

**The Americans with Disabilities Act:
What the Legal Research Reveals About
Trends and Unanticipated Applications
of the Law**

**State of the Science
Conference on the ADA
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Barry C. Taylor
Equip for Equality**

Overview – Webinar Content



- Since the ADA was passed in 1990, there have been numerous court cases that have not only impacted the litigants of the case, but had a profound impact on the development of case law and policy under the ADA.
- Today, we will focus on several major ADA cases that will reveal:
 - ADA trends established by legal precedent
 - Unexpected applications of the ADA

Top ADA Case

Sutton v. United Airlines – narrowing the definition of disability



Definition of Disability under the ADA

The term "disability" means

- (A) a physical or mental impairment that substantially limits one or more of the major life activities;
- (B) a record of such an impairment; or
- (C) being regarded as having such impairment.

42 U.S.C. §§ 12102(2), 12112(B)(4); 29 C.F.R. § 1630.2(g)

- Congress adopted definition of disability from Rehabilitation Act
- Supreme Court previously declared the definition of disability to be “broad”, *School Bd. of Nassau County, v. Arline*, 480 U.S. 273, 285 (1987)

Courts interpret ADA definition of disability narrowly

Sutton v. United Airlines, 527 U.S. 421 (1999)

Facts: Twin women sued under ADA after United refused to hire them as pilots because of their inadequate vision. United then claimed they were not covered by the ADA because they were not substantially limited in a major life activity when they wore their glasses.

Issue: Are mitigating measures taken into account when assessing disability?

Supreme Court: Effects of corrective measures must be taken into account when determining if plaintiff has an ADA disability.

Sutton v. United Airlines, **527 U.S. 421 (1999) (cont'd)**

Impact: Hundreds of ADA cases were dismissed because the plaintiff deemed to not have a disability when the mitigating measure was taken into account.

Catch 22: Forces people with disabilities to choose between enforcing their civil rights and addressing the manifestations of their disabilities.

EEOC/DOJ Disregarded: Court refuses to give deference to regulations on this issue.

The Supreme Court further narrows the definition of disability

Toyota v. Williams, 534 U.S. 184 (2002)

Facts: Woman with carpal tunnel syndrome who was denied accommodation and ultimately terminated sued under the ADA.

Supreme Court: Plaintiff did not have an ADA disability because she was not substantially limited in performing manual tasks that are “central to most people’s daily lives.” Definition of disability is to be “interpreted strictly” to create a “demanding standard.”

Impact: Further narrowed who is considered to have an ADA disability

Lower Court Decisions Finding No ADA Disability

People with the following impairments have been found not to have an ADA disability:

- **Intellectual Disability** – *Littleton v. Wal-Mart Stores, Inc.*, (11th Cir. 2007)
- **Epilepsy** – *Todd v. Academy Corp.*, (S.D. Tex. 1999)
- **Diabetes** – *Orr v. Wal-Mart Stores, Inc.*, (8th Cir. 2002)
- **Bipolar Disorder** – *Johnson v. North Carolina Dep't of Health and Human Services*, (M.D.N.C. 2006)
- **Multiple Sclerosis** – *Sorensen v. University of Utah Hosp.*, (10th Cir. 1999)
- **Hearing Impairment** – *Eckhaus v. Consolidated Rail Corp.*, (D.N.J. 2003)
- **Back Injury** – *Wood v. Crown Redi-Mix, Inc.*, (8th Cir. 2003)

Lower Court Decisions Finding No ADA Disability

People with the following impairments have been found not to have an ADA disability:

- **Vision in Only One Eye** – *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999)
- **Post-Traumatic Stress Disorder** – *Rohan v. Networks Presentations LLC*, (4th Cir. 2004)
- **Heart Disease** – *Epstein v. Calvin-Miller Intern., Inc.*, (S.D.N.Y. 2000)
- **Depression** – *McMullin v. Ashcroft*, (D. Wyo. 2004)
- **HIV Infection** – *Cruz Carrillo v. AMR Eagle, Inc.*, (D.P.R. 2001)
- **Asthma** – *Tangires v. Johns Hopkins Hosp.*, (D. Md. 2000)
- **Cancer** – *Burnett v. LFW, Inc.*, 472 F.3d 471 (7th Cir. 2006)

Congress to the rescue!

