

# ADA NEWS

## 2002

```
@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@
@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@
@                                                                 @
@          ***          *****          ***          @
@          *****          *****          *****          @
@          *** ***          ***  ****          *** ***          @
@          *** ***          ***  ****          *** ***          @
@          *****          ***  ****          *****          @
@          *****          ***  ****          *****          @
@          ***          *** *****          ***          ***          @
@          ***          *** *****          ***          ***          @
@                                                                 @
@          ** ** ***** **          ** *****          @
@          ** ** ***** **          ** *** **          @
@          *** ** **          **          ** ** **          @
@          **** ** ****          ** *** **          ****          @
@          ** **** ****          ** ***** **          ****          @
@          ** *** **          ** ** ** ** **          *          ****          @
@          ** ** *****          ****  ****          ***  ***          @
@          ** ** *****          ***  ***          *****          @
@                                                                 @
```

### "News Reviews to Peruse"

Number 95

January 2002

Items regarding disabilities law and 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.) ([pbair@state.pa.us](mailto:pbair@state.pa.us)). Current and recent issues can be found online at [http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews\\_index\\_2001.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews_index_2001.htm). All past issues of this publication are archived at [http://intradep/ChiefCounsel/ADANews/adanews\\_index.htm](http://intradep/ChiefCounsel/ADANews/adanews_index.htm) on the DEP internal website.

**SUPREME COURT LIMITS MEANING OF “DISABILITY”** - In a not unexpected decision, the U.S. Supreme Court has ruled against an employee whose carpal tunnel syndrome made it difficult for her to work at her assembly line position. The decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, USSCt., No. 00-1089, 1/8/02 (see *ADA News* No. 87, 5/15/01 ([http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/ada\\_news\\_87\\_frontpage.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/ada_news_87_frontpage.htm))), was a victory for employers trying to limit the impact of the Act. “Merely having an impairment does not make one disabled for purposes of the ADA,” wrote Justice Sandra Day O’Connor for a unanimous Court. “To qualify as disabled, a claimant must further show that the limitation on the major life activity is ‘substantia[il].’ ... ‘Substantially’ in the phrase ‘substantially limits’ suggests ‘considerable’ or ‘to a large degree,’ and thus clearly precludes impairments that interfere in only a minor way with performing manual tasks.” Williams had argued that, while she was not prevented by her carpal tunnel syndrome from performing a variety of personal and household tasks, it nevertheless prevented her from performing manual tasks necessary for her job. The Court, however, saw the issue in the case as “whether the claimant is unable to perform the variety of tasks central to most people’s daily lives, not whether the claimant is unable to perform the tasks associated with her specific job,” and whether “the impairment’s impact [is] permanent or long-term.” Justice O’Connor observed that Williams “could still brush her teeth, wash her face, bathe, tend her flower garden, fix breakfast, do laundry, and pick up around the house.” While the decision does not foreclose the possibility that another individual’s carpal tunnel syndrome could be a disability under the ADA, it certainly sets the bar higher for those individuals, as well as anyone with an impairment that does not provide obviously substantial limitations. “This decision is going to give employers a lot of confidence that they can challenge workers on whether they are disabled,” said Kathleen Blank, a National Council on Disability attorney. “It’s clearly a decision in favor of employers, giving them more latitude to refuse to make accommodations.” *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, USSCt., No. 00-1089, 1/8/02 (<http://a257.g.akamaitech.net/7/257/2422/08jan20021100/www.supremecourtus.gov/opinions/01pdf/00-1089.pdf>).

**COURT ISSUES EEOC v. WAFFLE HOUSE DECISION** - It has been a busy week for the U.S. Supreme Court. Fast on the heels of its decision in *Toyota*, the Court on January 15<sup>th</sup> issued its decision in *EEOC v. Waffle House* (see *ADA News* No. 94, 12/15/01, [http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/ada\\_news\\_94\\_frontpage.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/ada_news_94_frontpage.htm)), a case that asked whether an agreement between an employer and employee to arbitrate employment-related disputes bars the EEOC from suing the employer on the employee’s behalf. The Court decided 6-3 (Rehnquist, C.J., Scalia, J. and Thomas, J. dissenting) that such an agreement does not bar the EEOC from pursuing victim-specific judicial relief, such as back pay, reinstatement, and damages in an ADA enforcement action. Because the EEOC is not a party to the employment contract and has independent statutory authority to bring suit in any federal district court where venue is proper, the agency is not bound by the terms of a contract entered into between the employee and employer. *EEOC v. Waffle House, Inc.* USSCt. No. 99-1823,

1/15/02

(<http://a257.g.akamaitech.net/7/257/2422/15jan20021055/www.supremecourtus.gov/opinions/01pdf/99-1823.pdf>).

**HIGH COURT ACCEPTS YET ANOTHER ADA CASE** - The U.S. Supreme Court on January 11<sup>th</sup> agreed to review the decision of the U.S. Court of Appeals for the Eighth Circuit (ND, SD, NE, MN, IA, MO, AR) in a case that decided whether municipalities are subject to punitive damages for their failure to accommodate people with disabilities. The case below - *Gorman v. Easley*, CA8, No. 00-1029/00-1030, 6/13/01 (<http://www.ca8.uscourts.gov/opndir/01/06/001029P.pdf>) - involved a man who uses a wheelchair who was arrested for trespassing by Kansas City, Missouri police. Police officers moved him in a police van despite his protestations that the van was not equipped to move him safely. He suffered shoulder and back injuries while being taken to jail, and sued the city under the ADA and the Rehabilitation Act for failure to accommodate his disability. The city did not contest a \$1 million actual damage award, but appealed the \$1.2 million in punitive damages awarded by the trial jury. The Appellate Court refused to dismiss the award, but invited review of its decision by the Supreme Court in view of a conflict with the U.S. Court of Appeals for the Sixth Circuit (MI, OH, KY, TN). The Supreme Court case is docketed as *Barnes v. Gorman*, No. 01-682 (<http://www.supremecourtus.gov/docket/01-682.htm>).

**BBVS MAJOR ACCOMPLISHMENTS IN 2001** - “During Federal Fiscal Year 2001, the Bureau of Blindness and Visual Services (BBVS) increased the number of persons placed in competitive employment by 10 percent. BBVS Rehabilitation Counselors successfully rehabilitated 489 customers in FFY2001. 3,469 individuals were provided services in this program during the year. Over the past two years, the Bureau has nearly tripled the number of persons served through the Independent Living Older Blind program. This number has risen from 1,081 in 1999 to 2,965 in FFY 2001. Special commendation goes out to BBVS Social Workers across the Commonwealth for their hard work! The Bureau served 1,320 persons through their Specialized Services Adult Program during FFY 2001. BBVS field staff also provided services to 1,068 children during this time period. Congratulations to BBVS Vocational Rehabilitation Counselors, Rehabilitation Teachers, Orientation & Mobility Instructors, and Social Workers!” (From *OVERVIEW*, the Pa. Labor & Industry Office of Vocational Rehabilitation online newsletter, <http://www.dli.state.pa.us/landi/lib/landi/pdf/ovr/overview12-14-01.pdf>).

**“BRIDGING THE DIGITAL DIVIDE”** - UCP (United Cerebral Palsy) of Central Pennsylvania has launched a program designed to bring more accessible computer terminals to public libraries in the area. Called “Bridging the Digital Divide,” the project is supported by a federal grant as part of a U.S. Department of Commerce initiative. The first workstation installed under the program debuted last month at the East Shore Library of the Dauphin County Library System. The program will eventually include nine other libraries in Carlisle, Lancaster, Lebanon and other Central Pennsylvania locations. (UCP Central PA was recently named as number nineteen of the “100

Best Place to Work in PA,” an award created last year by the Ridge-Schweiker Administration.)  
[Http://www.ucp.org/ucp\\_localdoc.cfm/132/9396/9404/9404-9404/2954](http://www.ucp.org/ucp_localdoc.cfm/132/9396/9404/9404-9404/2954).

**DISABILITIES WEBSITE OF THE MONTH** - Take a look at the website of the “[Disability Social History Project](http://www.disabilityhistory.org)” for a fascinating insight into the history of disabilities and people with disabilities. The Disability History Project describes itself as, “an opportunity for disabled people to reclaim our history and determine how we want to define ourselves and our struggles. People with disabilities have an exciting and rich history that should be shared with the world ... Disability has existed since the beginning of time. The ways in which people with disabilities have been treated and represented in art and media varies dramatically throughout history and among different cultures. Disabled people have been revered or ascribed with superhuman characteristics in some cases and disparaged, tortured, and even systematically murdered in others. People with disabilities also have a long history of attempting to better their situation through self-advocacy and self-determination.” Wow! This site is filled with information, including biographies of famous people with disabilities (Helen Keller, Harriet Tubman, Frida Kahlo, and Rosa Luxemborg), a history of disability and the disability rights movement, and information on disability-related institutions. This website is truly “not to be missed.” Browse now to <http://www.disabilityhistory.org>. You will not be disappointed.

**EEOC WILL CONTINUE TO INVESTIGATE STATE CHARGES** - The EEOC has instructed its regional offices to continue to accept and investigate charges filed against state governments, despite the decision of the U.S. Supreme Court in *University of Alabama, et al. v. Garrett*, in which the High Court found that states are not subject to suits for monetary damages brought by their employees under Title I of the Act. The EEOC plans to continue to refer these cases for mediation, and will discuss possible litigation of meritorious cases with the U.S. Department of Justice. In addition, several states have waived their sovereign immunity for these suits, and legislation to do so is pending in others.

**NORTH CAROLINA WAIVES ADA IMMUNITY** - With the signature of Governor Michael Easley, North Carolina joined Minnesota in waiving its sovereign immunity to lawsuits by state employees under the ADA and the Age Discrimination in Employment Act (ADEA). North Carolina’s “[State Employee Federal Remedy Restoration Act](#)” imposes certain caps on damages, and applies also to suits under the Family Medical Leave Act and Fair Labor Standards Act.

**FAMILY SUPPORT ACT PASSES STATE HOUSE** - On November 20, 2001, the Pennsylvania House of Representatives unanimously passed the Family Support Act ([H.B. 1655](#)), legislation intended to assist in the establishment of services for families of children with developmental disabilities.

**SIXTH CIRCUIT REVERSES COURSE ON TITLE II** - The U.S. Court of Appeals for the Sixth Circuit, sitting *en banc*, has reversed its earlier decision in which it found that Title II of the ADA could not constitutionally be applied to a state defendant. (See *ADA News* No. 80, 10/15/00, [http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews\\_80.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews_80.htm).) “We conclude that the plaintiff’s action is barred by the Eleventh Amendment in so far as the action relies on congressional enforcement of the Equal Protection Clause,” wrote Circuit Judge Merritt for a divided Court, “but it is not barred in so far as it relies on congressional enforcement of the Due Process Clause. As applied to the plaintiff’s cause of action, Title II is ‘appropriate legislation’ under section 5 and the Due Process Clause of section 1 of the Fourteenth Amendment.” *Popovich v. Cuyahoga County Court of Common Pleas, Domestic Relations Division, CA6*, Nos. 98-4100/4540, 1/10/02 (<http://pacer.ca6.uscourts.gov/cgi-bin/getopn.pl?OPINION=02a0009p.06>).

### **AREA CALENDAR** -

- ❑ Public meeting of Presidential Task Force on Employment of Adults with Disabilities; 9-Noon, January 28, 2002; U.S. Chamber of Commerce headquarters, Washington, DC; panel will discuss President Bush’s “New Freedom Initiative,” among other topics; info at PTFEAD website, [http://www.dol.gov/\\_sec/programs/ptfead/main.htm](http://www.dol.gov/_sec/programs/ptfead/main.htm)
- ❑ Equal Access to Software & Information (EASI) has four online courses beginning February 4: “Beginner Barrier-free Web Design,” “Advanced Barrier-free Web Design,” “Barrier-free Information Technology,” and “Business Benefits of Accessible Information Technology;” EASI is a provider of online training on making computers and information technology for persons with disabilities; registration and syllabus are available from the main course page at <http://easi.cc/workshop.htm>
- ❑ National Association of ADA Coordinators Spring 2002 National Conference; April 23 - 26, 2002; San Diego Marriott Mission Valley Hotel, San Diego, CA; conference will feature prominent speakers and workshops covering a variety of topics in four tracks: Employment, College/University, Accessibility, and Transportation; required pre-registration deadline is April 17 (early-bird discount is available for registrations made by February 18); more information at 1-800-722-4232, or [naadac@aol.com](mailto:naadac@aol.com)
- ❑ “Providing Culturally Competent Disability Services;” May 6 - 8, 2002; Washington, DC; international conference to examine issues related to providing rehabilitation services to persons born in other countries and of differing cultures; sponsored by the Center for International Rehabilitation Research Information and Exchange (CIRRIE); information and a call for papers available at <http://cirrie.buffalo.edu/conference/CIRRIE2002>

**UPS FAILS TO ENGAGE IN INTERACTIVE PROCESS WITH DRIVER** - The U.S. Court of Appeals for the Ninth Circuit (WA, OR, ID, CA, NV, AZ, AK, HI, GU) has reversed a lower court decision dismissing the ADA claim of a United Parcel Service warehouse worker. The worker, who is deaf, applied for a position as a driver. UPS requires all of its drivers to be certified by the U.S. Department of Transportation (DOT), a certification denied to the worker because of her hearing impairment. The worker, who was otherwise qualified to be a driver, asked UPS to modify its policy as a reasonable accommodation to allow her to drive smaller UPS vehicles for which the DOT certification was not necessary, but was refused. She resigned her position and sued UPS, charging that its across-the-board prohibition discriminated against her. The trial court granted UPS summary judgment, but the Appellate Court reversed, finding that the company had failed to engage the worker in an interactive process following her request for accommodation and had improperly denied her request for accommodation. (The opinion contains an interesting discussion of the “business necessity” defense under the ADA.) *Morton v. United Parcel Service, Inc.* CA9, No. 99-17447, 11/30/01 ([http://www.ca9.uscourts.gov/ca9/newopinions.nsf/C5B60AB901073A8D88256B1400537A04/\\$file/9917447.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/C5B60AB901073A8D88256B1400537A04/$file/9917447.pdf?openelement)).

**FIRED SUPERVISOR SUCCEEDS IN REVERSING TRIAL COURT** - A fired warehouse supervisor with Type I diabetes was successful in his attempt to have a trial court’s dismissal of his ADA claim reversed on appeal. The U.S. Court of Appeals for the Seventh Circuit (WI, IL, IN) found that the lower tribunal had erred when it found the supervisor not to be a qualified individual with a disability. The Appellate Court found that the supervisor’s difficulty in controlling his worsening diabetic condition could amount to a substantial limitation on the major life activities of thinking and caring for himself to the extent that a factual issue was created, making the case inappropriate for summary judgment. *Nawrot v. CPC International, n/k/a Bestfoods, Inc.*, CA7, No. 00-2849, 1/11/02 (<http://laws.lp.findlaw.com/7th/002849.html>).

**DIABETIC WORKER POSED A DIRECT THREAT TO OTHERS** - The U.S. Court of Appeals for the Ninth Circuit affirmed a lower court’s decision dismissing the ADA claim of a worker at an Oregon facility of a Pennsylvania chemical manufacturer who had several severe diabetic episodes while on the job. The worker was responsible for handling large volumes of chlorine gas and liquid chlorine, and was required to work rotating shifts, which interfered with his ability to control his diabetes. The Court found that, even if the chances were small of the worker experiencing a diabetic episode on the job that would cause a loss of consciousness, the consequences of an accident were catastrophic. Since the record showed that “[n]one of the examining or consulting physicians could rule out the occurrence of a hypoglycemic event that would affect [his] ability to remain conscious, alert, and communicative, especially in light of [the worker’s] somewhat erratic medical history,” the risk of his having such an episode was real and immediate. Using the four-part EEOC test for direct threat, the Court found the worker to be a direct threat to others and, thus, not a qualified individual with a disability. *Hutton v. Elf Atochem*

North America, Inc., CA9, No. 00-35683, 11/28/01  
([http://www.ca9.uscourts.gov/ca9/newopinions.nsf/A86720895D48DA8088256B12005F595F/\\$file/0035683.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/A86720895D48DA8088256B12005F595F/$file/0035683.pdf?openelement)).

**AMAZON.COM DEBUTS NEW ACCESSIBLE WEBSITE** - Last month, [Amazon.com](http://www.amazon.com) launched “Amazon Access,” an alternative version of its commercial website designed to make online shopping easier for customers using screen access software. Found at <http://www.amazon.com/access>, the site is a streamlined version of Amazon.com’s standard website with less text and fewer graphics, providing access to Amazon.com’s full line of products and personalization features. The text and user functions are advertised as being fully compatible with screen access software, which reads aloud the text and links displayed for the user.

**NCD YOUTH ADVISORY COMMITTEE SOLICITS INPUT** - The Youth Advisory Committee of the National Council on Disability (NCD), chartered in January 2000 to provide advice to the NCD on a wide variety of issues impacting the lives of children and youth, is soliciting youth input on a draft paper. The paper, posted at <http://www.ncd.gov/newsroom/advisory/youth/speakout.html>, addresses five topical areas: Education; Social Security, Rehabilitation & Health Care; Transportation; Employment; and Voting. “[The] paper is a first effort by the NCD Youth Advisory Committee to call nation-wide attention to youth and young adult perspectives across a number of issues that impact the disability community.” [Http://www.ncd.gov/newsroom/advisory/youth/youth.html](http://www.ncd.gov/newsroom/advisory/youth/youth.html).

**ON A ROLL TALK RADIO ON LIFE & DISABILITY** - “Live, Sundays 6-8 p.m. on 39 radio stations and the Internet, ‘On A Roll’s’ URL <http://www.onarollradio.com> will point you directly to a new and improved site within iCan, a virtual disability community. On A Roll now airs on the Radio America network and would like to connect with local organizations in each of our markets to develop strategies for promoting the show in your community. Check the website for stations airing the program in your area. Judy Heumann, a former assistant secretary for the U.S. Department of Education during the Clinton administration will host a show once a month starting January 13. Check the site to get Judy’s on-air schedule.” (From January’s *ADA Update*, a publication of the Pennsylvania ADA Coalition, <http://www.psu.edu/dept/aaoffice/PADAC>.)

**PARKING PLACARDS NO LONGER AVAILABLE ON E-BAY** - A mini-scandal threatened to engulf online retailer “eBay” last week, when some folks found so-called “handicapped parking placards” being offered for auction on the website. The counterfeit placards, advertised as “novelty items,” were apparently near-perfect replicas of state government-issued placards, and displayed no indication that they were fakes. Fast action by disability advocates (notably Frederick Shotz of ADA Consulting Associates) convinced eBay attorneys that it would be in their interests to stop allowing the sale, and the sale disappeared from the website soon after. In many states it is a criminal violation to use a counterfeit parking permit, and printing placards using the

design as shown in federal regulations published by the United States Department of Transportation is a federal felony. A change in eBay's policy on acceptable merchandise is expected.

---



```

@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@
@
@          ***          *****          ***          @
@          *****          *****          *****          @
@          *** ***          ***          ***          *** ***          @
@          ***          ***          ***          ***          ***          ***          @
@          *****          ***          ***          *****          @
@          *****          ***          ***          *****          @
@          ***          ***          *****          ***          ***          @
@          ***          ***          *****          ***          ***          @
@          **   **   *****   **          **   *****          @
@          **   **   *****   **          **   ***          ***          @
@          ***   **   **          **          **   **          **          @
@          ****   **   ****          **          ***          **          ****          @
@          **   ****   ****          **   *****   **          ****          @
@          **   ***   **          **   **   **   **          *          ****          @
@          **   **   *****          ****          ****          ***          ***          @
@          **   **   *****          ***          ***          *****          @
@

```

"News Reviews to Peruse"

Number 96

February 2002

Items regarding disabilities law and 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.) ([pbair@state.pa.us](mailto:pbair@state.pa.us)). Current and recent issues can be found online at [http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews\\_index\\_2001.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews_index_2001.htm). All past issues of this publication are archived at [http://intradep/ChiefCounsel/ADANews/adanews\\_index.htm](http://intradep/ChiefCounsel/ADANews/adanews_index.htm) on the DEP internal website.

**SO, JUST WHO IS THIS "AVERAGE PERSON"?** - An interesting decision recently came to my attention involving a Court's efforts to determine whether an individual's impairments were sufficiently serious for that person to be a person with a disability under the Act. The case evolved from a tragic mass shooting that took place in a Tulsa, Oklahoma Wendy's in 1994. The U.S. Court of Appeals for the Tenth Circuit (WY, UT, CO, NM, KS, OK) looked at a Title I claim of a man who sustained a brain injury in that shooting in order to determine whether he was

"substantially limited" in a major life activity. The Court looked for guidance to EEOC regulations that provide that "a person suffers a substantial limitation if he is either unable to perform or significantly restricted in performing a major life activity 'that the average person in the general population can perform.' 29 C.F.R. § 1630.2(j)." Therefore, the Court compared his abilities to those of the average person in the general population. Significantly, the Court made no comparison to the abilities the individual possessed **prior** to his injuries. The lesson to be learned here is that when making a determination, one should not compare a person's abilities to the level of abilities the person had prior to an injury, but to the level of those abilities held by others. Because the claimant in this case continued to function well compared to others, even though not as well as before his injuries, he was not substantially limited and, therefore, did not have a disability for purposes of the ADA. *Bowen v. Income Producing Management of Oklahoma, Inc.*, CA10, Nos. 98-5037 and 98-5051, 2/1/00 (<http://www.kscourts.org/ca10/cases/2000/02/98-5037.htm>).

**SUPREME COURT HEARS ARGUMENTS** - Now that we have decisions in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* and *EEOC v. Waffle House*, you are probably all wondering what is happening with the "other" ADA case on the U.S. Supreme Court's calendar. Oral arguments in *US Airways v. Barnett* (U.S., No. 00-1250) were heard by the Court on December 4<sup>th</sup>. (See ADA News No. 94, 12/15/01, [http://intradep/ChiefCounsel/ADANews/ada\\_news\\_94/ada\\_news\\_94\\_frontpage.htm](http://intradep/ChiefCounsel/ADANews/ada_news_94/ada_news_94_frontpage.htm).)

**COURT FINDS HIV DIRECT THREAT** - The U.S. Court of Appeals for the Eleventh Circuit (AL, GA, FL) has affirmed the dismissal of a case brought by a Florida dental hygienist who was asked to take a non-hygienist position when it was discovered that he tested positive for HIV. The hygienist's dental practice, after putting him on leave and researching the matter, determined that he presented a direct threat to its patients, and offered him a clerical position as an accommodation. *Waddell v. Valley Forge Dental Association*, CA11, No. 00-14896, 12/21/01 ([http://www.law.emory.edu/pub-cgi/print\\_hit\\_bold.pl/11circuit/dec2001/00-14896.opn.html?waddell#first\\_hit](http://www.law.emory.edu/pub-cgi/print_hit_bold.pl/11circuit/dec2001/00-14896.opn.html?waddell#first_hit)).

**FIRED HIV-POSITIVE TEENAGER GETS SETTLEMENT FROM GROCERY CHAIN** - A 16-year-old grocery clerk, who was fired when she told her store manager that she tested positive for HIV, will receive \$90,000 - \$1,000 in back pay and \$89,000 in emotional damages - in settlement of her ADA lawsuit against the store. The clerk worked one day in the store - until she informed the manager that she would have to take her breaks at certain

times in order to take HIV medication. The AIDS Resource Center of Wisconsin helped the teenager file a complaint with the EEOC, which found reasonable cause that a violation of the Act had occurred. The teenager, whose biological mother died in 1994, was born with the virus.

**DISABILITIES WEBSITE OF THE MONTH** - You should know that, now that the Winter Olympics are drawing to a close, the Winter Paralympics can't be far behind. The 2002 Paralympic Games will be held in salt Lake City from March 7-13. And what better time to visit the website of the National Sports Center for the Disabled? Now thirty-two years old, the Center is a non-profit organization that provides year-round sports activities for more than 3,000 adults and children with disabilities every year. "Our programs allow people with disabilities to take part in a sport, often for the very first time," says NCSO founder Hal O'Leary. "The success our participants experience helps them in their day-to-day life. They know that they can overcome their obstacles, achieve their goals, and reach their full potential." Visit the site and, while you're there, read about all of the NCSO-trained athletes who are heading to Salt Lake City. [Http://www.nscd.org](http://www.nscd.org).

**FORMER EMPLOYEE ALLOWED SUIT UNDER TITLE I** - The U.S. Court of Appeals for the Eleventh Circuit (AL, GA, FL) decided last November that a former Kmart employee should not be prevented from suing under Title I of the ADA even though not currently employed. The Court based its decision, reversing precedent, on the decision of the U.S. Supreme Court in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol+000&invol=95-1376>), a 1997 case in which that Court found that a former employee had similar rights under Title VII of the Civil Rights Act of 1964. The former Kmart manager, who stopped working after 30 years due to chronic depression, is suing because the retailer's disability insurance policy would end his coverage after two years, while providing coverage for those with physical illnesses until age 65. A split in the circuits on the question whether differentiating coverage between persons with mental and physical illnesses violates the ADA could bring the question to the U.S. Supreme Court. *Johnson v. K Mart Corp.*, CA11, No. 99-14563, 11/21/01 ([http://www.law.emory.edu/pub-cgi/print\\_hit\\_bold.pl/11circuit/nov2001/99-14563.opn.html?johnson+and+kmart#first\\_hit](http://www.law.emory.edu/pub-cgi/print_hit_bold.pl/11circuit/nov2001/99-14563.opn.html?johnson+and+kmart#first_hit)).

**WAL-MART SETTLES CLAIMS** - In the past several issues, I have reported on a number of Title I lawsuits brought by applicants and employees of retailing giant Wal-Mart. The EEOC has announced that Wal-Mart agreed on December 17<sup>th</sup>, literally the eve of trial, to pay \$6.8 million to settle thirteen ADA lawsuits brought on behalf of applicants for positions in eleven states. Among other charges, the complaints alleged the applicants were asked to complete applications that sought disability-related information, in violation of the Act. It is believed to be one of the largest

settlements by the government with a corporation under the Act. Go to <http://www.eeocvwalmart.com> for more information on these cases.

**SITE-SPECIFIC DEPRESSION NOT A DISABILITY** - The claim of a firefighter employed by the U.S. Army that he “suffers from the disability of depression caused by ‘the stress and anxiety of having to work with certain employees’” at a particular location where he was asked to work temporarily was dismissed in December by the U.S. Court of Appeals for the Fifth Circuit (TX, LA, MS). The firefighter, who had filed fifty-one unsuccessful EEOC complaints during his fifteen-year employment, claimed he had a disability - chronic depression - and was also “regarded as” having a disability. The Court found that his evidence of disability “is not sufficient to create a jury question as to whether he was disabled,” and found no evidence whatsoever to support his “regarded as” claim. *Aldrup v. Caldera, Secretary of the Army*, CA5, No. 01-50369, 12/10/01 (<http://laws.lp.findlaw.com/5th/0150369cv0.htm>).

**HHS REPORT SENT TO PRESIDENT** - Health and Human Services Secretary Tommy Thompson sent a status report of the agency’s progress in implementing President Bush’s “[New Freedom Initiative](#)” to President Bush on December 21, 2001. The report - “Delivering on the Promise: Preliminary Report of Federal Agencies’ Actions to Eliminate Barriers and Promote Community Integration” - can be found at <http://www.hhs.gov/newfreedom/prelim>.

**CAREER OPPORTUNITY** - The American Foundation for the Blind, a national nonprofit whose mission is to eliminate the inequities facing the ten million Americans who are blind or visually impaired, is seeking an advocate in its Governmental Relations office in Washington. A job announcement can be found at [http://www.afb.org/employment\\_detail.asp?jobid=100](http://www.afb.org/employment_detail.asp?jobid=100) or interested applicants can e-mail resumes and writing samples to [afbgov@afb.net](mailto:afbgov@afb.net).

**RESOURCES** - Some disability/employment-related resource material recently added to the catalogue. Publications from the Equal Employment Opportunity Commission (EEOC) can be ordered at <http://www.usdoj.gov/crt/ada/publicat.htm>, or by calling 1-800-514-0301(V) or 1-800-514-0383(TTY).

Some useful web-based resources, courtesy of Bill Ritzman, Executive Director of the Pennsylvania ADA Coalition:

- ❑ Emergency Preparedness - The Access Board has posted on its website information and resources for preparing the workplace to accommodate employees and visitors in times of emergency or disaster. The site is at <http://www.access-board.gov/evac.htm>.

- ❑ Sneak Peak: Self-Employment - The Small Business Administration is developing a web site for entrepreneurs with disabilities. To visit this work in progress, go to <http://sbaresearch.org>.
- ❑ ADA Watch Coalition - This online community of individuals and organizations defending the ADA can be found at <http://adawatch.org>.
- ❑ Disability History - The Disability History Museum's library features searchable archives with historic images, documents and other artifacts. To visit this web site go to <http://disabilitymuseum.org>.
- ❑ I.T. Works Grant Web Page Announcement, Law, Health Policy & Disability Center - The Law, Health Policy & Disability Center has a new web page for the I.T. Works project which began on November 1, 2001. The web page is located at [http://www.its.uiowa.edu/law/projects/it\\_grant.htm](http://www.its.uiowa.edu/law/projects/it_grant.htm).
- ❑ Careers in the Arts Listserv - The Kennedy Center for the Arts has a Listserv designed for people with disabilities interested in careers in the arts. Members of this Listserv will receive periodic announcements about job and funding opportunities in the arts across the nation, as well as information about training programs and other issues of interest to individuals pursuing careers in the arts. In addition, members of this Listserv will receive the new Careers in the Performing Arts for People with Disabilities newsletter. To subscribe to this free listserv go to: [http://artsedge.kennedy-center.org/user\\_guide/commcent/listservs.html](http://artsedge.kennedy-center.org/user_guide/commcent/listservs.html) and check the box next to "Careers in the Arts for People with Disabilities(ARTSFORUM)."
- ❑ SignTel: Virtual Interpreter - For a demonstration of newly available software program that translates speech and print into ASL, visit the web site at <http://signtelinc.com/demo.htm>
- ❑ House Trade Article - Anthony Tusler details (with editing and photographs supplied by his wife, Lyndi) their experiences in finding and trading wheelchair accessible "vacation" homes in an article published by "Disability World." Anthony and Lyndi have traded their home in Sonoma Valley, California with a wheelchair user in England, and spent a month in Warborough (near Oxford). "Disability World," a web based magazine, is found at <http://www.disabilityworld.org>.
- ❑ Airline Security & Disability Rights - The Department of Transportation has issued a fact sheet to address concerns about airport security for passengers with disabilities. The basic premise is that passengers with disabilities should still expect nondiscriminatory treatment as required by the Air Carrier Access Act (ACAA), but a thorough security screening does not violate the ACAA. Members of the public, who

feel they have been the subject of discriminatory actions or treatment by air carriers, may file a complaint by sending an e-mail to the Aviation Consumer Protection Division (ACPD) at [airconsumer@ost.dot.gov](mailto:airconsumer@ost.dot.gov). The ACPD's website is at <http://www.dot.gov/airconsumer>

- ❑ Commercial Market for Artists with Disabilities - For information about the USA division of the Mouth and Foot Painting Artists, visit their international website at <http://www.amfpa.com> or e-mail at [admin@mfpausa.com](mailto:admin@mfpausa.com)

Thanks, Bill!

