Disabilities Discrimination Under the Americans with Disabilities Act

Thomas P. Murphy
DISABILITIES DISCRIMINATION UNDER THE AMERICANS WITH DISABILITIES ACT

THOMAS P. MURPHY*

INTRODUCTION

The Americans with Disabilities Act (the "ADA") prohibits employment discrimination against qualified individuals with certain disabilities. While there are a number of important distinctions allowed to religious organizations, the ADA does not expressly exempt such entities from its provisions.

Under the ADA, a religious organization can give preference to individuals within that organization and can require employees to adhere to

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* The author is a partner in the McLean, Virginia and Washington, D.C., offices of Reed Smith Shaw & McClay, where he specializes in representing management in labor and employment law matters. Mr. Murphy received his undergraduate degree in industrial management from Clarkson College of Technology and his law degree from Vermont Law School. He also served four years as an officer in the United States Navy. Prior to entering private practice, Mr. Murphy was an Assistant United States Attorney for the District of Columbia. In 1985, he was the recipient of a Department of Justice Special Achievement Award. Mr. Murphy is a member of the National Association of Manufacturers' Labor Law Advisory Committee, the Chair of the Employer-Employee Relations Committee of the Arlington Chamber of Commerce and the Hearing Committee of the District of Columbia Bar's Board on Professional Responsibility, and the Co-Chair of the Labor Section of the Prince George's County Bar Association.

2 See id. §§ 12101(b)(1), 12112(a).
3 See id. § 12111(5)(B). Subsection 12111(5)(B) lists entities that are exempt from the Americans with Disabilities Act (the "ADA"). Id. However, religious organizations are not included in this list.
4 Id. § 12113(c)(1).

[A]ssume that a Mormon organization wishes to hire only Mormons to perform certain jobs. If a person with a disability applies for the job, but is not a Mormon, the organization can refuse to hire him or her. However, if two Mormons apply for a job, one with a disability and one without a disability, the organiza-
its religious tenets. Another distinction afforded to religious employers derives from the legislative history of Title I of the ADA ("Title I"), which encourages, to the extent possible, adherence to what is known as the "minister exception" to Title VII of the Civil Rights Act of 1964 ("Title VII"). Title VII generally prohibits discrimination on the basis of race, sex, or national origin. Following the "minister exception," however, courts have consistently refused to apply Title VII to the employment relationship between a minister and his congregation. Therefore, an employment decision by a congregation with respect to the hiring, firing, promotion, or transfer of its ministers is not reviewable under Title VII. For instance, a minister cannot bring an action against his congregation claiming a disparity in pay on the basis of gender. Thus, as the legislative history indicates, this doctrine also applies to disability discrimination under Title I of the ADA.

Nevertheless, there are several employment relationships created by many of the Church's activities, including child care, education, and nursing homes, that could become the subject of an action under the ADA. This discussion addresses the ADA generally, and as it relates to religious organizations. Part I describes the scope of Title I of the ADA. Part II reviews the types of employment relationships that could fall under the provisions of Title I. Part II discusses precautionary measures.


5 42 U.S.C. § 12113(c)(2) (Supp. V 1993). For example, a parochial school can insist that teachers adhere to a particular curriculum, adhere to certain religious tenets, and conform their life style and teaching style to those religious tenets. The school can take disciplinary action against the employee even if the employee suffers from a disability or claims that, for some reason, a disability would interfere with adhering to those tenets.

6 H.R. Rep. No. 485 (II), supra note 4, at 76-77, reprinted in 1990 U.S.C.C.A.N. at 359. Because title I of this legislation incorporates by reference the definition of the term "employer" and "employee" used in title VII of the Civil Rights Act of 1964 and because of the similarity between the "religious preference" provisions in title VII and the ADA, it is the Committee's intent that title I of the ADA be interpreted in a manner consistent with title VII of the Civil Rights Act of 1964 as it applies to the employment relationship between a religious organization and those who minister on its behalf.