- To remedy the problems arising from the narrow court decisions, Congress passed the ADA Amendments Act (ADAAA) on September 30, 2008

The purposes of the ADA Amendments Act are to:

- Reject the reasoning in the *Sutton & Toyota* cases;
- Convey that Congress intended that a primary focus in ADA cases is whether entities covered by the ADA have complied with their obligations; and
- Convey that whether a person's impairment is an ADA disability should not demand extensive analysis.

ADAAA Regulations: Impairments that easily should be found to be substantially limiting

- Deafness
- Blindness
- Mobility impairments requiring use of wheelchair
- Intellectual disability
- Partially or completely missing limbs
- Autism
- Cancer
- Cerebral palsy
- Diabetes
- Epilepsy
- HIV infection
- Multiple sclerosis
- Muscular dystrophy
- Major depressive disorder
- Bipolar disorder
- Post-traumatic stress disorder
- Obsessive-compulsive disorder
- Schizophrenia

Episodic Conditions and Those In Remission are Covered

ADAAA & EEOC Regulations: Impairments that are episodic or in remission are disabilities if they substantially limit a major life activity when active.

Appendix for EEOC Regulations: Includes a non-exclusive list of impairments that may be episodic: “epilepsy, hypertension, diabetes, asthma, multiple sclerosis, cancer, and psychiatric disabilities such as major depressive disorder, bipolar disorder, schizophrenia, and post-traumatic stress disorder.”

42 U.S.C. § 12102(4)(D); 29 C.F.R. § 1630.2(j)(1)(vii);
29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vii)

ADAAA and Major Life Activities

Definition of actual disability ADA (and ADAAA):

- ❖ Physical or mental impairment that substantially limits one or more **major life activities**

No definition of “major life activities” in the text of the original ADA and no examples.

ADAAA: Gives examples of major life activities and also makes clear that the term major life activity also includes the operation of the numerous major bodily functions

42 U.S.C. § 12102(2)(B), as amended.

ADAAA and Major Life Activities

A non-exhaustive list of major life activities:

caring for oneself

performing manual tasks

seeing

hearing

eating

sleeping

learning

concentrating & thinking

walking & standing

reading

lifting

bending

speaking

breathing

communicating

working

ADAAA and EEOC Regulations

Major Bodily Functions

New ADAAA Category: Major Bodily Functions

In ADAAA

immune system
normal cell growth
digestive
bowel
bladder
reproductive functions

neurological
brain
respiratory
circulatory
endocrine

Added in EEOC Regs

special sense organs & skin
genitourinary
cardiovascular
hemic
lymphatic
musculoskeletal
individual organ operation

Lists are not exhaustive - no negative implication by omission

Litigation Applying the ADAAA

***Gogos v. AMS Mechanical Systems, Inc.*, 737 F.3d 1170 (7th Cir. 2013)**

- Plaintiff worked as a pipe welder for 45 years
- Had high blood pressure for over 8 years, controlled by meds
- For a short period of time, his blood pressure spiked to “very high” and he experienced intermittent vision loss
- Supervisor granted request to leave work to seek immediate medical treatment because his eye was red
- Plaintiff told the general foreman that he was going to the hospital because his “health [ha]s not been very good lately”
- Foreman fired Plaintiff on the spot

Litigation Applying the ADAAA

- District court = Dismissed case
 - ❖ Found disabilities to be “transitory” and “suspect”
 - ❖ Not covered under ADA
- Appellate court = Found for Plaintiff
 - ❖ **One of the first appellate court decisions substantively applying the ADAAA**
- Analysis (Applied numerous provisions of the ADAAA):
 - ❖ **Episodic conditions:** Even if Plaintiff’s blood pressure spike and vision loss are episodic, can be disabilities
 - ❖ Noted that EEOC lists hypertension as an example of an impairment that may be episodic

Litigation Applying the ADAAA

- **Short Term Impairments:** Even if Plaintiff's blood pressure spike and vision loss are short-term, can be disabilities
 - ❖ Appendix to EEOC regs: "The fact that the periods during which an episodic impairment is active and substantially limits a major life activity may be brief or occur infrequently is no longer relevant to determining whether the impairment substantially limits a major life activity."
- **Major Bodily Function:** Blood pressure spike and intermittent blindness substantially limit two major life activities, eyesight and circulatory function
 - Court easily accepts concept of major bodily function

