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The Americans with Disabilities Act: The Basics Every Public Lawyer Should Know

Jana O'Leary Sullivan, Staff Attorney, League of Minnesota Cities

Chad Wilson, Assistant Supervising Attorney, Minnesota Disability Law Center

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12:00 p.m. to 1:15 p.m.

This program has been approved for 1.25 standard CLE credits,
Minn. Event Code No. 498012

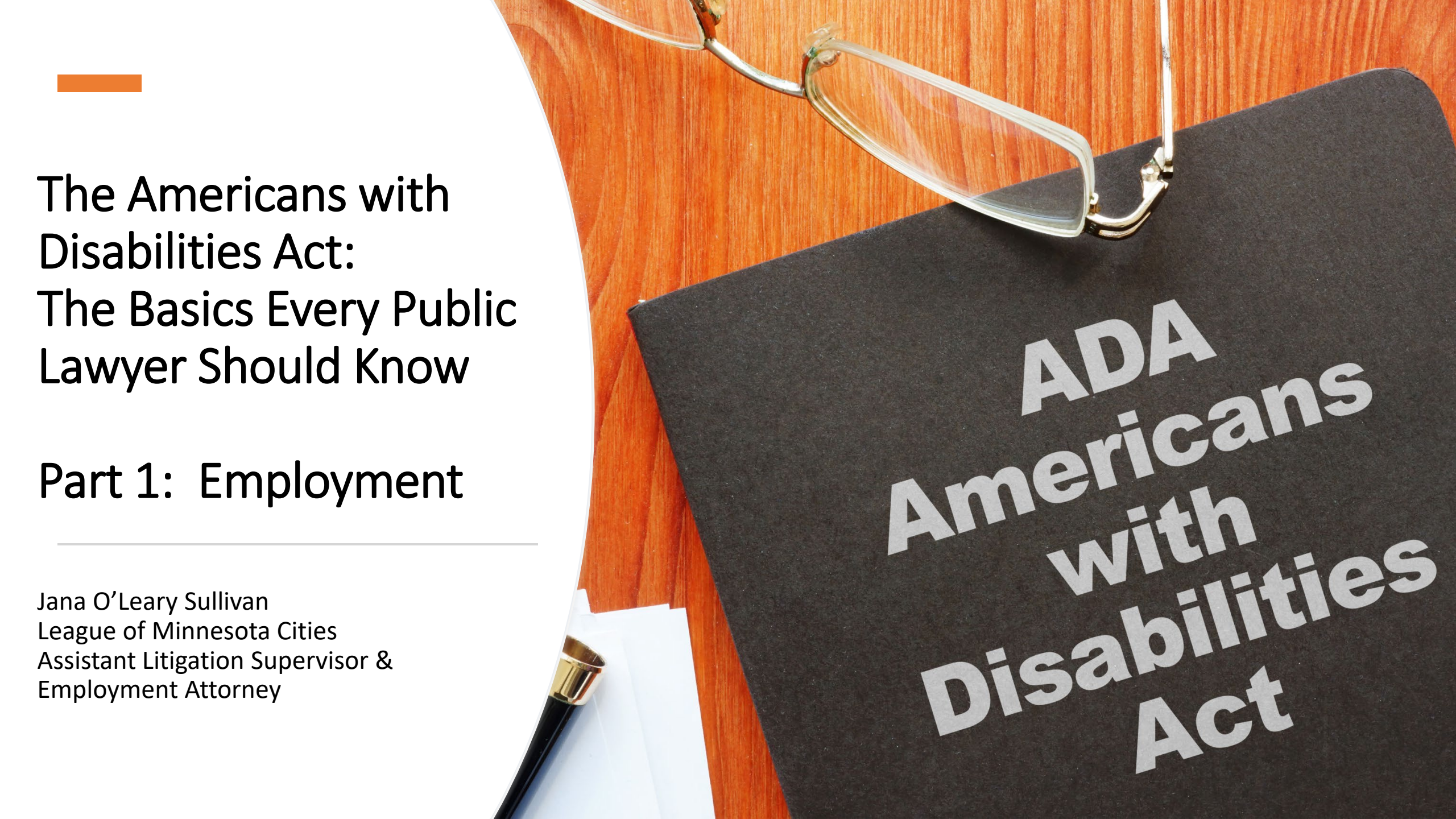
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The Americans with Disabilities Act: The Basics Every Public Lawyer Should Know

