prohibitive, but advances in technology and availability are expected to make it more affordable in the future.

- **"DIRECT THREAT TO SELF" QUESTIONED** - Those of you who attended the Department's ADA course for managers and supervisors several years ago might remember that a question the presenters raised was whether the EEOC's interpretation of the scope of the Act's "direct threat" provision was correct. The Act provides that an employer need not accommodate a person with a disability who presents a "direct threat." The Act specifically refers to a direct threat to the health and safety of other individuals in the workplace. (42 U.S.C. Section 12101(3)) The EEOC's position has been that this includes a direct threat to the employee and others, which we saw as improperly expanding the definition. (See 29 C.F.R. Section 1630.2(r).

Now a federal district court in Illinois has taken on the EEOC on this point. In Kohnke v. Delta Airlines (1996 U.S. Dist. LEXIS 9656, N.D.Ill. 1996), the U.S. Court for the Northern District of Illinois analyzed the statute and legislative history. The Court held that direct threat plainly does not include threat to the employee, and suggested that the EEOC regulations "misinterpret the 'direct threat' defense." According to the Court, the EEOC position "is untenable, because it renders certain words in the ADA meaningless.... [T]he ADA clearly and unambiguously refers to 'a direct threat to the health or safety of other individuals in the workplace.'... Such an interpretation must be rejected."

- **INDEFINITE LEAVE NOT AN ACCOMMODATION** - Although a reasonable period of leave may be a reasonable accommodation for an employee's disability, indefinite leave, even unpaid, is not according to a decision of the U.S. Circuit Court of Appeals for the 10th Circuit (WY, UT, CO, NM, KS, OK). In Hudson v. MCI Telecommunications Corp. (5 AD Cases 1099, CA10, 7/1/96), an employer refused to grant an indefinite amount of unpaid leave to an employee seeking treatment for carpal tunnel syndrome. The Court affirmed the lower court, holding that the employer "was not required to wait indefinitely for [the employee's] recovery, whether it maintained her on its payroll or elected to pay the cost of her disability benefits."

- **LOTTERY SETTLEMENT** - In a settlement of a lawsuit brought against it by several Pennsylvania and national disability rights groups under Title II of the ADA, the Commonwealth has agreed to require each of its lottery ticket retail outlets to complete an "ADA statement of compliance" this year, outlining steps needed to achieve ADA compliance. Retailers must identify barriers, how said barriers will be removed, or give legal or structural reasons which prevent their removal. The Commonwealth must certify full ADA compliance by May 1997. (von Schmetterling v. Pennsylvania, CA No. 95-CV-599, E.D.Pa. 1996)

- **UPS AND DOWNS IN THE ELEVATOR BUSINESS** - You may recall an article in last month's "News" regarding the settlement of a Title II case against a group of architects who designed a non-compliant building in Hershey, PA. More information about this case has come to light. It appears that the building - the Parkside Professional Center - was designed with an internal staircase and an elevator shaft, but no elevator! Other violations included inaccessible meeting rooms, restrooms and showers. The architects agreed to pay a civil penalty of $8000. (The building's owners are to pay a fine of $10,000.)

Now a federal district court in Washington, D.C., ruling that architects could not be found liable under the ADA, has dismissed the architects as defendants in a suit that also named builders and owners of the MCI Center in Washington. The court cited two provisions of the ADA: Section 12182(a), which states that anyone who "owns, leases ... or operates a place of public accommodation" may not discriminate; and Section 12183, which provides that "discrimination" includes "a failure to design and construct" accessible facilities. Since the architects did not own, lease or operate the facility they designed, and did not design and construct the facility, they were not covered by the Act, according to the Court. (Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers, et al., 5 AD Cases 1494, DC DC, Civ. No. 96-1354 (TFH), 7/29/96)

- **ZONING LAWS** - In an interesting decision, a federal district court in New York has ruled that the ADA forbids local governments from using zoning ordinances to discriminate on the basis of disability. The case involved a challenge to the city of White Plain's attempt to use its zoning regulations to prevent the relocation of a drug and alcohol treatment program to a site it had leased. The court stated that it found "nothing in the text or

legislative history of the ADA to suggest that zoning or any other governmental activity was excluded from its mandate." (Innovative Health Systems v. City of White Plains, SDNY, No. 95-CV-9642 (BDP), 6/12/96)

- **ACCESSIBILITY GUIDELINES FOR PARKS & RECREATION** - The Access Board has announced that it plans to publish minimum accessibility guidelines for sports facilities, playgrounds, places of amusement, boating and fishing facilities in early 1997.

- **"BOSSECTOMY" REQUEST REJECTED** - A few issues back, we were introduced by a conference speaker to the term "bossectomy," or a request from an employee to have her boss, who she alleged was causing her disability, removed. I am unable to determine whether this is the matter to which the speaker was referring, but the U.S. Circuit Court of Appeals for the 2nd Circuit has ruled that a Federal Reserve Bank is not required to change a returning employee's supervisor as an accommodation, even though the employee claims that working under her current supervisor would cause stress which would aggravate her back problems. The Court concluded that there is nothing to indicate that "in enacting the disability acts, Congress intended to interfere with personnel decisions" within an organization. (Wernick v. Federal Reserve Bank, 5 AD Cases 1345, CA2, 8/6/96)

- **INTERVIEWERS: DON'T ASK, DON'T ASK** - In an unreported decision from 1995, a federal district court in Texas ruled that an interviewer had violated the act when he asked about the nature of an applicant's facial disfigurement, even though the employer was found not to have discriminated in hiring. (EEOC v. Community Coffee Co., Inc., DC STexas, CA No. H-94-1061, 1995) The Act forbids the asking of any "disability-related" question in an interview. The EEOC defines a "disability-related question" as one "likely to elicit information about a disability." Questions about an applicant's need for accommodation are appropriate in the following instances only, according to the EEOC: when accommodations may be needed for the interview process; when the disability is obvious and arguably job-related; when the individual self-discloses a disability or the need for a reasonable accommodation.

- **OFF-DUTY CONDUCT FOUND RELEVANT** - The U.S. Court of Appeals for the Second Circuit has affirmed a lower court decision in whichthe district court allowed evidence of a nurse's off-duty alcohol abuse to go to the jury over the objection of the nurse/plaintiff. The nurse was fired following an incident in which he came drunk to his hospital while on vacation and got into a violent fight with security guards. The ADA excludes from the definition of "person with a disability" persons "whose employment, by reason of [ ] current alcohol abuse, would constitute a direct threat to property or the safety of others." The courts found that the nurse's off-duty conduct was relevant to whether his employment poses a threat to the safety of others, especially patients, given his tendency to become belligerent when intoxicated. (Johnson v. The New York Hospital, CA2, No. 96-7147, 9/13/96)

- **ATTACHMENTS** - Several articles are attached for your information. My apologies for any difficulty or confusion created by those articles pulled from the Internet minus their graphics. The following topics/articles follow:

1. "Advice for Plaintiff's Lawyers" - from an address by Mary K. O'Melveny, counsel for the Communications Workers of America (1 p.)

2. Commonly-Asked Questions About Service Animals (3 pp.)

3. Readily Achievable Barrier Removal (13 pp.)

4. Van Accessible Parking Spaces (8 pp.)

5. 1994 Update to Title II Technical Assistance Manual - for those of you who may have an outdated copy (5 pp.)

An uncommonly long newsletter this month! Read it a little bit at a time and you won't overdose on it! Special thanks to Nancy Elsavage and Ed Morris for their help on this month's "News." See you in November!

I. Advice For Plaintiffs' Attorneys

Mary K. O'Melveny, general counsel for the Coalition of Labor Union Women and headquarters counsel for the Communications Workers of America, recently offered some advice for plaintiffs' attorneys handling ADA cases. Her tips are worth noting by managers and supervisors. Among Ms O'Melveny's tips were:

- The employee should let the employer know he or she has a disability and needs an accommodation. Courts have been unsympathetic to plaintiffs who claimed knowledge of their disability should be "imputed" to the employer, especially where performance problems are involved and there was no clear notification.

- The employer needs to know what the specific limitation is that the employee is claiming. Courts tend to be less sympathetic, O'Melveny said, when the claimed limitation is "environmental," such as carpal tunnel syndrome, or a mental impairment.

- The employee needs to cooperate in supplying medical records and releases.

- Employees reject accommodations proposed by the employer "at their peril." When employers in good faith make accommodations to employees' disabilities, courts do not look favorably on plaintiffs who reject them.

- The importance of experts should not be minimized. For example, the opinions of rehabilitation specialists and physicians can show that employees could perform essential functions of the job if accommodations were made.

- The accommodations requested by employees must be effective. In Johnson v. Morrison's Cafeteria (3 ADA Cases 259), decided by the U.S. District Court for Northern Alabama in 1994, a cafeteria worker's request to work non-peak hours because they were less stressful was not acceptable because working at peak hours was an essential function of the job.

- The plaintiff should not take any action inconsistent with his or her ADA claim. If the employee applies for disability benefits, the application should state that the individual is not "totally disabled," but could perform the job with reasonable accommodation.

- Accommodations that violate collective bargaining agreements or that disadvantage other workers should not be proposed.

II.

URL: http://www.usdoj.gov/crt/ADA/qasrvc.txt

COMMONLY ASKED QUESTIONS ABOUT SERVICE ANIMALS IN PLACES OF BUSINESS

1. Q: **What are the laws that apply to my business?**

A: Under the Americans with Disabilities Act (ADA), privately owned businesses that serve the public, such as restaurants, hotels, retail stores, taxicabs, theaters, concert halls, and sports facilities, are prohibited from discriminating against individuals with disabilities. The ADA requires these businesses to allow people with disabilities to bring their service animals onto business premises in whatever areas customers are generally allowed.

2. Q: **What is a service animal?**

A: The ADA defines a service animal as any guide dog, signal dog, or other animal individually trained to provide assistance to an individual with a disability. If they meet this definition, animals are considered service animals under the ADA regardless of whether they have been licensed or certified by a state or local government.