Litigation Applying the ADAAA

- **Mitigating Measure:** Plaintiff's chronic blood-pressure condition could also qualify as a disability
 - ❖ Must disregard ameliorative effects of mitigating measures, such as medication
 - ❖ Cited Appendix to EEOC regs, which includes language directly "on point" regarding an individual who takes medication for hypertension and who would have substantial limitations to cardiovascular and circulatory system without medication

Top ADA Case

Chevron USA v. Echazabal – extending direct threat defense to “threat to self”



ADA Supreme Court Case: Direct Threat to Oneself

Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73 (2002)

- **Facts:** Person with Hepatitis C was not hired as he was considered a danger to himself.
 - ❖ Liver condition may be exacerbated by exposure to toxins at work.
 - ❖ ADA statute only listed “danger to others” as a defense. [42 USC § 12111\(3\)](#)
 - ❖ EEOC Title I regulations listed “danger to self.” [29 C.F.R. §1630.2\(r\)](#)
- **Holding:** EEOC Regulations upheld – direct threat includes threat to self.
- **Implication:** Ruling may result in paternalistic conjecture by employers, which could undercut personal empowerment for people with disabilities.

Echazabal Applied – Taylor v. Rice



Taylor v. Rice, 451 F.3d 898 (D.C. Cir. 2006)

- Plaintiff's application to be an officer with the Foreign Service was rejected due to HIV status.
 - ❖ State Department policy prohibited hiring of people with HIV for these positions.
 - ❖ Asserted they may need medical treatment that is not available in less-developed countries where they might be stationed.
- **Trial Court** - Relying on *Echazabal*, the trial court held plaintiff would potentially be a direct threat to himself in such a situation.
- **D.C. Circuit Court reversed**
 - ❖ Reasonable accommodations may reduce the alleged direct threat so there was no substantial risk of significant harm to his health.

Top ADA Case

Cleveland v. Policy Management Systems Corp. – interplay between being “qualified” under the ADA and statements about inability to work as a condition of receiving other benefits.



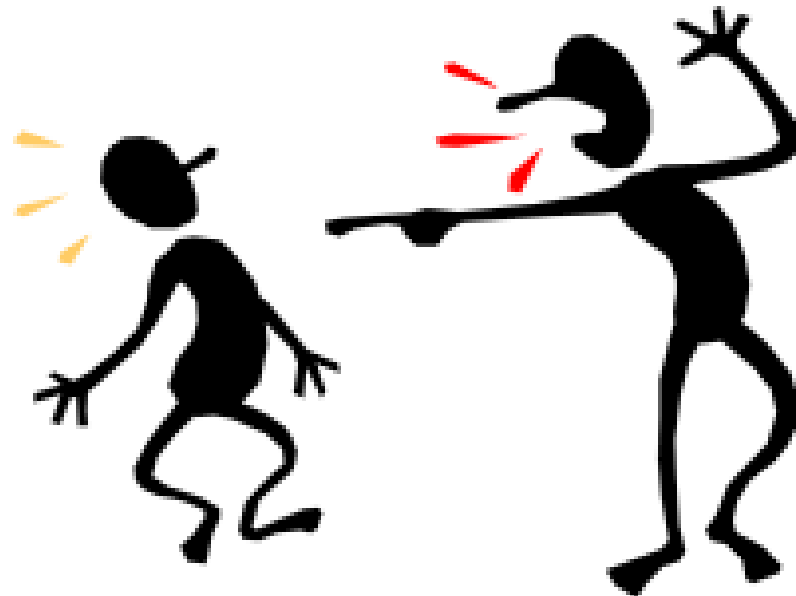
ADA Supreme Court Case: “Qualified” & Receipt of Benefits

Cleveland v. Policy Management Systems Corp.,
526 U.S. 795 (1999)

- An SS Beneficiary asserted an ADA Claim
- **Employer** – not qualified under ADA because of statement to Social Security of unable to work – judicially estopped
- **Supreme Court:** People who are disabled under Social Security rules may pursue ADA claims.
- **Basis of the Decision:**
 - ❖ ADA considers Reasonable Accommodations
 - ❖ Differing Analyses (e.g. SSA has listed disabilities)
 - ❖ SSA work incentive rules anticipate working
 - ❖ People’s conditions may change over time
 - ❖ Alternative pleading is allowable

Top ADA Case

Fox v. General Motors Corp – disability harassment is actionable under the ADA



Disability Harassment and the ADA

Fox v. General Motors Corp.