8 Id.

9 See id. § 2000(e)(1). Courts have consistently interpreted Title VII to exempt a minister/congregation relationship. See, e.g., EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980) (stating "[o]nly the relationship between a church and its minister is exempt from coverage of this subchapter"); McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir.) (holding Congress did not intend ... to regulate the employment relationship between church and minister), cert. denied, 409 U.S. 896 (1972).
an employer can take during its hiring process to handle potentially disabled employees without violating the provisions of Title I. Part IV addresses certain litigation techniques that attorneys dealing with ADA claims should be aware of. Finally, Part V reviews the provisions of Title III of the ADA ("Title III") that regulate commercial facilities and places of public accommodation.

I. Scope of Title I of the ADA

A. Employers Subject to Regulation by the ADA

The applicability of the ADA is determined, in part, by the number of employees in an organization or entity. From July 26, 1992 to July 26, 1994, any employer engaged in an industry affecting commerce that had twenty-five or more employees was subject to the ADA. After July 26, 1994, the threshold requirement was changed to fifteen or more employees.

B. Remedies Available

Employers should be particularly aware of the remedies available under Title I of the ADA. Unlike other provisions of the ADA, Title I provides for a jury trial. In addition, Title I offers various forms of equitable relief. If, for instance, an employee brings an action against an employer seeking some type of reasonable accommodation on the job, the court can order the accommodation requested. If an applicant was illegally denied a position based on a disability, the court can order that the person be hired. If a person was demoted or denied a transfer or promotion, equitable or affirmative relief can be ordered by the court.

Also, both front pay and back pay are available under the ADA. As with Title VII of the Civil Rights Act of 1964 and the Age Discrimina-

11 Id.
12 Id.
15 Id.
16 Id.
17 Id.
18 See H.R. Rep. No. 485(II), 101st Cong., 2d Sess., at 48, reprinted in 1990 U.S.C.C.A.N. 445, 471 (1990). When settling an ADA case or a Title VII case with a claimant to pay compensatory damages, taxes are not deducted. If the settlement includes backpay, taxes must be withheld. Employers' attorneys will, therefore, want the entire settlement amount characterized as disputed compensatory damages. The settlement agreement should expressly state that the settlement represents disputed compensatory damages and the par-
tion in Employment Act, front pay is awarded when the court determines that reinstatement of a terminated employee is not appropriate. This may occur in a case where there is too much hostility between the employee and the employer, or where other circumstances indicate that equitable relief is not appropriate. In such cases, the court can order not only back pay, which the employee would be entitled to retroactively to the date of the court’s judgment, but also front pay. As the term implies, front pay is the court’s determination of the present value of the expected wages and benefits the employee would have earned had he or she not been discriminated against. This exercise involves expert testimony regarding the present value computation, which, fortunately, is not treated as a jury issue in most circuits. Thus, inflammatory evidence will not be put to a jury by an economist regarding damages suffered by an employer’s alleged discriminatory acts. Instead, this evidence is heard by the court; in most circuits, only after the court has determined that discrimination occurred and that equitable remedies are not appropriate.

It is also important for religious organizations to be aware of remedial changes under the Civil Rights Act of 1991, which amended Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the ADA. In addition to giving employers the right to a jury trial for any claims arising under Title I of the ADA after November 21, 1991, the Civil Rights Act of 1991 grants the right to compensatory and