Service animals perform some of the functions and tasks that the individual with a disability cannot perform for him or herself. "Seeing eye dogs" are one type of service animal, used by some individuals who are blind. This is the type of service animal with which most people are familiar. But there are service animals that assist persons with other kinds of disabilities in their day-to-day activities. Some examples include:

- Alerting persons with hearing impairments to sounds.

- Pulling wheelchairs or carrying and picking up things for persons with mobility impairments.

- Assisting persons with mobility impairments with balance.

A service animal is not a pet.

3. **Q: How can I tell if an animal is really a service animal and not just a pet?**

A: Some, but not all, service animals wear special collars and harnesses. Some, but not all, are licensed or certified and have identification papers. If you are not certain that an animal is a service animal, you may ask the person who has the animal if it is a service animal required because of a disability. However, an individual who is going to a

restaurant or theater is not likely to be carrying documentation of his or her medical condition or disability. Therefore, such documentation generally may not be required as a condition for providing service to an individual accompanied by a service animal. Although a number of states have programs to certify service animals, you may not insist on proof of state certification before permitting the service animal to accompany the person with a disability.

4. **Q: What must I do when an individual with a service animal comes to my business?**

A: The service animal must be permitted to accompany the individual with a disability to all areas of the facility where customers are normally allowed to go. An individual with a service animal may not be segregated from other customers.

5. **Q: I have always had a clearly posted "no pets" policy at my establishment. Do I still have to allow service animals in?**

A: Yes. A service animal is not a pet. The ADA requires you to modify your "no pets" policy to allow the use of a service animal by a person with a disability. This does not mean you must abandon your "no pets" policy altogether but simply that you must make an exception to your general rule for service animals.

6. **Q: My county health department has told me that only a seeing eye or guide dog has to be admitted. If I follow those regulations, am I violating the ADA?**

A: Yes, if you refuse to admit any other type of service animal on the basis of local health department regulations or other state or local laws. The ADA provides greater protection for individuals with disabilities and so it takes priority over the local or state laws or regulations.

7. **Q: Can I charge a maintenance or cleaning fee for customers who bring service animals into my business?**

A: No. Neither a deposit nor a surcharge may be imposed on an individual with a disability as a condition to allowing a service animal to accompany the individual with a disability, even if deposits are routinely required for pets. However, a public accommodation may charge its customers with disabilities if a service animal causes damage so long as it is the regular practice of the entity to charge non-disabled customers for the same types of damages. For example, a hotel can charge a guest with a disability for the cost of repairing or cleaning furniture damaged by a service animal if it is the hotel's policy to charge when non-disabled guests cause such damage.

8. **Q: I operate a private taxicab and I don't want animals in my**

taxi; they smell, shed hair and sometimes have "accidents." Am I violating the ADA if I refuse to pick up someone with a service animal?

A: Yes. Taxicab companies may not refuse to provide services to individuals with disabilities. Private taxicab companies are also prohibited from charging higher fares or fees for transporting individuals with disabilities and their service animals than they charge to other persons for the same or equivalent service.

9. **Q: Am I responsible for the animal while the person with a disability is in my business?**

A: No. The care or supervision of a service animal is solely the responsibility of his or her owner. You are not required to provide care or food or a special location for the animal.

10. **Q: What if a service animal barks or growls at other people, or otherwise acts out of control?**

A: You may exclude any animal, including a service animal, from your facility when that animal's behavior poses a direct threat to the health or safety of others. For example, any service animal that displays vicious behavior towards other guests or customers may be excluded. You may not make assumptions, however, about how a particular animal is likely to behave based on your past experience with other animals. Each situation must be considered individually.

Although a public accommodation may exclude any service animal that is out of control, it should give the individual with a disability who uses the service animal the option of continuing to enjoy its goods and services without having the service animal on the premises.

11. **Q: Can I exclude an animal that doesn't really seem dangerous but is disruptive to my business?**

A: There may be a few circumstances when a public accommodation is not required to accommodate a service animal - that is, when doing so would result in a fundamental alteration to the nature of the business. Generally, this is not likely to occur in restaurants, hotels, retail stores, theaters, concert halls, and sports facilities. But when it does, for example, when a dog barks during a movie, the animal can be excluded.

If you have further questions about service animals or other requirements of the ADA, you may call the U.S. Department of Justice's toll-free ADA Information Line at 800-514-0301 (voice) or 800-514-0383 (TDD).

DUPLICATION OF THIS DOCUMENT IS ENCOURAGED.

III.

URL: **http://www.usdoj.gov/crt/ADA/adata1.txt**

U.S. Department of Justice
Civil Rights Division
Disability Rights Section

Americans with Disabilities Act

Technical Assistance Updates from the U.S. Department of Justice

Common Questions:
Readily Achievable Barrier Removal

Design Details: **Van Accessible Parking Spaces**

Number 1, August 1996

Reproduction of this document is encouraged.

Disclaimer

The ADA authorizes the Department of Justice to provide technical assistance to individuals and entities that have rights or responsibilities under the Act. This document provides informal guidance to assist you in understanding the ADA and the Department's regulation. However, this technical assistance does not constitute a legal interpretation of the statute.

Introduction

ADA-TA, a series of technical assistance (TA) updates from the Disability Rights Section of the Civil Rights Division of the Department of Justice, provides practical information on how to comply with the Americans with Disabilities Act (ADA). Each ADA-TA highlights specific topics of interest to business owners and managers, State and local government officials, architects, engineers, contractors, product designers and manufacturers, and all others who seek a better understanding of accessible design and the ADA. The goal of the series is to clarify potential misunderstandings about the requirements of the ADA, and to highlight its flexible, common sense approach to accessibility.

Each ADA-TA has two standard features: Common Questions and Design Details. Common Questions answers questions that have been brought to our attention through complaints, compliance reviews, calls to our information

line, or letters from the public. Design Details provides supplemental information and illustrations of specific design requirements.

ADA-TA complements the Department's ADA documents, including the regulations issued under titles II and III of the ADA and the Department's technical assistance manuals. ADA-TA is not a legal interpretation of the ADA. Instead it provides practical solutions on how to comply with the ADA while avoiding costly and common mistakes.

Obtaining additional ADA information may be as easy as a trip to your local library. The Department of Justice has sent an ADA Information File containing 70 technical assistance documents to 15,000 libraries across the country. Most libraries maintain this file at the reference desk.

(**sidebar**)
To order copies of the Department's regulations, technical assistance manuals and other publications, or obtain answers to specific questions, CALL: (800) 514-0301 (voice) (800) 514-0383 (TDD). The Department's ADA publications are also available electronically, including ADA regulations and technical assistance materials, through the Internet or by calling the Department's electronic bulletin board (BBS). Materials can be accessed on the World Wide Web at **http://www.usdoj.gov/crt/ADA/adahom1.htm** or by using gopher client software (**gopher://justice2.usdoj.gov:70/ 11/crt/ADA)**. The materials can be also downloaded from the Department of Justice ADA-BBS by dialing (202) 514-6193. You can also reach this BBS through the Internet using the Telnet fedworld gateway (Telnet **fedworld.gov**). At the main menu, choose "U" (Utilities/Files/Mail), then choose "D" (gateway system) followed by "D" (connect to government sys/database) and then #9 ADA-BBS (DOJ).

Common Questions

ILLUSTRATION: Three lavatories in a public toilet room. One lavatory has been made accessible.

Title: Selected Examples of Barrier Removal

Notes for illustration:

Replacing round faucet handles with lever handles

Repositioning the paper towel dispenser

Installing a full-length bathroom mirror or lowering lavatory mirror

Modifying the front of the counter at the accessible lavatory to provide wheelchair access

Insulating lavatory pipes under sinks to prevent burns
Common Questions

Common Questions: Readily Achievable Barrier Removal

The ADA requires companies providing goods and services to the public to take certain limited steps to improve access to existing places of business. This mandate includes the obligation to remove barriers from existing buildings when it is readily achievable to do so. Readily achievable means easily accomplishable and able to be carried out without much difficulty or expense.

Many building features that are common in older facilities such as narrow doors, a step or a round door knob at an entrance door, or a crowded check-out or store aisle are barriers to access by people with disabilities. Removing barriers by ramping a curb, widening an entrance door, installing visual alarms, or designating an accessible parking space is often essential to ensure equal opportunity for people with disabilities. Because removing these and other common barriers can be simple and inexpensive in some cases and difficult and costly in others, the regulations for the ADA provide a flexible approach to compliance. This practical approach requires that barriers be removed in existing facilities only when it is readily achievable to do so. The ADA does not require existing buildings to meet the ADA's standards for newly constructed facilities.

The ADA states that individuals with disabilities may not be denied the full and equal enjoyment of the "goods, services, facilities, privileges, advantages, or accommodations" that the business provides -- in other words, whatever type of good or service a business provides to its customers or clients. A business or other private entity that serves the public must ensure equal opportunity for people with disabilities.

In the following section, we answer some of the most commonly asked questions we receive from our toll-free ADA Information Line about the barrier removal requirement and how it differs from those requirements that apply to new construction and alteration of buildings.

(**sidebar**)

Individuals with disabilities may not be denied the full and equal enjoyment of the "goods, services, facilities, privileges, advantages, or accommodations."

Common Questions

I own three buildings, two of which were designed and constructed prior to the enactment of the ADA. I have been told I have to make them all accessible. Is this true? Does the ADA require me to make them all accessible?

The ADA establishes different requirements for existing facilities and new construction. In existing facilities where retrofitting may be expensive, the requirement to provide access through barrier removal is less than it is in new construction where accessibility can be incorporated in the initial stages of design and construction without a significant increase in cost.

The requirement to remove barriers in existing buildings applies only to a private entity that owns, leases, leases to or operates a "place of public accommodation." Further, barriers must be removed only where it is "readily achievable" to do so. Readily achievable means easily accomplishable and able to be carried out without much difficulty or expense.

(**sidebar**)

The ADA establishes different requirements for existing facilities and new construction.

Is my business required to remove barriers?