**ATLANTA PUBLIC TRANSIT SYSTEM SUED** - Add Atlanta Georgia's public transit system MARTA (Metropolitan Atlanta Rapid Transit Authority) to the growing list of systems being sued under the ADA for accessibility problems. Last November, six plaintiffs, including a Fulton County magistrate with quadriplegia, represented by attorneys for the nonprofit Disability Law and Policy Center, filed suit alleging consistent, blatant discrimination against MARTA riders with disabilities. "Like many Atlantans, I use MARTA as my primary means of transportation, said Judge Stephanie Davis, who uses a wheelchair as the result of a spinal cord injury she sustained in 1980. "It is not unusual for me to encounter buses with wheelchair lifts that don't work, or drivers who don't know how to operate the equipment, and to experience unacceptable delays in service. But when a paratransit van driver recently refused to help me deposit my fare because he wasn't supposed to handle money, I was shocked." "In a three month period of time, riders have logged an unacceptable number of violations," explained Joshua H. Norris, spokesperson for the DLPC. "Visually-impaired riders constantly encounter drivers who do not announce stops, and people who use wheelchairs are frequently denied service because buses have broken equipment. Riders who rely on MARTA's paratransit service have received the worst treatment, which is made all the more unfortunate by the fact that the paratransit van is for many the only option for transportation." The ADA requires all public transportation systems to provide paratransit services, which are dedicated buses that provide transportation to individuals with disabilities who cannot use the regular, fixed route service.

**LATEX ALLERGY NOT A DISABILITY SAYS PHILADELPHIA JURY** - A federal jury in Philadelphia decided a case in December that could be very important to the health care industry. The jury found that a nurse's allergy to latex was not a disability because she could avoid the problem simply by not wearing latex products and taking medications. Lawyers for the defense argued that she could easily return to work as a nurse in a non-latex environment and thus, under *Sutton v. United Air Lines*, she did not have a disability. *Scanlon v. Temple University*.

**TICKET TO WORK OFF AND RUNNING** - The Social Security Administration launched its "Ticket to Work" program February 5<sup>th</sup> to help millions of people with disabilities find jobs. (See ADA News No. 92, 10/15/01,

[http://intradep/ChiefCounsel/ADANews/adanews\\_92/ada\\_news\\_92\\_frontpage.htm](http://intradep/ChiefCounsel/ADANews/adanews_92/ada_news_92_frontpage.htm).) “Ticket to Work” vouchers can be used by eligible people to pay for job training, employment counseling and vocational rehabilitation. The goal of the program is to get more people off the Social Security, Medicaid and Medicare rolls and bring more people with talent and skills into the work force, says Social Security Commissioner Jo Anne Barnhart. “It’s the best opportunity I’ve had in a long time to do something,” said Ormaine Hawthorne, who has used a wheelchair since a car accident in May 2000, and who said he wants to use his voucher to get job training. Vouchers will be mailed to Social Security beneficiaries by January 2004. Participation in the program is voluntary. “Millions of Americans with disabilities will have new opportunities for career counseling, training and job placement,” said former Sen. Bill Roth, R-Del., who helped write the Ticket to Work legislation as chairman of the Senate Finance Committee. For more information on the program, go to [http://www.ssa.gov/work/Ticket/ticket\\_info.html](http://www.ssa.gov/work/Ticket/ticket_info.html).

**RAMPS AREN’T ALL THAT IS NEEDED TO MAKE STORE ACCESSIBLE** - Okay, so your a store owner who has made all of the alterations necessary to make your store accessible to persons with disability, and to bring your premises into compliance with the Act. Now you can relax, right? Not necessarily, as the manager of the Dexter Shoe Factory Outlet in Chichester, New Hampshire found out earlier this month. A couple, one of whom uses a wheelchair, found the store’s ramp covered with snow and ice following a snowstorm, and blocked with hand-lettered signs reading, “RAMP CLOSED FOR WINTER.” The store manager, pleading that it was “too cold” to clear the ramp of snow and ice, offered to have an employee go into the parking lot to assist anyone who required assistance entering the store, by carrying the person if necessary. According to the Act, stores are required to take “readily achievable” steps to make their buildings accessible. Clearing ice and snow from the ramp would be readily achievable, according to Maureen Stimpson, an accessibility specialist with the New Hampshire Governor’s Commission on Disability. “The whole idea behind the law is that people with disabilities should be able to access doors, businesses, schools and courthouses without assistance,” said Michael Jenkins, director of the Governor’s Commission. “It’s an issue of dignity.” Physically carrying a person with a disability is not a permitted accommodation in almost all instances.

### **AREA CALENDAR** -

- ❑ 19<sup>th</sup> Annual Employment Law and Legislation Conference; March 11-13, 2002; Washington, DC; Society for Human Resource Management (SHRM); conference will include sessions on ADA and reasonable accommodation; for information, contact SHRM at 703-548-3488, via e-mail at [shrm@shrm.org](mailto:shrm@shrm.org), or on the web at <http://www.shrm.org>
- ❑ Disability Convocation directed to seminary communities; March 15, 2002; Wesley Theological Seminary, Kresge Academic Center, 4500 Massachusetts Ave. NW, Washington, D.C.; coordinated by the National Organization on Disability; the first regional disability conference focusing on seminaries, the Convocation is directed to the 12 mid-

Atlantic seminaries within the Washington Theological Consortium; for information, contact Ginny Thornburgh or Lorraine Thal, 202-293-5960, or at [religion@nod.org](mailto:religion@nod.org)

- ❑ “Multiple Perspectives on Access, Inclusion, & Disability: Disability in Context;” April 11 - 12, 2002; The Ohio State University’s Fawcett Center, Columbus Ohio; sponsored by The Ohio State University, ADA-OHIO & Great Lakes ADA & IT Center; check the OSU webpage for registration updates at <http://ada.osu.edu>
- ❑ “Improving the Quality of Education for Students with Disabilities: A Shared Responsibility;” April 25, 2002, 2-4 PM; a national teleconference sponsored by The Ohio State University Partnership Grant and affiliates; an effort to share cost-effective and meaningful strategies for improving collaboration among administrators, faculty, staff, and students on diversity and disability issues in higher education; for more information or to register for this special event, visit The Ohio State University Partnership Grant web site at [www.osu.edu/grants/dpg/teleconference](http://www.osu.edu/grants/dpg/teleconference)

**EEOC COUNSEL TO BE NAMED** - President Bush has announced his intension to name Donald Prophete as general counsel for the [EEOC](http://www.eeoc.gov). Prophete is currently an employment attorney for the Sprint Corporation, and was formerly with the law firm of Klett Lieber Rooney and Schoring in Pittsburgh. He is a native of Haiti, and a graduate of Fordham University and Boston University School of Law. The EEOC’s office of general counsel obtained \$47.3 million in monetary benefits for claimants during the last fiscal year. The President has also nominated Leslie Silverman and Naomi Churchill Earp to the two open Republican seats on the Commission. [Http://www.eeoc.gov](http://www.eeoc.gov).

**EMPLOYER ENTITLED TO RELY ON DOT RULE** - An employer was entitled to rely on U.S. Department of Transportation (DOT) advisory criteria in deciding that a driver taking antiseizure medication was unqualified to operate a commercial motor vehicle hauling propane and other fuel products said the U.S. Court of Appeals for the Tenth Circuit (WY, UT, CO, NM, KS, OK). Although the driver provided a medical certification to drive commercial vehicles, the Court held that the employer could rely on the DOT criteria, which advise against employing seizure-prone drivers given the risks involved if they fail to take their medication. Although the DOT criteria are merely advisory and nonbinding, the court was hesitant to challenge the legitimate business judgment of the DOT and its covered employers. *Tate v. Farmland Indus., Inc.*, CA10, No. 99-6329, 10/10/01 (<http://www.kscourts.org/ca10/cases/2001/10/99-6329.htm>).

**NEW BUILDING CODES TO RECOGNIZE ACCESSIBILITY NEEDS** - Naperville, Illinois and Pima County, Arizona - what could these two possibly have in common? They are the believed to be the first localities in the country to adopt building code changes that will make new homes more accessible to persons with disabilities. The code amendments require that new homes have wider interior doors, lower light switches, higher electrical sockets, reinforced bathroom walls to allow (but not require) handrails and, in the case of Pima County, the additional requirement of a



zero-step entrance that can be traversed by wheelchairs. (This change is also being considered by the Naperville city council.) “This is like walls being removed, or layers being peeled away,” said Norene Jenkins of Naperville, who uses a motorized scooter because of a virus that causes paralysis. “We’re going to be able to go to the bathroom,” exulted Bill Malleris, a wheelchair user and developer. Several cities, including Chicago, Atlanta, Austin, Texas and Urbana, Illinois have passed similar laws pertaining to housing built with public funds.

**ADA CLAIMANTS HAVE LOW SUCCESS RATE** - A recent study indicates that fewer than 17 percent of appeals court decisions under the ADA result in judgments favorable to claimants. The study shows that results differ significantly among circuits, with the U.S. Court of Appeals for the Fourth Circuit (WV, VA, MD, NC, SC) being the most hostile to ADA claimants, and the District of Columbia, Second, and our own U.S. Court of Appeals for the Third Circuit (PA, NJ, DE, VI) being the most friendly.

**FROM THE MICROSOFT ACCESSIBILITY UPDATE** - You can now hear what you type in Excel 2002 spreadsheet cells. Hearing what is typed can assist students with data entry and help them check their work for errors. The text-to-speech options let you control what voice is used (male or female) as well as the speed of the reading. This feature is not only a great way for students who are learning English to hear the text, but also a great auditory reinforcement for children. [Http://www.microsoft.com/education/?ID=speechfeature](http://www.microsoft.com/education/?ID=speechfeature).

**FLORIDA COMMUNITY WINS NOD ACCESSIBILITY AWARD** - Venice, Florida has been chosen by the [National Organization on DisAbility](http://www.nod.org) for its first annual Accessible America award. The city received an award of \$25,000, which will be used to further the inclusion of people with disabilities in community life. The contest was open to all U.S. cities and towns. Venice’s application detailed community efforts to welcome, include, and be accessible to people with disabilities, and surpassed sixty-four other entries from around the nation. [Http://www.nod.org/cont/dsp\\_cont\\_item\\_view.cfm?viewType=itemView&contentId=778&fromLocHmePg=T&fromLocationId=19&timeStamp=14-Feb-0208:09:40](http://www.nod.org/cont/dsp_cont_item_view.cfm?viewType=itemView&contentId=778&fromLocHmePg=T&fromLocationId=19&timeStamp=14-Feb-0208:09:40).

```

@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@
@
@          ***          *****          ***          @
@          *****          *****          *****          @
@          *** ***          ***          ***          *** ***          @
@          ***          ***          ***          ***          ***          ***          @
@          *****          ***          ***          *****          @
@          *****          ***          ***          *****          @
@          ***          ***          *****          ***          ***          @
@          ***          ***          *****          ***          ***          @
@          **   **   *****   **          **   *****          @
@          **   **   *****   **          **   ***          ***          @
@          ***   **   **          **          **   **          **          @
@          ****   **   ****          **          ***          **          ****          @
@          **   ****   ****          **   *****   **          ****          @
@          **   ***   **          **   **   **   **          *          ****          @
@          **   **   *****          ****          ****          ***          ***          @
@          **   **   *****          ***          ***          *****          @
@

```

"News Reviews to Peruse"

Number 97

March 2002

Items regarding disabilities law and 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.) ([pbair@state.pa.us](mailto:pbair@state.pa.us)). Current and recent issues can be found online at [http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews\\_index\\_2001.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews_index_2001.htm). All past issues of this publication are archived at [http://intradep/ChiefCounsel/ADANews/adanews\\_index.htm](http://intradep/ChiefCounsel/ADANews/adanews_index.htm) on the DEP internal website.

**HIGH COURT WILL NOT RULE ON DRIVING CASE** - The U.S. Supreme Court has declined to review a decision of the U.S. Court of Appeals for the Eleventh Circuit (AL, GA, FL), in which the Circuit Court found that a nurse's temporary inability to drive an automobile due to epilepsy was not a substantial limitation on a major life activity. See *Chenoweth v. Hillsborough County*, ADA News No. 88, 6/15/01 ([http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/ada\\_news\\_88\\_frontpage.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/ada_news_88_frontpage.htm)).

**ECHAZABAL CASE ARGUED** - The Supreme Court heard argument on February 27, 2002 in *Chevron U.S.A. Inc. v. Mario Echazabal*, No. 00-1406 (appeal from decision of the U.S. Court of Appeals for the Ninth Circuit). This case, involving the applicability of the "direct threat" exception to cases solely involving threat to the safety of the individual with a disability and not others, was reported in ADA News No. 94, 12/15/01 ([http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/ada\\_news\\_94\\_frontpage.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/ada_news_94_frontpage.htm)). The *amicus curiae* brief of the [National Council on Disability](http://www.ncd.gov/newsroom/publications/chevron_amicus.html) can be found online at [http://www.ncd.gov/newsroom/publications/chevron\\_amicus.html](http://www.ncd.gov/newsroom/publications/chevron_amicus.html). "This case is so important because the outcome will say a lot about what the ADA really means," said employee counsel Gary Phelan of Klebanoff & Phelan, who filed an amicus brief for the National Employment Lawyers Association supporting Echazabal. A decision is expected this spring.

**CIRCUIT CITY AGREEMENT VOID** - An arbitration agreement that was at the heart of a recent decision of the U.S. Supreme Court has been found to be unenforceable. Last spring, the Court issued a decision in *Circuit City v. Adams*, 532 U.S. 105 (2001), finding that a compulsory arbitration agreement between employee and employer could bar a discrimination lawsuit by an employee against the employer. (See *Employers Welcome Supreme Court Arbitration Decision*, ADA News No. 90, 8/15/01, [http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ada\\_news\\_90\\_frontpage.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ada_news_90_frontpage.htm)). The decision reversed that of the U.S. Court of Appeals for the Ninth Circuit (WA, OR, ID, CA, NV, AZ, AK, HI, GU) that had found that employment arbitration agreements were unenforceable under the Federal Arbitration Act, and remanded the matter to the Circuit Court. This February, the Circuit Court issued a new ruling finding that the arbitration agreement was too one-sided to be enforceable under California law. "Objectionable provisions pervade the entire contract," wrote Judge D.W. Nelson for the Court. "[W]e find the entire arbitration agreement unenforceable." *Circuit City Stores, Inc. v. Adams*, CA9, No. 98-15992, 2/4/02 ([http://www.ca9.uscourts.gov/ca9/newopinions.nsf/1CAEBFEEDEB3E38288256B56005E9EE6/\\$file/9815992.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/1CAEBFEEDEB3E38288256B56005E9EE6/$file/9815992.pdf?openelement)).

**DISABILITIES WEBSITE OF THE MONTH** - Few areas have offered more opportunities for technological advances than the field of disabilities accommodations. Cognizant of the substantial spending power of 40 million plus Americans with disabilities, companies - especially computer companies - have pushed the development envelope. For one example of some exciting new developments in reader technology, take a look at [NextUP.com](http://NextUP.com), a company that specializes in reader software for people with low or no vision. From radio to weather to stocks, there is

a product from NextUp to bring the written word alive. Find it on the web at <http://www.NextUpTech.com>.

**AWAITING THE AX AT EEOC** - The Bush administration's 2003 fiscal budget contained a reduction in allotted funds for the [Equal Employment Opportunity Commission](#). The agency, whose FY 2002 funding was \$326 million, was reduced to \$323.5 million, about \$30 million of which is intended for state and local work-share agencies. A reorganization of the agency and staff cuts are expected. In the President's just-released budget, domestic "discretionary" spending will rise 7% overall, but a substantial part is accounted for by an increase for an anti-terrorism programs, leaving a roughly 1% growth for other domestic discretionary programs. Many programs of importance to the disabilities movement were level funded.

**PATIENTS' BILL OF RIGHTS TRUDGES ON** - A spokesperson for Senator Tom Daschle has indicated that he expects that the Majority Leader to appoint the members of the conference committee for the Patients' Bill of Rights to work out differences between the House and Senate-passed versions. The House version of Patients' Bill of Rights legislation included an amendment encouraging the formation of association-sponsored health plans, while the Senate-passed version did not include such a provision. Senator Edward Kennedy (D-MA) is negotiating with the President on a possible compromise on patients' rights. [Http://www.senate.gov/~dpc/patients\\_rights](Http://www.senate.gov/~dpc/patients_rights).

**N.O.D. ISSUES "STATE OF THE UNION" RESPONSE** - On January 29, 2002, President Bush delivered the State of the Union address, in which he addressed the challenges of this country as it entered a new year. A few days after the President's address, the [National Organization on Disability](#) issued its own "State of the Union 2002," in which it addressed what it saw as the problems facing Americans, with and without disabilities. "A clear majority of people with disabilities, 63 percent, say that life has improved for the disability community in the past decade," the address declares. "But when asked about life satisfaction, only 33 percent say they are very satisfied with their life in general - half as many as among those without disabilities. There is much room for improvement." Read the complete document at [http://www.nod.org/cont/dsp\\_cont\\_item\\_view.cfm?viewType=itemView&contentId=751&fromLocHmePg=T&fromLocationId=2&timeStamp=25-Jan-0202:17:24](http://www.nod.org/cont/dsp_cont_item_view.cfm?viewType=itemView&contentId=751&fromLocHmePg=T&fromLocationId=2&timeStamp=25-Jan-0202:17:24).

## AREA CALENDAR -

- ❑ “Brain Awareness Week;” March 11-17, 2002; various locations; for information, visit [http://www.ucp.org/ucp\\_generaldoc.cfm/134/2/125/125-125/3183](http://www.ucp.org/ucp_generaldoc.cfm/134/2/125/125-125/3183)
- ❑ Statewide public forums; April 1-12, 2002; various Pennsylvania locations; sponsored by the state [Office of Vocational Rehabilitation](#); forums allow any Pennsylvanian to present his or her views and recommendations on the Combined Agency State Plan, and on how the state’s vocational rehabilitation program can better serve the needs of people with disabilities; for specific dates and locations, browse to <http://www.dli.state.pa.us/landi/lib/landi/pdf/ovr/overview2-22-02.pdf>
- ❑ Telecommunications Relay Service Forum; Friday, May 3, 2002, from 9:30 a.m. - 3:30 p.m.; Federal Communications Commission, 445 12th Street, S.W., Washington, DC; forum and Expo for TRS administrators, consumers, providers, and Commission staff to share information on current state of TRS and TRS technologies; information at [http://www.ucp.org/ucp\\_generaldoc.cfm/134/8/11211/11211-11211/3184](http://www.ucp.org/ucp_generaldoc.cfm/134/8/11211/11211-11211/3184)
- ❑ “National Council on Independent Living: Celebrating 20 Years;” June 12 - 15, 2002; Washington, DC; NCIL’s 20<sup>th</sup> annual conference, featuring speakers, workshops, and activities; for information, contact 800-883-2420 (v or TTY) or 202-833-4456 (voice or TTY), or e-mail [ncilconference@ncil.org](mailto:ncilconference@ncil.org)
- ❑ “Reframing Disability: AHEAD 2002;” July 8-12, 2002; Hyatt Regency Crystal City, Arlington, VA; 25<sup>th</sup> annual conference and exhibit of the Association on Higher Education and Disability; for more information, visit <http://www.ahead.org>, or call 617-287-3880 (v), or 617-287-3882 (TTY)
- ❑ Cultural Arts Accessibility Conference; August 8-11, 2002; The Kennedy Center, Washington, DC; conference for ADA/504 coordinators and accessibility managers in the cultural arts, including discussions on interpreting, captioning and audio description, technology resources, and community advocacy; for additional information, contact the Kennedy Center Manager of Accessibility, Betty Siegel, at (202) 416-8727 (v) or (202) 416-8728 (TTY), or e-mail at [access@kennedy-center.org](mailto:access@kennedy-center.org).

**UCP OF PITTSBURGH ISO “COMMUNITY HEROES”** - [UCP of Pittsburgh](#) is accepting nominations for its “Community Hero Awards” dinner to be held September 25, 2002 at the Pittsburgh Hilton and Towers. Each year UCP of Pittsburgh honors “Community Heroes,” both individuals and associations, who have enhanced the quality of life for people in our community. The awards have increased awareness of issues confronting people with disabilities, and brought

about meaningful change in the community. Nominations for awards can be made online at [http://www.ucp.org/ucp\\_localdoc.cfm/136/9492/9500/9500-9500/1704](http://www.ucp.org/ucp_localdoc.cfm/136/9492/9500/9500-9500/1704).

**DOJ GUIDANCE ON SERVICE ANIMALS** - The Department of Justice amended its guidance last year for businesses that serve the public regarding service animals. The change permits business owners to inquire of a person who seeks to enter the facility with a service animal, “if an animal is a service animal or ask what tasks the animal has been trained to perform, but cannot require special ID cards for the animal or ask about the person’s disability.” The DOJ guidance document can be found online at <http://www.usdoj.gov/crt/ada/svcanimb.htm>.

**KEYBOARD ASSISTANCE FOR USERS WITH LIMITED MOBILITY** - A new product has been introduced that is designed to make computer input easier for folks who, because of limited hand mobility, have difficulty using traditional keyboards. Called “OrbiTouch,” the keyboard is produced by [Keybowl, Inc.](#), a manufacturer of other ergonomic products. The OrbiTouch Keyless Keyboard is a 128-“key” keyboard made of two domes. It use two independent inputs in which the two domes are used concurrently to type. While both hands are required to type, no finger or wrist motion is required. Read John Williams’ review of this product on the [N.O.D.](#) website at [http://www.nod.org/cont/dsp\\_cont\\_item\\_view.cfm?viewType=itemView&contentId=753&locationId=4&contentTypeId=17&fromLocHmePg=F&LineNbr=1&StartRow=1&timeStamp=14-Mar-0206:47:08](http://www.nod.org/cont/dsp_cont_item_view.cfm?viewType=itemView&contentId=753&locationId=4&contentTypeId=17&fromLocHmePg=F&LineNbr=1&StartRow=1&timeStamp=14-Mar-0206:47:08).

**SHAREHOLDERS ARE EMPLOYEES FOR ADA PURPOSES** - The U.S. Court of Appeals for the Ninth Circuit (WA, OR, ID, CA, NV, AZ, AK, HI, GU) decided late last year that, for purposes of the Act, shareholders of a professional corporation are employees. An “employee” is defined as “an individual employed by an employer” in the ADA. In a case of first impression, the Court found that a medical corporation could not “have it both ways” in trying to limit its liability and still procure the tax benefits of incorporation. Citing *Hyland v. New Haven Radiology Associates, P.C.*, 794 F.2d 793 (2<sup>nd</sup> Cir. 1986), the Court found “[i]n *Hyland*, the court held that the use of the corporate form, including a professional corporation, ‘precludes any examination designed to determine whether the entity is in fact a partnership.’ The incorporators of a professional corporation make a deliberate decision to adopt the corporate form for their business in order to avail themselves of important tax, employee benefit, and civil liability advantages. Having freely made the choice to adopt this form of business organization ‘they should not now be heard’ to say that their firm is ‘essentially a medical partnership,’ and not a corporation.” *Wells v. Clackamas Gastroenterology Associates, P.C.*, CA9, No. 00-35545, 11/26/01 ([http://www.ca9.uscourts.gov/ca9/newopinions.nsf/E9B2567FD81D455588256B0E00043F7C/\\$file/0035545.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/E9B2567FD81D455588256B0E00043F7C/$file/0035545.pdf?openelement)).

**MARTIN HOSPITALIZED** - Casey Martin, the 29-year-old professional golfer who challenged the Professional Golfers’ Association all the way to the U.S. Supreme Court and won, was hospitalized in January for a life-threatening infection in his withered right leg. Martin was

operated on January 15<sup>th</sup> to remove “golf ball-size bacteria” that had triggered “a potentially life-threatening infection.” The infection arose following surgery to ease the pain he experiences in his leg. Martin was expected to be in the hospital for up to two weeks and then require another six to 10 weeks rehabilitation at home. Martin has Klippel-Trenaunay-Webber Syndrome, a degenerative circulatory disorder in his right leg that makes it agonizing for him to walk more than a short distance.

**ANNOTATIONS** - *Not Exactly What We Intended, Justice O’Connor*, by Representative Steny H. Hoyer (D-Md.) - As we know, courts interpret law as they see it. Even when determining a legislature’s intent, a court decides for itself what the legislators intended. Here is a thoughtful and fascinating view into the process of passing laws and interpreting them, by someone who was present at the birth of the ADA. Originally published in the *Washington Post*.

---

❑ ***Not Exactly What We Intended, Justice O’Connor*, by Representative Steny H. Hoyer (D-Md.), Sunday, January 20, 2002**

Earlier this month, Supreme Court Justice Sandra Day O’Connor said she understood the intent of Congress -- what my fellow lawmakers and I meant -- when we wrote and then enacted the Americans with Disabilities Act in 1990.

She never asked for my view; the court doesn’t work that way. Still, in four places in her opinion, Justice O’Connor cited a phrase or context to invoke what “Congress intended.” Then she and her fellow justices unanimously narrowed the scope of the act and ordered a lower court to reconsider a decision that allowed a woman suffering from carpal tunnel syndrome to be excused from certain tasks at a Toyota Motor plant in Kentucky. Casting doubt on the woman’s right to protection under the legislation, O’Connor wrote that a disability must substantially limit major activities “that are of central importance to most people’s daily lives.”

It is difficult to say, based solely on the letter of the law as we wrote it, that O’Connor is wrong. But as the congressman who shepherded the legislation through the House of Representatives, I believe that the “intent of Congress” was clearly more expansive than Justice O’Connor’s ruling would suggest.

It is not unusual for the Supreme Court to invoke “the intent of Congress” in interpreting the Constitution or pieces of legislation. It helps make our Constitution and laws living documents instead of dead letters. But divining the intent of Congress, even a decade ago, can be tricky business, especially given the compromises and disparate motives that go into the making of legislation.

In this case, I know a lot about the intent of Congress and how the Americans with Disabilities Act came into being. The story sheds light on what we meant by disability and on the perils of judicial attempts at retroactive mind reading.

The original sponsor of the ADA in the House was Tony Coelho, then a California Democrat and majority whip. Coelho had a personal interest in the bill. After a head injury suffered as a child, Coelho developed epilepsy. This would not fit the court's definition of something that prevented Coelho from performing major life activities. Unless someone told you about his epilepsy, you would never know he had it. Yet because of misconceptions about the effects of epilepsy, he had been expelled from a seminary, had his driver's license revoked, been discriminated against by health insurers, and rejected by the armed services.

When Coelho resigned from Congress in 1989, he asked that I take over stewardship of the bill. My wife also had epilepsy, though it was under control. So I knew of the prejudice such illnesses can evoke. And it contributed to my belief that a range of illnesses should be covered by the ADA and should not disqualify a person from employment or cause discrimination.

This highlights a crucial issue in the ADA debate: perceptions are important to overcome, too. Many medical conditions, like mental illness, if treated properly, are not debilitating. In our minds, it was important to protect not only people who had genuine trouble functioning normally, but people whose employers might wrongly perceive as being substantially impaired.

When writing the legislation, we borrowed the definition of handicapped from the Rehabilitation Act of 1973, which applied to federal grant recipients. We did this because the courts had generously interpreted this definition. Moreover, we thought using established language would help us avoid a potentially divisive political debate over the definition of disabled. The ADA was designed to extend protection to people working in the private sector and seeking access to public accommodations, transit systems and communications networks. So we simply adopted the definition of disability from language in the 1973 act.

Justice O'Connor cited that language in her opinion earlier this month. That's where she found reference to an illness "that substantially limits one or more of the major life activities of [an] individual." Ella Williams, the woman at the Toyota plant who had carpal tunnel, might not be able to prove her condition blocks her from one of life's major activities, such as walking, seeing or hearing. O'Connor said that "household chores, bathing and brushing one's teeth" were also the types of tasks the court of appeals should have considered in deciding whether Williams was "substantially limited" in performing manual tasks.



Is this what we had in mind when we passed the ADA -- that lawyers for businesses and individuals should spend time and money arguing about whether people can brush their teeth and take out the garbage? Not at all.

The whole tenor of the debate at that time was far broader. For example, we defeated an amendment introduced by Rep. Jim Chapman (D-Tex.) to protect restaurant owners who refused to hire people with HIV/AIDS. The restaurant owners wanted the law to specifically exclude HIV/AIDS from the definition of disability. No disability, no protection. The restaurant owners' association argued that if, medical evidence to the contrary, the public perceived that people could transmit AIDS by handling food, people would avoid restaurants that employed such people.

But the majority in Congress wanted AIDS sufferers, and others perceived as disabled, to be covered by the ADA, so in the end the law did not mention the issue.

There could of course be 535 different answers about the intent of Congress when it passed the ADA. It passed both houses by wide margins: 403 to 20 in the House and 76 to 8 in the Senate. Several committees and subcommittees in the House -- including the telecommunications, education and labor, judiciary, and transportation committees -- weighed different sections. I led the battle on the House floor. On the Senate side, the legislation was co-sponsored by Tom Harkin (D-Iowa), Robert Dole (R-Kan.) and 32 other senators. If anything, Harkin had a more expansive definition of disability than I did. His deaf brother was sent to the Iowa School for the Deaf and Dumb, where students were taught one of only three trades: baker, printer or cobbler. And Dole, who suffered a debilitating injury to his right arm in World War II, was also a strong and leading advocate of the ADA.

When we wrote the ADA, we estimated that 43 million people would be covered. That seemed like a lot and we thought that showed we intended the law to be broad rather than narrow. Until the ADA passed, the average guy thought of a disability as something that meant you couldn't walk or see or hear. Our broader estimate helped build support for the legislation.

Now, however, O'Connor has cited that figure to say that carpal tunnel and other conditions might push the national total of people protected under the ADA far beyond 43 million and that Congress did not intend that. "If Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher," she wrote. But the number we used wasn't designed to limit the effect of our legislation, but to show its breadth.

When President George H.W. Bush signed the Americans With Disabilities Act in July 1990, partisans on both sides of the aisle rejoiced that we had made our nation a better place

for everyone. Bush said, “with today’s signing of the landmark ADA, every man woman and child with a disability can now pass through once-closed doors into a bright new era of equality, independence and freedom.”

Has our vision come to fruition? Yes and no.

The ADA has clearly helped people with some disabilities. It has transformed how architects design buildings, how conference organizers plan events, and how states provide services to people with mental illness and retardation.

But defense lawyers in recent years have concocted novel arguments to exclude impairments that do not sufficiently limit a major enough activity. People with diabetes, heart conditions, cancer and mental illnesses have had their ADA claims kicked out of court because, with improvements in medication, they are “too functional” to be considered “disabled.” One trial judge ruled that a salesman who tried to return to work after recovering from a heart attack was not “disabled,” and therefore not entitled to protection when his employer fired him because it feared he would not be as productive as before.

Recent studies show that plaintiffs lose 90 percent of ADA claims, mostly on the grounds that they are not disabled enough. Ironically, that includes a majority of claims brought by Coelho’s fellow epileptics. The ADA has become a “Lawyers’ Employment Act,” instead of the “People’s Empowerment Act” we intended it to be.

So perhaps the most striking thing about the Supreme Court’s decision this month in *Toyota Motor Manufacturing v. Williams* is how we and the advocates for the disabled failed to anticipate what this court’s views of our views would be.

Our responsibility now is to revisit both our words and our intent in passing the ADA. In matters of statutory interpretation, unlike constitutional matters, Congress has the last word. We can decide whether the employment policy effectively put into place by the Supreme Court’s interpretations of the ADA is a solid one. Or we can decide to rewrite the statute. In either case, Congress must look at this landmark civil rights law and determine whether it is carrying out the promise and potential we all celebrated in 1990.