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20 See EEOC v. Prudential Fed. Sav. & Loan Assoc., 763 F.2d 1166 (10th Cir.), cert. denied, 474 U.S. 946 (1985). “The power to grant equitable relief provided in the [Age Discrimination in Employment Act] clearly stands in addition to the monetary relief available . . . and is expressly stated to be without limitation.” Id. at 1172.
21 See id. “Reinstatement may not be appropriate . . . when the employer has exhibited such extreme hostility that, as a practical matter, a productive and amicable working relationship would be impossible.” Id.
22 See id. “[A]n award of future damages in lieu of reinstatement furthers the remedial purpose of the [Age Discrimination in Employment Act] by assuring that the aggrieved party is returned as nearly as possible to the economic situation he would have enjoyed but for the defendant’s illegal conduct.” Id. at 1173. See also Blim v. Western Electric Co., 731 F.2d 1473, 1479 (10th Cir.), cert. denied sub nom. AT&T Technologies v. Blim, 469 U.S. 874 (1984).
23 See Koyen v. Consolidated Edison Co., 560 F. Supp. 1161, 1168-69 (1983). Courts take into account “the availability of employment opportunities, the period within which one, by reasonable efforts may be re-employed, the employee’s work and life expectancy, the discount tables to determine the present value of future damages and other factors that are pertinent.” Id. at 1169.
24 Id.
25 Id.
punitive damages, though it caps such damages on a sliding scale based on the size of a company or organization. The caps for compensatory and punitive damages are as follows: for a company with 15 to 100 employees, $50,000, with 100 to 200 employees, $100,000, with 200 to 500 employees, $200,000, and with 500 or more employees, $300,000.

While these caps are an effective means of limiting potential liability of religious organizations, they can sometimes be circumvented. Plaintiffs' lawyers will tack common law tort or contract claims to the ADA lawsuit. Because these common law tort claims are not subject to damage caps, the jury will hear damages evidence they otherwise would not be entitled to hear under the ADA. One of the common law tort theories invoked over the last two years in the context of disability cases is "intentional infliction of emotional distress," particularly with long-term employees who believe they can establish that their employer was acting insensitively. If they can prove they were ridiculed because of their disability, and that it caused them great emotional upset, they may have a tort claim.

"Interference with contractual relations" is another common law tort claim that is often tacked on to an ADA case. Other tort claims asserted include "wrongful discharge," and "whistle-blower" exceptions to a state's at-will doctrine. Regardless of whether any of these claims are meritorious, or whether they could even survive a motion to dismiss for failure to state a claim, these are the types of variances an attorney must watch for when defending a claim under Title I of the ADA.

An attorney must also be mindful of the provisions of applicable state disability law. Prior to the passage of the ADA, many states had "little ADAs." These acts basically provided the same protection that the

27 Id. § 1981a(b)(3).
28 Id.
29 Id. § 1981a(b)(3)(A).
30 Id. § 1981a(b)(3)(B).
32 Id. § 1981a(b)(3)(D).
37 See, e.g., Patterson, 866 F. Supp. 1379.
ADA now provides. In Washington, D.C., for instance, the liberal provisions of the District of Columbia Human Rights Act\(^{38}\) make it much easier to win compensatory and punitive damages. As a result, in many of the ADA lawsuits in the District of Columbia, a state claim will be appended.\(^{39}\) Additionally, there are often local codes or ordinances to protect the disabled. For example, in northern Virginia, in addition to the ADA and Virginia Human Rights Act,\(^{40}\) some localities, such as the City of Alexandria or Arlington County, have a city code or county ordinance that prohibits discrimination in employment by entities doing business in the locality.

Another way the plaintiff’s lawyer will try to get around the damages cap is by asserting, under the ADA, the “single employer” doctrine of Title VII.\(^{41}\) Assume, for instance, a jurisdiction where each parish is incorporated. An aggrieved person may hesitate to sue only the parish for an alleged discriminatory act by the parish if damages would be limited because the parish has a small number of employees. The plaintiff may then attempt to name the diocese as a defendant in the action and claim that, even though the diocese is a separate corporation from the parish, the diocese and the parish are considered a single employer under most labor law statutes, including the National Labor Relations Act or Title VII.

If the plaintiff or employee can prove a commonality between the two entities in terms of management and control, then the court will disregard these separate entities and find that they are, in fact, a single employer for labor law purposes, much like the principle of piercing the corporate veil. A principal factor the court may consider is the amount of control the bishop or diocese exercises over the school.\(^{42}\) Most parishes are constantly struggling with the diocese for control of their schools and activities. If the parish and diocese are deemed a single employer, the plaintiff may be permitted to name the bishop or diocese as an additional party to increase the damages cap. This same principal would be effective with regard to the application of the law in the first instance.