If your business provides goods and services to the public, you are required to remove barriers if doing so is readily achievable. Such a business is called a public accommodation because it serves the public. If your business is not open to the public but is only a place of employment like a warehouse, manufacturing facility or office building, then there is no requirement to remove barriers. Such a facility is called a commercial facility. While the operator of a commercial facility is not required to remove barriers, you must comply with the ADA Standards for Accessible Design when you alter, renovate or expand your facility.

What is a "place of public accommodation"?

A place of public accommodation is a facility whose operations affect commerce and fall within at least one of the following 12 categories set out in the ADA:

1) Places of lodging (e.g., inns, hotels, motels) (except for owner-occupied establishments renting fewer than six rooms);

2) Establishments serving food or drink (e.g., restaurants and bars);

3) Places of exhibition or entertainment (e.g., motion picture houses, theaters, concert halls, stadiums);

4) Places of public gathering (e.g., auditoriums, convention centers, lecture halls);

5) Sales or rental establishments (e.g., bakeries, grocery stores,

hardware stores, shopping centers);

6) Service establishments (e.g., laundromats, dry-cleaners, banks, barber shops, beauty shops, travel services, shoe repair services, funeral parlors, gas stations, offices of accountants or lawyers, pharmacies, insurance offices, professional offices of health care providers, hospitals);

7) Public transportation terminals, depots, or stations (not including facilities relating to air transportation);

8) Places of public display or collection (e.g., museums, libraries, galleries);

9) Places of recreation (e.g., parks, zoos, amusement parks);

10) Places of education (e.g., nursery schools, elementary, secondary, undergraduate, or postgraduate private schools);

11) Social service center establishments (e.g., day care centers, senior citizen centers, homeless shelters, food banks, adoption agencies); and

12) Places of exercise or recreation (e.g., gymnasiums, health spas, bowling alleys, golf courses).

(**sidebar**)

The types of facilities listed in each category are examples - they are not intended to be an exhaustive list of all covered facilities.

I operate a restaurant that opened in 1991. The city required that the restaurant comply with the local accessibility code. Is the restaurant "grandfathered" and not required to remove barriers as required by the ADA?

No. A restaurant is a public accommodation and a place of public accommodation must remove barriers when it is readily achievable to do so. Although the facility may be "grandfathered" according to the local building code, the ADA does not have a provision to "grandfather" a facility. While a local building authority may not require any modifications to bring a building "up to code" until a renovation or major alteration is done, the ADA requires that a place of public accommodation remove barriers that are readily achievable even when no alterations or renovations are planned.

(**sidebar**)

...the ADA does not have a provision to "grandfather" a facility..

Do I, as the owner, have to pay for removing barriers?

Yes, but tenants and management companies also have an obligation. Any private entity who owns, leases, leases to, or operates a place of public accommodation shares in the obligation to remove barriers.

If I do remove barriers, is my business entitled to any tax benefit to help pay for the cost of compliance?

As amended in 1990, the Internal Revenue Code allows a deduction of up to $15,000 per year for expenses associated with the removal of qualified architectural and transportation barriers (Section 190). The 1990 amendment also permits eligible small businesses to receive a tax credit (Section 44) for certain costs of compliance with the ADA. An eligible small business is one whose gross receipts do not exceed $1,000,000 or whose workforce does not consist of more than 30 full-time workers. Qualifying businesses may claim a credit of up to 50 percent of eligible access expenditures that exceed $250 but do not exceed $10,250. Examples of eligible access expenditures include the necessary and reasonable costs of removing architectural, physical, communications, and transportation barriers; providing readers, interpreters, and other auxiliary aids; and acquiring or modifying equipment or devices.

(**sidebar**)

To learn more about tax credits and deductions for barrier removal and providing accessibility contact the IRS at (800) 829-1040 (voice) or (800) 829-4059 (TDD) or call the Department of Justice ADA Information Line (800) 514-0301 voice, (800) 514-0383 TDD.

What design standards apply when I'm removing barriers?

When you undertake to remove a barrier, you should use the alterations provisions of the ADA Standards for Accessible Design (Standards). These Standards were published in Appendix A to the Department of Justice's Title III regulations, 28 CFR Part 36, Non-discrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities. Deviations from the Standards are acceptable when full compliance with those requirements is not "readily achievable". In such cases, barrier removal measures may be taken that do not fully comply with the Standards, so long as the measures do not pose a significant risk to the health or safety of individuals with disabilities or others.

ILLUSTRATION: As a first step toward removing architectural barriers, the owner of a small shop decides to widen the shop's 26-inch wide front door. Because of space constraints the shop owner can only widen the door to provide a 30-inch clear width, not the full 32-inch clearance required for alterations under the Standards. Full compliance with the Standards is not in this case readily achievable. The 30-inch clear width will allow most people who use crutches or wheelchairs to get through the door and will

not pose a significant risk to their health or safety.

How can I get a copy of the ADA Standards for Accessible Design?

Copies of the regulations, which include the Standards, are available from the Department of Justice's ADA Information Line and may also be available in your local library. The Department of Justice distributed an ADA Information File containing regulations and technical assistance materials to over 15,000 libraries nationwide. Copies of the regulations can be ordered 24 hours a day from the Department's ADA Information line (1-800-514-0301 Voice or 1-800-514-0383 TDD).

(**sidebar**)

Copies of the regulations, which include the Standards can be ordered 24 hours a day from the Department's ADA Information line.

How do I determine what is readily achievable?

"Readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. Determining if barrier removal is readily achievable is, by necessity, a case-by-case judgment. Factors to consider include:

1) The nature and cost of the action;

2) The overall financial resources of the site or sites involved; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements necessary for safe operation, including crime prevention measures; or any other impact of the action on the operation of the site;

3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;

4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and

5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

(**sidebar**)

..readily achievable will have to be determined on a case-by-case basis in light of the nature and cost of the barrier removal and the

resources available.

If the public accommodation is a facility that is owned or operated by a parent entity that conducts operations at many different sites, you must consider the resources of both the local facility and the parent entity to determine if removal of a particular barrier is "readily achievable." The administrative and fiscal relationship between the local facility and the parent entity must also be considered in evaluating what resources are available for any particular act of barrier removal.

Can you tell me what barriers it will be "readily achievable" to remove?

The Department's regulation contains a list of 21 examples of modifications that may be readily achievable. These include installing ramps, making curb cuts in sidewalks and at entrances, repositioning telephones, adding raised markings on elevator control buttons, installing visual alarms, widening doors, installing offset hinges to widen doorways, insulating lavatory pipes under sinks, repositioning a paper towel dispenser, installing a full-length mirror, rearranging toilet partitions to increase maneuvering space or installing an accessible toilet stall. The list is not exhaustive and is only intended to be illustrative. Each of these modifications will be readily achievable in many instances, but not in all. Whether or not any of these measures is readily achievable will have to be determined on a case-by-case basis in light of the nature and cost of the barrier removal and the resources available.

Does the ADA permit me to consider the effect of a modification on the operation on my business?

Yes. The ADA permits consideration of factors other than the initial cost of the physical removal of a barrier.

ILLUSTRATION: CDE convenience store determines that it would be inexpensive to remove shelves to provide access to wheelchair users throughout the store. However, this change would result in a significant loss of selling space that would have an adverse effect on its business. In this case, the removal of all the shelves is not readily achievable and, thus, is not required by the ADA. However, it may be readily achievable to remove some shelves.

If an area of my store is reachable only by a flight of steps, would I be required to add an elevator?

Usually no. A public accommodation generally would not be required to remove a barrier to physical access posed by a flight of steps, if removal would require extensive ramping or an elevator. The readily achievable standard does not require barrier removal that requires burdensome expense. Thus, where it is not readily achievable to do so, the

ADA would not require a public accommodation to provide access to an area reachable only by a flight of stairs.

I have a portable ramp that we use for deliveries - can't I just use that?

Yes, you could, but only if the installation of a permanent ramp is not readily achievable. In order to promote safety, a portable ramp should have railings, a firm, stable, nonslip surface and the slope should not exceed one to twelve (one unit of rise for every twelve units horizontal distance). It should also be properly secured and staff should be trained in its safe use.

Because one of my buildings is very inaccessible, I don't know what to fix first. Is guidance available?

Yes. The Department recommends priorities for removing barriers in existing facilities because you may not have sufficient resources to remove all existing barriers at one time. These priorities are not mandatory. You are free to exercise discretion in determining the most effective "mix" of barrier removal measures for your facilities.

The first priority is enabling individuals with disabilities to enter the facility. This priority on "getting through the door" recognizes that providing physical access to a facility from public sidewalks, public transportation, or parking is generally preferable to any alternative arrangements in terms of both business efficiency and the dignity of individuals with disabilities.

The second priority is providing access to those areas where goods and services are made available to the public. For example, in a hardware store these areas would include the front desk and the retail display areas of the store.

The third priority is providing access to restrooms (if restrooms are provided for use by customers or clients).

The fourth priority is removing any remaining barriers, for example, lowering telephones.

(**sidebar**)

Our priorities for barrier removal are not mandatory. Public accommodations are free to exercise discretion in determining the most effective "mix" of barrier removal measures to undertake in their facilities.

What about my employee areas? Must I remove barriers in areas used only by employees?

No. The "readily achievable" obligation to remove barriers in existing facilities does not extend to areas of a facility that are used exclusively by employees. Of course, it may be necessary to remove barriers in response to a request for "reasonable accommodation" by a qualified employee or applicant as required by Title I of the ADA. For more information, contact the Equal Employment Opportunity Commission (EEOC) which enforces Title I of the ADA.

How can a public accommodation decide what needs to be done?

One effective approach is to conduct a "self-evaluation" of the facility to identify existing barriers. While not required by the ADA, a serious effort at self-assessment and consultation can save resources by identifying the most efficient means of providing required access and can diminish the threat of litigation. It serves as evidence of a good faith effort to comply with the barrier removal requirements of the ADA. This process should include consultation with individuals with disabilities or with organizations representing them and procedures for annual re-evaluations.

(**sidebar**)

...public accommodations are urged to establish procedures for an ongoing assessment of their compliance with the ADA's barrier removal requirements

If a public accommodation determines that its facilities have barriers that should be removed, but it is not readily achievable to undertake all of the modifications now, what should it do?