Part 1: Employment

Jana O'Leary Sullivan
League of Minnesota Cities
Assistant Litigation Supervisor &
Employment Attorney



**ADA
Americans
with
Disabilities
Act**

1. No discrimination

2. Must provide reasonable accommodation

- Affirmative duty (unique)
- Modification to job/workplace so can perform **essential functions** – medical leave, change in schedule, special equipment/tools, different communication methods, etc.
- **Individualized inquiry** – focus on specific job & specific work restrictions (nature, duration, etc.)
- **Interactive process** – discussion re: potential accommodations
- Must provide but not necessarily preferred option



The Big Picture

- Most public employers & employees covered
- Most medical conditions/injuries covered
- Most people will have medical issue at some point.

Why Important?

- The law
- Hot labor market (recruitment & retention are key)
- DEI (Diversity, Equity & Inclusion)
- Right thing to do!



The Legal Landscape

- State & federal courts, agencies, legislatures
- Other laws: Minnesota Human Rights Act (MHRA), Pregnant Fairness Workers Act, Family Medical Leave Act (FMLA), Paid Family Medical Leave Act (PFMLA), Earned Safe & Sick Time (ESST), Genetic Information Non-discrimination Act (GINA), Cannabis legalization, etc.



**Communicate
Early & Often**



**Practice
compassionate
leadership**



Trust your instincts



Documentation is key!



Applicants

Don't Ask

even if obvious, voluntarily disclosed
(except generally whether can perform job,
with or without reasonable accommodation)

No automatic medical disqualifiers

Are the job requirements legit?
(Truly part of the job? How developed,
especially hearing/vision, lifting, etc.?)



MEDICAL LEAVE

What is reasonable, considering organization/workplace, employee's job, duration of leave, etc.?

- One of most common reasonable accommodation
- Different than other leave laws (FMLA, etc.)
- Intermittent leave may be required
- Indefinite leave not required – but an extended leave may be
- Prohibited: Bright line rules re: max leave – even if generous

Agency focus:

<https://www.eeoc.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act>



Remote/Hybrid Work

- Pandemic = gamechanger
- May have to provide even if generally not allowed
- Trial run
- What if performance/other concerns?



Mental Health

- Dramatic increase during/post pandemic
- What if misconduct/performance issues?
- Can hold employees accountable to workplace conduct rules – but be fair & compassionate

Practice Tips



Promote wellness programs & employee assistance programs



League's PTSD Toolkit



Normalize the conversation



Promote good workplace culture



Lead & act with compassion



Analyze holistically



It's complicated!