As indicated, the larger the number of employees, the higher the cap imposed on damages. The legislative history of the ADA provides some guidance by referring to Title VII of the Civil Rights Act of 1964 and the

\[^{38}\text{D.C. CODE ANN. § 1-2501 (1981).}\]


\[^{40}\text{VA. CODE ANN. § 2.1-342 (Michie 1985).}\]


\[^{42}\text{See Armbruster, 711 F.2d at 1338 (noting “control” is factor in “single employer doctrine”).}\]
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case law developed under that statute for determining who is an "employee." To meet the threshold of employees, case law under Title VII says that both part-time and full-time employees are considered. Many organizations use part-time employees to avoid health insurance coverage and other obligations. Also, since the employer must count the number of employees on the payroll, those people on disability leave or workers compensation, if technically on the payroll, should also be included. As a practical matter, once the fifteen employee threshold came into effect, this issue became of lesser concern, except for some smaller parishes.

II. PROVISIONS OF TITLE I OF THE ADA

The fundamental basis of Title I is that it prohibits discrimination against an individual with a disability who is otherwise qualified to perform the essential function of a job with reasonable accommodation. Several of the terms of this portion of Title I have left courts and the Equal Employment Opportunity Commission (the "EEOC") struggling for proper definition of such terms, including "qualified individual," "disability," "essential function of a job," and "reasonable accommodation." Likewise, these terms and issues cause difficulty in advising clients when they are confronted with various cases of employees claiming to have disabilities and a need for some reasonable accommodation.

A. "Disability"

Many employers have struggled with the definition of the term "disability" because the statute does not offer much guidance in this area. Generally, the confusion is not over maladies of a long-term nature; rather, the struggle is over injuries or illnesses that are of a short-term

44 See supra notes 11 & 12.
46 Id.
47 Id.
48 See supra note 12.
50 See id. § 12102(2). Disabled individuals are broadly defined as individuals who have: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) are regarded as having such an impairment." Id.
A practical concern for potential defendants is the ease with which plaintiffs can establish the existence of a "disability." It is impractical to dispute whether an employee really has a "disability," since the test for what constitutes a "disability" is so vague and general. The applicable statutory definition provides that a "disability" "is a physical or mental impairment that substantially limits one or more of the major life activities."\(^{52}\)

EEOC regulations list broad examples of what constitutes a "major life activity," including walking, standing, pushing, lifting, reading, and working.\(^{53}\) In most instances, it will be easy for an employee to find a physician willing to give an opinion that an employee is suffering from a physical or mental impairment that limits one or more of their major life activities: "This patient should not stand for periods beyond ten minutes without resting for twenty." "This patient should not work or leave bed for a three-day period." These types of notes are common in an employment setting.

A private sector or religious employer is not likely to successfully argue to the jury that the plaintiff is not disabled. Other ADA factors tend to be more amenable to an employer's arguments. For instance, an employee may ask for accommodations which are unreasonable or would impose an undue hardship on the organization. However, if an employer does argue that the employee does not have a "disability," the best time to do so is on a motion for summary judgment.

Another interpretive issue is whether short-term conditions, such as broken limbs, a pulled back from a weekend softball game, or a twisted ankle are disabilities within the meaning of the ADA. It is unclear when or whether an employer must provide some type of reasonable accommodation\(^{54}\) for an employee with a short-term condition. To assist employers in complying with the ADA, the EEOC has published the *Technical Assistance Manual for the Americans with Disabilities Act* (the "EEOC Manual").\(^{55}\) The EEOC Manual is written in plain language, and at-
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tempts to answer an employer's most common questions regarding the ADA. By using specific examples and offering suggestions, it provides straightforward, practical guidance for ADA compliance.

The EEOC Manual states that temporary, nonchronic impairments "that do not last for a long time and that have little or no long term impact usually are not disabilities." It cites as examples: broken limbs, sprains, concussions, appendicitis, common colds, and influenza, suggesting these would not be considered disabilities. This is beneficial to employers, eliminating the need to revamp sick leave and short-term disability policies or to reassign job responsibilities based on short-term disability.