The Department recommends that a public accommodation develop an implementation plan designed to achieve compliance with the ADA's barrier removal requirements. Such a plan, if appropriately designed and executed, could serve as evidence of a good faith effort to comply with the ADA's barrier removal requirements.

(**sidebar**)

...when barrier removal is not readily achievable, then goods and services must be made available through alternative methods, if such methods are readily achievable.

What if I'm not able to remove barriers at this time due to my financial situation? Does that mean I'm relieved of current responsibilities?

No, when you can demonstrate that the removal of barriers is not readily achievable, you must make your goods and services available through

alternative methods, if undertaking such methods is readily achievable. Examples of alternative methods include having clerks retrieve merchandise located on inaccessible shelves or delivering goods or services to the customers at curbside or in their homes. Of course, the obligation to remove barriers when readily achievable is a continuing one. Over time, barrier removal that initially was not readily achievable may later become so because of your changed circumstances.

If the obligation is continuing, do you mean there are no limits on what I must do to remove barriers?

No. There are limits. In removing barriers, a public accommodation does not have to exceed the level of access required under the alterations provisions contained in the Standards (or the new construction provision where the Standards do not provide specific provisions for alterations).

ILLUSTRATION 1: An office building that houses places of public accommodation is removing barriers in public areas. The alterations provisions of the Standards explicitly state that areas of rescue assistance are not required in buildings that are being altered. Because barrier removal is not required to exceed the alterations standard, the building owner need not establish areas of rescue assistance.

ILLUSTRATION 2: A grocery store has more than 5000 square feet of selling space and prior to the ADA had six inaccessible check-out aisles. Because the Standards do not contain specific provisions applicable to the alteration of check-out aisles one must look to the new construction provisions of the Standards for the upper limit of the barrier removal obligation. These provisions require only two of the six check-out aisles to be accessible. Because the store found it readily achievable in 1993 and 1994 to remove barriers and make two of check-out aisles accessible, the store has fulfilled its obligation and is not required to make more check-out aisles accessible.

What is the difference between barrier removal and alterations? Aren't they both very similar?

Not really . Under the ADA, barrier removal is done by a place of public accommodation to remove specific barriers that limit or prevent people with disabilities from obtaining access to the goods and services offered to the public. This is an ongoing obligation for the business that has limits determined by resources, size of the company and other factors (see pages 7 & 8). An alteration is replacement, renovation or addition to an element or space of a facility. Generally alterations are done to improve the function of the business, to accommodate a change or growth in services, or as part of a general renovation. The requirements for alterations are greater than those for barrier removal because the alteration is part of a larger construction or replacement effort.

One of the buildings that I own is a small factory with offices. Do I have to make that accessible?

No, commercial facilities such as factories, warehouses, and office buildings that do not contain places of public accommodation are considered "commercial facilities" and are not required to remove barriers in existing facilities. They are, however, covered by the ADA's requirements for accessible design in new construction or alterations.

(**sidebar**)

Commercial facilities that do not contain places of public accommodation are not required to remove barriers in existing facilities except to provide access to employment.

Information Sources

Information Sources: ADA Technical Assistance

The Department of Justice, through the Disability Rights Section, has responsibility for coordinating government-wide ADA technical assistance activities. Information and direct technical assistance are available from the agencies listed below. Use the list to select the agency responsible for ADA requirements in your area of interest. Some provide free publications in addition to other information services.

For State and local government programs, privately-operated businesses and services, access to facilities, design standards enforceable under the ADA, and information on tax credits and deductions contact:

U.S. Department of Justice
ADA Information Line
(800) 514-0301
(800) 514-0383 (TDD)
ADA-BBS:
(202) 514-6193
Internet:
http://www.usdoj.gov/crt/ada/adahom1.htm
gopher://justice2.usdoj.gov:70/11/crt/ada

For information about Tax Credits and Deductions, contact:

Internal Revenue Service
(800) 829-1040
(800) 829-4059 (TDD)

For employment issues, contact:

Equal Employment Opportunity
Commission (EEOC)
(800) 669-4000
(800) 669-6820 (TDD)
For transportation, contact:

U.S. Department
of Transportation
(202) 366-1656
(202) 366-4567 (TDD)
Internet: http://www.fta.dot.gov

For information on the ADA Accessibility Guidelines, contact:

Access Board
(800) 872-2253
(800) 993-2822 (TDD)
Internet: http://www.access-board.gov/

For additional ADA information and referral sources from Federally funded grantees, contact:

Job Accommodation Network
(800) 526-7234 (V/TDD)
Internet: http://www.janweb.icdi.wvu.edu/

Disability and Business
Technical Assistance Centers
(800) 949-4232 (V/TDD)

Disability Rights Education
and Defense Fund (DREDF)
(800) 466-4232 (V/TDD)

IV.

URL: http://www.usdoj.gov/crt/ada/adata1.txt

U.S. Department of Justice
Civil Rights Division
Disability Rights Section

Americans with Disabilities Act

Technical Assistance Updates from the U.S. Department of Justice

Design Details: Van Accessible Parking Spaces

Vans equipped with lifts are an essential mode of transportation for many people who use wheelchairs and three-wheeled scooters. The lift-equipped van permits people to enter and exit the vehicle independently without having to leave their wheelchair.

The ADA creates new requirements for van accessible parking spaces. The ADA Standards for Accessible Design or Standards cover public accommodations, commercial facilities and certain State and local governments. State and local governments may choose between these Standards and the Uniform Federal Accessibility Standards (UFAS). Because UFAS does not specify how many van accessible parking spaces are required, only those State and local governments that have chosen the Standards as their ADA accessibility standard have specific, numerical requirements for van accessible parking. Requirements for State and local government agencies that have chosen the Uniform Federal Accessibility Standard (UFAS) are not addressed by this document.

ILLUSTRATION

A van equipped with a side-mounted wheelchair lift parked in a van-accessible parking space. A person using a wheelchair is getting out of the van using the lift. The accessible route from the lift to the sidewalk is marked with a dashed line and arrow leading to a curb ramp.

(**sidebar**)

A Van Accessible Parking Space always has a minimum 96-inch wide access aisle next to the van.

The new requirement for van accessible parking spaces is an important one for van users but its implementation has caused some confusion among people responsible for providing parking.

The following section provides information about the design requirements for van accessible parking spaces and explains when these spaces are required, what features are required, and where to locate them on a site.

Design Requirements for Van Accessible Parking Spaces

Van accessible parking spaces are identical to accessible parking spaces for cars except for the following:

- the access aisle must be at least eight-feet wide (as opposed to five-feet wide) to accommodate a wheelchair lift mounted at the side of a van;

- vertical clearance of at least 98 inches is required along the vehicular route to the parking space, at the van parking space, and along the route from the space to the exit to accommodate the height of most vans; and

- the required sign must have the words "van accessible" below the international symbol of accessibility (see 4.6.4 of the Standards).

ILLUSTRATION:

Van with side-mounted wheelchair lift parked in a van-accessible parking space. The wheelchair lift and a person using a wheelchair are in the marked access aisle. Notes (below) are provided for the sign identifying the accessible parking space, the vertical clearance and the width of the access aisle.

Title: Unique Features of a Van Accessible Parking Space

Notes:

Sign with symbol of access and "Van Accessible"

98 inch min. vertical clearance for vans along route to space, at the parking space and along route to exit the site

96 inch min. width access aisle provides space for lift

The other required features of van accessible parking spaces are the same as those for accessible parking spaces for cars. These include:

- the parking space for the vehicle must be at least 96 inches wide;

- the parking space for the vehicle and the entire access aisle must be level (with a maximum slope of 1:501 in all directions);

- the access aisle must have a firm, stable, non-slip surface;

1 (footnote) A 1:50 slope is nearly level and is usually adequate for drainage. The ratio means that a change in vertical height of no more than one unit can occur for every fifty units of distance. For example, a change of one inch in height over a distance of fifty inches.

- the access aisle must be part of an accessible route to a facility or building entrance(s), and

- a sign that complies with 4.6.4 of the Standards must be mounted in front of where the vehicle parks to designate the accessible parking space.

ILLUSTRATION:

Plan view of a van accessible parking space which highlights the common features of accessible parking spaces (van and car)

Title: Common Features of all Accessible Parking spaces (van and car)

Notes: Parked vehicle overhangs shall not reduce the clear width of the accessible route

- sign with international symbol of accessibility mounted high enough so view is not obstructed by parked vehicle

- wide access aisle is part of the accessible route to the accessible entrance and has a firm, stable, non-slip surface

- level access aisle and vehicle parking space (max. 1:50 slope in all directions)

- accessible parking spaces are min. 96 inches wide

The access aisle must be located on a 36-inch-wide accessible route to the building entrance(s). Section 4.3 of the Standards contains requirements for accessible routes and includes specifications for width, passing space to permit two people using wheelchairs to pass, head room, ground surfaces along the route, slope, changes in levels, and doors. The accessible route must not be obstructed by any objects including vehicles that may extend into the accessible route, a curb, outdoor furniture, or shrubbery.

If an accessible route crosses a curb, a curb ramp must be used. However, a built-up curb ramp may not project into the minimum required space for the access aisle at an accessible parking space. When an accessible route crosses a vehicular way, a marked crosswalk may be part of the accessible route.

ILLUSTRATION:

Example of a sign for a van accessible parking space

Title: Sample sign for a van accessible parking space

Location and Dispersion of Parking Spaces

Section 4.6.2 of the Standards requires that accessible parking spaces, including van accessible spaces, be located on the shortest accessible route from adjacent parking to the accessible entrance of the building or facility. Accessible parking spaces and the required accessible route should be located where individuals with disabilities do not have to cross a vehicular lane. When parking cannot be located immediately adjacent to a building and the accessible route must cross a vehicular route, then it is recommended that a marked crossing must be used where the accessible route crosses the vehicular route. In facilities that have multiple accessible entrances with adjacent parking spaces, the accessible parking spaces must be dispersed.