247 F.3d 169 (4th Cir. 2001)

- **Facts:**
 - Fox sustained back injury and had light-duty work restrictions.
 - Foreman and other employees verbally abused Fox.
- **Court:** Disability harassment is actionable under the ADA, under the same theory of hostile work environment under Title VII.
- **Jury Verdict:**
 - Harassment was severe and pervasive
 - Significant damages
 - \$200,000 in compensatory damages, \$3,000 for medical expenses, \$4,000 for lost overtime

Disability Harassment and the ADA

5 Factors in Disability Harassment Claims:

1. Plaintiff is a qualified individual with a disability
2. Plaintiff was subjected to unwelcome harassment
3. The harassment was based on plaintiff's disability
4. The harassment was sufficiently severe or pervasive to alter a term, condition, or privilege of employment, and
5. Some factual basis exists to impute liability for the harassment to the employer (i.e. the employer knew or should have known of the harassment and failed to take prompt, remedial action)

Post-Fox Disability Harassment

- Courts have uniformly found ADA covers disability harassment. Many have taken strict view on whether harassment was severe or pervasive. For more case analysis, see legal brief at: http://www.ada-audio.org/Archives/ADALegal/Materials/FY2012/September_2012_Legal_Brief.pdf

Top ADA Case

Olmstead v. L.C. – unjustified institutionalization is discrimination under the ADA.



ADA Supreme Court Case: Community Integration



Elaine Wilson (right) and Lois Curtis were kept in a hospital against doctors' advice.

Olmstead v. L.C., 527 U.S. 581 (1999)

Facts:

- ❖ Two women with MI/DD wanted to move from state hospital to community – state agreed they were ready
- ❖ Placement was never changed and they filed suit alleging the State's failure to provide community services violated the ADA integration mandate

Holding:

- ❖ Unwarranted institutionalization of people with disabilities is a form of discrimination under ADA

Olmstead Factors



- **Community integration requirements:**
 - ❖ Treatment officials find community is appropriate
 - ❖ Person does not oppose placement in the community
 - ❖ Placement can be reasonably accommodated taking into account State resources & needs of other pwds
- **State can meet its ADA obligations if it has a:**
 - ❖ ***comprehensive, effectively working plan*** for evaluating/placing pwds in less restrictive settings;
 - ❖ ***waiting list that moves at a reasonable pace*** not controlled by the State's efforts to keep its institutions fully populated.

Olmstead applied to private institutions

- Although *Olmstead* involved state-operated institution, courts have applied the case to privately owned facilities that receive state funding
 - ***Disability Advocates Inc. v. Patterson***, 653 F.Supp.2d 184 (E.D.N.Y. 2009) – Adult Homes for people with MI
 - ***Ligas v. Hamos***, 2006 WL 644474 (N.D. Ill. Mar. 7, 2006) – Intermediate Care Facilities for people with DD
 - ***Williams v. Quinn***, 2006 WL 3332844 (7th Cir. Nov. 13, 2006) – Institutions for Mental Diseases
 - ***Colbert v. Quinn***, 2008 WL 4442597 (N.D. Ill. Sept. 29, 2008) – Traditional nursing homes in Cook County



Olmstead applied to people at risk of institutionalization

Fisher v. Oklahoma Healthcare Auth.,
335 F.3d 1175 (10th Cir. 2003)

- State limited prescription drugs for community programs, but not for nursing home residents.
- Plaintiffs claimed ADA violation because medication limits placed them at risk of institutionalization.
- **Court:** Integration mandate's protections not limited to those currently institutionalized, but also those who may “stand imperiled with segregation” because of state policy.

Olmstead applied to budget cuts



V.L. v. Wagner, 669 F.Supp.2d 1106 (N.D. Cal. 2009)

- California proposed reducing or terminating in-home support services for elderly and people with disabilities
- Plaintiffs filed suit to prevent service cuts
- **Argument:** Violation of ADA because cuts would place plaintiffs at risk of institutionalization
- **Court:** Budget cuts could violate the ADA's integration mandate
- Preliminary injunction granted which prevents budget cuts from taking place while litigation is pending

Olmstead applied to employment



Lane v. Kitzhaber, 841 F. Supp. 2d 1199 (D. Ore. 2012)

- Class action by people segregated in sheltered workshops
- **Court:** Title II's integration mandate applies to the provision of employment-related services
- Settlement reached that will provide opportunities for integrated employment -

www.ada.gov/olmstead/olmstead_cases_list2.htm#lane

U.S. v. Rhode Island – 1:14-cv-00175 – (D.R.I. 2014)