Medical Exams & Inquiries

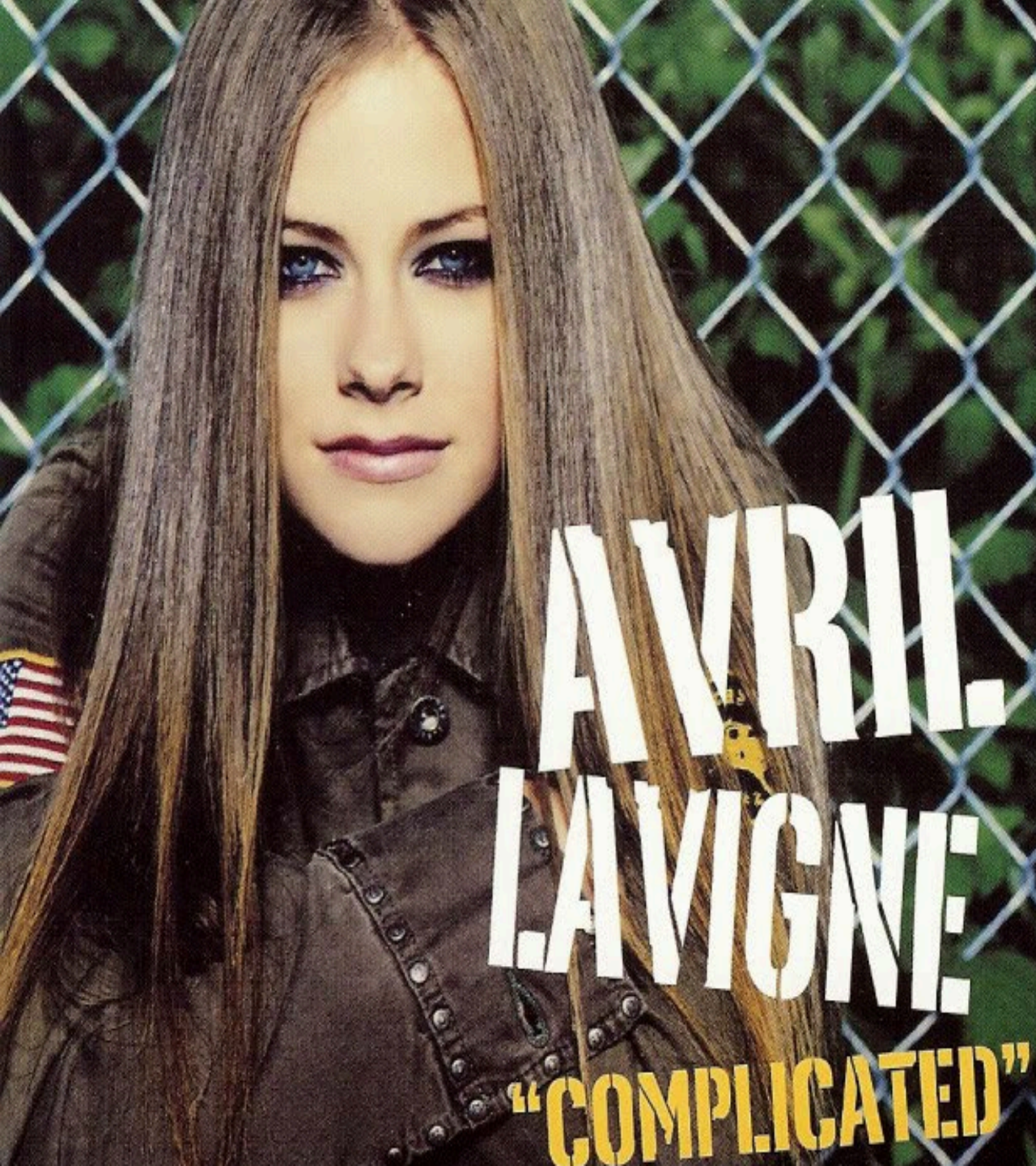
- Job Related & Business Reason
 - Identify reasonable accommodations
 - Determine if safety risk (direct threat)
- Treating provider vs. independent provider
- Fitness-for-duty exams
- U.S. v. City of Blaine (2023 consent decree)
- Biggest mistakes: Overly broad, pre-employment before conditional offer



- Medical leave
- Modified schedules, additional breaks, etc.
- Specialized tools & equipment
- Available light duty (no need to create, can't give preference for work-related conditions)



- Undue hardship
- Removal of essential functions
- Stress-free work environment
- New supervisor
- Ineffective



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League of Minnesota Cities

www.lmc.org

EEOC

www.eeoc.gov

MDHR

<https://mn.gov/mdhr/>

Job Accommodation
Network

<https://askjan.org/>



Understanding the ADA: Title II & III January 10

Minnesota Disability Law Center
Chad Wilson, Assistant Supervising Attorney
612-746-3734
cwilson@mylegalaid.org



Mid-Minnesota Legal Aid's Minnesota Disability Law Center

- Protection and Advocacy System for Minnesota.
- Provides civil legal services to individuals with disabilities from the entire state of Minnesota, regardless of income.
- Represents private clients in administrative hearings, state and federal courts.