When parking spaces are located in a parking garage, the Standards permit the van accessible parking spaces to be grouped on one floor (Standards 4.1.2 (5) (b)).

ILLUSTRATION:

Multi-story building with a circular driveway adjacent to the front entrance and a three level parking garage located across the street. The accessible route from the parking garage to the building entrance is identified. A note also identifies a possible location for van accessible parking spaces on the circular driveway.

Notes:

Van accessible parking spaces may be grouped on one level of a parking structure

- possible location for van accessible parking spaces if inadequate vertical clearance exists in parking garage

When Van Accessible Spaces are Required

When you provide parking at a newly constructed place of public accommodation or at a commercial facility you must provide accessible parking spaces including van accessible parking spaces.

When you alter or renovate a parking lot or facility the following may apply.

- If you re-pave or otherwise alter the parking lot, you must add as many accessible parking spaces, including van spaces, as needed to comply.

- If you re-stripe the parking area, you must re-stripe so that you provide the correct number of accessible parking spaces, including van accessible parking.

- Existing physical site constraints may make it "technically infeasible" to comply fully with the Standards. However, in most cases a "technically infeasible" condition exists only in a portion of a lot, and other suitable locations for accessible parking spaces are often available.

Number of Van Accessible Spaces Required

Section 4.1.2 (5) of the Standards specifies the minimum number of accessible parking spaces to be provided including van accessible parking spaces. One out of every eight accessible spaces provided must be a van accessible space. When only one accessible parking space is required, the space provided must be a van accessible parking space. Van accessible spaces can serve vans and cars because they are not designated for vans only.

In larger parking lots, both van accessible and accessible car spaces must be provided. For example, in a parking lot for 250 spaces where seven accessible parking spaces are required, one van accessible space would be required along with six accessible car parking spaces. In a parking lot for 450 spaces where nine accessible spaces are required, then two van accessible spaces would be required along with seven accessible car parking spaces.

Two van accessible parking spaces may share an access aisle.

(**sidebar**)

When accessible spaces are required for new construction and during alterations, van accessible parking spaces must always be provided.

Readily Achievable Barrier Removal: Van Accessible Parking Spaces

Public accommodations must remove architectural barriers that are structural in nature in existing facilities when it is "readily achievable" to do so. Readily achievable means easily accomplishable and able to be carried out without much difficulty or expense.

The ADA provides flexibility for public accommodations undertaking barrier removal and does not require that the ADA Standards for Accessible Design (Standards) be complied with fully if it is not readily achievable to do so. Rather, the Standards serve as guidelines for barrier removal that should be met if physical conditions and cost permit. Deviation from the Standards is permitted unless it results in a safety hazard to people with disabilities or others.

Because removing barriers to accessible parking generally involves relatively low cost, it may be readily achievable for many public

accommodations.

ILLUSTRATION:

View of three parking spaces with a sidewalk located at the front of the spaces. None of the parking spaces are accessible.

Title: Existing parking area without accessible spaces

If readily achievable, the first accessible parking space that is provided as part of barrier removal activities should be a van accessible space. This type of parking space can be used by both vans and by cars and can be used by anyone who needs accessible parking.

Examples of barrier removal related to accessible parking may include re-striping a section or sections of a parking lot to provide accessible parking spaces with designated access aisles, installing signs that designate accessible parking spaces, providing an accessible route from the accessible parking spaces to the building entrance, and providing a marked crossing where the accessible route crosses a vehicular way.

(**sidebar**)

If readily achievable, the first accessible parking space that is provided should be a van accessible space.

Where parking lot surfaces slope more than 1:50, select the most nearly level area that is available for the accessible parking spaces. When selecting the area for the accessible parking spaces, consider the location of the accessible route that must connect the access aisle to the facility's accessible entrance(s).

ILLUSTRATION:

Same view of parking spaces after re-striping and installation of a curb ramp and sign. One of the three parking spaces is now a 96 inch wide access aisle and a curb ramp is located adjacent to the access aisle.

Title: Same area with van accessible parking space added

Notes:

- sign with international symbol of accessibility and "van accessible"designates van accessible parking
- curb ramp installed outside access aisle area
- accessible route to entrance
- level access aisle

Requirements for readily achievable barrier removal permit businesses to consider the effect of barrier removal on the operation of their businesses.

For example, a small independently owned store has only three parking spaces for its customers. It determines that re-striping the parking area to provide an accessible parking space could be easily accomplished without significant expense. However, to provide a fully complying van accessible parking space would reduce the available parking for other customers who do not have disabilities from three spaces to one. This loss of parking (not just the cost of the paint for re-striping) can be considered in determining whether the barrier removal is readily achievable.

The ADA provides flexibility for the store to implement a solution that complies with the law but does not result in loss of business. For example, if it is not readily achievable to provide a fully compliant van accessible parking space, one can provide a space that has an access aisle that is narrower than required by the Standards if the result does not cause a safety hazard. Or, the store may provide the service (to a customer with a disability) in an alternative manner, such as curb service or home delivery. In some cases, providing a van accessible parking space that does not fully comply with the Standards will often be the preferred alternative approach, if doing so is readily achievable, because many people with disabilities will benefit from having a designated accessible parking space, even if it is not usable by everyone. If an accessible parking space is provided with a narrow access aisle, then a "Van Accessible" sign should not be provided and the store should be prepared to offer service in an alternative manner, if it is readily achievable to do so, to van users who cannot park in the space.

(**sidebar**)

Requirements for readily achievable barrier removal permit businesses to consider the effect of barrier removal on the operation of their businesses.

Information Sources

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U.S. Department of Justice
ADA Information Line
(800) 514-0301
(800) 514-0383 (TDD)
ADA-BBS:
(202) 514-6193
Internet:
http://www.usdoj.gov/crt/ada/adahom1.htm
gopher://justice2.usdoj.gov:70/11/crt/ada

For information about Tax Credits and Deductions, contact:

Internal Revenue Service
(800) 829-1040
(800) 829-4059 (TDD)

For employment issues, contact:

Equal Employment Opportunity
Commission (EEOC)
(800) 669-4000
(800) 669-6820 (TDD)

For transportation, contact:

U.S. Department
of Transportation
(202) 366-1656
(202) 366-4567 (TDD)
Internet: http://www.fta.dot.gov

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(800) 872-2253
(800) 993-2822 (TDD)
Internet: http://www.access-board.gov/

For additional ADA information and referral sources from Federally funded grantees, contact:

Job Accommodation Network
(800) 526-7234 (V/TDD)
Internet: http://www.janweb.icdi.wvu.edu/

Disability and Business
Technical Assistance Centers
(800) 949-4232 (V/TDD)

Disability Rights Education
and Defense Fund (DREDF)
(800) 466-4232 (V/TDD)

V.

URL: http://www.usdoj.gov/crt/ada/taman2up.html

Americans with Disabilities Act
Title II Technical Assistance Manual 1994 Supplement

The following pages contain material to be added to the Americans with Disabilities Act Title II Technical Assistance Manual (Nov. 1993 edition.) These supplements are to be inserted, as appropriate, at the end of each chapter of the Manual.

II-1.0000 COVERAGE.

II-1.3000 Relationship to title III.

[Insert the following text at the end of ILLUSTRATION 2, p. 2.]

Similarly, if an existing building is owned by a private entity covered by title III and rented to a public entity covered by title II, the private landlord does not become subject to the public entity's title II program access requirement by virtue of the leasing relationship. The private landlord only has title III obligations. These extend to the commercial facility as a whole and to any places of public accommodation contained in the facility. The governmental entity is responsible for ensuring that the programs offered in its rented space meet the requirements of title II.

II-3.0000 GENERAL REQUIREMENTS

II-3.3000 Equality in participation/benefits.

[Insert the following text after ILLUSTRATION 5, p. 11.]

Finally, the ADA permits a public entity to offer benefits to individuals with disabilities, or a particular class of individuals with disabilities, that it does not offer to individuals without disabilities. This allows State and local governments to provide special benefits, beyond those required by the ADA, that are limited to individuals with disabilities or a particular class of individuals with disabilities, without thereby incurring additional obligations to persons without disabilities or to other classes of individuals with disabilities.

ILLUSTRATION 6: The ADA does not require a State government to continue providing medical support payments to dependent children with schizophrenia, if other dependent children without disabilities are also ineligible for continued coverage. This is true even if the State chooses to provide continued coverage to a particular class of children with disabilities (e.g., those with physical impairments, or those who have mental

retardation).

II-3.5300 Unnecessary inquiries.

[Insert the following text at the end of this section, p. 14.]

ILLUSTRATION 2: An essential eligibility requirement for obtaining a license to practice medicine is the ability to practice medicine safely and competently. State Agency X requires applicants for licenses to practice medicine to disclose whether they have ever had any physical and mental disabilities. A much more rigorous investigation is undertaken of applicants answering in the affirmative than of others. This process violates title II because of the additional burdens placed on individuals with disabilities, and because the disclosure requirement is not limited to conditions that currently impair one's ability to practice medicine.

II-3.6000 Reasonable modifications.

II-3.6100 General.

[Insert the following text after ILLUSTRATION 3, p. 15.]

ILLUSTRATION 4: C, a person with a disability, stops at a rest area on the highway. C requires assistance in order to use the toilet facilities and his only companion is a person of the opposite sex. Permitting a person of the opposite sex to assist C in a toilet room designated for one sex may be a required reasonable modification of policy.

ILLUSTRATION 5: S, an individual with an environmental illness, requests a public entity to adopt a policy prohibiting the use of perfume or other scented products by its employees who come into contact with the public. Such a requirement is not a "reasonable" modification of the public entity's personnel policy.

II-5.0000 PROGRAM ACCESSIBILITY

II-5.1000 General.

[Insert the following text before the question, "Can back doors . . . ?" p. 22.]