*Rep. Steny Hoyer, a Democrat, represents Maryland’s 5th Congressional District in the U.S. House of Representatives.*

```

@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@
@
@          ***          *****          ***          @
@          *****          *****          *****          @
@          *** ***          ***          ***          *** ***          @
@          ***          ***          ***          ***          ***          ***          @
@          *****          ***          ***          *****          @
@          *****          ***          ***          *****          @
@          ***          ***          *****          ***          ***          @
@          ***          ***          *****          ***          ***          @
@          **   **   *****   **          **   *****          @
@          **   **   *****   **          **   ***          ***          @
@          ***   **   **          **          **   **          **          @
@          ****   **   ****          **          ***          **          ****          @
@          **   ****   ****          **   *****   **          ****          @
@          **   ***   **          **   **   **   **          *          ****          @
@          **   **   *****          ****          ****          ***          ***          @
@          **   **   *****          ***          ***          *****          @
@

```

"News Reviews to Peruse"

Number 98

April 2002

Items regarding disabilities law and 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.) ([pbair@state.pa.us](mailto:pbair@state.pa.us)). Current and recent issues can be found online at [http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews\\_index\\_2001.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews_index_2001.htm). All past issues of this publication are archived at [http://intrade/ChiefCounsel/ADANews/adanews\\_index.htm](http://intrade/ChiefCounsel/ADANews/adanews_index.htm) on the DEP internal website.

**SUPREME COURT RULES ON 'ONE STRIKE' RULE** - In ADA News No. 94, 12/15/01 ([http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/ada\\_news\\_94\\_frontpage.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/ada_news_94_frontpage.htm)), I reported on a case scheduled for review by the U.S. Supreme Court involving a Housing and Urban Development (HUD) rule that required the eviction of a resident of public housing if it is discovered that drug-related criminal activity is taking place in or near the public housing unit and the tenant, a members of the tenant's household or a guest is engaging in the activity. One of the plaintiffs

in the case from the U.S. Court of Appeals for the Ninth Circuit (WA, OR, ID, CA, NV, AZ, AK, HI, GU) was a 75-year-old man with a disability whose caregiver was found to have used drugs in the man's apartment. On March 26<sup>th</sup>, the Court handed down a unanimous decision affirming the federal rule. The High Court found that the rule allowed no exceptions, reversing the decision of the Ninth Circuit, that had found the rule to apply only when the drug offender was "under the tenant's control." The HUD rule, "requires lease terms that give local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity," wrote Chief Justice Rehnquist for the Court. *Department of Housing and Urban Development v. Rucker*, USSCt, Nos. 00-1770 & 1781, 3/26/02 (<http://supct.law.cornell.edu/supct/html/00-1770.ZO.html>).

**O'CONNOR CRITICIZES DISABILITIES LAW AS TOO VAGUE** - "Supreme Court Justice Sandra Day O'Connor sounded off on the country's leading law protecting the rights of the disabled yesterday [March 14<sup>th</sup>], telling a conference of business lawyers that the high court has been obliged to wrestle with a heavy load of disability rights cases because the 1990 act was drafted too hastily by Congress." Read about this important glimpse into the thoughts of a Supreme Court Justice who has been the swing vote in a number of ADA cases at the Washington Post website, <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A29110-2002Mar14&notFound=true>.

**GENETIC DISCRIMINATION** - The Bush administration has announced that it supports legislation designed to ban discrimination on the basis of the results of a person's genetic testing, but opposes a measure allowing potential plaintiffs to bypass the EEOC and proceed directly to federal court with their claims. Senator Tom Daschle (D-S.D.) has proposed legislation (S. 318) that does bypass the EEOC, and contains no caps on damages. (To see Senator Daschle's bill, go to <http://thomas.loc.gov>, and enter "S318" (without the quotes) in the bill number window.) Compromise bills are being worked on by Senators Snow (R-Maine), Jeffords (I-Vt.) and Enzi (R-Wyo.). The ban on so-called "genetic discrimination" enjoys general support by both parties.

**DISABILITIES WEBSITE OF THE MONTH** - Thanks to reader Marc Roda for bringing Audible.com to my attention. Audible.com provides audio copies of books and other audio programs in .MP3 format - a service that can be of use to person with low or no vision, but also to folks who like to "hear" the latest best seller instead of reading it on the printed

page. Audible.com maintains a library of recorded works that for a reasonable price can be downloaded directly to one's personal or laptop computer, where one can listen or download further onto any of a number of portable .MP3 players. Works are available in a number of categories, including best sellers, business, kids, history, spirituality, etc. A Basic Membership costs less than \$15.00 and entitles a member to download one audio book per month. More books are available under the premium plan. Currently, the site is offering a free Otis portable .MP3 player to new members. Check it out at <http://www.audible.com>.

**REAPPLICATION REQUIREMENT NOT BASED ON DISCRIMINATORY REGARD** - A Pennsylvania nurse was required to reapply for her job after being absent from work on disability leave for six months. The nurse had three surgeries during her absence for carpal tunnel syndrome, notifying her employer each time. When she was cleared by her physician to return to work, she was told by her employer that she must re-apply for her position. The nurse refused to re-apply or return to work, instead suing under the ADA alleging discrimination based on a perception that she had a disability. U.S. District Judge Bruce W. Kauffman dismissed her claim. Citing *Kelly v. Drexel University*, 94 F.3d 102 (3<sup>rd</sup> Cir. 1996), Judge Kaufman found that merely proving that an employer was aware of a medical problem was insufficient to show discriminatory regard. "Because plaintiff has produced no evidence other than defendant's knowledge of her disability leave, she has failed to establish that defendant regarded her as having a disability," wrote Judge Kauffman. Kaufman added in two footnotes that, even had the nurse succeeded in proving that her employer regarded her as a person with a disability, she would be unlikely to be able to prove that she was regarded as being able to perform a broad class of jobs, or that she had suffered an adverse employment action. *Poyner v. Good Shepherd Rehab*, USDC EPa. No. CA-01-CV-829, 2/15/02.

**DOES THE ADA APPLY TO PAROLE DECISIONS?** - It does according to the U.S. Court of Appeals for the Ninth Circuit (WA, OR, ID, CA, NV, AZ, AK, HI, GU). That Court decided last month that the Act applies to California parole decisions, in a case where the California parole board allegedly considered the past drug addiction of two prisoners in denying their parole applications. "Since a parole board may not deny African-Americans consideration for parole because of their race, and since Congress thinks that discriminating against a disabled person is like discriminating against an African-American, the parole board may not deny a disabled person parole because of his disability," the opinion reads. A federal trial judge will now consider whether the Board

discriminated against the prisoners. The opinion suggests that the ADA may also apply to an even wider variety of criminal justice decisions. *Thompson v. Davis*, CA9, 02 C.D.O.S. 2207, 3/8/02.

**CHARGES INCREASE AT EEOC** - Job discrimination complaints filed against private employers with the Equal Employment Opportunity Commission increased last year to the highest level in six years as the country's economy moved into recession. "It's not unusual to see an increase in complaints against employers when the economy has gone south and employees are being laid off," said Randy Johnson, the U.S. Chamber of Commerce's labor policy vice president.

**NATIONWIDE WORKSHOPS LAUNCHED UNDER NEW FREEDOM INITIATIVE** - (April 1, 2002) "As part of President George W. Bush's New Freedom Initiative, U.S. Equal Employment Opportunity Commission (EEOC) Chair Cari M. Dominguez today announced a series of workshops designed to share information on the employment of individuals with disabilities with small businesses nationwide. This free, flexible outreach program will target the participation of small business chambers of commerce, associations and development centers outside of major metropolitan areas." Read the rest of the EEOC press release at the Commission's website, <http://www.eeoc.gov/press/4-1-02.html>.

**SON PUNISHED FOR THE "SINS" OF FATHER** - Credit Chief Judge Becker of the U.S. Court of Appeals for the Third Circuit (PA, NJ, DE, VI) for that one, in his delightfully written opinion in *Fogleman v. Mercy Hospital, Inc.* (Hey, it's not everyday you see Euripides quoted in a judicial opinion.) The appeal examined a case in which the son, a security guard fired purportedly for job-related reasons, alleged that he was fired, in fact, in retaliation for an ADA lawsuit his father, formerly an employee, had filed against the hospital. The suit, brought under the anti-retaliation provisions of the ADA, the Age Discrimination in Employment Act (ADEA), and the Pennsylvania Human Relations Act (PHRA), raised the question, "whether the anti-retaliation provisions of the ADA, ADEA, and PHRA prohibit an employer from taking adverse employment action against a third party in retaliation for another's protected activity." The Court found the answer to this question to be generally yes with respect to the three laws. "[W]e believe ... the plain text of these statutes clearly prohibits only retaliation against the actual person who engaged in protected activity," stated the Court. Unfortunately for the hospital, however, the Court looked to the "additional" anti-retaliation provision of the ADA, that "makes it unlawful for an employer 'to coerce, intimidate, threaten, or interfere with any individual'

exercising rights protected under the Act. 42 U.S.C. S 12203(b).” The Court reversed the decision of the lower court to grant summary judgment because, as it saw it, the son’s “claim that he was retaliated against for his father’s protected activity is valid as a matter of law.” *Fogleman v. Mercy Hospital, Inc.*, CA3, No. 00-2263, 3/18/02 (<http://www.ca3.uscourts.gov/opinions/002263.txt>).

**SECOND CIRCUIT WRONG IN INCREASING PLEADING STANDARD** - The U.S. Supreme Court held unanimously on February 26<sup>th</sup> that plaintiffs in employment discrimination cases need not plead facts in their complaints to make out a *prima facie* case, but are required only to make a “short and plain” statement of their claim. The Court’s decision followed review of a decision of the U.S. Court of Appeals for the Second Circuit (NY, VT, CT) that had required a plaintiff to plead facts that satisfy the first prong of the *McDonnell Douglas* burden shifting test for proving discrimination. “The *prima facie* case under *McDonnell Douglas* ... is an evidentiary standard, not a pleading requirement,” wrote Justice Clarence Thomas for the Court. “Under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a *prima facie* case because the *McDonnell Douglas* framework does not apply in every employment discrimination case.” *Swierkiewicz v. Sorema N.A.*, USSCt. No. 00-1853, 2/26/02 (<http://a257.g.akamaitech.net/7/257/2422/26feb20021130/www.supremecourtus.gov/opinions/01pdf/00-1853.pdf>).

**DISMISSAL INAPPROPRIATE IN CASE OF AMPUTEE EMT** - Summary judgment was improvidently granted by a trial court in a case involving a “genetic amputee” who applied for a job as an EMT with an ambulance company, according to a recent decision of the U.S. Court of Appeals for the First Circuit (ME, PR, NH, MA, RI). In an enlightening opinion written by Circuit Judge Selya, the Court examined a case involving a woman born with a deformed left arm who, aspiring to be a doctor, decided as an interim step to be an Emergency Medical Technician. She encountered difficulty, however, when the ambulance company to which she applied turned her down for the job because, in the opinion of the company’s medical examiner, she could not perform one essential function of the job - “2 handed lift independent or with partner.” The EMT sued, but the trial court dismissed her claim, finding that she was not substantially limited in the major life activity of “lifting,” and because she was “not qualified for the position when she applied ... because she was unable to lift sufficient weight to enable her to perform essential job functions.” In a very well-reasoned opinion, Judge Selya found that the lower court erred, “[b]ecause genuine issues of material fact persist on at least three salient questions - whether the appellant’s impairment was disabling, whether she was qualified for

the position at the time that she applied, and whether [the employer] discriminated against her on the basis of an illegal stereotype." This opinion is worth reading. *Gillen v. Fallon Ambulance Service, Inc.* CA1, No. 01-1642, 03/19/02 (<http://www.cal.uscourts.gov/cgi-bin/getopn.pl?OPINION=01-1642.01A>).

**FEDERAL JUDGE FINDS STATES NOT IMMUNE FROM RETALIATION SUITS** - While the U.S. Supreme Court has found that states generally have immunity from suit under Title I of the ADA, a federal district judge sitting in Philadelphia has found that no similar immunity applies to suits under the Act alleging retaliation under Title V of the Act. In his memorandum opinion in *Roberts v. Department of Public Welfare*, Senior Judge Edmund Ludwig denied a request for summary judgment, stating that retaliation claims raise a right under the First Amendment to the U.S. Constitution - the right to petition the courts - that is not subsumed by the Supreme Court's decision in *University of Alabama, et al. v. Garrett*. Judge Ludwig added that the retaliation claim was not subject to the same arguments in favor of immunity used in *Garrett*. *Gregory S. Roberts v. Pennsylvania Department of Public Welfare, et al.*, USDC EPa. No. 99-3836, 2/21/02 (<http://www.paed.uscourts.gov/documents/opinions/02D0134P.HTM>).

**TOPEKA PROTEST** - Angry demonstrators crammed the Kansas statehouse March 26<sup>th</sup> as the state legislature debated a budget-balancing bill that could slash state spending on programs designed for people with disabilities. At issue were approximately \$6.7 million in spending cuts. Read the story at [http://www.cjonline.com/stories/032702/leg\\_protestlead.shtml](http://www.cjonline.com/stories/032702/leg_protestlead.shtml).

**"OVR HELPS A FARMER STAY IN BUSINESS"** - Richard Maurer is a Perry County farmer who was helped by the state Office of Vocational Rehabilitation to return to farming after two serious strokes. Read his story at <http://www.dli.state.pa.us/landi/lib/landi/pdf/ovr/overview3-22-02.pdf>. You can also see the complete OVR 2001 Annual Report at <http://www.dli.state.pa.us/landi/cwp/view.asp?a=128&Q=64970&landiPNav=#2750>.

**CALIFORNIA ORDERED TO ALLOW ACCOMMODATIONS ON STATE GRADUATION TEST** - Like approximately half the states, California has instituted statewide graduation math and language testing. A passing score on the so-called "exit exam" is required for California high school graduation beginning with the class of 2004. The use of accommodations such as calculators and reading aids in the exam is forbidden; if students with disabilities need such accommodations, their school district had to



apply for a waiver, which might or might not be granted. Concern about the effect of the requirement on students with learning and other disabilities provoked a lawsuit under the ADA, brought by Oakland-based [Disability Rights Advocates](#). On February 21<sup>st</sup>, Judge Charles R. Breyer of Federal District Court in Oakland ruled that students with learning disabilities had the right to special treatment through different assessment methods or accommodations, such as the use of a calculator or the chance to have test questions read aloud. It was the first time a state had been ordered to adjust the conditions for its graduation exams for students with learning disabilities. When the test was given last year on a voluntary basis, nine out of ten California students with learning disabilities failed. Some education experts say they worry, however, that as more students seek special accommodations, the whole notion of standardized testing may break down. New York state already allows a range of alternatives for students with disabilities, including taking the regular test, giving oral presentations or presenting portfolios of their work. However, there is little scientific data on precisely which accommodations help which learning disabilities. Nevertheless, advocacy groups say that making a learning-disabled student take a standardized test without accommodations is as unfair as requiring a physically disabled child to run a race without a wheelchair. "Standardized tests test students' disabilities, not their abilities," said Sid Wolinsky, a lawyer with Disability Rights Advocates. "No matter how well they master the content that's being tested, they will fail the exam if they have real problems with reading or handwriting." In the meantime, California's testing requirement has many parents of students with disabilities considering transfers to private or parochial schools, where the testing is not mandatory.

#### **AREA CALENDAR -**

- ❑ 23rd International Conference on Developmental & Learning Disabilities; April 29-May 3, 2002; New York, New York; information at <http://www.yai.org/Pid/index.cfm>, or via e-mail to [awittenberg@yai.org](mailto:awittenberg@yai.org) or fax to 212-629-4113
  
- ❑ Seminar on laws enforced by the EEOC; June 12, 2002 at the Richmond Marriott Hotel, Richmond, VA; and July 18, 2002 at the Hyatt-Regency Baltimore Hotel, Baltimore, MD; the EEOC will present two one-day seminars designed for human resource personnel, EEO officers, labor attorneys, business owners, and others who make employment decisions; for more information, call Erica Cryor, Program Analyst, at (410) 962-4194, or (202) 663-7071 for registration information, or browse to <http://www.eeoc.gov/taps/private.html> and click on the appropriate location link

- ❑ Third International Conference on Family Care; October 12-14, 2002; Washington, DC; hosted by the National Alliance for Caregiving; forum for caregiving groups, advocates and policy makers from around the globe; more information at <http://www.caregiving.org/content/Conference2002.html>
- ❑ International Perspectives: Global Voices for Gender Equity; November 15-17, 2002; Washington, D.C.; organized by the American Association for University Women, symposium will explore four key global issues, especially in emerging nations: literacy improvement, governance, education for people with disabilities, and peace education & conflict resolution; more info at <http://www.disabilityworld.org/conferences/gendereqconf.shtml>, or via fax at 202-463-7169 or e-mail to [intsymp@aauw.org](mailto:intsymp@aauw.org)

**OLIVE GARDEN RESTAURANT SETTLES ADA LAWSUIT** - The Olive Garden Restaurant has settled a lawsuit brought against it by a former employee who is mentally retarded for \$125,000. The lawsuit was brought by the EEOC on behalf of the employee, who was harassed and fired from his job as a dishwasher. The lawsuit alleged that the man was frequently harassed by his coworkers, who called him offensive names, hid his bicycle, put him in headlocks and pulled his pants down in front of others. During this time, management did nothing to help him, and failed to notify any of his caregivers. He was fired when his performance deteriorated. The Olive Garden restaurant denied liability. As part of the settlement, Olive Garden, which has 478 restaurants and more than 60,000 employees, will provide nationwide training for its managers on disability-based harassment and reasonable accommodations for people with disabilities.

**US DEPARTMENT OF EDUCATION UNVEILS NEW WEBSITE** - The U.S. Department of Education is sponsoring the development of a free, user-friendly email program for persons with cognitive impairments. For complete information, visit the website at <http://www.think-and-link.org>. The site has information for survivors, family, researchers, clinicians, and software developers, and a short survey that will help shape the final program.

**INCLUDE PERSONS WITH DISABILITIES IN EMERGENCY PREPAREDNESS PLANNING** - The [National Organization on Disability](http://www.nod.org) has sent letters to fourteen U.S. cabinet officers, fifty governors, elected county officials, and mayors urging them to include people with disabilities in emergency planning. To further assist leaders in achieving this goal, the NOD has provided an online list of suggestions for locating community residents with disabilities. The NOD disaster preparedness information can be found at [http://www.nod.org/cont/dsp\\_cont\\_item\\_view.cfm?viewType=itemView&contentId=792&locationId=6&contentTypeId=99&fromLocHmePg=F&LineNbr=1&StartRow=1&timeStamp=26-Feb-0201:57:45](http://www.nod.org/cont/dsp_cont_item_view.cfm?viewType=itemView&contentId=792&locationId=6&contentTypeId=99&fromLocHmePg=F&LineNbr=1&StartRow=1&timeStamp=26-Feb-0201:57:45).

And while you're visiting the NOD website, check out *PageScreamer*, a new free website accessibility tool. Check the accessibility of your website, or another favorite, at [http://www.nod.org/cont/dsp\\_cont\\_loc\\_hme.cfm?locationId=17](http://www.nod.org/cont/dsp_cont_loc_hme.cfm?locationId=17).

**SALT LAKE 2002 PARALYMPICS** - Don't miss the final recap of the 2002 Paralympics, held March 7<sup>th</sup> through 16<sup>th</sup> in Salt Lake City. Find results and other news at <http://www.paralympic.org>.

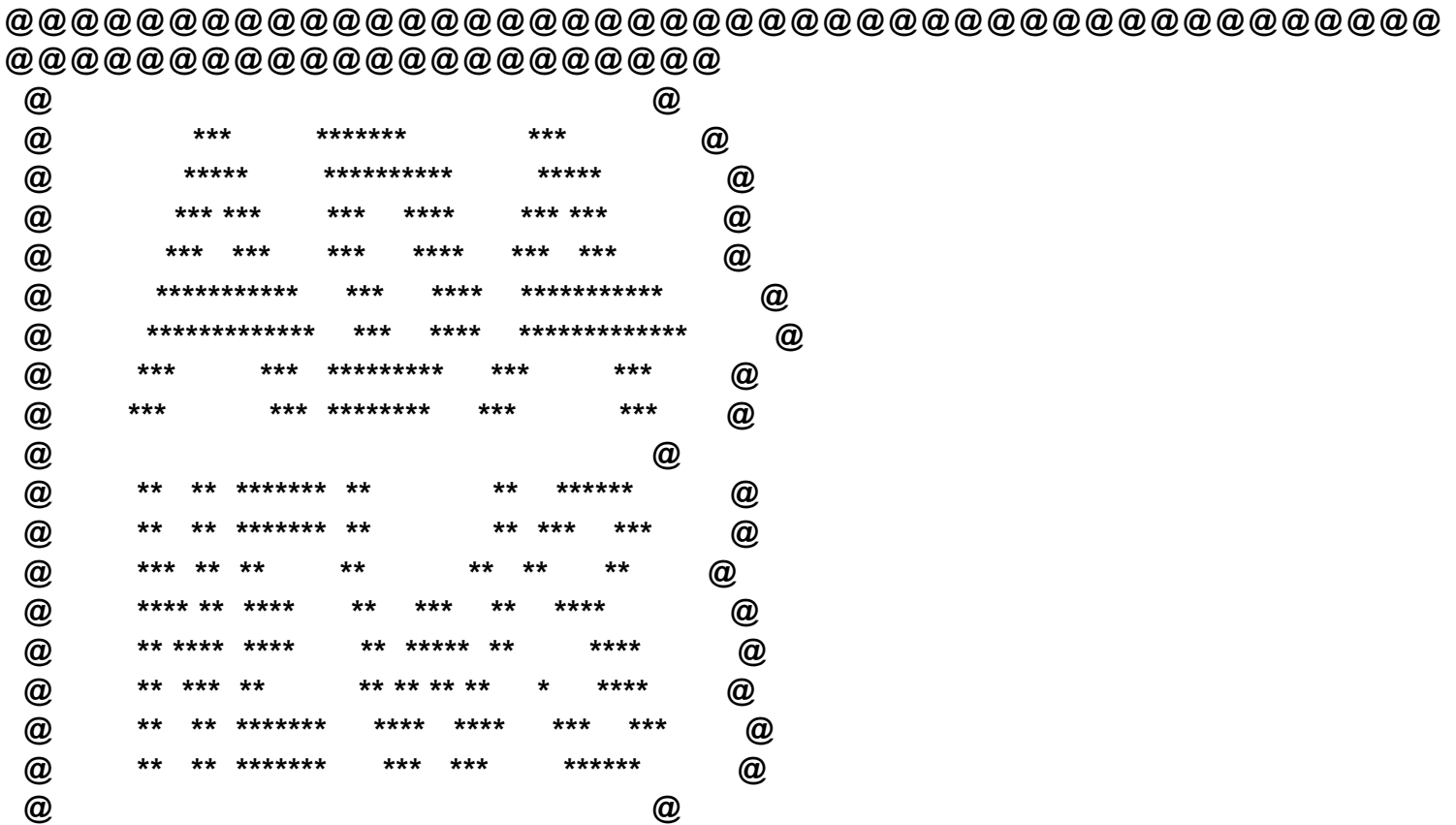
**CAN ABLE-BODIED AND WHEELCHAIR BASKETBALL PLAYERS MIX?** - A six-year-old boy from Wakefield, Massachusetts, is about to find out. Colin Williams has played basketball, floor hockey and T-ball at recess and in church-sponsored leagues. But when he applied to play with able-bodied first and second-graders in a Wakefield Basketball Association program, his application was turned down. "They're afraid of my wheelchair, that if someone is running they'll trip over my wheelchair and that would be a foul for me," said Williams. "Our concern is that one of the kids will get hurt running into his wheelchair," said Joe Sancinito, president of the WBA. "It could be anywhere from nothing happening to literally somebody getting killed," Sancinito said. "These kids are running, diving all over the floor for the ball. Sometimes it is mayhem out there." Williams and his parents have filed a federal lawsuit under the ADA that tests the right of disabled children to participate in group sports. Stan Eichner, a lawyer for the Disability Law Center, which is representing Williams, said the case is about "a young boy who is trying to live a full and complete life, just like any other boy."

**MISSOURI GOVERNOR APPOINTS BLIND JUDGE TO STATE SUPREME COURT** - Governor Bob Holden has appointed Richard B. Teitelman, a judge on the Missouri Court of Appeals, Eastern District, to the Missouri Supreme Court. Teitelman will become the first legally blind judge to serve on that state's highest court. "Rick Teitelman has devoted his life to making the words 'justice for all' a reality, not just an expression," Governor Holden said. "From the beginning of his career, he has fought for equal access to the courts for all – no matter what their background, race, gender or creed." Teitelman was appointed to the Missouri Court of Appeals in 1997 after a 27-year career with Legal Services of Eastern Missouri, where he served as executive director and general counsel since 1980.

**PARKING IN DC JUST BECAME A LOT MORE DIFFICULT** - Angering the disabilities community, Washington DC has recently enacted a city ordinance requiring that vehicles parked in so-called "handicapped parking spaces" display the DC parking permit in order to park for free. According to the ordinance, vehicles utilizing the spaces but displaying only placards from outside the district are not eligible for free parking, and must pay the appropriate parking fee or they will be ticketed. In addition, holders of DC placards, who formerly could park an unlimited time in the spaces, are now restricted to parking for only double the time allowed on the parking meter. Numerous protests have been lodged in this city that attracts perhaps more out-of-state drivers than any other.

**NEW JERSEY HIGH COURT FINDS MORBID OBESITY A PROTECTED STATUS** - The New Jersey Supreme Court found persons with morbid obesity to have protected status under the state's Law Against Discrimination in a recent unanimous decision. The definition of "handicap" in the New Jersey law is somewhat easier for a plaintiff to satisfy than that found in the ADA. "The term 'handicapped' in LAD is not restricted to 'severe' or 'immutable' disabilities," stated the Court. That law "does not incorporate the requirement that the condition result in a substantial limitation on a major life activity." The opinion is not seen as throwing open the doors to anyone who is obese, but will make it possible for persons who experience significant health problems as a result of their obesity to bring claims of discrimination. *Vicsik v. Fowler Equipment Company*, N.J.S.Ct. No. A-38-01, 4/3/02 (<http://lawlibrary.rutgers.edu/courts/supreme/a-38-01.opn.html>).

**MINNEAPOLIS THEATER GROUP UNDETERRED BY DISABILITIES** - Listen to the report from NPR's *Morning Edition* by Minnesota Public Radio's Marianne Combs, who reports on a theater troupe of actors and singers who have schizophrenia, Down's Syndrome, and other disabilities. The troupe, called "[Interact](#)," is direct and often very funny about who they are. The troupe is off soon to tour Scandinavia. Combs' report (which requires RealPlayer) can be heard at <http://www.npr.org/ramfiles/me/20020326.me.16.ram>, or can be found on the NPR website at <http://search.npr.org/cf/cmn/cmnpd01fm.cfm?PrgDate=3%2F26%2F2002&PrgID=3>. Learn more about the group at the Interact Web site at <http://www.InteractCenter.com>.



"News Reviews to Peruse"

Number 99

May 2002

Items regarding disabilities law and 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.) ([pbair@state.pa.us](mailto:pbair@state.pa.us)). Current and recent issues can be found online at [http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews\\_index\\_2001.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews_index_2001.htm). All past issues of this publication are archived at [http://intradep/ChiefCounsel/ADANews/adanews\\_index.htm](http://intradep/ChiefCounsel/ADANews/adanews_index.htm) on the DEP internal website.

**SUPREME COURT ISSUES BARNETT DECISION** - After a four-month wait, disability-advocates received another disappointment from the U.S. Supreme Court when the Court issued its decision in *US Airways, Inc. v. Barnett* on April 29<sup>th</sup>. (See *ADA News* No. 94, 12/15/01, [http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/ada\\_news\\_94\\_frontpage.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/ada_news_94_frontpage.htm)) And what an unusual decision it was, gathering dissenting votes from Justices Thomas, Scalia, Ginsburg and Souter - four jurists who in the past have represented the poles of the legal

spectrum - and a concurring opinion from Justice O'Connor, in which she stated that, although she disagreed with Justice Breyer's majority approach, she was nevertheless concurring in order to form a majority. *Barnett* presented the Court with the question whether a company's unilaterally imposed seniority system could supercede an accommodation under the ADA. The Court's answer - sometimes. The case involved a cargo handler who, after a back injury, had been given a less-demanding mailroom job, then was bumped by a more senior employee and fired when the mailroom job became subject to seniority-based employee bidding under US Airways' seniority system, and US Airways refused to accommodate him by allowing him to remain in the job. The seniority system in question had not been bargained for collectively. Continuing its trend of narrowing the scope of the Act, the Court threw out the decision of the U.S. Court of Appeals for the Ninth Circuit (WA, OR, ID, CA, NV, AZ, AK, HI, GU) that the employee's back injury gave him first choice of jobs at US Airways over his more senior co-workers, holding that a company seniority plan - even one imposed unilaterally - normally will trump an ADA accommodation, though not always. "In our view, the seniority system will prevail in the run of cases," Justice Breyer wrote. The presence of "special circumstances" that "might alter the important expectations created by a seniority system," however, could allow the accommodation to hold up. "The plaintiff might show, for example, that the employer, having retained the right to change the system unilaterally, exercises the right fairly frequently, reducing employee expectations that the system will be followed to the point where the requested accommodation will not likely make a difference," wrote Justice Breyer for the majority. "The plaintiff might also show that the system already contains exceptions such that, in the circumstances, one further exception is unlikely to matter. The plaintiff has the burden of showing special circumstances and must explain why, in the particular case, an exception to the seniority system can constitute a reasonable accommodation even though in the ordinary case it cannot." Justices Scalia and Thomas argued that the Court should provide greater protections for employers from employees' ADA lawsuits, while Justices Ginsburg and Souter opined that an ADA accommodation should always trump seniority in a non-negotiated system. *US Airways, Inc. v. Barnett*, USSCt, No. 00-1250, 4/29/02 (<http://a257.g.akamaitech.net/7/257/2422/29apr20021100/www.supremecourtus.gov/opinions/01pdf/00-1250.pdf>).

To listen to an excellent analysis of the Court's decision, browse to NPR legal reporter Nina Totenberg's report at <http://www.npr.org/ramfiles/atc/20020429.atc.08.ram> (requires RealPlayer).

**HIGH COURT WILL NOT REVIEW NINTH CIRCUIT ACCOMMODATION DECISION** - The U.S. Supreme Court has decided to allow the decision of the U.S. Court of Appeals for the Ninth Circuit (WA, OR, ID, CA, NV, AZ, AK, HI, GU) in *Memorial Hospitals Association v. Humphrey* to stand. Reported in *ADA News* No. 85, 3/15/01, ([http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews\\_85/ada\\_news\\_85\\_frontpage.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews_85/ada_news_85_frontpage.htm)), and *ADA News* No. 93, 11/15/01 ([http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews\\_93/ada\\_news\\_93\\_frontpage.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews_93/ada_news_93_frontpage.htm)), this case involves an employer that made attempts to accommodate a medical transcriptionist with obsessive-compulsive disorder whose

condition made it impossible for her to work a standard eight-hour shift. The employer accommodated the transcriptionist by allowing her to work her shift beginning whenever she arrived at work, but this accommodation failed. The employer denied the employee's request to work from home or take an indefinite medical leave, and terminated her. The Appellate Court reversed a grant of summary judgment, and the High Court refused to grant the employer's request for review. An *amicus* brief filed by the U.S. Solicitor General asserted that the case was not an "appropriate vehicle" for review of the questions presented. The case below, which will now go back to the trial court, is *Humphrey v. Memorial Hospitals Association*, CA9, No. 98-15404, 2/13/01 (<http://www.ca9.uscourts.gov/ca9/newopinions.nsf/04485f8dcbd4e1ea882569520074e698/abd495f0e26fa48e882569f200608b6b?OpenDocument>).