The Americans with Disabilities Act:

The Americans with Disabilities Act of 1990 is a broad federal civil rights statute mandating the elimination of discrimination and the integration of persons with disabilities into the mainstream of American life.

Structure of the ADA – 5 Titles

- Title I- Employment
- **Title II- Public Services (State and Local Government and Public Transportation)**
- **Title III – Public Accommodations**
- Title IV - Telecommunications Relay Services
- Title V- Miscellaneous Provisions

What does Title II Say?

Title II of the ADA prohibits a public entity from discriminating against a qualified individual with a disability:

“No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a **public entity**, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132.

A Public Entity is:

- Any state or local government;
- Any department, agency, special purpose district, or other instrumentality of a state or local government; and
- The National Railroad Passenger Corporation (Amtrak), and any commuter authority as defined in statute 42 U.S.C. § 12131 (1).
- Public transportation operated by state and local governments is covered by regulations of the Department of Transportation (DOT).
- Title II “encompasses virtually everything that a public entity does.” *Johnson v. City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998).

Section 504 – 29 U.S.C. § 794

Section 504 of the Rehabilitation Act of 1973 covers federal agencies and federally-funded programs. The ADA's title II covers all state and local government activities, whether or not they get federal funds. The ADA is modeled on § 504 in many respects, and plaintiffs will generally combine claims under title II and § 504. *See* 28 C.F.R. 35.130 – 35.135.

The Eighth Circuit holds that the enforcement, remedies, and rights are the same under the two statutes. *Birmingham v. Omaha Sch. Dist.*, 220 F.3d. 850, 856 (8th Cir. 2000)

What does Title III Say?

Title III of the ADA prohibits a public accommodation from discriminating against a qualified individual with a disability:

“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of **public accommodation** by any person who owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S.C. § 12182 (a).

A Public Accommodation is:

Any private entity that is open to the public that effects commerce

Fall within at least one 12 categories:

- Places of lodging (e.g., inns, hotels, motels)
- Establishments serving food or drink;
- Places of exhibition or entertainment;
- Places of public gathering
- Sales or rental establishments;
- Service establishments (e.g., laundromats, dry-cleaners, banks, offices of health care providers, hospitals);
- Public transportation terminals, depots, or stations (not including relating to air transportation);
- Places of public display or collection ;
- Places of recreation;
- Places of education ;
- Social service center establishments (e.g., day care centers, senior citizen centers, homeless shelters,);
- Places of exercise or recreation

Minnesota Human Rights Act- Minn. Stat. § 363A.12

- State law that prohibits discrimination based on many characteristics, including disability.
- MHRA protects against disability discrimination in employment, housing, public accommodations, public services, education, credit and business.
- Claims under the ADA and MHRA are construed similarly. -- *Bahl v. Cty. of Ramsey*, 695 F.3d 778, 783 (8th Cir. 2012).
- MHRA has a one-year statute of limitations (shorter than ADA).

A Qualified Individual with a Disability is:

A person with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity. 42


U.S.C. § 12131 (2)

First Prong:

An individual with a disability:

- 1) has a physical or mental impairment that substantially limits one or more major life activities; or
- 2) has a record of a physical or mental impairment that substantially limited one or more major life activities; or
- 3) is regarded as having such an impairment, whether they have one or not.

42 U.S.C. § 12102(1); 28 C.F.R. § 35.104



Temporary impairments are covered by title II & III if the impairment substantially limits a major life activity. This must be resolved on a case-by-case basis taking into account both:

- Duration or expected duration of impairment and
- Extent to which it actually limits a major life activity.