Does the program accessibility requirement prevent a public entity from renting existing inaccessible space to a private entity? Not necessarily. For example, if a State leases space to a public accommodation in a downtown office building in a purely commercial transaction, i.e., the private entity does not provide any services as part of a State program, the State may rent out inaccessible space without violating its program access requirement. The private entity, though, would be responsible for compliance

with title III. On the other hand, if a State highway authority leases a facility in one of its highway rest areas to a privately owned restaurant, the public entity would be responsible for making the space accessible, because the restaurant is part of the State's program of providing services to the motoring public. The private entity operating the restaurant would have an independent obligation to meet the requirements of title III.

II-5.2000 Methods for providing program accessibility.

[Insert the following text after ILLUSTRATION 3, P. 23.]

ILLUSTRATION 4: A municipal performing arts center provides seating at two prices -- inexpensive balcony seats and more expensive orchestra seats. All of the accessible seating is located on the higher priced orchestra level. In lieu of providing accessible seating on the balcony level, the city must make a reasonable number of accessible orchestra-level seats available at the lower price of balcony seats.

II-6.0000 NEW CONSTRUCTION AND ALTERATIONS

II-6.2000 Choice of design standard: UFAS or ADAAG.

II-6.2100 General.

[Insert the following text at the end of this section, p. 26]

What if neither ADAAG nor UFAS contain specific standards for a particular type of facility? In such cases the technical requirements of the chosen standard should be applied to the extent possible. If no standard exists for particular features, those features need not comply with a particular design standard. However, the facility must still be designed and operated to meet other title II requirements, including program accessibility (see II-5.0000).

ILLUSTRATION 1: A public entity is designing and constructing a playground. Because there are no UFAS or ADAAG standards for playground equipment, the equipment need not comply with any specific design standard. The title II requirements for equal opportunity and program accessibility, however, may obligate the public entity to provide an accessible route to the playground, some accessible equipment, and an accessible surface for the playground.

ILLUSTRATION 2: A public entity is designing and constructing a new baseball stadium that will feature a photographers' moat running around the perimeter of the playing field. While there are no specific standards in either ADAAG or UFAS for either dugouts or photographer's moats, the chosen standard should be applied to the extent that it contains appropriate technical standards. For example, an accessible route must be provided and any ramps or changes in level must meet the chosen standard. The public

entity may have additional obligations under other title II requirements.

II-6.6000 Curb ramps.

[Insert the following text at the end of this section.]

Resurfacing beyond normal maintenance is an alteration. Merely filling potholes is considered to be normal maintenance.

II-7.0000 COMMUNICATIONS

II-7.1000 Equally effective communication.

A. [Insert the following text after ILLUSTRATION 2, p. 38.]

ILLUSTRATION: S, who is blind, wants to use the laundry facilities in his State university dormitory. Displayed on the laundry machine controls are written instructions for operating the machines. The university could make the machines accessible to S by Brailling the instructions onto adhesive labels and placing the labels (or a Brailled template) on the machines. An alternative method of ensuring effective communication with S would be to arrange for a laundry room attendant to read the instructions printed on the machines to S. Any one particular method is not required, so long as effective communication is provided.

B. [Insert the following text after ILLUSTRATION 2, p. 39.]

ILLUSTRATION 3: A municipal police department encounters many situations where effective communication with members of the public who are deaf or hard of hearing is critical. Such situations include interviewing suspects prior to arrest (when an officer is attempting to establish probable cause); interrogating arrestees; and interviewing victims or critical witnesses. In these situations, appropriate qualified interpreters must be provided when necessary to ensure effective communication.

The obligation of public entities to provide necessary auxiliary aids and services is not limited to individuals with a direct interest in the proceedings or outcome. Courtroom spectators with disabilities are also participants in the court program and are entitled to such aids or services as will afford them an equal opportunity to follow the court proceedings.

ILLUSTRATION: B, an individual who is hard of hearing, wishes to observe proceedings in the county courthouse. Even though the county believes that B has no personal or direct involvement in the courtroom proceedings at issue, the county must provide effective communication, which in this case may involve the provision of an assistive listening device, unless it can demonstrate that undue financial and administrative burdens would result.

C. [Insert the following text at the end of the question, "Must tax bills . . . ?" p. 39.]

Brailled documents are not required if effective communication is provided by other means.

II-7.1100 Primary consideration.

[Insert the following text after the first paragraph of this section, p. 39.]

ILLUSTRATION: A county's Supervisor of Elections provides magnifying lenses and readers for individuals with vision impairments seeking to vote. The election procedures specify that an individual who requests assistance will be aided by two poll workers, or by one person selected by the voter. C, a voter who is blind, protests that this method does not allow a blind voter to cast a secret ballot, and requests that the County provide him with a Brailled ballot. A Brailled ballot, however, would have to be counted separately and would be readily identifiable, and thus would not resolve the problem of ballot secrecy. Because County X can demonstrate that its current system of providing assistance is an effective means of affording an individual with a disability an equal opportunity to vote, the County need not provide ballots in Braille.

II-7.3000 Emergency telephone services.

II-7.3300 Seven-digit lines.

[Insert the following text at the end of this section, p. 42.]

ILLUSTRATION: Some States may operate a statewide 911 system for both voice and nonvoice calls and, in addition, permit voice callers only to dial seven-digit numbers to obtain assistance from particular emergency service providers. Such an arrangement does not violate title II so long as nonvoice callers whose calls are directed through 911 receive emergency attention as quickly as voice callers who dial local emergency seven-digit numbers for assistance.

II-9.0000 INVESTIGATION OF COMPLAINTS AND ENFORCEMENT

II-9.2000 Complaints.

[Insert the following text at the end of this section, p. 51.]

Is a private plaintiff entitled to compensatory damages? A private plaintiff under title II is entitled to all of the remedies available under section 504 of the Rehabilitation Act of 1973, including compensatory damages.

ILLUSTRATION: A county court system is found by a Federal court to have violated title II of the ADA by excluding a blind individual from a jury because of his blindness. The individual is entitled to compensatory damages for any injuries suffered, including compensation, when appropriate, for any emotional distress caused by the discrimination.

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"News Reviews to Peruse"

Number 33 November 15, 1996

Items regarding the Americans with Disabilities Act which maybe of interest to you. Please share this information with colleagues, supervisors and subordinates. The views and opinions expressed herein are solely those of the editor, except where noted, and do not represent the views of the Office of Chief Counsel or the Department of Environmental Protection. Comments, contributions or questions, including requests for accommodations needed to receive or apprehend this publication, should be addressed to Patrick H. Bair (Ed.).

- **FCC RULES** - The Federal Communications Commission has issued proposed rules under the Telecommunications Reform Act of 1996 to implement procedures designed to make telecommunications services more accessible to people with disabilities. The FCC is seeking comment on the proposed rules, published at 61 FR 50465 (9/26/96). Comments received on computer diskette will be published on the Internet at **http://www.fcc.gov**.

- **COPYRIGHT CHANGES** - An amendment to the federal legislative branch appropriations bill, signed recently by the President, will make it easier to get books in accessible formats to the market more quickly. The amendment, sponsored by Sen. John Chafee, provides "it is not an infringement of copyright for an authorized entity to reproduce or to distribute copies or phonorecords of a previously published, nondramatic literary work if such copies or phonorecords are reproduced or distributed in specialized formats exclusively for the use of blind or other persons with disabilities."

- **GOOD FAITH NO SAFE HARBOR** - A federal court in Illinois has denied a

motion to dismiss filed by an employer defending against the ADA claim of a former employee who alleged that the employer refused to reasonably accommodate her. The court ruled that even though the employer believed in good faith that the accommodation requested by the employee was unreasonable and denied it on that basis, the employee could still proceed with her claim. The court stated it could find no cases which supported the employer's "attempt to apply a subjective good faith standard to the employer's determination of what accommodations are reasonable." (Garza v. Abbott Laboratories, 1996 U.S.Dist., LEXIS 13520, N.D.Ill.1996)

- "**NON-ASSIST" CLAUSE INVALID** - The First Circuit U.S. Court of Appeals (ME, NH, MA, RI, PR) has ruled that so-called "non-assist" clauses, typical in agreements in settlement of Title VII lawsuits, are invalid. The clauses customarily state that in entering into the settlement agreement, the claimant agrees not to file a charge or assist fellow employees or the EEOC in investigating a charge of unlawful discrimination. While not ruling on the question whether an agreement could prohibit the filing of a charge by the employee, the court determined that prohibiting communications with the EEOC should be void as against public policy. (EEOC v. Astra USA, 1996 U.S.App. LEXIS 23355, 1st Cir.1996)

- **ACCESSIBLE PRISONS** - The Third U.S. Circuit Court of Appeals (PA, NJ, DE, VI) recently ruled in a case involving inmates of an Allegheny County jail that Title II of the ADA applies to correctional facilities, thus provoking a split between that court and courts in the Fourth, Seventh and Tenth circuits. (Inmates of Allegheny County Jail v. Wecht, 1996 U.S.App. LEXIS 21555, 3d Cir.1996 - in the same case, the Court also ruled that a facially neutral rule may violate the ADA if it causes a discriminatory impact.) Now, the Third Circuit has been joined in its opinion by a federal district court in California, which found that the California Department of Corrections violated the ADA by failing to provide some of its prisoners with disabilities with an equal opportunity to benefit from some of its programs.

In an interesting side story, today's Philadelphia Inquirer reports that the Pennsylvania Department of Corrections has designated the new minimum-security State Correctional Institution at Laurel Highlands as the new home for many of the Commonwealth's aging inmates and/or inmates with disabilities. Special architectural features, such as wide hallways, handrails, etc., have been installed or upgraded at the former state mental hospital. It is anticipated that the facility will help the Commonwealth deal with an aging prison population, as well as those prisoners with disabilities. [Sounds like a noble objective, but does anyone remember what the ADA provides regarding segregation on the basis of disability?]

- **SLOGAN OF THE MONTH** - From a group organized to promote the rights of persons with learning disabilities: "NOT ALL GREAT MINDS THINK ALIKE!"

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"News Reviews to Peruse"

Number 34 December 13, 1996

Items regarding the Americans with Disabilities Act which may be of interest to you. Please share this information with colleagues, supervisors and subordinates. The views and opinions expressed herein are solely those of the editor, except where noted, and do not represent the views of the Office of Chief Counsel or the Department of Environmental Protection. Comments, contributions or questions, including requests for accommodations needed to receive or apprehend this publication, should be addressed to Patrick H. Bair (Ed.).