**COURT LIMITS SOVEREIGN IMMUNITY DEFENSE** - The U.S. Supreme Court handed down a decision on May 13<sup>th</sup> in a defamation case brought by a Kennesaw State University assistant professor against the university and the State Board of Regents, instructing states they can no longer move a case from state to federal court, then claim sovereign immunity and demand dismissal. The professor claimed that he was defamed by unsubstantiated allegations made during a sexual harassment investigation, and that he had been singled out because he is Jewish. The defendants petitioned successfully to remove the complaint from Cobb County Superior Court, where it was originally filed, to federal court, then sought to dismiss the claims on grounds that the Constitution grants state governments immunity from suits in federal court by private individuals. The Court's opinion, written by Justice Stephen G. Breyer, bars state attorneys general and their staffs from removing a case to federal court and then seeking its dismissal on 11<sup>th</sup> Amendment grounds "to achieve unfair tactical advantages." Breyer wrote "that a state's voluntary appearance in federal court amounts to a waiver of its Eleventh Amendment immunity." The Court also determined that the case does not include any valid federal claim against the state of Georgia or the Board of Regents. *Lapides v. Board of Regents of the University System of Georgia*, USSCt, No. 01-298, 5/13/02 (<http://a257.g.akamaitech.net/7/257/2422/13may20021500/www.supremecourtus.gov/opinions/01pdf/01-298.pdf>).

**WHEELCHAIR CONFINES PARTY TO HIGH COURT'S GALLERY** - As reported in *ADA News* No. 95, 1/15/02 ([http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/ada\\_news\\_95\\_frontpage.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/ada_news_95_frontpage.htm)), the U.S. Supreme Court in January added the ADA case of *Barnes v. Gorman* - which raised the question whether local governments can be forced to pay punitive damages for violating the ADA - to its docket. Arguments were heard in the Court's chambers on Tuesday, April 23<sup>rd</sup>. Unfortunately for Mr. Gorman, the claimant in the case, there was no wheelchair accessible seat at the table, and he was required to observe the arguments from the back of the courtroom. He had been told by Court officers that he could have a reserved seat in the courtroom if he arrived ahead of the two-hour session, but his disability makes it impossible for him to sit that long. The fact that it was his case being heard did not convince Court officials to budge. "He told them, 'This is my case,'" attorney Michael Hodges

said. “Apparently that didn’t make a difference.” Federal courts, unlike state courts, are not required by the Act to be accessible or to make accommodations for persons with disabilities. A decision on the case is expected by July. *Barnes v. Gorman*, USSCt, No. 01-682 (<http://www.supremecourtus.gov/docket/01-682.htm>).

**ECONOMIC STIMULUS PACKAGE LACKS HEALTH CARE** - The recently passed federal Economic Stimulus bill omitted any funding for healthcare. The Senate had wanted an increased federal share for Medicaid spending and subsidies for laid-off workers to buy health insurance, while the House passed bills that would have provided health block grants to states to help the unemployed. The bill did include a 13-week extension of unemployment insurance for workers who lost their jobs as a result of the September 11<sup>th</sup> attack.

**DISABILITIES WEBSITE OF THE MONTH** - *Disability World* webzine is a bimonthly online publication dedicated to advancing an exchange of information and research about the international independent living movement of people with disabilities. Available in English or Spanish, the attractive website offers readers information on varied topics including independent living, access and technology, employment, arts and media, women, children and youth, and book reviews. It is also a great source of international news about disability-related subjects. Take a glance at <http://www.disabilityworld.org/index.htm>.

**“TACTI-COM” ENABLES COMMUNICATION BY TOUCH** - Inventor and former-Temple University student Scott Stoeffel and a group of Temple students have revolutionized a device invented by Stoeffel that will enable wireless communication with persons who have vision and hearing disabilities via an electronic Braille pad. The “Tacti-com” sends electronic signals from a traditional keyboard to a black box, where the signals are translated into prescribed movements of six buttons on the box that can be “read” with the palm of a user’s hand. The device can be used by a sighted, hearing person to communicate with someone who is blind and deaf without having to learn Braille or hand-sign language. Stoeffel, who is deaf and legally blind, invented a “plugged-in” version of the device a year ago. The portable wireless version - which operates on two 9-volt batteries and does not require a computer - is expected to enhance the Tacti-com’s usefulness, as well as its commercial potential.

#### **AREA CALENDAR** -

- ❑ EEOC Technical Assistance Program Seminars (TAPS); May 1, 2002 - Arlington, VA; June 12, 2002 - Philadelphia, PA & Richmond, VA; June 26, 2002 - Pittsburgh, PA; July 18, 2002 - Baltimore, MD; one-day seminars emphasize how to prevent EEO problems from developing and how to resolve discrimination complaints effectively when they do arise; human resource staff, business owners, managers, supervisors, state and local government officials, federal agency EEO staff, employment agency staff, union officials, attorneys and others will obtain useful information and guidance to help meet legal



requirements and provide equal opportunity in the workplace; for more information, visit the [EEOC web site](http://www.eeoc.gov/taps/private.html) at <http://www.eeoc.gov/taps/private.html>.

- ❑ Benefit Fashion Show and Tea; 2:30 pm, Sunday, May 19, 2002; West Shore Country Club, Camp Hill, PA; sponsored by United Cerebral Palsy of Central Pennsylvania; Members 1st Federal Credit Union and WINK 104 FM; assorted teas, sandwiches and desserts at 3:00 pm, followed by the fashion show portion of the afternoon with clothes from Creative Elegance, Sweet Peas and Painting Red Rhinos, and a silent auction
- ❑ 14th Annual UCP Foundation Golf Classic 2002; 10:30am, June 3, 2002; Lone Pine Golf Club, Washington, PA; deadline for registration is May 20, 2002; for more information, contact Jackie Newman at 724-229-0851 or [jnewman@ucpswpa.org](mailto:jnewman@ucpswpa.org)
- ❑ “Prevention, Resilience and Recovery: United for Mental Health;” June 5 - 8, 2002; Washington, DC; National Mental Health Association’s 2002 Annual Conference will explore strategies for promoting mental health and recovery from mental illness; for more information, contact 800-969-NMHA (6642) or visit <http://www.nmha.org/annual/index.cfm>
- ❑ 16th Annual UCP/Harrisburg Senators Sports Auction 2002; Saturday, June 8, 2002; Riverside Stadium Carousel Pavilion, City Island, Harrisburg, PA; unique memorabilia auction for benefit of UCP-sponsored programs; questions can be directed to Jennifer Brubaker at [jbrubaker@ucpcentralpa.org](mailto:jbrubaker@ucpcentralpa.org) or [Chris Stotz](mailto:Chris Stotz) at [cstotz@uspcentralpa.org](mailto:cstotz@uspcentralpa.org), or call (717) 975-0611
- ❑ Rehabilitation Act reauthorization hearings; 10 am, June 19, 2002; U.S. Department of Education, Barnard Auditorium, 400 Maryland Ave, SW, Washington, DC; public meetings and requests for written comments on implementation of the Rehabilitation Act of 1973 (<http://www.eeoc.gov/laws/rehab.html>), which must be reauthorized next year; for more information, or to attend or give a brief presentation, make a reservation by contacting Tammy Nelson, DOE, 400 Maryland Avenue, SW, Room 3214, Mary E. Switzer Building, Washington, DC 20202-2531, Tel.: (202) 205-9005 (V), (fax) (202) 260-7527, (TTY) (202) 205-5538, or via e-mail at [tammy.nelson@ed.gov](mailto:tammy.nelson@ed.gov)

**RESOURCES** - Some disability/employment-related resource material recently added to the catalogue. Publications from the Equal Employment Opportunity Commission (EEOC) can be ordered at <http://www.usdoj.gov/crt/ada/publicat.htm>, or by calling 1-800-514-0301(V) or 1-800-514-0383(TTY).

- ❑ The “Simplified Web Accessibility Guide,” a publication available on the web in HTML or .PDF format, introduces and presents the WebContent Accessibility Guidelines from the Worldwide Web Consortium in an easy to understand, easy to use question and answer

format. This is a good jumping-off point for developers trying to make their websites more accessible. [Http://www.webaccessguides.org](http://www.webaccessguides.org)

**DOT ANNOUNCES SETTLEMENT WITH NORTHWEST AIRLINES** - U.S. Transportation Secretary Norman Y. Mineta has announced the U.S. Department of Transportation has approved a settlement with Northwest Airlines regarding the carrier's treatment of air travelers with disabilities. (See *ADA News* No. 79, 9/15/00, [http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/ADA\\_News\\_79.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/ADA_News_79.htm)) Under the settlement, Northwest agreed to cease and desist from future violations of DOT's rules prohibiting discrimination against passengers with disabilities, and agreed to pay a civil penalty of \$700,000, part of which may be offset by measures to improve the carrier's services to passengers.

**WHEELCHAIR DEMONSTRATORS SNARL DC TRAFFIC** - Wheelchair-using members of [ADAPT](http://www.adapt.org) held a "rolling demonstration" May 13<sup>th</sup> to protest what they see as inequitable treatment of persons with disabilities. The protestors blockaded the new Executive Offices, and tried to present their grievances to the White House. Story at <http://www.wjla.com/news/showstory.hrb?f=n&s=41899&f1=loc>.

**A MOMENT IN DISABILITIES RIGHTS HISTORY** - Twenty-five years ago last month, a small but determined group of protestors with disabilities gathered in San Francisco to stage a sit-in at the federal office building, demanding enforcement of Section 504 of the Rehabilitation Act of 1973. Weeks later, more than 100 protestors remained, despite the efforts of government and law enforcement officials to make them leave. Nearly four weeks after the protestors gathered, Health, Education and Welfare Secretary Joseph Califano endorsed the Section 504 regulations, handing the movement a monumental victory. Read and listen to more about this watershed event in the history of the disabilities rights movement on the [National Public Radio](http://www.npr.org/programs/wesun/features/2002/504/index.html) website at <http://www.npr.org/programs/wesun/features/2002/504/index.html>.

**VACANT? WHAT DO YOU MEAN, THE POSITION'S VACANT?** - The U.S. Court of Appeals for the Tenth Circuit (WY, UT, CO, NM, KS, OK) tried to answer just that question a few months ago. Under the ADA, employers must reasonably accommodate qualified employees, including reassigning them to vacant positions if other accommodations would not be effective. The Court settled the confusion in the circuit created by different trial court definitions of the term, holding that "vacant" includes positions at the moment vacant and those that will become vacant in the "fairly immediate future." The Court said that "fairly immediate future" refers to the employer's subjective knowledge of an upcoming opening. "[A] position is 'vacant,' for purposes of considering whether an employer has a duty to transfer a disabled employee to that position ... only if the employer knows, at the time the employee asks for a reasonable accommodation, that the job opening exists or will exist in the fairly immediate future," wrote Circuit Judge Ebel for the Court. "A position is not vacant if ... the employer did not know at the time the employee asks for a reasonable accommodation that the position would become vacant in the fairly immediate

future, even if it did in fact open up a reasonable time after the employee's request had been made." Oh yeah, that's perfectly clear. *Bristol v. Board of County Commissioners of Clear Creek*, CA10, No. 00-1053, 2/26/02 (<http://www.kscourts.org/ca10/cases/2002/02/00-1053.htm>).

**DON'T MESS WITH A WOMAN AND HER POMERANIAN!** - A determined woman with hearing loss and her "service animal" Pomeranian has changed policy at Wal-Mart, the nation's largest retailer. The woman was gradually losing her hearing in 1997 when she entered a Wal-Mart store with a Pomeranian dog that had been trained to help her distinguish where sounds were coming from, she charged in a lawsuit. She said in the lawsuit that several Wal-Mart employees refused to allow her to shop with the animal, repeatedly asked to see the dog's certification as a guide animal and refused to let her put the small dog in a shopping cart. According to the lawsuit, the harassment continued even after her doctor was contacted by Wal-Mart employees. She filed a complaint against the store with her state human right commission, which found reasonable grounds to believe that she had been discriminated against on the basis of her disability. In March, Wal-Mart settled the lawsuit, promising "to adopt a policy 'fully compliant' with the requirements of the Americans With Disabilities Act, to train employees about that policy and to provide [the customer] with a letter saying she was entitled to enter all Wal-Mart stores in Vermont and New Hampshire without any certification for her service animal." The concept of a "service animal" has expanded in recent years beyond the traditional seeing-eye dog. Dogs, cats and other pets have been prescribed to accompany people who suffer from hearing, mobility, anxiety and other disorders.

**PA. HOUSE BILL WOULD PROTECT SERVICE DOGS-** House Bill 2445, passed by the Pennsylvania House on May 7<sup>th</sup>, proposes amending the state crimes code to make it a third-degree felony to kill, maim or disfigure a service dog for "an individual who is physically limited." The bill also imposes upon a perpetrator the costs of veterinary care or replacement and training of the service dog. <http://www.legis.state.pa.us/WU01/LI/BI/BT/2001/0/HB2445P3888.HTM>.

**EMPLOYEE FIRED, BUT NOT FOR DISABILITY** - The U.S. Court of Appeals for the Seventh Circuit (WI, IL, IN) has affirmed the judgment of a lower federal court in a case involving a service manager fired from his job with Mostardi Platt Associates, Inc., an Illinois-based environmental consulting firm. The manager had a history of complications from arthritis that worsened in 1996 and required his taking substantial time off work. After depleting his sick leave, he required surgery on a knee, for which he took two weeks of vacation time. On his return to work, he was informed that he would be required to undertake an assignment requiring travel. The manager refused the assignment, informing his supervisor that he "may never be able to do the same kind of physical work" that he had "been able to do in the past." The company suggested placed him on Family and Medical Leave Act (FMLA) leave, despite resistance from the manager. While the manager was on leave, the company discovered "that a laptop [the manager] had used had been tampered with, that a customer database had been improperly saved on its hard drive, and that the computer had been used for personal purposes, including the sending of communications to a

competitor that were derogatory of Mostardi-Platt.” The manager was fired when he refused to cooperate in the investigation of his alleged computer misuse. The manager sued alleging he was fired because of his disability, and the employer defended that he was actually fired for computer misuse and inappropriate behavior. The trial court granted summary judgment, and the manager appealed. Although finding that the manager had submitted sufficient evidence of the existence of a disability to survive summary judgment, he had failed to provide evidence that his termination was connected in any way to his alleged disability. *Dvorak v. Mostardi Platt Associates, Inc.*, CA7, No. 44-4309, 5/10/02 (<http://www.ca7.uscourts.gov/op3.fwx>).

**USDOJ SUES SFX ENTERTAINMENT** - The U.S. Department of Justice announced on April 9<sup>th</sup> that it had sued [SFX Entertainment](#) over the entertainment giant’s policy of prohibiting concert goers with insulin-dependent diabetes from carrying their medical supplies into concerts. The lawsuit, filed in the U.S. District Court in Philadelphia after attempts at negotiating a voluntary settlement proved fruitless, alleges that individuals with diabetes, who require insulin and immediate access to their blood testing equipment and insulin, are forced by SFX’s policy to choose between being barred from concerts or taking unreasonable health risks. “Individuals with diabetes are entitled to attend and enjoy community events, like anyone else, without putting their lives at risk,” said Ralph F. Boyd, Jr., Assistant Attorney General for Civil Rights. “SFX’s policy is unnecessary and reflects outdated fears about individuals with disabilities.” SFX Entertainment Inc. which does business as Clear Channel Entertainment, is the world’s largest concert promoter.

**INTERNATIONAL DISABILITY FILM FESTIVAL** - From September 26-29, 2002, Moscow, Russia will host its first international disability film festival. The festival is being organized by Russia’s leading independent living and disability rights group, [Perspektiva](#), with the assistance of [Rehabilitation International](#). If you have an outstanding disability-themed video or film produced since 1995 that you would like to enter in the festival, contact the Russian organizer, Denise Roza via email for application forms at [Droza@online.ru](mailto:Droza@online.ru). Deadline to submit films & videos is May 30, 2002. See more online at [http://www.disabilityworld.org/01-03\\_02/arts/moscowfestival.shtml](http://www.disabilityworld.org/01-03_02/arts/moscowfestival.shtml).

**HYPERTENSE SUPERVISOR SUBSTANTIALLY LIMITED IN “SOCIALIZING”** - In a rather surprising decision that just came to my attention, the federal district court in Philadelphia in October 2000 denied summary judgment in a case involving a production supervisor with “uncontrollable hypertension” who, the court opined, could be substantially limited in the “major life activities of interpersonal relations and socializing.” After experiencing dizziness at work from his hypertension, the supervisor was ordered by his doctor to no longer work the eleven-to-seven leg of the employer’s rotating shifts, and to work no more than forty hours a week. He was given a different job as an accommodation but, on his return from an unrelated FMLA leave, he was told that the job no longer existed and was terminated. The supervisor sued under the ADA, and the employer moved to dismiss, arguing in part that the supervisor was not a qualified individual with a disability. Citing other trial decisions as precedent, the court decided that “interpersonal

relations and socializing are major life activities,” concluding that “a jury could reasonably conclude that [the supervisor] is substantially limited in the major life activity of interaction with others.” “There is evidence that anytime [the supervisor] becomes involved in a stressful social situation or argument, his blood pressure will rise to a dangerous level,” wrote Judge Clarence Newcomer. “Thus, [he] must avoid stressful situations, arguments, heated debates, and emotional conversations at all costs. Consequently, a question of fact exists whether plaintiff’s inability to enter into stressful situations, interpersonal or otherwise, is a substantial limitation on his ability to interact with others.” Sorry, but no further information about this case was available at press time. *Garvey v. Jefferson Smurfit Corporation*, EDPa., No. 00-1527 (SJ), 10/24/00 (<http://www.paed.uscourts.gov/documents/opinions/00D0804P.HTM>).

---

```

@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@
@
@          ***          *****          ***          @
@          *****          *****          *****          @
@          *** ***          ***          ***          *** ***          @
@          ***          ***          ***          ***          ***          ***          @
@          *****          ***          ***          *****          @
@          *****          ***          ***          *****          @
@          ***          ***          *****          ***          ***          @
@          ***          ***          *****          ***          ***          @
@          **   **   *****   **          **   *****          @
@          **   **   *****   **          **   ***          ***          @
@          ***   **   **          **          **   **          **          @
@          ****   **   ****          **          ***          **          ****          @
@          **   ****   ****          **   *****   **          ****          @
@          **   ***   **          **   **   **   **          *          ****          @
@          **   **   *****          ****          ****          ***          ***          @
@          **   **   *****          ***          ***          *****          @
@

```

"News Reviews to Peruse"

Number 100

June 2002

Items regarding disabilities law and 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.) ([pbair@state.pa.us](mailto:pbair@state.pa.us)). Current and recent issues can be found online at [http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews\\_index\\_2001.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews_index_2001.htm). All past issues of this publication are archived at [http://intradep/ChiefCounsel/ADANews/adanews\\_index.htm](http://intradep/ChiefCounsel/ADANews/adanews_index.htm) on the DEP internal website.

**WELCOME TO THE 100<sup>TH</sup> EDITION OF THE ADA NEWS** - advising readers of disabilities and employment news, monthly since 1994.

**U.S. SUPREME COURT HANDS EMPLOYERS ANOTHER VICTORY** - The U.S. Supreme Court unanimously reversed the U.S. Court of Appeals for the Ninth Circuit (WA, OR, ID, CA, NV, AZ, AK, HI, GU) in a decision issued June 11<sup>th</sup> in *Chevron v. Echazabal*, a case involving the right of an individual with a disability to work in a job that presents a direct

threat solely to the health of the individual, even where the individual is willing to assume the risk of injury. (See ADA News No. 94, 12/15/01, [http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/ada\\_news\\_94\\_fronpage.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/ada_news_94_fronpage.htm).) The case is the latest in a line of rulings that have limited worker rights under the ADA, and the second major ruling this year that strengthened employers' hands while making it more difficult for some workers to claim the law gives them special protection. The Act protects others in the workplace from direct threats that may be presented by individuals with disabilities; but, said the Court, the EEOC, as the agency primarily responsible for enforcing the employment provisions of the Act, may interpret this exception as also applying to workers who may be a risk only to themselves. "The EEOC was certainly acting within the reasonable zone when it saw a difference between rejecting workplace paternalism and ignoring specific and documented risks to the employee himself," wrote Justice Souter for the Court, "even if the employee would take his chances for the sake of getting a job." The Court refused, however, to issue a blanket rule, adding that each case had to be evaluated on its individual merits based on the most recent medical analysis. Business representatives applauded the decision. "This is twice this year by 9-0 decisions that the Court has made clear that they think the ADA was being read by the lower courts too broadly," said Stephen Bokart, senior vice president and general counsel of the [U.S. Chamber of Commerce](#). Disabilities advocates predictably were disappointed with the ruling. "The United States Supreme Court today once again demonstrated its fundamental hostility to disability rights in the workplace," said Andrew J. Imparato, president of the [American Association of People with Disabilities](#). "The Court's decision endorses 'the assumption that people with disabilities are not competent to make informed, wise, or safe life choices,' which is 'the most long standing and insidious aspect' of the discrimination that is banned by the ADA," said Marca Bristo, chairperson of the [National Council on Disability](#). *Chevron U.S.A. Inc. v. Echazabal*, USSCt, No. 00-1406, 6/10/02 (<http://a257.g.akamaitech.net/7/257/2422/10jun20021130/www.supremecourtus.gov/opinions/01pdf/00-1406.pdf>).

**FEDERAL CLASS ACTIONS OPENED TO CHALLENGE** - In a non-ADA case, the High Court handed down a decision making it easier for plaintiffs not named in a lawsuit to challenge a class action settlement. Many ADA and disability-related cases are settled in this manner, especially lawsuits brought under Title II. The Court said that people affected by a settlement could appeal a class action settlement even if they were not named class representatives and even if they did not intervene at

an earlier stage, so long as they objected at a fairness hearing before a trial judge in the case. *Devlin v. Scardelletti*, USSCt, No. 01-417, 6/10/02 (<http://a257.g.akamaitech.net/7/257/2422/10jun20021530/www.supremecourtus.gov/opinions/01pdf/01-417.pdf>).

**MENDACIOUS ASSEMBLY WORKER STILL MAINTAINS JURY AWARD** - The U.S. Court of Appeals for the Tenth Circuit (WY, UT, CO, NM, KS, OK) handed an employer a mixed bag when it reversed an injunction but affirmed a jury award in a case involving an applicant for employment. (A preliminary order in this case was reported in ADA News No. 75, 5/15/00, [http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews\\_75.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews_75.htm).) The applicant had applied for an assembly job and was offered the position contingent on his passing a medical examination required of all new employees. On a questionnaire, the applicant untruthfully denied ever having "hearing loss; pain in the shoulder, arms, or hands; leg or foot problems; and back pain, strain, or surgery," and he was recommended for the position. The employer's human resources department, however, discovered from his past workers' compensation records that he had received workers' compensation for several injuries arising from previous employment, including from injuries to his hearing, neck, shoulder, elbow, hand, back, abdomen, lungs, knee, and feet. The offer of employment was withdrawn because, as explained to the applicant, "the positions that we were looking at you for are those positions that would put you in a position to likely be injured again and we don't do that." (*Bad move - why wasn't he told it was because he had lied on the form?*) A jury awarded the applicant \$3500 in compensatory damages, and the trial court enjoined the employer from allowing its human resources department to request and review past workers' compensation records. The appellate court affirmed the verdict, but dissolved the injunction as, in the words of the Court, the "injunction limited lawful review of workers' compensation histories by employers." *Garrison v. Baker Hughes Oilfield Operations, Inc.*, CA10, No. 01-5032, 4/19/02 (<http://www.kscourts.org/ca10/cases/2002/04/01-5032.htm>).

**ADA In Focus** - The Summer 2002 issue of *ADA In Focus*, the newsletter of the [ADA Information Center for the Mid-Atlantic Region](http://www.usaia.org), is now available online at the USAIC's website. This issue of the newsletter, published three times a year, contains articles on travel and recreation for people with disabilities, a calendar, a publications list, and other items of interest. Point your browser to <http://www.adainfo.org/development/summer02.html>.



**WORKER'S LAWSUIT AGAINST UNION LOCAL GOES FORWARD** - A federal trial judge in Maine has allowed the ADA claim of a paper mill employee against his union local to go forward because of the union's "deliberate acquiescence" in the possibly unlawful acts of his employer. The question of union liability for so-called deliberate acquiescence is undecided in the First Circuit. *Greenier v. PACE Local 1188*, D.Me. No. 01-CV-121-B-S, 4/23/02 ([http://www.med.uscourts.gov/site/opinions/singal/2002/gzs\\_04232002\\_1-01cv121\\_greenier\\_v\\_pace\\_local1188.pdf](http://www.med.uscourts.gov/site/opinions/singal/2002/gzs_04232002_1-01cv121_greenier_v_pace_local1188.pdf)).

**NURSE'S TRANSFER WAS DISCRIMINATORY ADVERSE ACTION** - A surgical nurse who was transferred by her employer to a non-nursing position when it discovered that she had "relapsed remitting" multiple sclerosis was the victim of illegal discrimination, according to the U.S. Court of Appeals for the Eighth Circuit (ND, SD, NE, MN, IA, MO, AR). The nurse, who experienced symptoms only periodically, separated by long intervals during which she was asymptomatic, had some problems performing job duties and was informed that she would be reassigned to a clerical position. Later she was told to find another job. The nurse sued her employer, alleging that she had been discriminated against because her employer had regarded her as a person with a disability. Her ADA claim was sustained by a trial court, which also awarded her fifty thousand dollars for emotional distress, and the judgment was upheld on appeal. The Appellate Court found that the nurse's transfer amounted to an adverse action because it was a "significant, detrimental change in [her] working conditions." *Brown v. Lester E. Cox Medical Centers*, CA8, No. 01-1096, 4/17/02 (<http://www.ca8.uscourts.gov/tmp/011096.html>).

**DISABILITIES WEBSITE OF THE MONTH** - Ready to start planning your summer activities? Concerned about the accessibility of a park or other tourist spot? Then check out the website of the [National Center on Accessibility](http://www.ncaonline.org), at <http://www.ncaonline.org>. Located at Indiana University in Bloomington, Indiana, the NCA is an organization committed to the full participation in parks, recreation and tourism by people with disabilities. The NCA provides technical assistance to organizations of all sizes who are designing and retrofitting their leisure areas and programs for accessibility; and conducts, promotes, and facilitates research on issues essential to accessibility. A one-stop-shop for issues of accessibility of parks and recreational facilities, this website should be bookmarked by anyone who works in or is concerned about accessibility of parks, swimming pools, golf courses, playgrounds, fitness centers, and virtually any other recreational facility. Visitors can also access the NCA newsletter *Access Today*, and the NCA online bookstore.

**FULL-TIME WORK WAS ESSENTIAL TO JOB** - A company that was able to demonstrate that the ability to work full time in an account development specialist job was an essential job function was successful in defending against the ADA claim of a former ADS who had asked for part-time work as an accommodation for his major depression while on medical leave. In sustaining summary judgment, the U.S. Court of Appeals for the Fourth Circuit (WV, VA, MD, NC, SC) found

that the company had not unreasonably denied the ADS an accommodation, and that he had not been fired in retaliation for requesting an accommodation. The Court found the ADS was not a “qualified individual with a disability” since he could not perform the essential functions of his job with or without an accommodation. *Lamb v. Qualex, Inc.*, CA4, No. 99-1188 (<http://pacer.ca4.uscourts.gov/cgi-bin/getopn.pl?OPINION=991188.U>).

**DISABLED LAWYERING ALLIANCE** - Harvard law student Carrie Griffin has established an online network for lawyers and law student with disabilities as part of a third-year law school project. The Alliance “is intended to bring together individuals to foster mentoring relationships, professional networking, and personal development. Any practitioner or student who self-identifies as having a disability is invited to participate by going to the website and signing up for the appropriate list-servs.” You can get involved in Ms Griffin’s project by visiting <http://www.disabledlawyering.org>.

**SANTA CRUZ METRO BUSES SUED** - A lawsuit has been filed against the Santa Cruz (California) Metro system by the [Disability Rights Education and Defense Fund](#) (DREDF) charging the bus system with longstanding violations of federal and California disabilities laws. The lawsuit alleges that the Metro system violates the rights of blind and sight-impaired riders by not announcing bus routes and stop numbers. Sight-impaired riders depend on oral announcements to know which bus they are boarding and what stops they are approaching.

**MAY OVR MAGAZINE AVAILABLE** - Read the May edition of *OVer View*, the monthly magazine of the Department of Labor and Industry’s Office of Vocational Rehabilitation, at <http://www.dli.state.pa.us/landi/lib/landi/pdf/ovr/overview5-22-02.pdf>. The issue relates the story of three graduates from the Business Enterprise Program, a program administered by the Bureau of Blindness and Visual Services.

#### **AREA CALENDAR** -

- ❑ “The ADA after *US Airways v. Barnett* and *Chevron v. Echazabal*,” ABA-CLE TeleConference; 3:00 - 4:30 PM EST, June 18, 2002; the panel will examine how these recent Supreme Court decisions will have implications for how courts will use administrative regulations to interpret Title I of the ADA; browse to <http://www.abanet.org/cle/programs/t02uab1.html> or call 800-285-2221 to register or for more information
- ❑ “Reframing Disability” - AHEAD Conference 2002; July 8 - 12, 2002; Washington, DC; more info at <http://www.disabilityworld.org/conferences/aheadconf.shtml>
- ❑ Third International Conference on Family Care; October 12 - 14, 2002; Washington, DC; forum for caregiving groups, advocates and policy makers from around the world to share

experiences and lessons in creating programs to assist family caregivers; more info at <http://www.disabilityworld.org/conferences/familycareconf.shtml>.

**RESOURCES** - Some disability/employment-related resource material recently added to the catalogue. Publications from the Equal Employment Opportunity Commission (EEOC) can be ordered at <http://www.usdoj.gov/crt/ada/publicat.htm>, or by calling 1-800-514-0301(V) or 1-800-514-0383(TTY).

- ❑ *Supreme Court Decisions Interpreting the Americans with Disabilities Act*, available from the National Council on Disability, summarizes and analyzes Court decisions through the 2000 term. The paper can be accessed from the NCD website at [http://www.ncd.gov/newsroom/publications/supremecourt\\_ada.html](http://www.ncd.gov/newsroom/publications/supremecourt_ada.html).