ADA Amendments Act of 2008

- Intended to overturn case law that restricted the application of the ADA, including definition of “disability”
- Impairment does not need to “prevent or severely or significantly restrict” a major life activity to be considered “substantially limiting.”
- Mitigating measures (except glasses) have no bearing in determining whether a disability qualifies under the law.
- An episodic impairment is now considered a disability if the impairment, when active, substantially limits a major life activity.

Second Prong

Qualified individual with a disability means:

An individual with a disability who with or without:

- reasonable modifications to rules, policies or practices;
- the removal of architectural, communication or transportation barriers or
- provision of auxiliary aids and services

Meets the essential eligibility requirements for receipt of services or participation in programs or activities provided by a public entity. 28

C.F.R. § 35.104

Regulations Detail Possible Violations:

- Excluding a person with a disability from a service, program, or activity just because they have a disability;
- Denying the person with a disability an opportunity to participate or benefit from the aid, benefit, or service **that is not equal to that afforded others** or that is not as effective in giving the person an equal opportunity to gain the same benefit or achievement as that provided to others;

Possible Violations

- Providing different or separate aids, benefits, or services to individuals with disabilities than are provided to others, unless it is necessary to do so in order that they can receive the same benefits as is provided to others.
- The ADA cannot be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which they choose not to accept. 42 U.S.C. § 12201 (d)

Other Possible Violations

- Covered entities are not allow to place a surcharges on individuals with disabilities to cover the costs of remedial measures. 28 C.F.R. § 35.130 (f).
- Retaliation against individual exercising rights under the ADA is prohibited. 28 C.F.R. § 35.134

What is a Reasonable Modification?

- A “reasonable modification” is a change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with a disability to have an equal opportunity.
- The idea behind a reasonable modification is to create an *equal* opportunity for an individual with a disability, not a better or worse opportunity.
- In context of Title II, terms “reasonable accommodation” and “reasonable modification” are synonymous

Examples: Modification/Accommodation

- Rescheduling court hearings to the afternoon to accommodate problems with medication or depression.
- Allowing a person be accompanied by a support person.
- Allow person to be accompanied by service animal.
- Extended time to take an exam.

Accommodations in Minnesota State Courts:

Practice Tip

- Minnesota State Court's Website set forth process for requesting accommodations in Court.
- <http://www.mncourts.gov/ADAAccommodation.aspx> (can find link on MN Courts homepage)
- Web page includes ADA contact form, ADA grievance procedure and ADA Accommodation request form.
(<http://www.mncourts.gov/ADAAccommodation/ADA-Accommodation-Request.aspx>)

Courtroom Accessibility

- If Courthouse is not accessible, alternative accommodations may be required.
 - Allowing person with disability to appear by phone or video conference (if the person wants this).
 - Having hearing in another public building that is accessible.
- Remember – requirement is to provide “meaningful access” to the service you are offering to the person with a disability.

Effective Communication

- Covered entities must ensure effective communication with individuals with disabilities. If needed to ensure that it is as effective as communication with others, the entity must provide appropriate auxiliary aids.
- Examples of auxiliary aids: Qualified interpreters, assistive listening headsets, television captioning, TDDs, readers, taped texts, large print materials.
- In determining what type of auxiliary aids , the entity should give primary consideration to the request of the individual with a disability.

28 C.F.R. § 35.160.

Effective Communication

- A entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.
- A public entity shall not require an individual with a disability to bring another individual to interpret for him or her.
- A public entity shall not rely on an adult accompanying an individual with a disability to interpret or facilitate communication except in an emergency or if the person with a disability requests it
- A public entity that chooses to provide qualified interpreters via Video remote interpreting (VRI) services shall ensure that it services works and people know how to use it.

Service Animals

Any dog individually trained to do work or perform tasks for the benefit of an individual with a disability, including physical, sensory, psychiatric, intellectual, or other mental disability is a service animal allowed under the ADA.