- **EXCESSIVE ABSENTEEISM GROUNDS FOR EXAM** - The Ninth Circuit U.S. Court of Appeals (AK, AR, CA, HI, ID, MT, NE, OR, WA, GU) has decided that an employer may require an employee who was chronically absent from work to take a medical examination without violating the ADA. The ADA prohibits employers from requiring employee medical exams to gather information about the employee's disability status unless the exam is "job-related and consistent with business necessity." In this case, the Ninth Circuit found that the employee's chronic absences significantly reduced her productivity over a four or five year period and caused disruption and morale problems in her office. The Court opined that an employer has good reason to determine an employee's fitness to perform her job where the employee's health problems have a "substantial and injurious impact" on the employee's ability to perform job-related functions. (Yin v. State of California, CA9, 1996, 5 ADCases 1487)

In an unrelated case, the U.S. District Court for the Western District of Michigan found an employer violated the ADA when it required an employee

with HIV to answer medical inquiries and take a medical exam. The employer claimed it needed the requested information in order to determine whether the employee posed a "direct threat." The court rejected this argument, stating that medical examinations are permitted only under these circumstances: when an employee is having difficulty performing a job effectively; when an employee becomes disabled on the job or wishes to return to work after an illness or injury; is an employee requests an accommodation; or if a medical examination is required by other laws. (EEOC v. Prevo's Family Market, 1996 WL 538635, WDMich.1996)

- "**CONTROLLED" CONDITION** - The federal district court for Kansas has joined several other courts in rejecting the EEOC's guidance on disabilities which can be "controlled" with medication. The EEOC Interpretive Guidelines provide that the judgment whether a person has a disability is made regardless of "mitigating measures" such as medication, prosthetic devices or treatment. 29 CFR § 1630.2(j). The Kansas court noted but did not follow this guidance in denying an ADA claim based on high blood pressure, which could be controlled with medication. This decision, the court observed, follows the decision of the Fifth Circuit Court of Appeals in Chandler v. City of Dallas (2 ADCases 1362), in which that court found that controlled diabetes and corrected vision - which the employee had admitted he did not consider to be substantial limitations on his major life activities - are not disabilities. The Kansas court also cited Deghand v. Wal-Mart Stores (DCKan, 5 ADCases 1006), in which high blood pressure was found not to be a disability because of a lack of medical evidence that hypertension substantially limits any major life activity. The court observed that the only restriction requested by the employee's physician was a 200-pound lifting restriction, which the court found did not constitute a substantial limitation. Finally, the court ruled that the employer's reliance on US Transportation Department regulations barring it from employing mechanics with high blood pressure constitutes a complete defense to an ADA claim. (Murphy v. United Parcel Service, DCKan, No. 95-4126-SAC, 10/22/96)

- **MANDATORY ARBITRATION CLAUSES** - The U.S. Supreme Court let stand a decision of a divided Fourth U.S. Circuit Court of Appeals in which that court barred a union-represented employee's age and sex discrimination lawsuit because she was covered by a negotiated grievance procedure and had failed to submit her claims for mandatory arbitration. The Fourth Circuit (MD, NC, SC, VA, WV) majority held that, since neither Title VII nor the ADA prohibit arbitration as a means of resolving disputes, and in view of the fact that the employer's collective bargaining agreement specifically provided that claims of gender and disability discrimination are subject to arbitration, the claims must be resolved in arbitration and not the courts. (Austin v. Owens Brockway Glass Container, USSct, No. 96-337, 72 FEPCases 320) In the Third Circuit (DE, NJ, PA, VI), in a case which did not involve a discrimination claim, the court ruled that an arbitrator's award does not bar a federal court from retrying a grievance. According to the court, though the collective bargaining agreement clearly provided that arbitration was mandatory, the agreement said nothing about it being "final," "binding" or "exclusive." (Orlando v. Interstate Container Corp., CA3, No. 96-1085,

11/6/96)

- **CANCER "SUBSTANTIALLY LIMITING?"** - The Supreme Court also recently declined to review a decision by the Fifth Circuit (TX, LA) to deny an employee's claim that she was fired because her employer "regarded" her as having a disability. Prior to the employee's return from an extended medical absence, her supervisor asked if her illness could be a recurrence of cancer diagnosed ten years prior. The supervisor instructed the employee not to report to work and fired her three days later for performance problems. The trial court granted the employer's motion to dismiss the employee's ADA lawsuit, finding that the employee failed to prove that the employer considered the employee's cancer to substantially limit any major life activity. The appellate court affirmed. (Paulsen v. Beyond, Inc., USSCt, No. 96-400, 11/18/96)

- **MOHAMED V. MARRIOTT UPDATE** - You may remember this case reported earlier in this journal. It involves Marriott's termination of Ahmed Mohamed, a deaf employee accused of theft after the sign language interpreter provided for the pre-discharge conference by Marriott misinterpreted Mohamed's explanation of the event as an admission of guilt. After his discharge, Mohamed filed for Social Security disability benefits, entering on a form that he was unable to work due to his "disabling condition" - total deafness. Marriott moved to dismiss Mohamed's claim, arguing that Mohamed should be prohibited from making opposing claims of his ability to work in different fora. (The ADA requires that a claimant be able to perform his/her job with or without a reasonable accommodation; Social Security forms require an applicant for benefits to claim "total disability.") The federal district court in New York which is hearing the case denied Marriott's motion to dismiss. Though several courts have found that statements on the disability forms prohibit ADA claims, the New York court found such a per se dismissal of what may otherwise be valid claims inappropriate. (Mohamed v. Marriott International Inc., DCSNY, No. 94 Civ. 2336 (RWS), 10/31/96)

- **REASSIGNMENT MUST BE CONSIDERED** - Denver city government must consider assigning police officers who can no longer perform all of their essential job functions to desk jobs, including jobs normally occupied by civilian employees. A lawsuit was brought against the city by the U.S. Department of Justice as a "pattern or practice" suit on behalf of a group of former officers who were forcibly retired after they were injured on the job. The U.S. District Court for Colorado determined that the officers could not perform all of the essential functions of the job even with an accommodation, but rejected the officers' claim that the ability to make forcible arrests and fire a weapon were not essential functions. The court, however, also rejected the city's contention that all police department positions required the ability to make forcible arrests, and dismissed the city's arguments that it was barred from transferring officers to civilian positions by the city charter and that doing so was an undue administrative hardship. The court held that the city was required to consider reassigning the officers to positions within the city's police and fire departments or the city's civilian employee personnel system. (U.S. v. Denver, 1996 U.S.Dist. LEXIS

15257, No. 96-K-370, D.Colo. 10/10/96)

- **EEOC POLICY LETTER - BARRIERS OUTSIDE WORK** - According to an EEOC policy letter, employers are not required to eliminate or make accommodation to overcome barriers to persons with disabilities outside of work. Two examples of accommodations which are not required are given in the letter: 1) transferring an employee from his or her car to a wheelchair ("Although the transfer may take place on or near the employer's premises, the physical barrier encountered is one that exists apart from the work environment."), and 2) providing transportation to and from work for an employee whose disability makes it difficult or impossible to use public or private transportation. An obligation to assist employees with disabilities would arise only if the employer offers similar assistance to non-disabled employees. The EEOC letter distinguishes so-called "workplace barriers," such as work schedules and parking space assignments, which may have to be modified for an employee with a disability, e.g., an employee who uses a wheelchair and commutes by public transportation must be permitted to arrive later in inclement weather. (EEOC Policy Letters are informal discussions and are not official opinions.) (EEOC, Thornton, 5/4/95)

- **UPDATED EEOC CHARGE DATA** - For those of you who are fascinated by statistics, here are the latest figures from the EEOC: As of September 30, 1996, the EEOC had received 72, 687 ADA-related charges, of which 59, 014 were resolved. According to the NAADAC Newsletter, the average monetary benefits per charge is nearly $16,000.

- **CASE SHORTS** - "General grief or stress" is not covered by the ADA. (Johnson v. Boardman Petroleum, Inc., 5 ADCases 983, SDGa. 1996)

- "Interacting with others" is not a major life activity. (Soileau v. Guilford of Maine, 5 ADCases 1036, DMe. 1996)

- A court will not assume an impairment is "substantially limiting" if the claimant does not present evidence to that effect. (Aucutt v. Six Flags Over Mid-America, Inc., 869 F.Supp. 736, EDMo. 1994)

- An employer need only provide an accommodation that works, not necessarily the one the employee prefers. (Perkins v. Board of Trustees of the University of Illinois, 8 NDLR 187, NDIll. 1996)

- **NO KNOWLEDGE OF DISABILITY** - A nursing home did not violate the ADA when it involuntarily reassigned a nurse with multiple sclerosis from a supervisory position to a unit nurse. The nurse claimed she was reassigned after the employer discovered she had MS. The employer denied her MS was a factor in its decision, claiming the nurse was reassigned for poor performance as a supervisor. The court found that, though the employer asked the nurse several times for information regarding her medical condition after she complained about symptoms, expressed the belief that she had MS and took time off, she did not provide proof to the employer that she had a disability until after her reassignment. The court did not accept that the employer had

sufficient information at the time of the reassignment upon which to discriminate against the nurse on the basis of disability. (Kocsis v. Multi-Care Management Inc., 97 F.3d 876, 10/15/96)

- **ATTACHMENT** - Attached you will find a question and answer document about Title II of the ADA, pulled off of the Department of Justice homepage (**www.usdoj.gov**).

Attachment

COMMON QUESTIONS ABOUT TITLE II OF THE AMERICANS WITH DISABILITIES ACT (ADA)

1. Q: Do we have to retrofit every existing municipal building in order to meet the accessibility requirements of the ADA?