The EEOC uses the word "usually" because, in another example, it provides that if a broken leg takes significantly longer to heal than a normal healing period, and, during this period, the individual cannot walk, the condition would be considered a "disability." Generally, temporary, non-chronic impairments are not entitled to protection under the ADA. If, however, the healing process takes significantly longer than normal, or some unusual complication sets in, even a temporary impairment may be considered a "disability."

Although "disability" is broadly defined in the ADA, the definition was not intended to encompass all physical characteristics or common personality traits. The legislative history of the ADA provides several examples of disabilities including cerebral palsy, epilepsy, muscular dystrophy, tuberculosis, mental retardation, cancer, emotional or mental illness, multiple sclerosis, HIV, heart disease, and diabetes.

regulation, and it is unclear how much weight courts will give to it. Those interested in obtaining a copy of the manual can contact any one of ten federally-funded regional centers that are providing ADA-related information and consultation. A uniform nationwide telephone number, (800) 949-4232, is available for ordering the manual or any other ADA-related materials.

The ADA regulations note that even a temporary condition, if severe enough, can qualify as a disability. 29 C.F.R. § 1630.2(j)(2)(ii) (1994).

The regulations point out that physical characteristics, such as eye and hair color, left-handedness, height, weight, or muscle tone within a normal range, and not the result of a physiological disorder, are not disabilities. 29 C.F.R. § 1630.2(h) (1994). In addition, environmental, cultural, and economic conditions, such as being poor or having a prison record, do not qualify as disabilities. H.R. Rep. No. 485(II), supra note 4, at 51-52, reprinted in 1990 U.S.C.C.A.N. 333-34. Some members of Congress were concerned by the broadness of the disability definition and expressly excluded certain conditions from the definition of "disability." The act expressly excludes, homosexuality, bisexuality, transvestism, trangenderism, pedophilia, exhibitionism, voyeurism, gender identity disorders, or other sexual disorders. 42 U.S.C. § 12211(b)(1) (Supp. V 1993). The ADA also excludes "compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from the current use of drugs" from the definition of disability. Id. § 12211(b)(2)-(3).
The ADA has a specific section dealing with drug and alcohol abuse. The ADA clearly states that an individual who is currently using illegal drugs is not a "qualified individual with a disability," and is not protected by the ADA. The term "currently" does not require the employer to prove the individual illegally used drugs at the time of the action. The act is intended to deny protection to an individual whose illegal use of drugs has "occurred recently enough to justify a reasonable belief" that the person's drug use is current. However, an individual who has completed a drug rehabilitation program and is not currently engaged in the illegal use of drugs is considered an individual with a "disability" under the ADA. If a former drug addict has been released from a rehabilitation program, and is otherwise qualified to perform all essential functions of a job with reasonable accommodation, an employer cannot discriminate against that individual. For example, in a parochial school setting, assume a reformed drug addict applying for a teaching position is otherwise qualified to perform all the essential functions of the teaching job, with reasonable accommodation. The diocese or school board may, as a reasonable accommodation, have to allow the individual to leave at noon every day to go to a methadone clinic, to come in a little later than other teachers, or maybe to leave a little earlier because he tires easily during the first six months after rehabilitation. Only by demonstrating that this type of accommodation is "unreasonable" and would work an undue hardship on the school can the school