- DOJ entered into agreement with RI to move from a system that relies on segregated employment settings to a system where integrated competitive employment is the first option.

http://www.ada.gov/olmstead/olmstead_cases_list2.htm#ri-state

Top ADA Case

Brooklyn Center for Independence

v. Bloomberg –

emergency

preparedness is

covered by the ADA

Preparing for Disaster
for People with
Disabilities and other
Special Needs



FEMA



Together, we can save a life





Emergency Preparedness

Brooklyn Center for Independence v. Bloomberg

980 F.Supp.2d 588 (S.D.N.Y. 2013)

- Alleged that NYC failed to plan for the needs of people with disabilities in large scale disasters
- November 2013: Court opinion finding that NYC violated ADA with inadequate emergency preparedness plan
 - ❖ First opinion, post-trial, finding that a gov't's emergency preparedness violated the ADA and Rehab Act
- NYC's emergency plans for residents: "Impressive"
- NYC's system for people with disabilities: "Benign neglect"
 - ❖ No system for mass evac of pwds from high-rise bldgs
 - ❖ Lacks reliable and effective communication systems



Brooklyn Center for Independence: Emergency Preparedness

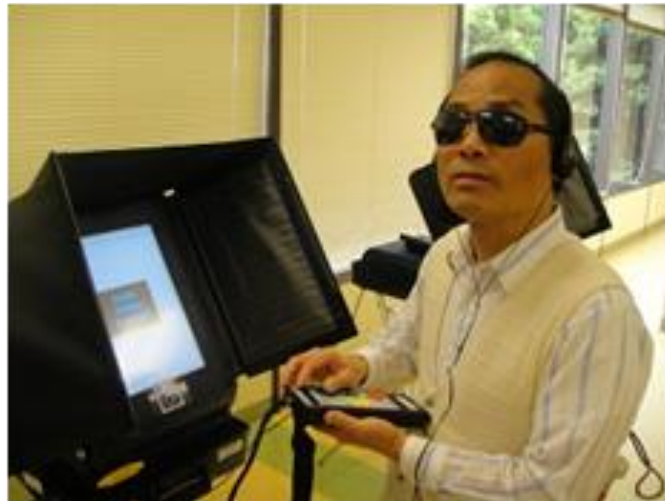
- Add'l violations of the ADA/Rehab Act:
 - ❖ Unaware which emergency shelters are accessible, and tells pwds that needs will not be met at shelters
 - ❖ No protocol to address needs of pwds in power outages
 - ❖ Relies on largely inaccessible public transit for evacuations
- Instead of ordering specific remedy, the Court:
 - ❖ Directed parties to confer with one another and with DOJ
 - ❖ If parties cannot reach an agreement, Court will impose remedies, and possibly have a second trial on this issue
- **DOJ's statement of interest:** www.ada.gov/brooklyn-cil-brief.doc

Settlement Agreement Approved 2015

- City to hire a **Disability and Access and Functional Needs Coordinator** – lead EE responsible for overseeing plans
- **Disability Community Advisory Panel** – provide feedback on a regular basis regarding City’s plans/proposed revisions
- By Aug 2017, City to create a **Post-Emergency Canvassing Operation** - survey households after a disaster to assess/identify needs of pwd by going door-to-door and send resource requests (including food, water, electricity, med care, med equipment)
- By Sept 2017, City will have at least 60 shelters that are physically and programmatically accessible
- Develop accessible transportation plans during emergencies
- **NYC/ADA High Rise Building Evacuation Task Force** to create a work plan, which will be implemented in next 3 years

Top ADA Case

California Council of the Blind v. County of Alameda - ADA provides right for people with disabilities to vote privately and independently



Right to Vote Privately and Independently



California Council of the Blind v. Cty. of Alameda 985 F.Supp.2d 1229 (N.D. Cal. 2013)

- **Issue:** Do voters have a right to vote privately/independently? Can county comply with ADA by having third-parties assist?
- **Court:** ADA/Rehab Act protections include “meaningful access” to private and independent voting
 - ❖ One of the “central features” and “benefits” of voting is “voting privately and independently”
 - ❖ Voters should be given equal opportunity
 - ❖ Relying on 3rd parties creates an inferior voting experience
 - ❖ To be effective, auxiliary aids and services must be provided in a way to protect the “privacy and independence” of the individual with a disability