A: No. Title II of the ADA requires that a public entity make its programs accessible to people with disabilities, not necessarily each facility or part of a facility. Program accessibility may be achieved by a number of methods. While in many situations providing access to facilities through structural methods, such as alteration of existing facilities and acquisition or construction of additional facilities, may be the most efficient method of providing program accessibility, the public entity may pursue alternatives to structural changes in order to achieve program accessibility. example, where the second-floor office of a public welfare agency may be entered only by climbing a flight of stairs, an individual with a mobility impairment seeking information about welfare benefits can be served in an accessible ground floor location or in another accessible building. Similarly, a town may move a public hearing from an inaccessible building to a building that is readily accessible. When choosing among available methods of providing program accessibility, a public entity must give priority to those methods that offer services, programs, and activities in the most integrated setting appropriate.

2. Q: If we opt to make structural changes in providing program accessibility, are we required to follow a particular design standard in making those changes?

A. Yes. When making structural changes to achieve program accessibility, a public entity must make those changes in accordance with the standards for new construction and alterations. See question #5.

3. Q: What is the time line for making structural changes?

A: Any structural changes that are required to achieve program accessibility must be made by January 26, 1995. Each public entity with 50 or more employees was required to complete a transition plan by July 26, 1992, setting forth the steps necessary to complete the changes.

4. Q: Are there any limitations on the program accessibility requirement?

A: Yes. A public entity does not have to take any action that it can demonstrate would result in a fundamental alteration in the nature of its program or activity or in undue financial and administrative burdens. This determination can only be made by the head of the public entity or his

or her designee and must be accompanied by a written statement of the reasons for reaching that conclusion. The determination that undue burdens would result must be based on all resources available for use in the program. If an action would result in such an alteration or such burdens, the public entity must take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits and services of the program or activity.

5. Q. What architectural design standard must we follow for new construction and alterations?

A: Public entities may choose from two design standards for new construction and alterations. They can choose either the Uniform Federal Accessibility Standards (UFAS) or the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG). ADAAG is the standard that must be used for privately-owned public accommodations and commercial facilities under title III of the ADA. If ADAAG is chosen, however, public entities are not entitled to the elevator exemption (which permits certain privately-owned buildings under three stories or under 3,000 square feet per floor to be constructed without an elevator).

6. Q. Is the Federal Government planning to eliminate this choice and establish one design standard for new construction and alterations?

A. Yes. The Department of Justice is proposing to amend its current ADA Standards for Accessible Design (which incorporate ADAAG) to add sections dealing with judicial, legislative, and regulatory facilities, detention and correctional facilities, residential housing, and public rights-of-way. The proposed amendment would apply these Standards to new construction and alterations under title II. Under the proposed rule, the choice between ADAAG and UFAS would be eliminated.

7. Q: We want to make accessibility alterations to our city offices, which are located in an historic building listed in the National Register of Historic Places. Are we prohibited from making changes? Which rules apply to us? What if these alterations would destroy the historic nature of the building?

A: Alterations to historic properties must comply with the specific provisions governing historic properties in ADAAG or UFAS, to the maximum extent feasible. Under those provisions, alterations should be done in full compliance with the alterations standards for other types of buildings. However, if following the usual standards would threaten or destroy the historic significance of a feature of the building, alternative standards may be used. The decision to use alternative standards for that feature must be made in consultation with the appropriate historic advisory board designated in ADAAG or UFAS, and interested persons should be invited to participate in the decisionmaking process.

The alternative requirements for historic buildings or facilities

provide a minimal level of access. For example --

1) An accessible route is only required from one site access point (such as the parking lot).

2) A ramp may be steeper than is ordinarily permitted.

3) The accessible entrance does not need to be the one used by the general public.

4) Only one accessible toilet is required and it may be unisex.

5) Accessible routes are only required on the level of the accessible entrance.

8. Q: But what if complying with even these minimal alternative requirements will threaten or destroy the historic significance?

A: In such a case, which is rare, the public entity need not make the structural changes required by UFAS or ADAAG. If structural modifications that comply with UFAS or ADAAG cannot be undertaken, the Department's regulation requires that "program accessibility" be provided.

9. Q: Does a city have to provide curb ramps at every intersection on existing streets?

A: No. To promote both efficiency and accessibility, public entities may choose to construct curb ramps at every point where a pedestrian walkway intersects a curb, but they are not necessarily required to do so. Alternative routes to buildings that make use of existing curb cuts may be acceptable under the concept of program accessibility in the limited circumstances where individuals with disabilities need only travel a marginally longer route. In addition, the fundamental alteration and undue burden limitations may limit the number or curb ramps required.

To achieve or maintain program accessibility, it may be appropriate to establish an ongoing procedure for installing curb ramps upon request in areas frequented by individuals with disabilities as residents, employees, or visitors.

However, when streets, roads, or highways are newly built or altered, they must have ramps or sloped areas wherever there are curbs or other barriers to entry from a sidewalk or path. Likewise, when new sidewalks or paths are built or are altered, they must contain curb ramps or sloped areas wherever they intersect with streets, roads, or highways. Resurfacing beyond normal maintenance is an alteration. Merely filling potholes is considered to be normal maintenance.

10. Q: Where a public library's open stacks are located on upper floors with no elevator access, does the library have to install a lift or an

elevator?

A: No. As an alternative to installing a lift or elevator, library staff may retrieve books for patrons who use wheelchairs. Staff must be available to provide assistance during the operating hours of the library.

11. Q: Does a municipal performing arts center that provides inexpensive balcony seats and more expensive orchestra seats have to provide access to the balcony seats?

A: No. In lieu of providing accessible seating on the balcony level, the city can make a reasonable number of accessible orchestra-level seats available at the lower price of balcony seats.

12. Q: Is a city required to modify its policies whenever requested in order to accommodate individuals with disabilities?

A: No. A public entity must make only "reasonable modifications" in its policies, practices, or procedures to avoid discrimination. If the public entity can demonstrate that a modification would fundamentally alter the nature of its service, program, or activity, it is not required to make the modification.

For example, where a municipal zoning ordinance requires a set-back of 12 feet from the curb in the central business district and, in order to install a ramp to the front entrance of a pharmacy, the owner requests a variance to encroach on the set-back by three feet, granting the variance may be a reasonable modification of town policy.

On the other hand, where an individual with an environmental illness requests a public entity to adopt a policy prohibiting the use of perfume or other scented products by its employees who come into contact with the public, adopting such a policy is not considered a "reasonable" modification of the public entity's personnel policy.

13. Q: Does the requirement for effective communication mean that a city has to put all of its documents in Braille?

A: Braille is not a "required" format for all documents. A public entity must ensure that its communications with individuals with disabilities are as effective as communications with others.

A public entity is required to make available appropriate auxiliary aids and services where necessary to ensure effective communication. Examples of auxiliary aids and services that benefit various individuals with vision impairments include magnifying lenses, qualified readers, taped texts, audio recordings, Brailled materials, large print materials, or assistance in locating items.

The type of auxiliary aid or service necessary to ensure effective

communication will vary in accordance with the length and complexity of the communication involved.

For example, for individuals with vision impairments, employees can often provide oral directions or read written instructions. In many simple transactions, such as paying bills or filing applications, communications provided through such simple methods will be as effective as the communications provided to other individuals in similar transactions.

Many transactions, however, involve more complex or extensive communications than can be provided through such simple methods and may require the use of magnifying lenses, qualified readers, taped texts, audio recordings, Brailled materials, or large print materials.

14. Q: Must tax bills from public entities be available in Braille and/or large print? What about other documents?

A: Tax bills and other written communications provided by public entities are subject to the requirement for effective communication. Thus, where a public entity provides information in written form, it must, when requested, make that information available to individuals with vision impairments in a form that is usable by them. "Large print" versions of written documents may be produced on a copier with enlargement capacities. Brailled versions of documents produced by computers may be produced with a Braille printer, or audio tapes may be provided for individuals who are unable to read large print or do not use Braille. Brailled documents are not required if effective communication is provided by other means.

15. Q: Does a city have to arrange for a sign language interpreter every time staff members deal with people who are deaf or hard of hearing?

A: Sign language interpreters are not required for all dealings with people who are deaf or hard of hearing. A public entity is required to make available appropriate auxiliary aids and services where necessary to ensure effective communication.

Examples of auxiliary aids and services that benefit individuals with hearing impairments include qualified interpreters, notetakers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDDs), videotext displays, and exchange of written notes.

The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the length and complexity of the communication involved.

For example, employees can often communicate with individuals who have hearing impairments through written materials and exchange of written notes. In many simple transactions, such as paying bills or filing applications, communications provided through such simple methods will be as effective as the communications provided to other individuals in similar transactions.

Many transactions, however, involve more complex or extensive communications than can be provided through such simple methods and may require the use of qualified interpreters, assistive listening systems, videotext displays, or other aids or services.

16. Q: Do all city departments have to have TDDs to communicate with people who have hearing or speech impairments?

A: No. Public entities that communicate by telephone must provide equally effective communication to individuals with disabilities, including hearing and speech impairments. If telephone relay services, such as those required by title IV of the ADA, are available, these services generally may be used to meet this requirement.

Relay services involve a relay operator who uses both a standard telephone and a TDD to type the voice messages to the TDD user and read the TDD messages to the standard telephone user. Where such services are available, public employees must be instructed to accept and handle relayed calls in the normal course of business.

However, State and local agencies that provide emergency telephone services must provide "direct access" to individuals who rely on a TDD or computer modem for telephone communication. Telephone access through a third party or through a relay service does not satisfy the requirement for direct access.

17. Q: Are there any limitations on a public entity's obligation to provide effective communication?

A: Yes. This obligation does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of its services, programs, or activities, or in undue financial and administrative burdens.

18. Q: Is there any money available to help local governments comply with the ADA?

A: Yes. Funding available through the Community Development Block Grant program at the U.S. Department of Housing and Urban Development may be used for accessibility purposes, such as installation of ramps, curb cuts, wider doorways, wider parking spaces, and elevators. Units of local government that have specific questions concerning the use of CDBG funds for the removal of barriers should contact their local HUD Office of Community

Planning and Development or call the Entitlement Communities Division at HUD, (202) 708-1577, for additional information.