61 Id. § 12114(a).
62 29 C.F.R. § 1630.3 (1994).
64 42 U.S.C. §§ 12111(b), 12112(a) (Supp. V 1993). Because a rehabilitated drug user is considered a "qualified individual with a disability," the ADA prohibits discrimination against him in all areas of "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." Id. at § 12112(a).
65 Id. § 12112(b)(5)A). The act expressly provides that "discrimination" includes "not making reasonable accommodations." Id. Among the many terms included in "reasonable accommodation" are "part-time or modified work schedules." Id. at § 12111(9)(B). Courts have often required accommodations for disabled individuals who need medical treatment that interferes with normal work schedules. See, e.g., Fisher v. Superior Ct., 177 Cal. App. 3d 779 (1986) (noting reasonable accommodation includes accommodating medical appointments during regular working hours). For a discussion of the criteria for a reasonable accommodation, see Elliot M. Shaller, "Reasonable Accommodation" Under the Americans with Disability Act, 16 EMPL. REL. L.J. 431 (1991); Rosalie K. Murphy, Reasonable Accommodation and Employment Discrimination Under Title I of the Americans with Disabilities Act, 64 S. Cal. L. Rev. 1607 (1991).
defend not providing the accommodation.\textsuperscript{66} Alcoholism is treated differently from drug use under the ADA. Unlike the current use of illegal drugs,\textsuperscript{67} the current use of alcohol does not automatically disqualify a person from being considered an individual with a "disability." Under the ADA, an alcoholic is considered an individual with a "disability" and is entitled to protection.\textsuperscript{68} As long as an alcoholic is otherwise qualified, an employer has to provide reasonable accommodation to that individual. This does not mean an employer has to tolerate an alcoholic who is impaired on the job. The ADA expressly allows an employment policy that prohibits being under the influence of alcohol at the work place.\textsuperscript{69} Since the ADA permits an employer to hold an alcoholic to the same standards and rules as other employees, an employer may discipline the alcoholic if the alcohol use results in constant lateness, poor attendance, or otherwise interferes with job performance.\textsuperscript{70} However, if an individual's alcoholism does not interfere with job performance, as an alcoholic, the individual may be protected against discrimination under the ADA.\textsuperscript{71}

Another interpretive issue arising out of the ADA is the expansion of the type of people protected as disabled. The ADA extends protection not only to individuals who have a disability, but to individuals who have a record of a disability.\textsuperscript{72} An example of this is an individual who has a record of a heart condition, mental illness, or cancer.\textsuperscript{73} Employees who

\textsuperscript{66} 42 U.S.C. § 12112(b)(5)(A) (Supp. V 1993). If the accommodation is unduly costly, extensive, disruptive, or will fundamentally alter the nature of a program, it will not be required. H.R. Rep. No. 485(II), supra note 4, at 67, reprinted in 1990 U.S.C.C.A.N. at 349. The ADA defines "undue hardship" as an action requiring "significant difficulty or expense" when viewed in light of four factors:

(i) the nature and cost of the accommodation needed . . . ; (ii) the overall financial resources of the facility or facilities involved; the number of persons employed; the effect on resources; or the impact of such accommodation on the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of its business; the number of employees; the number, type, and location of its facilities; and (iv) the types of operations of the covered entity; its composition and structure; its geographic separateness, administrative or financial relationship to the facility in question.

\textsuperscript{67} See supra note 61.


\textsuperscript{69} See id. § 12114(c)(1).

\textsuperscript{70} Id. § 12114(c)(4).

\textsuperscript{71} Id. §§ 12111(8), 12112(a).

\textsuperscript{72} Id. § 12102(2)(B).

\textsuperscript{73} 29 C.F.R. § 1630.2(k) (1994). A person is considered to have a "record" of disabilities if he or she has a physical or mental impairment which at one time substantially limited a major life activity, but is no longer so limited. \textit{Id.}
can establish that an employer has denied them certain promotions, job assignments, or transfers because of a record of disability are entitled to ADA protection, despite not being currently disabled.\footnote{42 U.S.C. \S 12102(2)(B) (Supp. V 1993). See H.R. Rep. No. 485(II), supra note 4, at 52, reprinted in 1990 U.S.C.C.A.N. at 334.}