**SHERIFF'S DEPUTY DEPRIVED OF HIS DAY IN COURT** - A Montrose County (Colorado) deputy sheriff who alleged that his boss, the county sheriff, violated his rights under the ADA when the sheriff denied the deputy a requested accommodation and subsequently demoted him, was forced to settle his lawsuit against the county. The deputy, who had narcolepsy (a neurological disorder that can bring on sudden sleep), requested that his shifts be changed so he could better manage his condition, but his request was denied and he was demoted to a lower-paying position. After he resigned his position with the county, the deputy sued. The pay cut, however, forced the deputy into bankruptcy before his case was heard, and his legal case was seized as a financial asset by his lenders' trustee. The trustee then substituted himself as plaintiff for the deputy, and settled the case for \$26,000.

```

@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@
@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@
@
@      ***      *****      ***      @
@      *****      *****      *****      @
@      *** ***      ***      ****      *** ***      @
@      *** ***      ***      ****      *** ***      @
@      *****      ***      ****      *****      @
@      *****      ***      ****      *****      @
@      ***      ***      *****      ***      ***      @
@      ***      ***      *****      ***      ***      @
@
@      ** ** ***** **      **      *****      @
@      ** ** ***** **      ** *** ***      @
@      *** ** **      **      ** **      **      @
@      **** ** ****      **      *** **      ****      @
@      ** **** ****      ** ***** **      ****      @
@      ** *** **      ** ** ** ** ** ** ** *      ****      @
@      ** ** *****      ****      ****      ***      ***      @
@      ** ** *****      ***      ***      *****      @
@

```

"News Reviews to Peruse"

Number 101

July 2002

Items regarding disabilities law and 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.) ([pbair@state.pa.us](mailto:pbair@state.pa.us)). Current and recent issues can be found online at [http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews\\_index\\_2001.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews_index_2001.htm). All past issues of this publication are archived at [http://intradep/ChiefCounsel/ADANews/adanews\\_index.htm](http://intradep/ChiefCounsel/ADANews/adanews_index.htm) on the DEP internal website.

**NO PUNITIVE DAMAGES FOR PARTIES SUING CITY GOVERNMENT** - On June 17<sup>th</sup>, the [U.S. Supreme Court](#) issued a decision in *Barnes v. Gorman* (see ADA News No. 95, 1/15/02, [http://www.dep.state.pa.us/dep/deputate/Chief\\_Counsel/ADA/ada\\_news\\_95\\_frontpage.htm](http://www.dep.state.pa.us/dep/deputate/Chief_Counsel/ADA/ada_news_95_frontpage.htm)), questioning whether a municipal government can be assessed punitive damages under the ADA where it has failed to accommodate a person with a disability. You may remember that this case involved a man with paraplegia who uses a wheelchair and who was injured when he was

arrested and transported in a Kansas City, Missouri police van that was not equipped to transport him and his chair. The city paid approximately \$1 million in actual and compensatory damages, but contested the jury's \$1.2 million punitive damages award. While municipalities can be forced to pay actual damages and ordered to make accommodations, the ADA does not authorize the assessment of punitive damages, the Court found. Justices John Paul Stevens, Ruth Bader Ginsburg and Stephen Breyer dissented from the majority, saying that the decision was written too broadly. *Barnes v. Gorman*, USSCt. No. 01-682, 6/17/02 (<http://a257.g.akamaitech.net/7/257/2422/17jun20021100/www.supremecourtus.gov/opinions/01pdf/01-682.pdf>).

**NO HARM, NO FOUL IN ILLEGAL INTERVIEW** - Now and then, it's nice to be able to revisit cases reported on in their opening stages to see their final outcome. Since so few ADA cases that survive the summary judgment phase ever actually go to trial, opportunities are not many. An exception is a case first reported way back in June 1999, *Steeltek v. Griffin*. (See ADA News No. 64, 6/15/99, [http://intradep/Chief Counsel/ADANews/adanews\\_64.htm](http://intradep/Chief Counsel/ADANews/adanews_64.htm).) This case involved a non-disabled job applicant who sued his prospective employer - in what turned out to be a very expensive exercise for the applicant - because his job application contained two questions which were clearly prohibited under the ADA. (One asked for an applicants workers' compensation history, the other asking for a list of "physical defects which preclude you from performing certain jobs.") The employer, which argued that the provision of the Act governing legal questions in job applications was not available to nondisabled persons, was denied summary judgment by the [U.S. Court of Appeals for the Tenth Circuit](#) (WY, UT, CO, NM, KS, OK) (*cert. denied*). In the trial on the merits, a federal jury returned a verdict in favor of the employer, and the applicant appealed. The 10<sup>th</sup> Circuit Court affirmed the judgment last August. The Court found that 1) an applicant does not necessarily suffer a compensable injury justifying even nominal damages from a violation of the prohibition; 2) punitive damages are unavailable where no intentional discrimination has been shown; and 3) attorney's fees are available only to prevailing parties, even where the pursuit of litigation has caused a desired and voluntary change in a defendant's conduct (the "catalyst theory"). (Testimony indicated that the employer had changed its forms after the applicant filed suit.) *Griffin v. Steeltek, Inc.*, CA10, No. 00-5174, 8/22/01 (<http://www.kscourts.org/ca10/cases/2001/08/00-5174.htm>).

**TECHNICAL ASSISTANCE CENTER TO SERVE LATINOS WITH DISABILITIES** - *Proyecto Visión*, the first U.S. National Technical Assistance Center for Latinos with disabilities, has been started with a five-year grant from the Rehabilitation Services Administration and World Institute on Disability. The initiative is an effort to improve educational and employment opportunities for Latinos with disabilities. [Http://www.proyectovision.net](http://www.proyectovision.net)

**EXECUTION OF PERSONS WITH MENTAL RETARDATION UNCONSTITUTIONAL** - In a 6-3 ruling issued on June 20<sup>th</sup>, the U.S. Supreme Court found that the execution of persons with mental retardation violates the 8<sup>th</sup> Amendments prohibition of cruel and unusual punishment. The

majority's view reflects changes in public attitudes on the issue since the Supreme Court declared such executions constitutional in 1989. Since 1989, the number of states not allowing capital punishment or prohibiting execution of the mentally retarded has grown to thirty. "It is not so much the number of these states that is significant, but the consistency of the direction of the change," Justice John Paul Stevens wrote for the majority. Chief Justice William H. Rehnquist and Justices Antonin Scalia and Clarence Thomas dissented. *Atkins v. Virginia*, USSCt No. 00-8452, 6/20/02 (<http://a257.g.akamaitech.net/7/257/2422/20jun20021230/www.supremecourtus.gov/opinions/01pdf/00-8452.pdf>).

**WORKER'S SLEEP APNEA CLAIM FAILS TO SURVIVE SUMMARY JUDGMENT** - A trial court's dismissal of the ADA claim of a quarry worker with sleep apnea - a temporary suspension of breathing occurring repeatedly during sleep, disrupting the sleep pattern and often leaving the individual very tired - was affirmed by the [U.S. Court of Appeals for the Seventh Circuit](#) (WI, IL, IN). After the worker, whose primary job at the quarry involved operating heavy equipment, tried unsuccessfully to obtain medical treatment for his "tendency to 'nod off' on the job," he was fired by the employer. He sued the employer, alleging originally only that his employer had failed to accommodate him, but adding later that it had also discriminated against him based on disability in his termination. In an unusual procedural move, the trial court skipped over the question whether the worker was a qualified individual with a disability entitled to the Act's protection; but dismissed the claim on a finding that the employer was entitled to fire the worker after he failed to return to work with a doctor's excuse following the expiration of his medical leave, as required by company policy. The Appellate Court agreed, finding that the worker had been fired for a legitimate business reason. "[A]n employee who is less than fully alert could harm himself and others if he is operating a front loader, or many other kinds of heavy industrial equipment," stated the Court, adding the employer "had no reason to care why [the worker] was sleeping; it just didn't want people who were groggy for any reason operating its machines." *Leonberger v. Martin Marietta Materials, Inc.*, CA7, No. 99-4294, 10/26/00 (<http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=7th&no=99-4294>).

**DISABILITIES WEBSITE OF THE MONTH** - The "[Journalist's Toolbox](#)" is, as its name implies, an online resource for reporters and editors. Here one can find links to more than 11,000 websites helpful to the media on a multitude of topics. Tucked in the convenient drop-down topic menu is "[The Journalist's Toolbox: Disabled Resources](#)," a collection of disability resources as valuable as any on the Internet. "Many of us unknowingly carry prejudices and misconceptions about people with disabilities," states the introduction. "Sometimes, these are magnified in the media. This page was developed to put the media in touch with credible sources on the disabled and related issues related." The website does this and more, and its usefulness is definitely not restricted to members of the fourth estate. This website gets a "four-star" rating, and should be in the "favorites" list of anyone involved in disabilities and disabilities law. The website address is <http://www.journaliststoolbox.com/newswriting/disabled.html>.

**MOST OF WORLD'S DISABLED LIVE IN SOUTH & SOUTHEAST ASIA** - A recent study by the United Nations found that nearly two-thirds of persons with disabilities - approximately 400 of the world's 600 million - live in the countries of South and Southeast Asia. Most are impoverished by their disabilities, the study shows, and experience discrimination in employment and otherwise. [Http://www.un.org/partners/civil\\_society/m-disabl.htm](http://www.un.org/partners/civil_society/m-disabl.htm)

### **AREA CALENDAR** -

- ❑ “Foot Works;” opening July 31<sup>st</sup>; UCP of Pittsburgh’s Centre Art Gallery, Pittsburgh, PA; first solo show for foot artist Sandy Allison, who has mental retardation and cerebral palsy, is nonverbal, hearing impaired and uses a wheelchair, has no use of her hands and paints and draws with her feet; Allison is the winner of the “Expressions” Art Show and Competition sponsored by Achieva; for further information about the exhibit, Foot Works, or about the Centre Art Gallery, contact Michelle Hines at 412-683-7100 ext. 362
- ❑ U.S. Equal Employment Opportunity Commission: Federal Employment Law Conference; August 26 - 30, 2002; Atlantic City, NJ; EEOC annual national conference provides interactive educational forum for examining contemporary equal employment opportunity and merit systems issues in the Federal sector workplace; for more information, visit the [EXCEL Conference Information and Registration page \(http://www.eeoc.gov/taps/taps-35.html\)](http://www.eeoc.gov/taps/taps-35.html) on the EEOC web site.
- ❑ National Employment Law Institute: Americans with Disabilities Act Workshop; September 30, 2002; Willard Inter-Continental Hotel, Washington, D.C.; NELI’s seventh annual ADA workshop will address recent developments in the application of the ADA, significant Supreme Court decisions, EEOC guidance, and practical experiences, as well as definitions of terms such as “disability,” “qualified,” and “direct threat;” for more information, visit <http://www.neli.org>
- ❑ Empowerment through Innovation: International Conference on Family Care; October 12 - 14, 2002; Washington, DC; international conference will focus on the wide range of family care situations, including caring for elders, grandparents caring for grandchildren, end-of-life care, and caring for people with a variety of physical and mental disabilities and chronic illnesses; for more information, visit <http://www.caregiving.org>
- ❑ 2002: An ADA Leadership Conference; October 22 - 25, 2002; Hilton Silver Spring, Washington, DC; Fall 2002 National Association of ADA Coordinators; early bird registration rate available until August 9<sup>th</sup>, regular registration deadline October 16<sup>th</sup>; for more information, call 1-800-722-4232 or visit <http://www.4naadac.com>

- ❑ Human Capital: Turning Investment to Profit; November 18 - 19, 2002; Washington, DC; Business Leadership Network National Summit will focus on best disability practices of U.S. businesses; for more information, call 1-800-833-1354 or visit <http://www.usbln.com>
- ❑ 9th Annual UCP Foundation Sporting Clays Classic; May 18th, 2003; Nemaacolin Woodlands Shooting Academy, Farmington, PA; contact Jackie Newman at 724-229-0851 or [jnewman@ucpswpa.org](mailto:jnewman@ucpswpa.org) for more information.

**NEW FREEDOM INITIATIVE PROGRESS REPORT** - The White House released its *New Freedom Initiative* in February 2001, setting out administration plans for fully integrating persons with disabilities into American society. So, how are they doing? You can read the first official progress report released in May of this year at <http://www.whitehouse.gov/infocus/newfreedom/toc.html>. Not surprising, it is a pretty favorable report. For a somewhat contrary account, read about Democratic National Committee (DNC) Chairman Terry McAuliffe's call for "Real Freedom" initiatives at [http://www.icanonline.net/news/fullpage.cfm/articleid/0C5E70AB-451A-4B77-99895FCB2C1B37E6/cx/issues.get\\_involved/article.cfm](http://www.icanonline.net/news/fullpage.cfm/articleid/0C5E70AB-451A-4B77-99895FCB2C1B37E6/cx/issues.get_involved/article.cfm).

**RESOURCES** - Some disability/employment-related resource material recently added to the catalogue. Publications from the Equal Employment Opportunity Commission (EEOC) can be ordered at <http://www.usdoj.gov/crt/ada/publicat.htm>, or by calling 1-800-514-0301(V) or 1-800-514-0383(TTY).

- ❑ The June 2002 issue of *OVeRVIEW*, the monthly newsletter of the Office of Vocational Rehabilitation, is available in PDF format at <http://www.dli.state.pa.us/landi/lib/landi/pdf/ovr/overview6-15-02.pdf> (Acrobat Reader required). The June issue is headlined by the fourth annual OVR PRIDE awards, acknowledging outstanding achievements by agency staff.
- ❑ "Deaf Mall Travel Services" - Travel services for and by the deaf, at <http://www.deafmall.net/travel>
- ❑ National Arts and Disability Center - The national information dissemination, technical assistance and referral center specializing in the field of arts and disability can be found at <http://nadc.ucla.edu>.
- ❑ Association of Science-Technology Centers - An organization of science centers and museums dedicated to furthering the public understanding of science, the ASTC encourages excellence and innovation in informal science learning by serving and linking its members worldwide and advancing their common goals. [Http://www.astc.org](http://www.astc.org)



- ❑ ABLEDATA - The premier source for information on assistive technology, sponsored by the National Institute on Disability and Rehabilitation Research, U.S. Department of Education. [Http://www.abledata.com](http://www.abledata.com)
- ❑ Institute on Independent Living travel-related resources - a virtual smorgasbord of travel and leisure related information for persons with disabilities, at <http://www.independentliving.org/links/links-travel-and-leisure.html>
- ❑ Two publications - *Accommodating All Guests: The ADA and the Lodging Industry*, and *ADA Answers for Food Service Operators* - are available free from the ADA Information Center, 800-949-4232 (V/TTY), or via e-mail to [adainfo@transcend.org](mailto:adainfo@transcend.org).
- ❑ *Accessible Temporary Events: A Planning Guide*, a recent publication of the Center for Universal Design, North Carolina State University, addresses accessibility issues in the context of fairs, concerts, races, rallies, etc. Copies are available for a nominal charge from the ADA Information Center at 800-949-4232 (V/TTY), or via e-mail to [adainfo@transcend.org](mailto:adainfo@transcend.org)
- ❑ The “Business Connection” webpage, newly launched on the U.S. Department of Justice website, links businesses and consumers to publications of interest, including those about design standards, barrier removal, policy and service issues and tax incentives. [Http://www.usdoj.gov/crt/ada/business.htm](http://www.usdoj.gov/crt/ada/business.htm)

**WORLD BANK APPOINTS NEW DISABILITIES ADVISER** - Ms Judith E. Heumann, internationally-recognized expert on disability and diversity issues, has been named by the World Bank to fill the position of Adviser, Disability and Development in the Human Development Network. Ms Heumann brings a strong background in government work, as well as with non-governmental organizations, to her new position. [Http://www.disabilityworld.org/04-05\\_02/news/heumann.shtml](http://www.disabilityworld.org/04-05_02/news/heumann.shtml)

**INCONSISTENT STATEMENTS FOR SSDI TORPEDO ADA CLAIM** - The U.S. Supreme Court said in [\*Cleveland v. Policy Management Corporation\*](#), 526 U.S. 795 (1999) that there is no “inherent” conflict between the ADA and the relevant Social Security disability statute; but that conflicts in statements made by claimants under each must be resolved in order for a claimant to avoid being judicially estopped from prevailing in an ADA claim. The problem typically arises when an SSDI claimant completes a form stating that she is “totally disabled.” If this person then files an ADA claim, she must prove that she is still a qualified individual with a disability, who is able to work with or without an accommodation, and reconcile the two. This conflict is examined in a 2000 decision from Judge Thomas N. O’Neill, Jr. of the Eastern District of Pennsylvania. The decision involved an administrative employee of the Philadelphia District Attorney’s office whose carpal tunnel syndrome had forced her to stop working and file for SSDI. After she was terminated

by the DA's office, she filed an ADA claim, alleging she was fired because of her disability. The judge disagreed, finding that statements made in her SSDI forms barred her from pursuing her claim. Significantly, Judge O'Neill found that the claimant was bound by statements made on the form, not by her, but by her treating physicians and not disavowed by the claimant. The case is *Lorde v. City of Philadelphia*, EDPa. No. 98-5267, 11/00 (<http://www.paed.uscourts.gov/documents/opinions/00D0896P.HTM>).

**ANNOTATION** - "Justin Dart, Father of the ADA, dies at 71" - On June 21, 2002, Justin Dart, a pioneer of the disability rights movement in this country and internationally, died. It is hard to attribute the success of any social movement to a single individual. Dart's contributions to the movement were crucial, however, such that some have called him the "Martin Luther King of the disabilities movement." Mr. Dart's obituary follows.

---

### "Justin Dart, An Obituary"

June 22, 2002

By Fred Fay and Fred Pelka, written at Justin Dart's request.

Justin Dart, Jr., a leader of the international disability rights movement and a renowned human rights activist, died last night at his home in Washington D.C. Widely recognized as "the father of the Americans with Disabilities Act" and "the godfather of the disability rights movement," Dart had for the past several years struggled with the complications of post-polio syndrome and congestive heart failure. He was seventy-one years old. He is survived by his wife Yoshiko, their extended family of foster children, his many friends and colleagues, and millions of disability and human rights activists all over the world.

Dart was a leader in the disability rights movement for three decades, and an advocate for the rights of women, people of color, and gays and lesbians. The recipient of five presidential appointments and numerous honors, including the Hubert Humphrey Award of the Leadership Conference on Civil Rights, Dart was on the podium on the White House lawn when President George H. Bush signed the ADA into law in July 1990. Dart was also a highly successful entrepreneur, using his personal wealth to further his human rights agenda by generously contributing to organizations, candidates, and individuals, becoming what he called "a little PAC for empowerment."

In 1998 Dart received the Presidential Medal of Freedom, the nation's highest civilian award. "Justin Dart," said President Clinton in 1996, "in his own way has the most Olympian spirit I believe I have ever come across."

Until the end, Dart remained dedicated to his vision of a "revolution of empowerment." This would be, he said, "a revolution that confronts and eliminates obsolete thoughts and

systems, that focuses the full power of science and free-enterprise democracy on the systematic empowerment of every person to live his or her God-given potential." Dart never hesitated to emphasize the assistance he received from those working with him, most especially his wife of more than thirty years, Yoshiko Saji. "She is," he often said, "quite simply the most magnificent human being I have ever met."

Time and again Dart stressed that his achievements were only possible with the help of hundreds of activists, colleagues, and friends. "There is nothing I have achieved, and no addiction I have overcome, without the love and support of specific individuals who reached out to empower me... There is nothing I have accomplished without reaching out to empower others." Dart protested the fact that he and only three other disability activists were on the podium when President Bush signed the ADA, believing that "hundreds of others should have been there as well." After receiving the Presidential Medal of Freedom, Dart sent out replicas of the award to hundreds of disability rights activists across the country, writing that, "this award belongs to you."

Justin Dart, Jr., was born on August 29, 1930, into a wealthy and prominent family. His grandfather was the founder of the Walgreen Drugstore chain, his father a successful business executive, his mother a matron of the American avant garde. Dart would later describe how he became "a super loser" as a way of establishing his own identity in this family of "super winners." He attended seven high schools, not graduating from any of them, and broke Humphrey Bogart's all-time record for the number of demerits earned by a student at elite Andover prep. "People didn't like me. I didn't like myself."

Dart contracted polio in 1948. With doctors saying he had less than three days to live, he was admitted into the Seventh Day Adventist Medical University in Los Angeles. "For the first time in my life I was surrounded by people who were openly expressing love for each other, and for me, even though I was hostile to them. And so I started smiling at people, and saying nice things to them. And they responded, treating me even better. It felt so good!" Three days turned into forty years, but Dart never forgot this lesson. Polio left Dart a wheelchair user, but he never grieved about this. "I count the good days in my life from the time I got polio. These beautiful people not only saved my life, they made it worth saving."

Another turning point was Dart's discovery in 1949 of the philosophy of Mohandas K. Gandhi. Dart defined Gandhi's message as, "Find your own truth, and then live it." This theme too would stay with him for the rest of his life. Dart attended the University of Houston from 1951 to 1954, earning his bachelor's and master's degrees in political science and history. He wanted to be a teacher, but the university withheld his teaching certificate because he was a wheelchair user. During his time in college, Dart organized his first human rights group -- a pro-integration student group at what was then a whites-only institution.

Dart went into business in 1956, building several successful companies in Mexico and Japan. He started Japan Tupperware with three employees in 1963, and by 1965 it had expanded to some 25,000. Dart used his businesses to provide work for women and people with disabilities. In Japan, for example, he took severely disabled people out of institutions, gave them paying jobs within his company, and organized some of them into Japan's first wheelchair basketball team. It was during this time he met his wife, Yoshiko.

The final turning point in Dart's life came during a visit to Vietnam in 1966, to investigate the status of rehabilitation in that war-torn country. Visiting a "rehabilitation center" for children with polio, Dart instead found squalid conditions where disabled children were left on concrete floors to starve. One child, a young girl dying there before him, took his hand and looked into his eyes. "That scene," he would later write, "is burned forever in my soul. For the first time in my life I understood the reality of evil, and that I was a part of that reality.

"The Darts returned to Japan, but terminated their business interests. After a period of meditation in a dilapidated farmhouse, the two decided to dedicate themselves entirely to the cause of human and disability rights. They moved to Texas in 1974, and immersed themselves in local disability activism. From 1980 to 1985, Dart was a member, and then chair, of the Texas Governor's Committee for Persons with Disabilities. His work in Texas became a pattern for what was to follow: extensive meetings with the grassroots, followed by a call for the radical empowerment of people with disabilities, followed by tireless advocacy until victory was won.

In 1981, President Ronald Reagan appointed Dart to be the vice-chair of the National Council on Disability. The Darts embarked on a nationwide tour, at their own expense, meeting with activists in every state. Dart and others on the Council drafted a national policy that called for national civil rights legislation to end the centuries old discrimination of people with disabilities -- what would eventually become the Americans with Disabilities Act of 1990.

In 1986, Dart was appointed to head the Rehabilitation Services Administration, a \$3 billion federal agency that oversees a vast array of programs for disabled people. Dart called for radical changes, and for including people with disabilities in every aspect of designing, implementing, and monitoring rehabilitation programs. Resisted by the bureaucracy, Dart dropped a bombshell when he testified at a public hearing before Congress that the RSA was "a vast, inflexible federal system which, like the society it represents, still contains a significant portion of individuals who have not yet overcome obsolete, paternalistic attitudes about disability." Dart was asked to resign his position, but remained a supporter of both Presidents Reagan and Bush. In 1989, Dart was appointed chair of the President's Committee on the Employment of People with Disabilities, shifting its focus from its traditional stance of urging business to "hire the handicapped" to advocating for full civil rights for people with disabilities.

Dart is best known for his work in passing the Americans with Disabilities Act. In 1988, he was appointed, along with parents' advocate Elizabeth Boggs, to chair the Congressional Task Force on the Rights and Empowerment of Americans with Disabilities. The Darts again toured the country at their own expense, visiting every state, Puerto Rico, Guam, and the District of Columbia, holding public forums attended by more than 30,000 people. Everywhere he went, Dart touted the ADA as "the civil rights act of the future." Dart also met extensively with members of Congress and staff, as well as President Bush, Vice President Quayle, and members of the Cabinet. At one point, seeing Dart at a White House reception, President Bush introduced him as "the ADA man." The ADA was signed into law on July 26, 1990, an anniversary that is celebrated each year by "disability pride" events all across the country.

While taking pride in passage of the ADA, Dart was always quick to list all the others who shared in the struggle: Robert Silverstein and Robert Burgdorf, Patrisha Wright and Tony Coelho, Fred Fay and Judith Heumann, among many others. And Dart never wavered in his commitment to disability solidarity, insisting that all people with disabilities be protected by the law and included in the coalition to pass it -- including mentally ill "psychiatric survivors" and people with HIV/AIDS. Dart called this his "politics of inclusion," a companion to his "politics of principle, solidarity, and love."

After passage of the ADA, Dart threw his energy into the fight for universal health care, again campaigning across the country, and often speaking from the same podium as President and Mrs. Clinton. With the defeat of universal health care, Dart was among the first to identify the coming backlash against disability rights. He resigned all his positions to become "a full-time citizen soldier in the trenches of justice." With the conservative Republican victory in Congress in 1994, followed by calls to amend or even repeal the ADA and the Individuals with Disabilities Education Act (or IDEA), Dart, and disability rights advocates Becky Ogle and Frederick Fay, founded Justice for All, what Dart called "a SWAT team" to beat back these attacks. Again, Dart was tireless -- traveling, speaking, testifying, holding conference calls, presiding over meetings, calling the media on its distortions of the ADA, and flooding the country with American flag stickers that said, "ADA, IDEA, America Wins." Both laws were saved. Dart again placed the credit with "the thousands of grassroots patriots" who wrote and e-mailed and lobbied. But there can be no doubt that without Dart's leadership, the outcome might have been entirely different.

In 1996, confronted by a Republican Party calling for "a retreat from Thomas Jefferson, Abraham Lincoln democracy," Dart campaigned for the re-election of President Clinton. This was a personally difficult "decision of conscience." Dart had been a Republican for most of his life, and had organized the disability constituency campaigns of both Ronald Reagan and George Bush, campaigning against Clinton in 1992. But in a turnabout that was reported in the New York Times and the Washington Post, Dart went all out for Clinton, even speaking at the Democratic National Convention in Chicago. The Darts yet again undertook a whirlwind

tour of the country, telling people to "get into politics as if your life depended on it. It does." At his speech the day after the election, President Clinton publicly thanked Dart for personally campaigning in all fifty states, and cited his efforts as "one reason we won some of those states."

Dart suffered a series of heart attacks in late 1997, which curtailed his ability to travel. He continued, however, to lobby for the rights of people with disabilities, and attended numerous events, rallies, demonstrations and public hearings. Toward the end of his life, Dart was hard at work on a political manifesto that would outline his vision of "the revolution of empowerment." In its conclusion, he urged his "Beloved colleagues in struggle, listen to the heart of this old soldier. Our lives, our children's lives, the quality of the lives of billions in future generations hangs in the balance. I cry out to you from the depths of my being. Humanity needs you! Lead! Lead! Lead the revolution of empowerment!"

Today, disabled people across the country and around the world will grieve at the passing of Justin Dart, Jr. But we will celebrate his love and his commitment to justice. Please join us at in expressing our condolences to Yoshiko and her family during this difficult time. Keep in mind, however, that it was Justin's wish that any service or commemoration be used by activists to celebrate our movement, and as an opportunity to recommit themselves to "the revolution of empowerment."

---

```

@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@
@
@          ***          *****          ***          @
@          *****          *****          *****          @
@          ***  ***          ***  ***          ***  ***          @
@          ***  ***          ***  ***          ***  ***          @
@          *****          ***  ***          *****          @
@          *****          ***  ***          *****          @
@          ***          ***  *****          ***          ***          @
@          ***          ***  *****          ***          ***          @
@          **  **  *****          **          **  *****          @
@          **  **  *****          **          **  ***  ***          @
@          ***  **  **          **          **  **  **          @
@          ****  **  ****          **  ***  **  **          ****          @
@          **  ****  ****          **  *****  **          ****          @
@          **  ***  **          **  **  **  **  **          *          ****          @
@          **  **  *****          ****  ****          ***  ***          @
@          **  **  *****          ***  ***          *****          @
@

```

"News Reviews to Peruse"

Number 102

August 2002

Items regarding disabilities law and 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.) ([pbair@state.pa.us](mailto:pbair@state.pa.us)). Current and recent issues can be found online at [http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews\\_index\\_2001.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews_index_2001.htm). All past issues of this publication are archived at [http://intradep/ChiefCounsel/ADANews/adanews\\_index.htm](http://intradep/ChiefCounsel/ADANews/adanews_index.htm) on the DEP internal website.

**ACT'S ANNIVERSARY OBSERVED BY NATIONAL ORGANIZATION** - National awareness of the ADA was at an all-time high, and support for the law remained strong as the nation marked the 12<sup>th</sup> anniversary of the Act's signing Friday, July 26<sup>th</sup>. On Capitol Hill, the [National Organization on Disability](#) (NOD) released results of a recent Harris Poll study showing that 77 percent of Americans say they are aware of the law, a notable increase from the 67 percent recorded in 1999. Of those who know of the

ADA, an overwhelming 93 percent said they "approve of and support" it. "This growing awareness of and consistent and long-term support for the ADA are welcome news for the 54 million Americans, roughly one in five, who have disabilities," said NOD Board Chairman Michael R. Deland. The anniversary was also marked by a memorial service for Justin Dart, who died recently.

**EMPLOYERS IGNORE ACCOMMODATION REQUESTS AT THEIR PERIL** - An employer was recently denied summary judgment by the [U.S. Court of Appeals for the Third Circuit](#) (PA, NJ, DE, VI) in a case that affirms the importance of employers engaging in an "interactive process" with employees requesting accommodation. The case involves a municipal Emergency Medical Technician who was injured on the job and was no longer capable of performing as an EMT. He suggested to his employer that he could return to work in a job as a police dispatcher, a job he had held previously, as a reasonable accommodation. Despite several attempts by the EMT and his attorney to draw it into discussions regarding accommodation, the municipality refused to do so, informing him that its "policy" required that he "go to Town Hall and fill out a job application." When the EMT sued for failure to reasonably accommodate, the municipality argued that it was entitled to take this position, and the trial court found that the EMT's failure to follow his employer's "policy" was fatal to his claim. The Appellate Court, however, disagreed and reversed. The Court emphasized the importance of the "interactive process," the discussion that should occur between employer and employee when an accommodation is requested. "[A]n employer that fails to engage in the 'interactive process' runs a substantial risk," wrote Judge Alito for the Court. With regard to the municipality's policy argument, the Court found that in some cases, the Act's reasonable accommodation requirement requires that an employer "deviate from a disability-neutral rule." *Shapiro v. Township of Lakewood*, CA3, No. 01-3212, 5/29/02 (<http://www.ca3.uscourts.gov/opinions/013212.txt>).

**'REGARDED AS' DISABILITY MUST STILL MEET TEST** - Under the ADA, a person has a "disability" if he is "regarded as" having a disability. The U.S. Court of Appeals for the Third Circuit has reaffirmed that to succeed in a "regarded as" claim, a plaintiff must prove that the "disability" he is regarded by the employer as having is "a mental or physical impairment that substantially limits a major life activity," the ADA's definition of disability. The case involved an employee who had pneumonia and was "sensitive to dust and fumes," a condition the Court declined to recognize as substantially impacting a major life activity. The Court found that pneumonia is not a disability, because of its



temporary nature, and that the employee had failed to prove that the employer knew or believed he had asthma, which the Court allowed "could" be a disability. *Rinehimer v. Cemcolift*, CA3, No. 01-1428, 5/30/02 (<http://www.ca3.uscourts.gov/opinions/011428.txt>).