Voting: Physical Access



Disabled in Action v. Bd. of Elections in the City of NY 752 F.3d 189 (2d. Cir. 2014)

- **Plaintiffs:** Failure to provide accessible polling places (80% of polling places had a least on barrier)
- **City had argued:** No alternative facilities exist
- **Dist. Ct:** NYC violated ADA/504; Must implement remedial plan
- **2nd Circuit:** Affirmed - City failed to provide “meaningful access.” Cites DOJ - Inaccessibility of existing facilities is not an excuse, but rather, a circumstance that requires a public entity to take reasonable active steps to ensure compliance with its obligations under Section 504 and Title II.

Top ADA Case

Nat'l Ass'n of the Deaf v. Netflix, Inc.

- ADA accessibility requirements extend to internet-based businesses.

The Netflix logo, consisting of the word "NETFLIX" in white, bold, sans-serif capital letters with a black drop shadow, centered on a solid red rectangular background.

NETFLIX



Background: Does the ADA Apply to Websites?

- Title III applies to public accommodations (12 categories)
- **Statute:** No mention of websites/Internet
- **Courts:** Differing opinions over the past 20 years
 - ❖ No physical nexus is required. *Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Association of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994) (non-website case)
 - ❖ Website with a nexus to a physical place of public accommodation must be made accessible. *Rendon v. Valleycrest Productions, Ltd.*, 294 F.3d 1279 (11th Cir. 2002) (non-website case)
 - ❖ ADA applies to the goods and services “of” a place of public accommodation rather than only the goods and services provided “at” or “in” a place of public accommodation. *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F.Supp.2d 946 (N.D. Cal. 2006)

ADA and Internet-Only Businesses



Nat'l Ass'n of the Deaf, et al, v. Netflix, Inc.

869 F. Supp. 2d 196 (D. Mass. 2012)

- Plaintiffs asserted that Netflix's "Watch Instantly" streamed content without providing closed captioning in violation of Title III of the ADA
- **Netflix:** No physical space, so not place of public accommodation
- **DOJ:** filed a statement of interest, included a number of strong statements:
 - ❖ Netflix is subject to ADA, even if it has no physical structure
 - ❖ Fact that the regulatory process is not complete does not support any inference that web-based services are not already covered by the ADA
 - ❖ DOJ has long interpreted Title III to apply to web services

www.ada.gov/briefs/netflix_SOI.pdf

Netflix Litigation

Court denied Netflix's motion to dismiss

- Relied on 1st Circuit's decision in *Carparts*, which held that “‘places of public accommodation’ are not limited to ‘actual physical structures’”
- Examples were not intended to be exhaustive, and that the ADA was intended to adapt to changes in technology
- Netflix “falls within at least one, if not more, of the enumerated ADA categories,” identifying “service establishment,” “place of exhibition or entertainment,” and “rental establishment”

Netflix Consent Decree



Parties settled after court's decision

- Netflix agreed to provide captioning for 100% of its content by 2014

Press Release: <http://dredf.org/captioning/netflix-press-release-10-10-12.pdf>

Consent Decree: <http://dredf.org/captioning/netflix-consent-decree-10-10-12.pdf>

- But see, *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017 (N.D. Cal. 2012)
 - ❖ Recognized conflicting opinion about *Netflix* in MA, but “must adhere to Ninth Circuit precedent” which defined “place of public accommodation” to be a physical place

Website Access



- DOJ is expected to issue a Notice of Proposed Rulemaking (“NPRM”) soon
- DOJ has stated that the NPRM will propose the scope of the obligation and propose the technical standards necessary to comply with the ADA.
- Legal Brief on Website Access Issues:
www.equipforequality.org/wp-content/uploads/2014/11/Websites-and-the-ADA-Accessibility-in-the-Digital-Age-Final-Brief.pdf



ADA Resources



- **ADA National Network** - www.adata.org
- **Job Accommodation Network** - www.jan.wvu.edu
- **Equal Employment Opportunity Commission**
www.eeoc.gov/laws/types/disability.cfm
- **Department of Justice** – www.ada.gov
- **Equip for Equality** – www.equipforequality.org

**The Americans with Disabilities Act:
What the Legal Research Reveals About
Trends and Unanticipated Applications
of the Law**

QUESTIONS?