The ADA also extends disability protection to people who are \textit{regarded} as disabled, but who are not necessarily disabled.\footnote{42 U.S.C. \S 12102(2)(C) (Supp. V 1993). For example, if a person has a condition that is not substantially limiting, like acne, but is treated by their employer as being limited, that satisfies the "regarded as" test. 29 C.F.R. \S 1630.2(1) (1994).} If an employer mistakenly believes an employee has a substantially limiting impairment, and discriminates against that individual, the ADA protects that employee.\footnote{42 U.S.C. \S 12102(2)(C); 29 C.F.R. \S 1630.2(1).} For example, consider an employee with the HIV virus. A person in the early stages of AIDS may not be disabled as that word is defined by Title I, but may be isolated because the employer fears a negative reaction from customers and other employees. The employee with HIV may be denied certain job opportunities because of a stereotype that the employer has with respect to the contagiousness of the employee's condition. Though the employee may not technically be disabled, and may be fully fit and able to perform all essential functions of a job, if that employee is treated or regarded as disabled, he can seek protection under the ADA.\footnote{H.R. Rep. No. 485(II), supra note 4, at 53, reprinted in 1990 U.S.C.C.A.N. at 335; 29 C.F.R. \S 1630.2(1). The regulation specifically cites discrimination problems associated with persons infected with HIV. \textit{Id.} See School Board of Nassau County v. Arline, 480 U.S. 273 (1987). In \textit{Arline}, the United States Supreme Court explained that impairments which do not substantially limit a person's functioning may nevertheless substantially limit that person's ability to work as a result of the negative reactions of others. \textit{Id.} at 283.}

Discrimination protection also extends to individuals who are \textit{associated} with someone disabled.\footnote{42 U.S.C. \S 12112(b)(4) (Supp. V 1993). Discrimination under the ADA includes, "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." \textit{Id.}} If an employer discriminates against an individual because that person's spouse or significant other is disabled, that individual may have a claim against the employer under the ADA.\footnote{\textit{Id.}} Again, this type of claim has commonly been asserted in the context of the HIV virus. For instance, employees may claim they are being discriminated against by their coworkers or supervisors by the type of job tasks or job locations assigned because they live or associate with a person that is in the late stages of AIDS.\footnote{\textit{Id.}}
It should be clear that an employer who terminates or otherwise discriminates against an employee because the employer mistakenly believed that the employee was disabled still violates the ADA if it turns out that the employee was not actually disabled. Recently, the EEOC filed its first lawsuit in Chicago.\textsuperscript{81} This case involved an executive who told his employer he had terminal brain cancer.\textsuperscript{82} Though the employee could still perform his job function, the employer terminated him immediately,\textsuperscript{83} believing that he was disabled and unable to perform job functions.\textsuperscript{84} The illness, however, was being treated, and was in remission by the time the case was in front of the jury.\textsuperscript{85} The employee had a claim, even though he was not technically disabled, because the employer made a mistake by regarding him as disabled and terminating him. As a result, the jury awarded the employee compensatory and punitive damages totalling $222,000.\textsuperscript{86}

B. "Reasonable Accommodation"

1. Persons Entitled to "Reasonable Accommodation"

An additional consideration with respect to these three new categories of people who are considered disabled under Title I, and who were not previously protected as disabled under the Rehabilitation Act or state and local laws, arises in the situation of a person who resides or associates with a disabled person.\textsuperscript{87} It is clear that reasonable accommodation may be required when employing an otherwise qualified person with a disability.\textsuperscript{88} However, must an employer reasonably accommodate an employee who is associated with a disabled person? Assume, for example, a teacher in a parish tells her employer that her son, who has cerebral palsy, is undergoing intensive physical therapy and a series of surgeries. In order to facilitate the treatment, she needs to arrive late every day because the hospital only has morning physical therapy. In addition, the teacher makes a request to leave early over the next several

\textsuperscript{82} The factual arguments of both parties was not described in the final opinion. For an early ruling on a summary judgment that includes a complete statement of the facts, see EEOC v. AIC Sec. Investigations, Ltd., 820 F. Supp. 1060 (N.D. Ill. 1993).
\textsuperscript{83} 820 F. Supp. at 1060.
\textsuperscript{84} Id. at 1064.
\textsuperscript{85} Id. at 1063-64.
\textsuperscript{86} AIC Sec. Investigations, Ltd., 823 F. Supp. at 581.
\textsuperscript{87} See supra note 79.
weeks. Under an ADA analysis, the considerations are: (1) the employee is known to be associated with someone that is disabled, and (2) the ADA provides that an employer cannot discriminate against an otherwise qualified individual based on their association with someone that is disabled. A close reading of the statute, however, indicates whether the employer's duty to provide reasonable accommodation for the employee extend this far.