**NOT YOUR "FINAL ANSWER"** - The U.S. Court of Appeals for the Eleventh Circuit (AL, GA, FL) has sent the ADA lawsuit challenging the application process for the television show "Who Wants to Be a Millionaire" back to the trial court that dismissed it originally. You may recall (see ADA News No. 93, 11/15/01, [http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews\\_93/ada\\_news\\_93\\_frontpage.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews_93/ada_news_93_frontpage.htm)) that the lawsuit alleged the popular show's application by telephone procedure unfairly discriminates against persons with hearing impairments and those who cannot use touch-tone telephones. The trial judge dismissed the suit, but the Appellate Court sent it back for further review. *Rendon v. Valleycrest Productions*, CA11, No. 01-11197, 6/18/02 (<http://www.law.emory.edu/11circuit/june2002/01-11197.opn.html>).

**BARRIER-FREE TRAVEL GUIDE AVAILABLE FROM AAA** - The [American Automobile Association](http://www.aaa.com) has created a new series of travel guides called *AAA Barrier-Free Travel* to help folks plan vacations where a barrier-free environment is important. The regional books detail the accessibility features of AAA-rated accommodations, as well as points of interest. Properties are categorized by the levels of mobility they can accommodate. Current guides cover California, Central Florida, Las Vegas, New York City and Washington, D.C., with more to come. The guides can be purchased by AAA members by calling 877-222-2665, or from the AAA website's "e-store" at <http://www.aaa.com>.

**SENATE PASSES ACCESSIBLE POLLING PLACES BILL** - The U.S. Senate on April 11<sup>th</sup> passed an election reform bill, S.565. The bill calls for at least one accessible voting system for every polling place nationally by 2006. A companion bill - H.R.3295 - was passed by the House of Representatives in December. (See ADA News No. 94, 12/15/01, [http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/ada\\_news\\_94\\_frontpage.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/ada_news_94_frontpage.htm).) The Senate bill offers \$500 million in grants for voting districts making improvements. You can find both bills online by navigating to <http://thomas.loc.gov> and entering the pertinent bill number.

**DISABILITIES WEBSITE OF THE MONTH** - "Label Jars, Not People." That's the folksy slogan of this month's website, from the [Center on Human Policy](http://www.chp.syr.edu) at Syracuse University. "The Center on Human Policy (CHP) is a

Syracuse University based policy, research, and advocacy organization involved in the national movement to insure the rights of people with disabilities. Since its founding, the Center has been involved in the study and promotion of open settings (inclusive community opportunities) for people with disabilities. The Center's staff and associates include educators, human services professionals, people with disabilities, graduate students, and family members of children and youth with disabilities. The Center has an Advocacy Board composed of people with disabilities, parents, and interested citizens that serves as an independent voice on behalf of the rights of people with disabilities in the community. The Center is involved with a broad range of local, statewide, national and international activities, including policy studies, research, information and referral, advocacy, training and consultation, and information dissemination." Bobby approved, the website contains a lot of free information, including the Center's publications. Visit the Center on Human Policy at Syracuse University at <http://soeweb.syr.edu/thechp>.

#### **AREA CALENDAR -**

- ❑ "Vocational Rehabilitation: Where Partners Create Careers" - RSA National Employment Conference; August 19 -21, 2002; Marriott Hotel, Washington, DC; information via e-mail to [jenn.rigger@ed.gov](mailto:jenn.rigger@ed.gov).
- ❑ "ADA Workshop;" September 30, 2002; Willard Inter-Continental Hotel, Washington, DC; National Employment Law Institute seventh annual ADA workshop; more info at <http://www.neli.org/programs2.asp?ProgramID=12>, or [neli@neli.org](mailto:neli@neli.org)

**OCTOBER 16<sup>th</sup> IS NATIONAL DISABILITY MENTORING DAY** - Disability Mentoring Day is a national effort which began in 1999 to promote the employment of students and people with disabilities through personal mentoring. With leadership, coordination, and resource materials from the [American Association of People with Disabilities](http://www.aapd.com), local communities organize activities that bring students and job-seekers with disabilities together with employers for informational sessions about career opportunities and one-on-one mentoring with volunteers at public and private places of employment. For an overview of Disability Mentoring Day, browse to <http://www.aapd.com/mentor.html>.

**NCD RELEASES ANNUAL PROGRESS REPORT** - The [National Council on Disability](http://www.ncd.gov) (NCD) released its 2001 annual *National Disability Policy: A Progress Report*, on July 26, 2002. The report addresses several important issues related to people with disabilities, including issues related to assistive technology and telecommunications. The entire report is available online at the NCD website, [http://www.ncd.gov/newsroom/publications/progressreport\\_07-26-02.html](http://www.ncd.gov/newsroom/publications/progressreport_07-26-02.html).

**NEW NCD BOARD MEMBERS CONFIRMED** - The U.S. Senate recently confirmed six new [NCD](#) Board members: Lex Frieden, Houston, Texas, chairperson; Young Woo Kang, Ph.D., Munster, Indiana; Kathleen Martinez, Oakland, California; Carol Hughes Novak, Tampa, Florida; Patricia Pound, Austin, Texas; and Robert R. Davila, Ph.D., Rochester, New York.

**RESOURCES** - Some disability/employment-related resource material recently added to the catalogue. Publications from the Equal Employment Opportunity Commission (EEOC) can be ordered at <http://www.usdoj.gov/crt/ada/publicat.htm>, or by calling 1-800-514-0301(V) or 1-800-514-0383(TTY).

- ❑ "At Your Service: Welcoming Customers with Disabilities to Your One-Stop Center" - The Southeast Disability and Business Technical Assistance Center has developed a free, fully accessible, on-line course to present information on how to effectively serve customers with a variety of disabilities. The course includes case studies and tests. To register, visit the [SEDBTAC](#) site at <http://www.sedbtac.org/distanceEd/web/AtService/index.cfm>.
- ❑ In the July issue of [OVerVIEW](#), the online newsletter of the Office of Vocational Rehabilitation, you will find a story about the OVR and the Penn State Milton S. Hershey Medical Center working together to preserve an important program that teaches driving skills to people with disabilities. <Http://www.dli.state.pa.us/landi/lib/landi/pdf/ovr/overview7-15-02.pdf>

**REHABILITATION ACT NOT LIMITED BY ADA** - The U.S. Court of Appeals for the Tenth Circuit (WY, UT, CO, NM, KS, OK) decided last month that, though the ADA defines "employer" as having fifteen or more employees, there is no similar restriction in Section 504 of the [Rehabilitation Act of 1973](#). The only criteria for an employer to be covered by the Rehabilitation Act is that it be a recipient of federal funds. *Schrader v. Ray*, CA10, No. 00-5224, 7/16/02 (<http://www.kscourts.org/ca10/cases/2002/07/00-5224.htm>).

**GROUP CHALLENGES U.S. CURRENCY** - The [American Council of the Blind](#) has sued the federal government seeking changes in the design of the nation's paper currency. The lawsuit contends individuals who can't identify currency denominations are precluded from participating in a variety of transactions integral to daily life, such as the ability to freely make purchases. The lawsuit, filed in federal court in Washington, seeks changes including the use of Braille markings and varying the length and height of bills by denomination. The council is suing under a provision contained in the Rehabilitation Act of 1973.

**FOUNDATION'S FOUNDER SUES GROUP** - The woman who founded the Multiple Sclerosis Foundation, Inc. in 1986 now claims that she was illegally fired by the organization because she has MS. Marilyn Manning-Albrecht is suing the group in U.S. District Court in Fort Lauderdale,

Florida, claiming violations of the ADA. The foundation denies that Manning-Albrecht's dismissal had anything to do with her having MS. The Multiple Sclerosis Foundation is a \$4 million a year nonprofit, tax-exempt education and service organization.

**HHS ANOUNCES NEW OFFICE ON DISABILITY** - U.S. Health and Human Services Secretary Tommy G. Thompson announced July 30<sup>th</sup> the creation of the HHS Office on Disability to oversee the coordination, development and implementation of programs and special initiatives within HHS that impact people with disabilities. Margaret J. Giannini, M.D., F.A.A.P., formerly the principal deputy assistant secretary for aging at the Administration on Aging, has been appointed the director to the new HHS Office on Disability. [Http://www.hhs.gov](http://www.hhs.gov)

**MS WHEELCHAIR AMERICA 2002 CROWNED** - Pediatric nurse [Candy Marsh](#), Ms Wheelchair Colorado, was crowned Ms Wheelchair America 2002 in a ceremony in Denver on August 4<sup>th</sup>. "Marsh, a nurse and single mother of three girls, was surrounded by her children and friends as she received the crown and sash from Ms. Wheelchair America 2001, Nicki Ard." Ms Wheelchair Pennsylvania, Jessica McFarlane, kept an online journal of her preparation for the pageant. See Jessica's journal, pageant pictures and more at <http://www.ican.com/news/fullpage.cfm?articleid=9ED0F23E-00C9-449A-B18E477E4D7A20D2>.

**BILL PORTER STORY A CROSS-MEDIA HIT** - "[Door to Door](#)," a made-for-television movie about Bill Porter starring William H. Macy and Kyra Sedgwick, was a genuine hit in its first airing on the [TNT](#) network July 14<sup>th</sup>. The true story of Porter, who was born with cerebral palsy and told that he was unemployable, documents how this "simply remarkable man" nevertheless came to be a door-to-door salesman of household products. (The TNT network plans to schedule more airings of the movie, made in cooperation with [UCP](#), later this year.) In addition, the book "Ten Things I Learned from Bill Porter" was briefly in the top ten of the [New York Times Best Seller List](#). Read more at the UCP website, [http://www.ucp.org/ucp\\_general.doc.cfm/134/2/125/125-125/3647](http://www.ucp.org/ucp_general.doc.cfm/134/2/125/125-125/3647).

**INSTRUCTIONAL MATERIALS ACCESSIBILITY ACT** - On April 24<sup>th</sup>, the Instructional Materials Accessibility Act (IMAA) was introduced in the Senate by Senator Christopher J. Dodd (D-CT) and in the House by Representative Thomas E. Petri (R-WI). This legislation is designed to dramatically improve access to textbooks for students in elementary and secondary schools who are blind or who have other print disabilities. The legislation mandates that publishers produce textbooks in a national standardized file format that can be used to produce braille, large print and other accessible formats. You will find more information on this important bill at <http://www.afb.org/textbooks.asp>.

**DOT'S AVIATION CONSUMER DISABILITY TOLL-FREE HOTLINE** - The U.S. Department of Transportation's aviation consumer disability toll-free hotline is now operational. The toll-free number for the hotline is 1-866-266-1368 (voice) and 1-866-754-4368 (TTY). This new hotline can

be used to obtain information and assistance for any travelers experiencing disability-related air service problems. People with disabilities are encouraged to call the hotline for information and assistance if they should experience disability-related air service problems. [Http://www.dot.gov](http://www.dot.gov)

**ELEVENTH CIRCUIT DISCUSSES “REASONABLENESS”** - What IS a reasonable accommodation? How far must an employer go to accommodate an employee’s disability? The U.S. Court of Appeals for the Eleventh Circuit (AL, GA, FL) engaged in a lengthy discussion of this question in a case decided last year involving a laborer with a back injury. *Lucas v. Grainger*, CA11, No. 00-14323, 7/17/01 (<http://www.law.emory.edu/11circuit/july2001/00-14323.man.html>).

**BURGER KING SETTLES DISABILITY ACCESS CLAIMS IN N.H.** - Burger King Corp. agreed in May to settle claims that some of its 21 restaurants in New Hampshire violated the ADA. The Miami-based company agreed to modify restrooms and parking lots at 17 restaurants to make access easier for people with disabilities, especially those using wheelchairs. The company also agreed to pay the government \$50,000 in fines and pay \$5,000 to the person who filed the complaint, after being unable to use facilities at a Burger King in Dover, NH. The U.S. attorney’s office investigated the restaurants after he complained. The office said Burger King cooperated with the investigation, and has completed most of the renovations.

**DEFENSE OF AUTISTIC SON LEAVES MOM FACING PRISON** - “She instinctively went to her son’s defense as police closed in on him at the Publix supermarket in Morrow, Georgia, where he was yelling and cursing at employees. Moreover, she says she did what a parent should do when that son is disabled. She was assertive in telling officers that the situation demanded special attention - that Billy Munger is an autistic 23-year-old, a 6-foot 2-inch man with the mind of a temperamental child. But Clayton County police say she stepped over the line amid the chaos of her son’s panic attack.” Read the whole story at <http://www.accessatlanta.com/ajc/metro/0702/19autism.html>.

**COMMONWEALTH COURT DECIDES TITLE II IN LICENSING CASE** - Cases involving ADA challenges to licensing regulations are always interesting, as courts struggle to apply concepts like “qualified individual” and “reasonable accommodation.” A prime example is the recent decision by the [Commonwealth Court of Pennsylvania](#) involving a challenge to a Vehicle Code provision providing for the suspension of driving privileges. The claim was brought by a bilateral amputee whose driving privileges had been suspended for one year for driving under the influence of alcohol. He alleged that, under Title II of the ADA, he was a “qualified individual with a disability and that, therefore, his license suspension was discriminatory and he was entitled to “reasonable accommodation” from the Department of Transportation. The court agreed with the trial court that the man was not a qualified individual with a disability, as he did not meet “essential eligibility requirements for participation in programs or activities provided by DOT” since his license was suspended for DUI. *Johnson v. Department of Transportation, Bureau of*

```
@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@
@
@          ***          *****          ***          @
@          *****          *****          *****          @
@          ***  ***          ***    ****          ***  ***          @
@          ***    ***          ***    ****          ***    ***          @
@          *****          ***    ****          *****          @
@          *****          ***    ****          *****          @
@          ***          ***  *****          ***          ***          @
@          ***          ***  *****          ***          ***          @
@          **   **  *****  **          **   *****          @
@          **   **  *****  **          **   ***    ***          @
@          ***  **  **          **          **   **          **          @
@          ****  **  ****          **   ***          **   ****          @
@          **  ****  ****          **  *****  **          ****          @
@          **   ***  **          **  **  **  **          *          ****          @
@          **   **  *****          ****  ****          ***          ***          @
@          **   **  *****          ***  ***          *****          @
@
```

"News Reviews to Peruse"

Number 103

September 2002

Items regarding disabilities law and 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.) ([pbair@state.pa.us](mailto:pbair@state.pa.us)). Current and recent issues can be found online at [http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews\\_index\\_2001.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews_index_2001.htm). All past issues of this publication are archived at [http://intradep/ChiefCounsel/ADANews/adanews\\_index.htm](http://intradep/ChiefCounsel/ADANews/adanews_index.htm) on the DEP internal website.

**THE SIDEWALKS OF SACRAMENTO** - For the first time, a federal appeals court has found that a city's sidewalks are a "service, program or activity" of the city within the meaning of Title II of the ADA. The significant decision came in a class action appeal heard by the [U.S. Court of Appeals for the Ninth Circuit](#) (WA, OR, ID, CA, NV, AZ, AK, HI,

GU) in March and decided in June, a decision that has been nervously anticipated by government officials in cities nationwide. The class representatives were a group of persons with mobility and/or vision disabilities who "alleged that the City violated the ADA and the Rehabilitation Act by failing to install curb ramps in newly-constructed or altered sidewalks and by failing to maintain existing sidewalks so as to ensure accessibility by persons with disabilities." The group alleged that the city's sidewalks were made inaccessible by a collection of barriers, including benches, sign posts and wires. The city settled that part of the lawsuit relating to curb ramps in 2001; but continued to challenge the claim that sidewalks themselves had to be accessible. Unlike the sidewalks in front of a public library, sidewalks in general are not a service, program or activity of the city, and hence do not fall under the ADA, the city maintained. This argument was brushed aside by the Court. "[A]ttempting to distinguish which public functions are services, programs or activities and which are not would disintegrate into needless 'hair-splitting arguments,'" wrote Judge Wallace Tamisha for the Court. "The focus of the inquiry, therefore, is not so much on whether a particular public function can technically be characterized as a service, program, or activity, but whether it is 'a normal function of a governmental entity.'" This decision continued a trend in which the circuit court has expanded the scope of the ADA at the same time the U.S. Supreme Court has been pulling back the law's coverage. *Barden v. City of Sacramento*, CA9, No. 01-15744, 6/12/02 ([http://www.ca9.uscourts.gov/ca9/newopinions.nsf/28B5D4CED8A33D7A88256BD5007FC4AE/\\$file/0115744.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/28B5D4CED8A33D7A88256BD5007FC4AE/$file/0115744.pdf?openelement)).

**RECORD OF DEPENDENCY WAS UNLAWFUL BASIS FOR REFUSAL TO REHIRE** - The former Hughes Missile Systems Company's refusal to rehire a former employee, if based on his record of alcoholism or drug use, would violate the ADA's proscription on discrimination on the basis of a record of disability, according to the [U.S. Court of Appeals for the Ninth Circuit](#). The decision came in an appeal from a lower court's grant of summary judgment on the claim of a former Hughes technician who resigned in lieu of termination after testing positive for cocaine. The technician, in recovery and drug-free, applied for a position with Hughes two years later, but was turned down for the job. Although the representative of Hughes' Labor Relations Department testified she denied the technician's application after she reviewed his personnel file "based on the company's unwritten policy of not rehiring former employees whose employment ended due to termination or resignation in lieu of termination," the company's written response to the technician's EEOC complaint in contrast stated that his "application

was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation." The Appellate Court reversed and remanded the decision of the lower court in Hughes' favor, finding that the technician had raised questions of fact sufficient to defeat a motion for summary judgment, and had, in fact, presented a *prima facie* case of disability discrimination. *Hernandez v. Hughes Missile Systems Company*, CA9, No. 01-15512, 6/11/02 (<http://caselaw.lp.findlaw.com/data2/circs/9th/0115512p.pdf>).

**'FUTILE GESTURE' DOCTRINE APPLIED TO ADA TITLE II CASE** - The [U.S. Court of Appeals for the Ninth Circuit](#) issued another significant ADA decision in June, this one addressing the requirements for a person with a disability to bring an accessibility lawsuit under Title III of the Act. The plaintiff, who uses a wheelchair, sued Holiday Quality Foods, a grocery store chain, alleging that the stores are a "public accommodation" covered by Title III and, as such, they must remove architectural barriers that make it difficult for a person using wheelchair to gain access to its stores. Holiday was awarded summary judgment at the trial level, successfully arguing that the plaintiff's claim was time-barred because he had not sought entrance to any of its stores within the statute of limitations period. In reversing, the Appellate Court found that, since the plaintiff knew that he would be unable to gain entrance into the stores, he was not required to keep trying. "[W]hen a plaintiff who is disabled within the meaning of the ADA has actual knowledge of illegal barriers at a public accommodation to which he or she desires access," wrote Circuit Judge Fletcher for the Court, "that plaintiff need not engage in the 'futile gesture' of attempting to gain access in order to show actual injury during the limitations period. When such a plaintiff seeks injunctive relief against an ongoing violation, he or she is not barred from seeking relief either by the statute of limitations or by lack of standing." (There is every reason to believe that this logic could also be applied in a Title II accessibility action. -Ed.) *Pickern v. Holiday Quality Foods*, CA9, No. 00-17203, 6/19/02 ([http://www.ca9.uscourts.gov/ca9/newopinions.nsf/2409B6220EC096CD88256BDC00805276/\\$file/0017203.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/2409B6220EC096CD88256BDC00805276/$file/0017203.pdf?openelement)).

**FIRED, THEN REHIRED, SUED ANYWAY** - A journeyman mailer for the [Denver Post](#) newspaper, who was fired when his epilepsy interfered with his performance of essential job functions, then rehired when he was cleared by his physician, sued his employer anyway, alleging that his firing violated the ADA. Affirming summary judgment, the [U.S. Court of](#)



Appeals for the Tenth Circuit (WY, UT, CO, NM, KS, OK) found that limitations placed on the mailer's work by his physician - not driving or working around heavy equipment - conflicted with essential functions of the mailer position requiring him to operate a power dolly and an "insert machine." Finding that no reasonable accommodation was possible, the Appellate Court agreed that he was not a qualified individual for the mailer position during the period of his medical restriction. The mailer's "proposal that he be permitted to perform only a portion of the essential duties of his position is 'tantamount to asking [the Post] to provide a permanent light duty post,'" said the Court. "Accommodation does not require the employer to create a new job." When the mailer's physician released him from the restrictions, he was rehired by the Post into his former position. *Mathews v. The Denver Post*, CA10, No. 99-1329, 8/24/01 (<http://www.kscourts.org/ca10/cases/2001/08/99-1329.htm>).

**NO DIRECT CBA CONFLICT** - The U.S. Court of Appeals for the Tenth Circuit affirmed the decision of a trial jury which found that SuperValu, Inc., the nation's eleventh largest food retailer, liable for violating the ADA rights of a trucker. The trucker developed back problems after working 18 years for SuperValu and requested a transfer to a route that did not involve heavy lifting as an accommodation. SuperValu refused, maintaining that all transfers are subject to its union seniority system, and offered to transfer the trucker instead to one of two lower-paying jobs. When he refused to accept a transfer, he was fired. The trucker sued SuperValu, alleging that his firing violated the ADA. The trial jury agreed, awarding him \$44,000, but denied reinstatement. On appeal, SuperValu argued that the trucker's transfer to a lighter-duty route would violate the seniority provisions of its union contract, but the Appellate Court disagreed. The Court noted that, while an accommodation that conflicts directly with a collective bargaining agreement is *per se* unreasonable, transferring the trucker as he requested would raise only the remote possibility of a conflict. The trucker had sufficient seniority for the position, and only four drivers had more seniority. "In reasonably accommodating an employee under the ADA, wrote Circuit Judge Ebel for the Court, "[t]he employer should first consider lateral moves to positions that are regarded as equivalent," and 'may only consider lesser jobs that constitute a demotion if there are no such equivalent positions available.'" The Court vacated and remanded the trial court's order on reinstatement, and awarded attorney fees. *Dilley v. SuperValu, Inc.*, CA 10, Nos. 00-1200, 00-1201, and 00-1217, 7/15/02 (<http://www.kscourts.org/ca10/cases/2002/07/00-1200.htm>).

**DON'T FORGET DISABILITIES MENTORING DAY OCTOBER 16<sup>TH</sup>** - "National Disability Mentoring Day: Career Development for the 21<sup>st</sup> Century," will be Wednesday, October 16, 2002. This is the official kick-off for a year-round effort promoting the employment of students and job-seekers with disabilities. The Mentoring Day program is being led by [The American Association of People with Disabilities \(AAPD\)](#) and the [U.S. Department of Labor \(DOL\)](#), who will provide coordination and resource materials to local communities. For information on the event and how to participate, go to <http://www.aapd.com/mentor.html> or, on the DOL website, [http://www.dol.gov/\\_sec/programs/ptfead/DMDbro\\_2001.htm](http://www.dol.gov/_sec/programs/ptfead/DMDbro_2001.htm)

**NEXT UP, THE FMLA** - On June 24<sup>th</sup>, the [U.S. Supreme Court](#) granted certiorari (review) of a [U.S. Court of Appeals for the Ninth Circuit](#) decision involving the liability of a state government under the Family and Medical Leave Act of 1993 (FMLA). The case, which the Court will hear this fall, could narrow the scope of the FMLA, which allows up to 12 weeks of unpaid leave for the birth or adoption of a child, or to tend to a personal or family illness. The case also presents another opportunity for the Court to examine the balance of power between Congress and the states. If the Court follows recent example, it could strip from state workers the ability to sue over leave guaranteed in the law. *Nevada Department of Human Resources v. William Hibbs*, USSCt, No. 01-1368 (<http://www.supremecourtus.gov/docket/01-1368.htm>). (Lower court decision at [http://www.ca9.uscourts.gov/ca9/newopinions.nsf/F382C43F9898192588256B1F00573AA6/\\$file/9916321.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/F382C43F9898192588256B1F00573AA6/$file/9916321.pdf?openelement).)

**DISABILITIES WEBSITE OF THE MONTH** - As so many of us know, coaching kids can be one of the most rewarding experiences an adult can have. Whether it's your son's T-ball team, your daughter's soccer team, or your nephew's swimming team, the rewards are well worth the time required. But how many of us are prepared to meet the needs of the young athlete with a disability? Particularly, how would you communicate with a deaf or hard-of-hearing 10-year-old basketball player? Fortunately, a measure of help is available at the [Disability Sports](#) website, sponsored by Michigan State University. "Coaching Communication with Deaf Athletes," an article by Aaron Moffett at <http://ed-web3.educ.msu.edu/kin866/resmoffett1.htm>, explains how a coach can surmount the communications hurdles. The MSU Disability Sports website, containing other interesting information for and about the disability sports community, can be found at <http://ed-web3.educ.msu.edu/kin866/default.htm>.

**CANADIAN ORGANIZATION HONORS MICROSOFT** - The Canadian National Institute for the Blind (CNIB), in conjunction with the World Blind Union, presented the Louis Braille Gold Medal to Bill Gates, Microsoft chairman and chief software architect, in recognition of Microsoft Canada's contribution to helping develop a digital library system for the CNIB. The medal is awarded to individuals who have made an exemplary commitment to advancing the rights and freedoms of blind people around the world. The medal has only been awarded on two other occasions, and this is the first time it has been presented to an individual or company involved in developing technology to help the blind and visually impaired realize their potential.  
[Http://www.microsoft.com/presspass/features/2002/aug02/08-20DigitalLibrary.asp](http://www.microsoft.com/presspass/features/2002/aug02/08-20DigitalLibrary.asp)

**NEW HHS OFFICE ON DISABILITY** - [U.S. Department of Health and Human Services](http://www.hhs.gov/officeofdisability/) (HHS) Secretary Tommy Thompson has announced the creation of the HHS Office on Disability to "oversee the coordination, development and implementation of programs and special initiatives within HHS that impact people with disabilities." The Office's new Director is Dr. Margaret Giannini, previously the principal deputy assistant secretary for aging at HHS's [Administration on Aging](http://www.hhs.gov/officeofaging/). The HHS Office on Disability will be the central point within the federal government for President Bush's [New Freedom Initiative](http://www.whitehouse.gov/newfreedom/). Prior to joining HHS, Giannini was the deputy assistant chief medical director for Rehabilitation and Prosthetics of the Department of Veterans Affairs in Washington, D.C. In 1979, President Carter appointed Dr. Giannini as the first Director of the National Institute of Handicapped Research, now known as the National Institute of Disability and Rehabilitation Research.

**AREA CALENDAR** -

- "ILRU/Disability Law Project Teleconference Series: Accessibility and the ADAAG;" August 21 - September 23, 2002; two-hour teleconferences, approved by the AIA for HSW learning unit hours, will cover different aspect of the Americans with Disabilities Act Accessibility Guidelines (ADAAG); sponsored by Disability Law Resource Project; cost is \$60 per person per teleconference, \$50 nonprofit rate; registration at <http://www.acteva.com/booking.cfm?bevaID=34501>, or 1-866-462-2832; info at <http://www.ilru.org/dbtac/Training/Teleconferences/ADAAGSeries.html>

- September 23, 2002, 3:00 p.m. EST, "Harmonization of the Standards - Getting Everyone on the Same Page"
- Public Sector EEO & Employment Law Conference; September 26-27, 2002; Washington, DC; sponsored by National Employment Law Institute(NELI); annual public sector conference surveying EEO and employment law developments affecting federal, state and municipal governments; info at <http://www.neli.org/programs2.asp?programid=13> or call NELI at (303) 861-5665
- ADA Workshop; September 30, 2002; Washington, DC; sponsored by NELI, this limited-enrollment interactive workshop is one of the best courses available on disabilities and the ADA; more information at <http://www.neli.org/programs2.asp?programid=12> or call NELI at (303) 861-5665
- 2002 UCP Foundation Fall Fashion Show; October 19, 2002; Hilton Garden Inn, Southpointe, PA; UCP Southwestern Pennsylvania benefit; tickets and info from Jackie Newman at 724-229-0851 or [jnewman@ucpswpa.org](mailto:jnewman@ucpswpa.org)
- Employment Law Conference; December 12-13, 2002; Washington, DC; sponsored by NELI; comprehensive annual advanced-level conference; info at <http://www.neli.org/programs2.asp?programid=15> or call NELI at (303) 861-5665
- ADA & FMLA Compliance Update; April 17-18, 2003; Washington, DC; sponsored by NELI; private and government expert panel discusses major aspects of developing ADA and FMLA law; more info at <http://www.neli.org/programs2.asp?programid=2> or call NELI at (303) 861-5665
- Human Resource Institute; May 15-16, 2003; Washington, DC; sponsored by NELI; practical guidance for HR professionals and their counsel on various liability issues arising in the workplace, such as reductions in force, harassment, privacy, etc.; more info at <http://www.neli.org/programs2.asp?programid=4> or call NELI at (303) 861-5665
- 9th Annual UCP Foundation Sporting Clays Classic; May 18th, 2003; Nemacolin Woodlands Shooting Academy; UCP Southwestern Pennsylvania

benefit; contact Jackie Newman at 724-229-0851 or [jnewman@ucpswpa.org](mailto:jnewman@ucpswpa.org) for more information

- ❑ Employment Law Litigation; June 12-13, 2003; Washington, DC; sponsored by NELI; program on critical elements of litigating employment cases, including tactics, procedures and strategies; more info at <http://www.neli.org/programs2.asp?programid=3> or call NELI at (303) 861-5665
- ❑ Employment Discrimination Law Update; August 7-8, 2003; Washington, DC; sponsored by NELI; definitive annual advanced-level update of significant developments in EEO; more info at <http://www.neli.org/programs2.asp?ProgramID=11> or call NELI at (303) 861-5665

**INABILITY TO READ ALL DAY NOT A DISABILITY** - According to the [U.S. Court of Appeals for the Seventh Circuit](#) (WI, IL, IN), an AT&T employee whose medical condition - congenital nystagmus - makes it difficult for him to focus his eyes does not have a qualifying disability under the ADA. The employee's job required that he read a computer screen at least 80 percent of his workday. He was denied a transfer to a job requiring less reading, and he sued. A trial jury found in his favor, but the trial court granted judgment to the defendant as a matter of law. The Appellate Court affirmed, agreeing that, though the employee's impairment was certainly "unpleasant," it did not rise to the level of a disability under the Act. "To be unable to read all day long is a misfortune for someone who loves to read or who wants to hold a job (a judgeship for example!) that requires continuous reading," wrote Judge Posner (the wag!) for the Court, "but the ability to read all day long is not a major life activity." While the employee "cannot read at all without some discomfort ... discomfort and disability are not synonyms," wrote Judge Posner. *Szmaj v. American Telephone & Telegraph Company*, CA7, Nos. 01-3379 & 01-3699, 5/28/02 (<http://laws.lp.findlaw.com/7th/013379.html>).

**ROCHESTER CITIZEN HONORED BY GOODWILL INDUSTRIES** - Paula Barton of Rochester, New York, was honored in May by being named Goodwill Industries International's "Graduate of the Year." She met with President Bush on May 6<sup>th</sup>. "I'm overwhelmed and extremely excited," she said. Barton has worked at ADT Security Services for about a year, supervises 15 people and is responsible for scheduling installations and service for ADT technicians. She has mild cerebral palsy, has had a kidney and pancreas transplant as a result of diabetes, and was paralyzed 5 years ago in an auto accident. She cannot walk and has limited use of her hands. "We like to take the philosophy of focusing on a person's abilities," said Mike Stewart, human resources director

for ADT. “In Paula’s case, she is a very good coordinator and we know she can do the job with some minor accommodations.” Barton uses a large computer screen at work, a program that increases the size of type, a desk that accommodates her wheelchair, and she brings her service dog Sheba to work every day.