- Other species of animals are not service animals even if trained, except for miniature horses.
- The animal's work or tasks must be directly related to the individual's disability.

Examples:

- Assisting individual who is blind with navigation.
- Interrupting impulsive behavior of individual with psychiatric disability.

Providing emotional support or comfort is **not** considered “work or tasks.” 28 C.F.R. § 35.104

Generally a public entity shall modify its policies, practices, or procedures to permit use of a service animal by individuals with a disability.

Except if:

- The animal is out of control and the handler does not take effective action to control it; or
- The animal is not housebroken.

Individuals with disabilities and their service animals shall be allowed in all areas of a public entity's facilities where members of the public, participants in services, programs, or activities, or invitees are allowed to go.

Permitted Inquiries

Two inquiries are allowed:

- (1) Is the animal required because of a disability?, and
- (2) What work or task has the animal been trained to perform?

Covered entity cannot:

Ask about the nature or extent of a person's disability; or

Require document such as proof of training or certification.

Removal of Barriers

- A public accommodation shall remove architectural barriers in existing facilities, including communication barriers that are structural in nature, where such removal is readily achievable, *i.e.*, easily accomplishable and able to be carried out without much difficulty or expense.
- Examples: repositioning shelves and tables, widening doors, installing grab bars in toilet stalls, creating accessible parking space.

Physical Access Issues- 2010 ADA Standards for Accessible Design

- ADA Standards govern the construction and alteration of places of public accommodation, commercial facilities, and state and local government facilities.
 - Apply to all ADA facilities except transportation facilities, which are subject to similar standards issued by the Department of Transportation (DOT).
- <https://www.ada.gov/regs2010/2010ADAStandards/2010ADAstandards.htm>

ADA Title II v. Title III

- Unlike private entities under title III, public entities are not required to remove barriers from each facility even if removal is readily achievable, so long as the “program” is accessible. Physical changes to a building are required only when there is no other feasible way to make the program accessible.
- In contrast, private places of public accommodation must remove barriers where “readily accessible” without regard to whether the services can be made accessible through other methods.

DOJ title II Technical Assistance Manual at 30

<http://www.ada.gov/taman2.html>

Website Accessibility

- Websites should be accessible to people with disabilities.
- Web Content Accessibility Guidelines (WCAG) 2.1 serves as a guide – but no formal regulations yet in place for Title II, Notice of Proposed rule making in 2023.
- Federal, State and Local Government also must comply with Section 508 regulations.

Integration Mandate

- A public entity shall administer services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities. 28 C.F.R. § 35.130(d)

Olmstead v. L.C

The leading case implementing this regulation is *Olmstead v. L.C.*, 527 U.S. 581 (1999).

In *Olmstead v. L.C.*, the U.S. Supreme Court held that under title II of the ADA, states are required to place persons with mental disabilities in community settings rather than in institutions when they can live in a community setting. More broadly, it stands for the proposition that title II prohibits unjustified segregation of individuals with disabilities.

The Court held that title II of the ADA required public entities to place persons with mental disabilities like plaintiffs in community settings rather than institutions when:

1. the state's treatment professionals have determined that community placement is appropriate;
2. the transfer from institutional care to a less restrictive setting is not opposed by the affected individual and
3. The placement can be reasonably accommodated taking into account the resources available to the state and the needs of others with mental disabilities.

ADA Defenses:

The law does not require a public entity to take any action:

- (a) that would result in a fundamental alteration of its program, service, or activity; or
- (b) that would produce undue financial or administrative burdens. This is an affirmative defense, and the defendant bears the burden of proof. The determination must be based on all resources available for use in the program.

28 C.F.R. § 35.164

Fundamental Alteration

- A "fundamental alteration" is a change that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered.
- What constitutes a "fundamental alteration" is a "complex, fact-intensive" inquiry.
- E.g. - PGA Tour, Inc. v. Martin, 532 U.S. 661, 690 (2001) – use of golf cart NOT a fundamental alteration to PGA Tour .