**11<sup>TH</sup> CIRCUIT DECISION WILL NOT BE REVIEWED** - The U.S. Supreme Court declined on May 28<sup>th</sup> to review the decision of the [U.S. Court of Appeals for the Eleventh Circuit](#) (AL, GA, FL) in *Waddell v. Valley Forge Dental Association*. The case involved the involuntary demotion and termination of a dental hygienist diagnosed with HIV (see *ADA News* No. 96, 2/15/02, [http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews\\_96/ada\\_news\\_96\\_frontpage.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews_96/ada_news_96_frontpage.htm)).

**11<sup>TH</sup> CIRCUIT REVERSES LEGAL FEES DENIAL** - The [U.S. Court of Appeals for the Eleventh Circuit](#) reversed a lower court’s denial of legal fees to an ADA plaintiff in May, and sent the decision back to the trial court for a determination of fees due. The case, which originated as a Title II action against the owner of a Ft. Lauderdale, Florida gas station, was settled prior to trial after the defendant’s motion for summary judgment was denied. In the settlement agreement, the defendant agreed to make all of the accessibility changes demanded by the plaintiff in exchange for dismissal of all charges against it, and agreed to the payment of “reasonable attorney’s fees and costs.” The trial court then entered a Final Order of Dismissal in which it specifically “approved, adopted and ratified” the Stipulation of Voluntary Dismissal With Prejudice, dismissed the case with prejudice, and expressly “retain[ed] jurisdiction solely for the purpose of enforcing the Settlement Agreement.” However, when the plaintiff later applied for fees and costs pursuant to the agreement, the court denied the application, stating that the plaintiff was not a “prevailing party” under the ADA and citing the decision of the U.S. Supreme Court in [Buckhannon Board & Care Home, Inc. v. W. Va. Department of Health & Human Resources](#), 532 U.S. 598 (2000). Finding that the court’s retained oversight of the agreement in effect converted it to a consent decree, a result appropriate for a fee award under *Buckhannon*, the Appellate Court ordered that fees be paid. “[I]t is clear that, even absent the entry of a formal consent decree, if the district court either incorporates the terms of a settlement into its final order of dismissal or expressly retains jurisdiction to enforce a settlement, it may thereafter enforce the terms of the parties’ agreement,” stated the Court. “Its authority to do so clearly establishes a ‘judicially sanctioned change in the legal relationship of the parties,’ as required by *Buckhannon*.” *American Disability Association, Inc., v. Ariel Chmielarz*, CA11, No. 01-15366, 5/1/02 (<http://www.law.emory.edu/11circuit/may2002/01-15366.opn.html>).

**RESOURCES** - Some disability/employment-related resource material recently added to the catalogue. Publications from the Equal Employment Opportunity Commission (EEOC) can be ordered at <http://www.usdoj.gov/crt/ada/publicat.htm>, or by calling 1-800-514-0301(V) or 1-800-514-0383(TTY).

- ❑ NEW EEOC GUIDE TO THE ADA - A new handbook, outlining the provisions of Title I of the ADA as they relate to employees and job applicants, is available through the U.S. Equal Employment Opportunity Commission (EEOC). Review [\*The Americans with Disabilities Act: A Primer for Small Business\*](#) and download your copy today. The EEOC press release, “EEOC Issues Handbook to Help Small Businesses Comply with Disabilities Act” (Aug. 15, 2002) is available at <http://www.eeoc.gov/press/8-15-02.html>.
  
- ❑ FINAL RULE ON APPLICATION OF ADA STANDARDS TO THE FEDERAL WORKFORCE - In May, the EEOC announced the publication of a final rule to clarify the application of the employment provisions of the Americans with Disabilities Act of 1990 (ADA) to federal government workers. This final rule implements the amendments to section 501 of the Rehabilitation Act and updates the EEOC’s Rehabilitation Act regulations. [Http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2002\\_register&docid=fr21my02-8](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2002_register&docid=fr21my02-8)
  
- ❑ CENSUS RESULTS - The U.S. Census Bureau has posted results, including statistics related to disability, from the 2000 census. Reports are in PDF format; you will need the Adobe Acrobat reader to open them. To get reports for your own state or town, visit <http://censtats.census.gov/pub/Profiles.shtml>.
  
- ❑ CENSUS BUREAU FACT SHEET - The Bureau has also posted the “12<sup>th</sup> Anniversary of Americans With Disabilities Act Fact Sheet on Statistics for People with Disabilities” at <http://www.census.gov/Press-Release/www/2002/cb02ff11.html> .
  
- ❑ FALL 2002 *ADA IN FOCUS*, the newsletter of the ADA Information Center for the Mid-Atlantic Region, can be found online at <http://www.adainfo.org/development/fall02.html>.
  
- ❑ The August edition of [OVeRVIEW](#), the monthly magazine of the Office of Vocational Rehabilitation, features an article about the 2002 Pennsylvania Transition Conference, a conference concerned with the transitions of students with disabilities. [Http://www.dli.state.pa.us/landi/lib/landi/pdf/ovr/overview8-15-02.pdf](http://www.dli.state.pa.us/landi/lib/landi/pdf/ovr/overview8-15-02.pdf).
  
- ❑ The U.S. Department of Justice has issued its report “Enforcing the ADA: A Status Report from the Department of Justice, April - June 2002,” covering the activities of the Justice Department during the second quarter of 2002. The report is available on the USDOJ website at <http://www.usdoj.gov/crt/ada/aprjun02.htm>.

**GOLFING WITH “1-PASS”** - A growing number of golf clubs are providing a new vehicle for golfers with disabilities, the “1-Pass” by [SoloRider Industries](#). Looking more like a fancy ATV than a conventional golfcart, the 1-Pass has handlebars instead of a steering wheel, a front-mounted

rack for clubs, and a 360-degree rotating seat that allows golfers to play shots without ever leaving the cart. The 1-Pass has a 6-inch clearance but a low center of gravity, making it able to traverse most course obstructions and stay stable on most grades. It also has four-wheel independent suspension that lowers the load on each wheel to about seven pounds of pressure, about equivalent to the average male golfer, thus allowing the 1-Pass to be driven on greens. In the wake of the [Casey Martin decision](#) by the U.S. Supreme Court, more golf clubs, and the PGA, are adopting the 1-Pass as the answer to making courses more accessible. [Http://www.SoloRider.com](http://www.SoloRider.com)

**DEAF ATHLETE AUDITIONS FOR WNBA TEAM** - Ronda Jo Miller, one of the finest athletes ever to play on a [Gallaudet University](#) sports team, made the pre-season roster of the [WNBA's Washington Mystics](#) last May. Miller is the first deaf athlete to try out for a Women's National Basketball Association (WNBA) team. The 6'2" forward, deaf since birth, was a standout volleyball and basketball player at Gallaudet, setting an NCAA Division III basketball record for career rebounds (1,545), and finishing third in both career scoring (2,656 points) and blocks (373). She returned to the states this year after playing basketball in Denmark, where she was voted the best foreign women's basketball player in the Denmark Elite Series league, leading the league in rebounding. Despite playing well in the Mystics' pre-season games, Miller was not invited to fill one of the available roster positions. She has been asked to play again in Denmark, and is expected to return there.

**CALIFORNIA COURTS SUED OVER DENIED ACCESS** - Contending that persons with disabilities are denied adequate access to the halls of justice, a group filed suit against Los Angeles County in May for allegedly violating federal equal-access laws. Many county courthouses have inadequate handicapped parking, dangerously steep ramps, heavy doors and inaccessible filing counters, jury boxes and witness stands, according to the lawsuit. The suit, which seeks damages and declarative and injunctive relief, was filed in U.S. District Court. The lawsuit names seven courthouses: the downtown Los Angeles Civil Courts building and courthouses in Santa Monica, Long Beach, Norwalk, Pasadena, Compton and Van Nuys, California. Of the 58 courthouses in Los Angeles county, only the Children's Court in Monterey Park is fully accessible, according to a spokeswoman for the plaintiffs.

**HOME DEPOT REVERSES POLICY CHANGE** - It was revealed in June of this year that [Home Depot Incorporated](#), the nation's largest hardware and home-improvement chain, had instructed its 1400 stores to cease doing any business with the federal government. Store managers were told to stop accepting federal government credit cards, purchase orders and even cash if the items purchased were for the government. According to a report in the St. Louis Dispatch, a "[c]ompany document suggests that home-improvement chain might not want to fall under certain [federal] laws," such as the Rehabilitation Act and Executive Order 11246 of 1965, which bans discrimination against any employee or applicant for employment because of race, color, religion, sex or national origin. According to the General Services Administration, Home Depot stores had



actually stopped sales to government representatives. The apparent policy change did not even last a month. On June 28<sup>th</sup>, Home Depot, Inc. issued a press release in which it “announced its intention to pursue federal government business,” adding, “[t]he announcement marks a change in the company’s previous policy, which precluded it from selling to any federal governmental agency or entity.” [Http://www.homedepot.com/prel80/HDUS/EN\\_US/diy\\_main/pg\\_diy.jsp?CNTTYPE=NAVIGATION&CNTKEY=compinfo%2fcurrent.jsp&BV\\_SessionID=@@ @0446588638.1031941396@@ @&BV\\_EngineID=ccciadcgelfddhhcgelceffdfgidjil.0](http://www.homedepot.com/prel80/HDUS/EN_US/diy_main/pg_diy.jsp?CNTTYPE=NAVIGATION&CNTKEY=compinfo%2fcurrent.jsp&BV_SessionID=@@ @0446588638.1031941396@@ @&BV_EngineID=ccciadcgelfddhhcgelceffdfgidjil.0) (“THE HOME DEPOT® ANNOUNCES INTENTIONS TO PURSUE GOVERNMENT BUSINESS - Jun 28, 2002”)

**DIRECT ACTION OPENS NATIONAL PARKS TO SERVICE ANIMALS** - In response to a call for assistance from a woman planning to visit several of our national parks, disabilities rights activist Frederick Shotz went right to the top to create change. The woman was informed earlier this year by one national park representative that only guide dogs for persons who are blind are allowed in undeveloped areas of the park such as hiking trails, and that all other service animals are permitted only in developed areas of the park. Shotz contacted the director of the National Park Service, setting the wheels in motion for a change in the twenty-year-old [National Park Service](#) regulations, which had not previously provided for service animals other than guide dogs. Word was to go out immediately from the NPS for all national parks to allow access to all areas of the park for persons using service animals, and a change in the NPS regulations was promised.

**UCP CENTRAL PENNSYLVANIA HOLIDAY GIFT-WRAP** - UCP Central PA will hold its annual “Holiday Gift-wrap” fundraiser at the Capital City Mall in Harrisburg from November 29<sup>th</sup> through December 24<sup>th</sup>. Packages are wrapped for donations to support the program services offered by UCP Central PA. Each year over 500 volunteers wrap gifts to raise approximately \$15,000. For more information, contact Marie Ledger at [mledger@ucpcentralpa.org](mailto:mledger@ucpcentralpa.org), or call (717)975-0611.

**JOHNNY CRESCENDO, BRITISH BALLADEER FOR DISABILITY RIGHTS** - “Alan Holdsworth became Johnny Crescendo basically as a joke. ‘It was during the punk era,’ he says. He was reading poetry and doing stand up comedy in clubs in Britain and one day he gave himself a stage name. By either name, Johnny Crescendo is one of the strongest British voices for disability rights in both spoken words and music.” Read the rest of this wonderful story at [http://www.disabilityworld.org/06-08\\_02/il/crescendo.shtml](http://www.disabilityworld.org/06-08_02/il/crescendo.shtml). And catch a profile of the singer/activist, with audio tracks of some of his songs, at <http://www.libertyresources.org/lunch/johnny.html>.

```

@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@
@
@          ***          *****          ***          @
@          *****          *****          *****          @
@          *** ***          ***          ***          *** ***          @
@          ***          ***          ***          ***          ***          ***          @
@          *****          ***          ***          *****          @
@          *****          ***          ***          *****          @
@          ***          ***          *****          ***          ***          @
@          ***          ***          *****          ***          ***          @
@          **   **   *****   **          **   *****          @
@          **   **   *****   **          **   ***          ***          @
@          ***   **   **          **          **   **          **          @
@          ****   **   ****          **          ***          **          ****          @
@          **   ****   ****          **   *****   **          ****          @
@          **   ***   **          **   **   **   **          *          ****          @
@          **   **   *****          ****          ****          ***          ***          @
@          **   **   *****          ***          ***          *****          @
@

```

"News Reviews to Peruse"

Number 104

October 2002

Items regarding disabilities law and 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.) ([pbair@state.pa.us](mailto:pbair@state.pa.us)). Current and recent issues can be found online at [http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews\\_index\\_2001.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews_index_2001.htm). All past issues of this publication are archived at [http://intradep/ChiefCounsel/ADANews/adanews\\_index.htm](http://intradep/ChiefCounsel/ADANews/adanews_index.htm) on the DEP internal website.

**OCTOBER IS NATIONAL DISABILITY EMPLOYMENT AWARENESS MONTH** - Read the Presidential Proclamation at [http://www.dol.gov/\\_sec/programs/ptfead/pressreleases/093000pr.htm](http://www.dol.gov/_sec/programs/ptfead/pressreleases/093000pr.htm). Also, please remember [National Disability Mentoring Day](#) on October 16<sup>th</sup>.

**SUPREME COURT SCHEDULED TO HEAR ADA APPEAL** - Last Monday, October 7<sup>th</sup>, the [U.S. Supreme Court](#) opened its October 2002 term with a calendar

that, in contrast to previous terms, included only one case interpreting the ADA. *Clackamas Gastroenterology v. Wells*, No. 01-1435 (271 F.3d 903 (9th Cir. 2001)), granted certiorari on October 1st, is not presently scheduled for argument. The case examines whether the four physician-shareholders of Clackamas Gastroenterology Associates ("CGA"), an Oregon professional corporation, were "employees" within the meaning of the ADA, thereby requiring the group to adhere to the Act because it has more than 15 employees. The lawsuit originated in 1997 when a former employee was terminated and sued, alleging discrimination on the basis of disability. CGA argued that it was not an "employer" for purposes of the Act, and thus, not a "covered entity," because it had fewer than fifteen employees. The federal trial court granted Clackamas summary judgment; but a divided [U.S. Court of Appeals for the Ninth Circuit](#) (WA, OR, ID, CA, NV, AZ, AK, HI, GU) reversed, finding that the physicians in question were employees for purposes of determining jurisdiction. (See ADA News No. 97, 3/15/02, [http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ada\\_news\\_97\\_frontpage.htm#SHAREHOLDERS](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ada_news_97_frontpage.htm#SHAREHOLDERS).)

**DISABILITIES WEBSITE OF THE MONTH** - The website of the [Assistive Technology Training Online Project](#) (ATTO) provides a center for student education. The ATTO provides information on assistive technology (AT) applications that help students with disabilities learn in elementary classrooms. Funded by the US Department of Education's Office of Special Education and Rehabilitation Services, and hosted by the University at Buffalo, The State University of New York, the site provides information and training on AT use for elementary students with disabilities; a "how to" for specific AT hardware and software; and resources such as links to national AT organizations. The website of the ATTO may be found at <http://atto.buffalo.edu>. (If you are interested, the [UCP of Pennsylvania](#) also has an excellent AT resource page at [http://www.ucp.org/ucp\\_channel.doc.cfm/130/14/86/86-86/3934](http://www.ucp.org/ucp_channel.doc.cfm/130/14/86/86-86/3934).)

**AREA CALENDAR** -

- ☐ **Disability Awareness Celebration;** October 16-18, 2002; Pa. Labor & Industry Building, Seventh and Forster Sts., Harrisburg, PA; presented by Pa. Department of Labor and Industry; second annual event provides a focus for reaffirming the rights of people with disabilities, highlights the values of a more diverse workforce, and provides an opportunity for various Commonwealth agencies to promote their services and programs available to citizens with disabilities, employers, and businesses; for information, contact

Stephanie Parker at 717-787-5123 or 1-800-442-6351, or on the web at [http://www.dli.state.pa.us/landi/iCal/eventDetail\\_page.asp?date\\_ID=CCC8C6CC83CDCECB](http://www.dli.state.pa.us/landi/iCal/eventDetail_page.asp?date_ID=CCC8C6CC83CDCECB)

- ❑ **2002: An ADA Leadership Conference**; October 22-25, 2002; Silver Spring, Maryland; annual conference of the [National Association of ADA Coordinators](#); for more information, call 1-800-722-4232, or point your web browser to <http://www.4naadac.com/naadac/conferences.htm>
- ❑ **Second Annual Disabilities Awareness Conference: Delaware-Maryland AgrAbility Project**; October 30, 2002; University of Maryland Eastern Shore, Princess Anne, Maryland; conference features workshops and exhibits directed to persons with disabilities and their families involved in farming, logging, and agribusiness; more information from Sally Van Schaik at 877-204-3276
- ❑ **Universal Access: Assistive and Accessible Technologies for Living and Learning**; November 13, 2002; Temple University, Strawberry Square, Harrisburg; statewide conference of [Pennsylvania's Initiative on Assistive Technology \(PIAT\)](#); more info at 800-204-PIAT (V), 800-750-PIAT (TTY), or online at [http://www.temple.edu/inst\\_disabilities/piat/aware2002/index.html](http://www.temple.edu/inst_disabilities/piat/aware2002/index.html)
- ❑ **Annual ADA Update**; November 15, 2002; Baltimore, Maryland; sponsored by Maryland Coalition for ADA Education, conference presents speakers from the Department of Justice, Access Board and EEOC; more info at 410-960-6263, or via e-mail to [mkfrancis@adelphia.net](mailto:mkfrancis@adelphia.net)
- ❑ **Human Capital: Turning Investment to Profit**; November 18-19, 2002; U.S. Chamber of Commerce, Washington, D.C.; latest information about hiring and retaining workers with disabilities, human resource training and employment issues; featured speaker U.S. Secretary of Labor Elaine L. Chao; for info, call 800-833-1354, e-mail to [blnsummit@aol.com](mailto:blnsummit@aol.com), or on the web at <http://www.usbln.com/about/summit2002/index.html>
- ❑ **World Bank Conference on Disability and Development**; December 3, 2002; World Bank Headquarters, 1818 H Street, N.W., Washington, D.C.; conference announces the World Bank's intention to move aggressively forward to integrate disability concerns into its

mainstream poverty alleviation efforts; more info at 202-458-5267 (V), 202-473-2229 (TTY), 202-522-3235 (Fax), or [socialprotection@worldbank.org](mailto:socialprotection@worldbank.org)

**ACCESS BOARD ISSUES NEW RECREATIONAL GUIDELINES** - In September, the federal [Architectural and Transportation Barriers Compliance Board](#) (commonly known as the "Access Board") published new guidelines under the ADA that address access for persons with disabilities to a variety of recreation facilities. The guidelines specify the minimum level of accessibility required in the construction or alteration of amusement rides, boating facilities, fishing piers and platforms, golf courses, miniature golf courses, sports facilities, swimming and wading pools, and spas. The Board is making these guidelines applicable to facilities covered by the [Architectural Barriers Act](#), which requires certain federally funded facilities to be accessible. The published guidelines supplement the Board's ADA Accessibility Guidelines (ADAAG) by adding a new chapter specific to recreation facilities. Access the new rules at <http://www.access-board.gov/news/reerule.htm>.

**PRESIDENT'S NOMINATIONS FOR NCD CONFIRMED** - Six of President Bush's nominees to the [National Council on Disability](#) (NCD) were confirmed by the U.S. Senate on September 26, 2002. Taking seats at the NCD are Glenn B. Anderson, Ph.D., Little Rock, Arkansas, director of training at the University of Arkansas Rehabilitation and Training Center for Persons who are Deaf or Hard of Hearing; Milton Aponte, Cooper City, Florida, general attorney with the U.S. Department of Justice, Immigration and Naturalization Service; Barbara Gillcrist, Santa Fe, New Mexico, a former high school teacher; Graham Hill, Arlington, Virginia, counsel to the U.S. House of Representatives, Committee on Transportation and Infrastructure; Marco Rodriguez, Elk Grove, California, branch owner and senior financial representative with Principal Financial Group; and David Wenzel, Scranton, Pennsylvania, a decorated Vietnam veteran currently teaching a course on the Vietnam conflict at the University of Scranton.

**RESOURCES** - Some disability/employment-related resource material recently added to the catalogue. Publications from the Equal Employment Opportunity Commission (EEOC) can be ordered at <http://www.usdoj.gov/crt/ada/publicat.htm>, or by calling 1-800-514-0301(V) or 1-800-514-0383(TTY).

- The report of the President's Commission on Excellence in Special Education—***A New Era: Revitalizing Special Education for Children***

**and their Families**—is available from the Department of Education. The Commission's effort represents the most expansive review of special education in the 27-year history of the Individuals With Disabilities Education Act (IDEA). You can find the report at <http://www.ed.gov/inits/commissionsboards/whspeiaeducation/reports.html>

- ❑ **Employment Access for People with Disabilities**; provided by the Cornell University School of Industrial and Labor Relations, the *Program on Employment and Disability* makes available a series of interesting and informative publications, including *Your Employees and Cancer*, *Working Effectively with People with Learning Disabilities*, *Assistive Technology*, *Accommodations and the ADA*, and *Employee Medical Exams and Disability-Related Inquiries under the ADA*; copies of these and other publications can be obtained from the ADA Information Center at 800-949-4232, and online at [http://www.ilr.cornell.edu/ped/hr\\_tips/home.cfm](http://www.ilr.cornell.edu/ped/hr_tips/home.cfm) or on the "Publications" page at <http://www.adainfo.org/publications>
- ❑ **Students with Disabilities Preparing for Post-secondary Education: Know Your Rights and Responsibilities**, a new U.S. Department of Education booklet, can be found online at <http://www.ed.gov/offices/OCR/transition.html>
- ❑ **OVR Annual Report** - report details the Federal Fiscal Year 2001 accomplishments of the Office of Vocational Rehabilitation; describes program accountability, including employment data, program expenditures, cost-effectiveness and program accomplishments; highlights numerous OVR customer achievements; available online at [http://www.dli.state.pa.us/landi/lib/landi/pdf/ovr/ovr\\_2001\\_annual\\_report.pdf](http://www.dli.state.pa.us/landi/lib/landi/pdf/ovr/ovr_2001_annual_report.pdf) (Caution, this link opens a 6.0 megabyte PDF file.)
- ❑ The September edition of [OVerVIEW](#), the monthly magazine of the Office of Vocational Rehabilitation, features an article about the Reading OVR office's third annual "Customer Achievement Day." <Http://www.dli.state.pa.us/landi/lib/landi/pdf/ovr/overview9-15-02.pdf>.
- ❑ Looking for a suitable place to work out? Check out **Tips for Evaluating a Potential Exercise Facility for People with Disabilities**, available from the [UCP of Pennsylvania](#) at

- The [National Council on Disability](#) (NCD) has created a new listserv to disseminate disability-related information on such issues as affordable housing, employment, transportation, health care, education, and assistive technology. Information will include NCD's monthly newsletter, NCD Bulletin, and news releases and media advisories on NCD activities and current issues before the Administration, Congress, and the Supreme Court. To subscribe, simply send a blank e-mail to [add-bulletin@list.ncd.gov](mailto:add-bulletin@list.ncd.gov). For more in-depth information, visit the NCD Web site at <http://www.ncd.gov>.

**BACK INJURY NOT SUBSTANTIALLY LIMITING** - The [U.S. Court of Appeals for the Sixth Circuit](#) (MI, OH, KY, TN) rejected the Rehabilitation Act claim of a former steam fitter for the Tennessee Valley Authority (TVA), finding that his herniated disc did not substantially limit any major life activity, including "working." "We would be using a less-than-demanding standard were we to find [the steam fitter] substantially limited in working when he is still qualified for over half the jobs he was qualified for before his injury," wrote Circuit Judge Merritt for the Court. The Court also rejected the steam fitter's "regarded as" claim "because he has not shown that TVA held any *mistaken* belief about him." *Mahon v. Crowell, et al.*, CA6, No. 00-6134, 6/28/02 (<http://pacer.ca6.uscourts.gov/cgi-bin/getopn.pl?OPINION=02a0215p.06>).

**DEP ATTORNEY RECOGNIZED** - Department of Environmental Protection attorney Michael T. Ferrence was recently awarded the Arline Phillips Achievement Award, in recognition of his contributions and achievements, by the [Greater Wilkes-Barre Association for the Blind](#).

**PA BILL WOULD CREDIT ASL COURSES** - Last Tuesday, October 8th, the Pennsylvania House of Representatives passed HB 572, amending the Public School Code. The bill requires that high school students who complete courses in American Sign Language (ASL) be given credit toward the satisfaction of the school's foreign language requirements. The bill does not mandate the teaching of ASL, but would allow districts to offer it as an alternative to French, Spanish, German or other foreign languages they teach. More than 30 states have similar laws. The bill now goes on to the state Senate. An Adobe copy of the Pa. House bill can be found at <http://www2.legis.state.pa.us/WU01/LI/BI/BT/2001/0/HB0572P4404.pdf>.

```

@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@
@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@
@                                     @
@      ***      *****      ***      @
@      *****      *****      *****      @
@      *** ***      ***      ****      *** ***      @
@      *** ***      ***      ****      *** ***      @
@      ****          ***      ****      ****          @
@      ****          ***      ****      ****          @
@      ***      *** *****      ***      ***      @
@      ***      *** *****      ***      ***      @
@                                     @
@      ** ** ***** **          ** *****      @
@      ** ** ***** **          ** *** ***      @
@      *** ** **      **          ** ** **      @
@      **** ** ****      ** *** **      ****      @
@      ** **** ****      ** ***** **      ****      @
@      ** *** **      ** ** ** ** ** ** **   *      ****      @
@      ** ** *****      ****      ****      *** ***      @
@      ** ** *****      *** ***      ****          @

```

"News Reviews to Peruse"

Number 105

November 2002

Items regarding disabilities law and the Americans with Disabilities Act which may be of interest to you. Please share this information with colleagues, supervisors and subordinates. This is a free publication available in electronic and printed format to anyone who is interested. Subscription requests, comments, contributions or questions, including requests for accommodations needed to receive or apprehend this publication, should be addressed to Patrick H. Bair (Ed.) ([pbair@state.pa.us](mailto:pbair@state.pa.us)). 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. Current and recent issues can be found online at [http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews\\_index\\_2001.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews_index_2001.htm). All past issues of this publication are archived at [http://intradep/ChiefCounsel/ADANews/adanews\\_index.htm](http://intradep/ChiefCounsel/ADANews/adanews_index.htm) on the DEP internal website.

**ADA DOESN'T APPLY TO THE INTERNET?** - In a decision that came as a blow to persons with disabilities and organizations that represent them, a judge for the [U.S. District Court for the Southern District of Florida](#) has held that the ADA was not meant to apply to the World Wide Web.



Plaintiffs [Access Now](#) and Robert Gumson had charged that the online website of Southwest Airlines is inaccessible in violation of the Act, contending that the airline's online virtual ticket counters are "extremely difficult," though technically possible, for blind persons to use. In her 12-page decision, Judge Patricia Seitz held that the ADA concerns *physical* spaces, not virtual ones, and left it up to Congress to decide whether to broaden the law to include cyberspace. In a footnote to her opinion, however, Judge Seitz expressed surprise that a customer-focused company like Southwest did not "employ all available technologies to expand accessibility to its Web site for visually impaired customers who would be an added source of revenue." A Southwest spokeswoman acknowledged that some screen readers may have problems with the company's website, adding that Southwest is "exploring some possibilities" to make "our website more user-friendly" for the blind or visually impaired. Problems with website accessibility are not uncommon, and accessibility is strictly a matter of whether a website designer "programmed it for people who are blind," according to Access Now President Edward Resnick. *Access Now, Inc. & Robert Gumson v. Southwest Airlines, Co.*, USDC SDFla., No. 02-CV-21734, 10/18/2002 (<http://www.flsd.uscourts.gov/default.asp?file=cases/index.html>). (A commentary on this case, and the ADA/Internet issue, can be found in the "[Annotations](#)" section of this newsletter.)

**CIRCUIT RULES SUITS UNDER ACAA BARRED** - The airline industry received another welcome decision when the [U.S. Court of Appeals for the Eleventh Circuit](#) (AL, GA, FL) ruled this month that Congress failed to grant individual plaintiffs the right to sue airlines in federal courts when it passed the [Air Carriers Access Act](#) (ACAA) in 1986. Rather ironic when one considers that the purpose of the ACAA was to *protect* the rights of air passengers with disabilities ("the Air Carrier Access Act of 1986 ... provides that no air carrier may discriminate against any otherwise qualified individual with a disability, by reason of such disability, in the provision of air transportation."). The plaintiff sued Delta Airlines under the ADA and the ACAA, alleging that its facilities and services were inaccessible. The trial court dismissed her ADA claim because the Act expressly excludes aircraft from coverage, but allowed her ACAA claim to go forward. The 11<sup>th</sup> Circuit said two U.S. Supreme Court decisions in 2001 - [Alexander v. Sandoval](#) and [Booth v. Churner](#) - unrelated to air travel, tied its hands. In *Sandoval*, the Supreme Court provided that only Congress can create a private right of action to enforce federal law, and that this right may not be implied. The 11<sup>th</sup> Circuit failed to find any evidence that Congress intended to grant private individuals the right to sue airlines in federal court under the ACAA, and dismissed the claim. "Statutory intent must be the touchstone of our analysis," wrote Circuit Judge Marcus for the Court. "We simply cannot create by implication a private right of action, no matter how socially desirable or otherwise warranted the result may be." *Love v. Delta Airlines*, CA11, No. 02-10223, 10/31/02 (<http://www.law.emory.edu/11circuit/oct2002/02-10223.opn.html>)

**SENATOR WELLSTONE WILL BE MISSED** - The tragic death of Senator Paul Wellstone (D-MN), members of his family, staff members and flight crew on October 25<sup>th</sup> came as a blow to the disabilities rights movement, among many others. Senator Wellstone was long known as a friend

of the movement, sponsoring several bills such as the Mental Health Equitable Treatment Act (S. 543), the Family Opportunity Act (S. 321), the Lifespan Respite Care Act (S. 2489), the Health Care Consumers Assistance Fund Act (S. 651), the Muscular Dystrophy Community Assistance, Research and Education Act (S. 805) and the National Affordable Housing Trust Fund Act (S. 1248). He was a strong supporter of brain biochemistry research, and had been diagnosed with multiple sclerosis earlier this year.

**DEAFWAY II AT GALLAUDET** - The world's preeminent liberal arts enclave for deaf students, Gallaudet University, was host this summer to an extraordinary event called DeafWay II. Held July 8-13, this international arts festival and conference brought together more than 9000 youths and adults from all over the world to explore all aspects of deaf life in the 21<sup>st</sup> century. Read Andrea Shettle's article for [Disability World](http://www.disabilityworld.org/09-10_02/news/deafway.shtml) about this extraordinary gathering at [http://www.disabilityworld.org/09-10\\_02/news/deafway.shtml](http://www.disabilityworld.org/09-10_02/news/deafway.shtml).

**DISABILITIES WEBSITE OF THE MONTH** - The credo of the [National Center on Physical Activity and Disability](http://www.ncpad.org) (NCPAD) is "Exercise is for EVERY body." And this website of the month certainly lives up to it. The NCPAD looks at every conceivable physical activity - from basketball to bowling, kayaking to climbing, skiing to scuba diving - from the perspective of participants with disabilities. Frequent features included are accessible outdoor recreational sites, information on nutrition and health, and a calendar of events regarding physical activity and disability. The website also holds a resource directory, bibliography, and discussion groups. I could go on, but why not check it out yourself? The address for the NCPAD is <http://www.ncpad.org>.

**FIT FOR EVERYONE** - Speaking of health and fitness, the Washington Post recently ran an interesting story about how gyms in the Washington area are not just making themselves more accessible for patrons with disabilities, but are actively seeking them out. Read it at <http://www.washingtonpost.com/wp-dyn/articles/A33526-2002Nov9.html>.

#### **AREA CALENDAR** -

- North American Riding for the Handicapped Association**; November 18-23, 2002; Chantilly, VA; info at [http://narha.org/conferences/2002\\_conf\\_info.pdf](http://narha.org/conferences/2002_conf_info.pdf)
- Business Leadership Network Summit**; November 18-19, 2002; Washington, DC; conference on including people with disabilities in the workforce designed by BLN employers and coordinators for employers and organizations that train and place workers with disabilities; info at <http://www.nataliepshear.com/events/bln/index.cfm>
- HIV Community Prevention Planning Committee**; November 20, 2002; Best Western Inn, Middletown, PA; for info contact Thomas DeMelfi at 717-783-0574

- ❑ **Perspectives on Employment of People with Disabilities in the Federal Sector;** December 4, 2002; Bethesda, MD; annual conference, co-sponsored by eight federal agencies and chaired by the Office of Disability Employment Policy, brings together federal EEO officials and personnel representatives who deal with issues that affect employment of people with disabilities within the federal government; info from [kravitz-betsy@dol.gov](mailto:kravitz-betsy@dol.gov)
- ❑ **American Alliance for Health, Physical Education, Recreation and Dance (AAHPERD) 2003 Conference;** April 1-5, 2003; Philadelphia Convention Center, Philadelphia, PA; more than 400 in-depth conferences, sessions, and workshops address issues including an array of hands-on activities to improve sound professional practices in health and physical education, active lifestyles, fitness and aging, and state-of-the-art dance technology; info at <http://www.aahperd.org/convention/template.cfm?template=main.html>

**RESOURCES** - Some disability/employment-related resource material recently added to the catalogue. Publications from the Equal Employment Opportunity Commission (EEOC) can be ordered at <http://www.usdoj.gov/crt/ada/publicat.htm>, or by calling 1-800-514-0301(V) or 1-800-514-0383(TTY).

- ❑ Read about one of our truly admirable colleagues at the Office of Vocational Rehabilitation, Carl Marshall, in the October edition of [OVerVIEW](#), the monthly OVR publication. Marshall, the OVR Administrator of Drug and Alcohol Programs, is this year's recipient of the Max T. Prince Award for Meritorious Service given by the National Rehabilitation Association. [Http://www.dli.state.pa.us/landi/lib/landi/pdf/ovr/overview10-15-02.pdf](http://www.dli.state.pa.us/landi/lib/landi/pdf/ovr/overview10-15-02.pdf)
- ❑ “My Administration remains committed to ensuring that the more than 54 million Americans with disabilities learn and develop skills, find meaningful work, and realize the promises of the Americans with Disabilities Act. ... This website is an important step in our work to build an America where all individuals are celebrated for their abilities and encouraged to achieve their dreams.” Thus, President Bush launched the newest addition to the nation's list of disability resources, [DisabilityInfo.gov](#), part of the President's New Freedom Initiative. Designed as a one-stop source for all disability-related information from the federal government, the site contains links to sources too numerous to list from a multitude of federal agencies. Take a look at <http://www.DisabilityInfo.gov>.
- ❑ *First Response to Victims of Crime Who Have a Disability: A Handbook for Law Enforcement Officers on How To Approach and Help Crime Victims Who Have Alzheimer's Disease, Mental Illness, Mental Retardation, Or Who Are Blind or Visually Impaired, Deaf or Hard of Hearing* - <http://www.ojp.usdoj.gov/ovc/publications/infores/firstrep/2002/welcome.html>

- ❑ *Revised EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, issued October 17, 2002 - <http://www.eeoc.gov/docs/accommodation.html>

**DO YOU KNOW WHO YOUR ADA COORDINATOR IS?** - Make it your business to find out who the ADA Coordinator (or Disability Services Coordinator) is for your employer or agency. In EEOC cases within the past few years, the claims of several employers that they regularly conducted ADA training was undermined when a large percentage of employees could not even identify the person chiefly responsible for ADA and disabilities matters. In one case, even the person identified by the employer as the coordinator - a corporate vice president - was unaware that he had been designated!

**UCP CHAPTER PLANS GOLDEN ANNIVERSARY** - Congratulations to [UCP Central Pennsylvania](#), which will be observing its 50<sup>th</sup> anniversary in 2003! Now headquartered in Camp Hill, Pennsylvania, and offering fourteen program services in ten midstate counties, the chapter was founded in 1953 by John Kessler. Stay tuned for more information about planned events.

**PITTSBURGH UCP HONORS COMMUNITY HEROES** - On September 26, 2002, [UCP of Pittsburgh](#) held its 10<sup>th</sup> Annual Community Heroes Awards Dinner at the Pittsburgh Hilton and Towers. Among the honorees were Giant Eagle, Citizen Care, Inc., Colleen Ley, FISA Foundation, Reverend Samuel George, and Dr. Robert Foltz, who received UCP's 2002 Gertrude Labowitz Lifetime Achievement Award for his 25 years of service to Goodwill Industries of Pittsburgh and other humanitarian efforts.

**EEOC CHAIR DOMINGUEZ URGES HIRING OF YOUNG PEOPLE WITH DISABILITIES** - Cari M. Dominguez, Chair of the U.S. Equal Employment Opportunity Commission (EEOC), called on government and business to increase their hiring and mentoring of young people with disabilities at a Washington, DC National Disability Mentoring Day event October 16<sup>th</sup> co-sponsored by the U.S. Department of Labor and several other federal agencies. During the event, part of National Disability Employment Awareness Month, Dominguez and other federal agency heads and officials discussed ways to employ and empower individuals with disabilities. "We all play an equally important role in the charge to give every American worker the freedom to compete on a fair and level playing field," Dominguez told the gathering. People with disabilities account for one of the nation's most underemployed demographic groups, she said. "Disability does not mean inability," she concluded. "In a competitive global marketplace, it is a business imperative for employers to obtain and retain the best available talent. Many talented individuals with disabilities are willing and able to work but are too often denied gainful employment due to discrimination. The EEOC will use all the available tools at its disposal, including vigorous enforcement, to ensure that qualified employees and applicants with disabilities are afforded equal opportunities."

**NY EEOC OFFICE WILL REOPEN** - The U.S. Equal Employment Opportunity Commission (EEOC) has announced that it will hold the grand reopening and dedication of its New York District Office, destroyed in the September 11 terror attacks, Friday, November 15<sup>th</sup> at its new headquarters at 33 Whitehall Street in Lower Manhattan. "This event is emblematic of the indomitable will of the EEOC and its brave employees to carry on their mission despite all the hardships related to the September 11 terrorist attacks," said EEOC Chair Dominguez, who will officially open the new headquarters, accompanied by Deputy New York City Mayor Carol Robles Roman, U.S. District Court Judge Denny Chin, EEOC Commissioners, and other dignitaries.

**ANNOTATIONS** - The Americans with Disabilities Act in Cyberspace: Should Web-Only Businesses Be Required To Be Disabled-Accessible? - Anita Ramasastry

---

1. **THE AMERICANS WITH DISABILITIES ACT IN CYBERSPACE: Should Web-Only Businesses Be Required To Be Disabled-Accessible?By ANITA RAMASTRY**  
Wednesday, Nov. 06, 2002

In late October, a Florida federal court ruled that Southwest Airlines does not have to retool its web site to make it more accessible to the blind. United States District Judge Patricia Seitz ruled that the Americans with Disabilities Act (ADA) applies only to businesses with a nexus to a physical location, not web-only businesses.

The ruling is the first to deal squarely with the question of whether the ADA applies to web sites. Unfortunately, it is in error.

Since 1996, the United States Department of Justice has taken the position that the ADA does indeed apply to web sites. DOJ is correct; the law applies not just to listed types of business, but also to "other service establishments," and websites should count.

If the ADA is deemed inapplicable to web sites or to Internet-only businesses, we need to amend the legislation. Otherwise, web-only businesses will escape requirements that are imposed on their brick and mortar counterparts.

And worse, disabled persons will be denied access to those special discounts and services only available over the Internet - thereby becoming victims of a new form of discrimination under which they must pay more for the same goods and services.

Since Internet booking and purchasing is cheaper for many industries, the risk of such discrimination is very real.

One of the major goals of the ADA is to remove barriers that prevent people from accessing important services. Architectural barriers are not the only kind; ramps and elevators are only the beginning of the ADA protections. The statute also protects disabled individuals against other

forms of exclusion and “relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.”

Moreover, even if architecture were the focus, what is at stake in cases like Gumson's is web architecture that acts just like a physical barrier in the real world, to keep the disabled out. Is A Website a “Service Establishment?”

Robert Gumson is a blind consumer who uses a screen reader and voice synthesizer when he accesses websites. He sued Southwest Airlines alleging that its website - which enables consumers to check airline fares and schedules, and book airline reservations - was not accessible to him.

Specifically, he faulted Southwest for failing to present its text so that it could be read by synthesized speech technology, thereby making it "extremely difficult" for blind or visually impaired persons to access the site.

Is the Southwest site covered by the ADA? The question depends on whether the site is a "public accommodation" - and that, in turn, depends on whether the site is a "service establishment." Under the ADA, the definition of "public accommodation" includes a list of twelve categories including travel offices, barber shops, pharmacies and "other service establishments."

All of the specific categories refer to physical establishments. That's not surprising, however. When the ADA was enacted in 1990, the Internet had not developed into a marketplace where goods and services were offered to consumers. At that time, the World Wide Web had not yet been invented.

Commercial and consumer traffic on the Internet did not exist and, indeed, was prohibited.

That doesn't mean the ADA doesn't apply to the Web. After all, the Constitution applies to airplanes even though the Framers rode horses - and, indeed, applies to the Web even though the Framers did not have AOL.

Similarly, perhaps because Congress anticipated that it could not provide for every technological contingency, the ADA's legislative history suggests that the statutory definition of "public accommodation" is intentionally broad.

A Senate Report on the ADA states that within each of these twelve categories, the legislation only lists a few examples and then, in most cases, adds the phrase "other similar" entities. It makes clear, in addition, that the Committee intends that the "other similar" terminology should be construed liberally, consistent with the intent of the legislation that people with disabilities should have equal access to the array of establishments that are available to others who do not currently have disabilities. And a House Report contains similar language indicating a broader legislative intent.

The district court nevertheless applied the rule of *ejusdem generis* - which says that "where general words follow a specific enumeration of persons or things, the general words should be limited to persons or things similar to those specifically enumerated." Since the twelve specific categories referred to physical locations, the court reasoned that the reference to "other service

establishment" did too. This ruling was directly contrary to Congress's intent that the statute be broadly construed.

Is There A Requirement of a Nexus to a Physical Location?

In reaching its decision, the district court considered the prior decision of the U.S. Court of Appeals for the Eleventh Circuit in *Rendon v. Valley Crest Prods. Ltd.* The Rendon court held that individuals with hearing and other body impairments could sue the producers of the TV show "Who Wants to Be a Millionaire?" under the ADA, because the show used an automated "fast finger" telephone system to select contestants.

The appeals court found that there was a nexus between the use of the telephone and access to a physical location: the television studio where the show takes place. Accordingly, it held that the telephone system was part of an ADA-covered service establishment. It also found "the fact that the plaintiffs in this suit were screened out by an automated telephone system, rather than by an admission policy administered at the studio door" to be "of no consequence under the statute," since telephone and other screening systems were common.

A similar nexus should have been found in *Gumson*, as noted above, since the website was related to a physical ticket counter. But more fundamentally, no nexus should be required to state an ADA claim.

A website that provides the service of expediting a ticket purchase is plainly a "service establishment." Moreover, the ADA covers services "of" - not "at" - a place of public accommodation, making clear the services need not be provided on-site to come within the ADA.

Indeed, Congress explicitly included businesses that provide services off-site. For instance, the ADA expressly covers department stores, which may use mail order or telephone ordering; plumbers, who make home visits; lawyers, who provide service in the courtroom and may also visit clients' offices as well as their own.

In short, web services themselves are clearly covered by the ADA. To suddenly exempt them when they are provided by a web-only business - in the precise circumstance when disabled customers have no other alternative - is the height of judicial folly.

DOJ Policy Does Not Require a Nexus With a Physical Location

Significantly, DOJ policy has never suggested that web services must have a nexus to a physical location to be covered by the ADA. And since DOJ has responsibility to enforce the ADA, it ought to know.

In 1996, in a letter to Senator Tom Harkin (D-IA) summarizing DOJ policy, DOJ said that the ADA "requires ... places of public accommodation to furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities ...." Thus, "[c]overed entities under the ADA are required to provide effective communication, regardless of whether they generally communicate through print media, audio media, or computerized media such as the Internet. Covered entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well."

(The federal government has also made its own websites accessible, showing it means what it says.)

#### Other Judicial Decisions and Favorable Settlements Suggest No Nexus Requirement

Meanwhile, other federal appellate courts -such as the U.S. Courts of Appeals for the First Circuit, in *Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n*, and for the Fifth Circuit, in *McNeil v. Time Insurance Co.* - have concluded that public accommodations are not limited to physical places only. Courts have accepted that insurance (as opposed to an insurance office) and health benefits, for example, are public accommodations under the ASA.

In addition, other similar ADA suits have resulted in favorable outcomes for disabled plaintiffs with respect to web site accessibility.

In November 1999, the National Federation for the Blind (NFB) sued America Online after AOL failed to alter proprietary software to allow compatibility with screen readers. AOL agreed to make the next version of its Internet software accessible to blind users.

Then in April 2000, NFB sued the Connecticut Attorney General's Office - which had provided links to four inaccessible online tax filing services on its Internal Revenue Service's official Web site. The four tax filing services agreed to make their Web sites accessible to the vision-impaired in time for the next tax season.

As recently as October 15, 2002, a federal district court in Atlanta ruled that a mass transit agency violated the ADA by constructing a web site that was inaccessible for people with visual disabilities. This is one of the first cases to decide that the ADA requires online access for people with disabilities. Although the Atlanta case focuses on other provisions of the ADA relating to a public agency's provision of services, the court nonetheless recognized that the transit agency's responsibility extended to its web site and Internet services.

#### The "Reasonable Modifications" Language Means Changes Won't Get Too Costly

How costly will it be for web-only businesses to comply with the ADA? Congress held hearings on the subject in February 2000. Critics testified that millions of pages will have to be taken down - and many will be forced to stay down, due to the cost of modifications. ADA advocates on the other hand, said costs would be minimal.

Who's right? It's probably the advocates. The reason is that the ADA does not require all possible modifications, only "reasonable ones." Specifically, its implementing regulations state: "[a] public accommodation shall make **reasonable modifications in policies, practices, or procedures**, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations." (Emphasis added).

Thus, if ensuring accessibility would be too burdensome, it might not be necessary. For instance, small mom and pop stores with Internet sites will not be crushed by the weight of burdensome ADA compliance. And even large sites need not make every conceivable modification.



Accessibility can work: Indeed, the Web's leading standards group, the World Wide Web Consortium (W3C) has been promoting it since 1997, when it launched its Web Accessibility Initiative (WAI). Since then, the group has periodically put forward voluntary accessibility guidelines and recommendations for software makers and Web publishers.

If the courts won't interpret the ADA to allow web accessibility, Congress should certainly amend the statute to do so. Otherwise web-only businesses will be advantaged over others, since only they will be able to avoid ADA compliance costs.

Moreover, we will risk erecting economic barriers as well as virtual barriers for disabled citizens in the U.S. Many of us have benefitted from exclusive offers, prices and promotions available through the Internet. If these promotions remain inaccessible to the disabled, we will only perpetuate the barriers to services that the ADA - and the Internet itself - were meant to remove.

The Internet could someday become a utopian medium by which the disabled can communicate with the non-disabled on equal ground. It would be a cruel irony if the Internet, which offers so much potential for the disabled, were used as a new forum for discrimination against them instead.

<http://writ.news.findlaw.com/ramasastry/20021106.html>

```

@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@@
@
@          ***          *****          ***          @
@          *****          *****          *****          @
@          *** ***          ***      ***          *** ***          @
@          ***      ***          ***      ***          ***      ***          @
@          *****          ***      ***          *****          @
@          *****          ***      ***          *****          @
@          ***          ***          *****          ***          ***          @
@          ***          ***          *****          ***          ***          @
@          **  **  *****  **          **  *****          @
@          **  **  *****  **          **  ***      ***          @
@          ***  **  **          **          **  **          **          @
@          ****  **  ****          **      ***          **  ****          @
@          **  ****  ****          **  *****  **          ****          @
@          **  ***  **          **  **  **  **          *          ****          @
@          **  **  *****          ****      ****          ***          ***          @
@          **  **  *****          ***      ***          ****          @
@

```

"News Reviews to Peruse"

Number 106

December 2002

Items regarding disabilities law and the Americans with Disabilities Act which may be of interest to you. Please share this information with colleagues, supervisors and subordinates. This is a free publication available in electronic and printed format to anyone who is interested. Subscription requests, comments, contributions or questions, including requests for accommodations needed to receive or apprehend this publication, should be addressed to Patrick H. Bair (Ed.) ([pbair@state.pa.us](mailto:pbair@state.pa.us)). 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. Current and recent issues can be found online at [http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews\\_index\\_2001.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews_index_2001.htm). All past issues of this publication are archived at [http://intradep/ChiefCounsel/ADANews/adanews\\_index.htm](http://intradep/ChiefCounsel/ADANews/adanews_index.htm) on the DEP internal website.

**SEVENTH CIRCUIT TIGHTENS 'REGARDED AS' CLAIMS** - The U.S. Court of Appeals for the Seventh Circuit (WI, IL, IN) has joined a number of other circuits in finding that in order for a person to prevail on an ADA claim that he was "perceived or regarded as" having a disability,

the person must prove that he is "regarded as" having an impairment that substantially limits a major life activity. The Appellate Court announced this standard in reversing a trial jury's finding in favor of a builder with acute right peroneal neuropathy, commonly referred to as "drop foot." The trial court had dismissed the builder's claim that his condition was an actual disability under the law, but permitted him to go forward on the theory that he was discharged based on his employer's perception that he had a disability. On appeal, the Court found that no reasonable jury could have concluded that the defendant regarded the builder as substantially limited in any "tasks central to his daily life." *Mack v. Great Dane Trailers*, CA7, No. 01-2467, 10/22/02 (<http://www.ca7.uscourts.gov/op3.fwx?submit1=showop&caseno=01-2467.PDF>)

**FIFTH CIRCUIT NARROWS HIV DISABILITY** - The U.S. Court of Appeals for the Fifth Circuit (TX, LA, MS) has found that a former Texas telephone company employee who is HIV positive does not have a disability, despite the decision of the U.S. Supreme Court in *Bragdon v. Abbott*, in which the Supreme Court held a person with asymptomatic HIV to be substantially limited in the major life activity of reproduction. The Court acknowledged that under the *Bragdon* decision, HIV qualifies as a physical impairment from the moment of infection; however, the Court found that the employee failed to prove that this was a substantial limitation on his personal ability to reproduce. The Court found that he was not substantially limited in reproduction because he had admitted in pleadings that he and his wife had decided to have no more children.(!) *Blanks v. Southwestern Bell Corp.*, CA5, No. 02-10089, 11/4/02 (<http://caselaw.lp.findlaw.com/data2/circs/5th/0210089cv0.pdf>).

**DISABILITIES MENTORING DAY A BIG SUCCESS** - [National Disabilities Mentoring Day](#), celebrated this year on October 16<sup>th</sup>, has grown! Beginning in 1999 with approximately 32 volunteer mentors who were "shadowed" at their jobs by students with disabilities, the program this year arranged for more than 3,000 mentors nationwide. In addition, volunteer mentors in New Zealand and Kosovo helped introduce student with disabilities to their work, lending the day an international flair. Amrith Fernandes, an American University student with a mobility impairment, shadowed Labor Secretary Elaine Chao, while five other students spent the day in the West Wing of the White House.

**DIABETIC PHARMACIST FAILS TO CONVINC 8<sup>TH</sup> CIRCUIT** - A Wal-Mart pharmacist with insulin-dependent diabetes failed to convince the U.S. Court of Appeals for the Eighth Circuit (ND, SD, NE, MN, IA, MO, AR)

that his impairment imposed any substantial limitation on his ability to "see, speak, type, read, and walk," and the Court denied his request to add "eating" as an additional major life activity when he failed to plead that at the trial level. The Court found that the primary detrimental effects of the pharmacist's diabetes were mostly speculative, adding that, "[h]ealth conditions that cause moderate limitations on major life activities do not constitute disabilities under the ADA." *Orr v. Wal-Mart Stores, Inc.*, CA8, No. 01-2959, 7/22/02 (<http://www.ca8.uscourts.gov/opndir/02/07/012959P.pdf>).

**DISABILITIES WEBSITE OF THE MONTH** - In honor of the tremendous success of National Disabilities Mentoring Day, this month we are looking at the website of the [National Collaborative on Workforce and Disability for Youth](http://www.ncwd-youth.info). "NCWD/Youth is your source for information about employment and youth with disabilities," states the homepage. "Our partners - experts in disability, education, employment, and workforce development - strive to ensure you will be provided with the highest quality, most relevant information available." A unique feature of the website is the NCWD/Youth Pro-Bank - "an evolving collection of promising programs and processes that draws upon evaluation, research, and quality award initiatives, cutting across job training, education, rehabilitation, vocational education, juvenile justice, and youth development." The website of the NCWD for Youth, at <http://www.ncwd-youth.info>, makes the connection between youth with disabilities and employment.

**AREA CALENDAR** -

- ADA & FMLA Compliance Update**; April 17-18, 2003; Washington, DC; sponsored by the National Employment Law Institute (NELI); private and government expert panel discusses major aspects of developing ADA and FMLA law; more info at <http://www.neli.org/programs2.asp?programid=2> or call NELI at (303) 861-5665
- Human Resource Institute**; May 15-16, 2003; Washington, DC; sponsored by NELI; practical guidance for HR professionals and their counsel on various liability issues arising in the workplace, such as reductions in force, harassment, privacy, etc.; more info at <http://www.neli.org/programs2.asp?programid=4> or call NELI at (303) 861-5665
- 9th Annual UCP Foundation Sporting Clays Classic**; May 18th, 2003; Nemacolin Woodlands Shooting Academy; UCP Southwestern Pennsylvania

benefit; contact Jackie Newman at 724-229-0851 or [jnewman@ucpswpa.org](mailto:jnewman@ucpswpa.org) for more information

- ❑ **Employment Law Litigation;** June 12-13, 2003; Washington, DC; sponsored by NELI; program on critical elements of litigating employment cases, including tactics, procedures and strategies; more info at <http://www.neli.org/programs2.asp?programid=3> or call NELI at (303) 861-5665
- ❑ **Employment Discrimination Law Update;** August 7-8, 2003; Washington, DC; sponsored by NELI; definitive annual advanced-level update of significant developments in EEO; more info at <http://www.neli.org/programs2.asp?ProgramID=11> or call NELI at (303) 861-5665

**WHAT'S THE PRICE OF DISCRIMINATION?** - To Mary Kay, Inc., it's approximately \$11.2 million. That is the size of the verdict awarded by a Texas jury this month in a lawsuit challenging the firing of a Mary Kay sales manager. The manager, formerly one of the company's top salespersons, was fired after she asked to be relieved of sales goals during treatment for an aggressive form of breast cancer, complicated by her pregnancy. Although "sick and bald and pregnant," according to her description, the sales manager continued running her sales operation from her hospital room, but could not meet sales quotas. When she asked for a reprieve from the sales goals, her corporate car was taken away and she was later fired. Although Mary Kay took the position at trial that the manager was an independent contractor, not a covered employee, the jury found that she was a Mary Kay employee and that the company "acted with oppression or malice" by refusing to accommodate her illness. The award included \$10 million in punitive damages.

**SUPERVISOR'S REMARKS NOT DIRECT EVIDENCE OF ANIMUS** - The U.S. Court of Appeals for the First Circuit (ME, PR, NH, MA, RI) found in favor of defendant Wal-Mart despite statements by a terminated employee's supervisor that the employee alleged demonstrated anti-disability animus. The employee had a record of absenteeism that stretched over months, and the employer had granted her several on-the-job accommodations for her muscular dystrophy-like condition. The employee claimed that she heard a store manager say upon the employee's return from an extended medical absence, "[w]e know [she] has a disability, but we're just tired of this. We're tired of her, and we just don't feel that she needs to be here." After missing several more days in the ensuing weeks, she was called to her supervisor's office and told,

"[w]e understand that you have health problems. We understand that you are disabled, but we don't want you working in this store." When the employee asked if she was being fired because of her disability, her supervisor responded, "you may take it as you want, but you are not working here." The Appellate Court found the two statements too "ambiguous" to constitute direct evidence of discrimination based on the employee's disability. "Neither of the sets of statements in this case meets this test [for direct evidence of discrimination]," wrote Circuit Judge Lynch for a unanimous Court, "Both are subject to the interpretation that management fully understood that appellant had a disability but could not further abide appellant's gross and repeated absenteeism. A decisionmaker's mentioning of a disability in the context of an adverse employment action cannot, without more, constitute direct evidence of discrimination." *Patten v. Wal-Mart Stores East, Inc.*, CA1, No. 01-2512, 8/14/02 (<http://www.cal.uscourts.gov/cgi-bin/getopn.pl?OPINION=01-2512.01A>).

**RESOURCES** - Some disability/employment-related resource material recently added to the catalogue. Publications from the Equal Employment Opportunity Commission (EEOC) can be ordered at <http://www.usdoj.gov/crt/ada/publicat.htm>, or by calling 1-800-514-0301(V) or 1-800-514-0383(TTY).

□ **Righting the ADA** is a series of policy documents of the [National Council on Disability](#) addressing topics raised by the ADA rulings of the U.S. Supreme Court. The inaugural paper, [Righting the ADA, Introductory Paper: The Americans with Disabilities Act](#), released October 16<sup>th</sup>, discusses the rationale for the series, and the NCD's role regarding the Act. Papers two through four are also available at the NCD website: [No. 2 A Carefully Constructed Law](#); [No. 3 Significance of the ADA Finding That Some 43 Million Americans Have Disabilities](#); and [No. 4 Broad or Narrow Construction of the ADA](#). All of the papers, and those to come, can be accessed from the NCD Publications webpage at <http://www.ncd.gov/newsroom/publications/02publications.html>.

□ The December edition of [OVERVIEW](#), the monthly magazine of the Office of Vocational Rehabilitation, features an article about the recent awards ceremony of the Altoona district OVR offices, in which employers and customers were recognized. [Http://www.dli.state.pa.us/landi/lib/landi/pdf/ovr/overview12-15-02.pdf](http://www.dli.state.pa.us/landi/lib/landi/pdf/ovr/overview12-15-02.pdf).

**CAN YOU RECOGNIZE AN ACCOMMODATION REQUEST WHEN YOU HEAR ONE?** -

Supervisors and managers must be able to recognize when an employee with a disability is asking for an accommodation. As you should know, there is no requirement that the person actually use the words "reasonable accommodation" or any other magic words. An employee must simply notify an employer of the existence of a disability - if not already known or obvious - and the need for some sort of workplace modification. Note the difference between the following: 1) an employee states, "these boxes are heavy and I'm not going to lift them anymore;" 2) a second employee states, "you know, my hearing's not what it used to be, and I have trouble hearing at these meetings." Providing that the employer is not aware that either employee has a disability, only the second employee is requesting an accommodation, and a manager should engage in an interactive process with the employee about her needs. In all cases, the accommodation requested must be tied to an alleged disability.

**GRIZZARD NAMED ASSISTANT SECRETARY OF LABOR** - Lewis Grizzard was sworn in as U.S. Assistant Secretary of Labor for Disabilities Employment Policy on October 2<sup>nd</sup>. Grizzard served formerly as a commissioner for the Virginia [Department for the Blind and Vision Impaired](#).

**CUTTING CORNERS** - One hundred forty-eight thousand seven hundred thirty eight, in case you were wondering. Believe it or not, that represents the number of street corners in New York City, at least according to a recent settlement between the city and the [Eastern Paralyzed Veterans Association](#). The EPVA sued the city for its failure to make its corners accessible as required by the ADA by installing curb cuts. Under the settlement, the city has agreed to spend \$218 million to ramp the remaining inaccessible 61,074 corners in the five boroughs.

**CENSUS SHOWS 1 IN 12 CHILDREN WITH DISABILITY** - According to the 2000 Census, there are approximately 5.2 million children and teenagers in the United States who have some sort of mental or physical disability, or about one out of every twelve. Disabilities measured by the census could range from mild asthma to severe mental illness. The Census figures, coupled with rising numbers of children requiring special education and of children receiving federal Social Security disability payments, indicate a sharp increase in the number of children with disabilities nationwide.

**IS YOUR DOCTOR'S OFFICE ACCESSIBLE?** - If not, the Disability Rights Division of the U.S. Department of Justice wants to know. The Justice

Department is collecting statistics in preparation for issuing new guidelines on accessibility for hospitals and physicians' offices. The Department would like to hear from people with disabilities - especially women using wheelchairs - who have been unable to enter a doctor's office because of steps; unable to have examinations because they could not safely get onto examination tables; or unable to use mammography or X-rays machines because of their wheelchairs or small stature. Persons who would like to contribute their personal stories may send them via e-mail to Disability Rights Division lawyer Amanda Maisels at [Amanda.Maisels@USDOJ.gov](mailto:Amanda.Maisels@USDOJ.gov).

**NYU HOSPITAL AGREES TO HALF MILLION DOLLAR SETTLEMENT** - New York University's Hospital Center agreed this summer to pay over \$500,000 to a deaf professor of sign language to settle his lawsuit against the hospital. The professor charged the hospital with failing to provide accommodation for his deafness in a series of visits over a period of nearly ten years. He claimed that either no sign-language interpreter was available on his visits or, if there was, the interpreter was unintelligible. "Anytime a hospital takes in a patient and cannot effectively communicate with that patient, they are running a tremendous risk of further injuring the patient," said Alan Rich, the professor's attorney.

**COLLEGE BOARD AGREES TO STOP "FLAGGING" TEST SCORES** - The College Board has agreed to stop the practice of marking the SAT scores of students with disabilities who take the test under special conditions, such as extra time. The decision to stop "flagging" the scores came as part of a settlement of a lawsuit brought by [Disability Rights Advocates](#). (See ADA News No. 93, 11/15/01, [http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews\\_93/ada\\_news\\_93\\_frontpage.htm](http://www.dep.state.pa.us/dep/deputate/ChiefCounsel/ADA/adanews_93/ada_news_93_frontpage.htm).) About 2 percent of the two million high school students who take the test each year get some accommodations - almost always including extra time - because of their documented disabilities. The College Board marks these tests with a notation that says, "Scores Obtained Under Special Conditions," a practice that advocates have long denounced as stigmatizing and discriminatory. Many high school guidance counselors and college admissions officers fear that the elimination of flagging could set off a wave of new applications for accommodations, including some from students without real disabilities. But Sid Wolinsky of Disability Rights Advocates, the group that handled the litigation, said the end of flagging would allow millions of students to use the accommodations they need without worrying that colleges might discriminate against them. "The flag has been an identifier, which



unfairly labels young men and women as second-class students," Mr. Wolinsky said. The changes take effect in September 2003.