Undue Burden

- The determination that there is an undue burden “must be based on all resources available for use in the program.” – Title II Manual
- Questions often surround what budget Court should use to evaluate undue burden defense - one department v. entire county.
- If request would be an undue burden, public entity must take any other action that would not result in such burdens but would still accommodate person with a disability,

Limits: Safety Requirements Allowed

A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs or activities if they are:

- based on actual risks, not mere speculation, stereotypes or generalizations about individuals with disabilities.

28 C.F.R. § 35.130 (h)

“Direct Threat”

An individual who poses a direct threat to health or safety of others will not be “qualified.”

A determination of a “direct threat” must be based on:

- an individualized assessment;
- based on reasonable judgment that relies on current medical knowledge;
- or on the best available objective evidence to ascertain the nature, duration and severity of the risk;

Limits: Personal Devices and Services

Personal devices and services are not required, such as wheelchairs, individually-prescribed devices like eyeglasses and hearing aids, readers for personal use or study, or services of a personal nature like assistance in eating, toileting, or dressing.

28 C.F.R. § 35.135

ADA Enforcement

Private parties may bring private lawsuits to enforce their rights under title II & III. Remedies are the same as under § 504 of the Rehabilitation Act. 42 U.S.C. § 12133. Including injunctive relief and compensatory damages.

The ADA does not contain a statute of limitations. The Eighth Circuit has adopted the six-year limitations period of Minnesota's personal injury actions (Minn. Stat. § 541.05) for titles II and III of the ADA. *Gaona v. Town & Country Credit*, 324 F. 3d 1050 (8th Cir. 2003).

Reasonable attorney fees and costs may be awarded to the prevailing party. 42 U.S.C. § 12205; 28 C.F.R. § 35.175

Enforcement (cont.)

To recover compensatory damages under title II, courts have held that the plaintiff must prove intentional discrimination. The Eighth Circuit and the U.S. Supreme Court have not adopted a specific test, but many courts use a test of “deliberate indifference.” This requires: (a) knowledge that a protected right is substantially likely to be violated; and (b) failure to take action to prevent the violation. See *e.g.*, *Meagley v. City of Little Rock*, No. 4:09-CV-226-DPM, 2010 WL 3219327, at *4-5 (E.D. Ark. 2010).

- Punitive damages are not available to private plaintiffs under title II. *Barnes v. Gorman*, 536 U.S. 181 (2002).
- There is no monetary damages under Title III of the ADA. However, the MHRA does have a monetary damages provision.

Administrative Complaints- DOJ:

Individuals may also file complaints with administrative agencies like the Department of Justice or DOT. The regulations designate eight federal agencies to handle title II complaints. 28 C.F.R. § 35.170 (c). The complaint must be filed within 180 days of the alleged discriminatory act unless extended for good cause. The complainant need not exhaust administrative remedies before suing in court. 28 C.F.R. § 35.172 (b)

DOJ has an online complaint form on its home page at <http://www.ada.gov/complaint/>

Administrative Complaints- Minnesota Department of Human Rights

- Investigates complaints of discrimination made under the Minnesota Human Rights Act.
- Process starts by contacting MDHR (phone, mail, email, or in-person).
- If complaint falls under the MHRA, MDHR will file a “charge” of discrimination.
 - Will notify the opposing party of the charge.
- MDHR may contact the parties to see if they will enter into voluntary mediation.
- If no voluntary mediation, MDHR will then conduct a neutral investigation of the charge.
 - Investigation will include interviewing parties and witnesses, gathering documents, etc.

MDHR Charges (Cont.)

- After investigation, MDHR will make a “probable cause” determination.
- If MDHR concludes that there is probable cause that discrimination occurred, then “Conciliation” process begins.
 - If no probable cause – then case is closed (unless appeal is filed).
- Conciliation Process – Attorney General’s Office will attempt to get parties to settle dispute.
- If no conciliation, the Attorney General may represent a party in court.

QUESTIONS?