Although reasonable accommodations are generally required unless they present an undue hardship, the statute specifically applies only to otherwise disabled individuals who are also the "applicant or employee." Therefore, reasonable accommodations are required only if the applicant or employee is disabled. While the statute provides that a person cannot be discriminated against on the basis of their being associated with a disabled person, it solely prohibits discrimination as far as terms and conditions of employment. Thus, the statute does not impose an affirmative obligation upon the employer to provide reasonable accommodation to an employee based upon their association with a disabled person.

2. "Reasonable Accommodation" Defined

Many interpretive problems arise in determining a "reasonable accommodation." The EEOC has given some guidance in this area. While the ADA does not define the term, it offers some illustrations of what may be considered "reasonable." Remember, however, that the jury is

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89 Id. § 12112(b)(4).
90 Id. § 12112(a).
91 Id. § 12112(b)(5)(A).
92 Id. Subsection 12112(b)(5)(A) provides:
Discrimination includes — not making reasonable accommodation to the known physical or mental limitation of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operator of the business of such covered entity;
Id. (emphasis added).
94 Id. § 12112(a).
95 The legislative history of the ADA notes that an employer may discipline or discharge an employee who violates a neutral attendance policy, even if the absences are required to care for a disabled spouse. H.R. REP. No. 485(II), supra note 4, at 61, reprinted in 1990 U.S.C.C.A.N. at 344. Unlike the employer's obligation towards a disabled employee, an employer has no duty to provide reasonable accommodation to non-disabled employees. Id. at 61-62, reprinted in 1990 U.S.C.C.A.N. at 344; 29 C.F.R. § 1630.8 (1994).
96 42 U.S.C. § 12111(9) (Supp. V 1993). The list includes job restructuring, part-time or modified work schedules, reassignments, acquisition or modification of examination, training materials or policies, and qualified readers or interpreters. Id.
ultimately going to decide whether an accommodation is "reasonable," unless the accommodation is more personal than job related. The EEOC provides a number of factors to consider in determining the "reasonableness" of an accommodation. These fall into three basic categories. The first category is the cost to the employer. An employee may want his desk raised so that his wheelchair can slide under it. This may entail either buying a desk that can be raised at a cost of $200 to $300, or mechanically raising the existing desk so the employee can slide his wheelchair underneath. It is estimated that eighty-nine percent of all accommodations will cost less than $1,000. However, an employee who is a quadriplegic may need a special computer that works on voice command, which may cost $5,000 or $6,000. If that employee holds a data processor job or some type of data input job for which he is paid $12,000 or $13,000 a year, such an accommodation may cause the business to suffer undue hardship. However, even if the cost of the accommodation exceeds the employee's salary, the employer may not automatically refuse the accommodation on this basis alone. The employer must offer to pay a portion of the cost that does not amount to an undue hardship if an agency or the employee is willing to pay the remainder.

The second category is the overall financial resources of the employer. Again, the "single employer" issue for determining who the employer is becomes important. For instance, the employer could be the school for whom that staff member works, the parish as a whole, or the diocese. The EEOC directs that the financial resources of the site

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98 29 C.F.R. § 1630.9 (1994). Reasonable accommodations must specifically assist the individual in performing their particular job, but not necessarily assist the individual in his daily activities. Id.; see Shaller, supra note 65, at 432-42.
99 42 U.S.C. § 12111(10)(B) (Supp. V 1993). Basically, the test of "reasonableness" concerns whether providing the accommodation will cause the employer to suffer undue hardship. Id. § 12112(b)(5)(A). Undue hardship is determined by examining several factors, including: the nature and cost of the accommodation; the financial resources of the facility and the covered entity; the number of employees; and the geographical administrator or fiscal relationship between the facility and the covered entity. Id. § 12111(10)(B); 29 C.F.R. § 1630.15(d) (1994).
102 The regulations expressly reject any defense to accommodate based on a comparison of the cost of an accommodation and the salary of the accommodated individual. 29 C.F.R. § 1630.15(d) (1994).
103 Id. § 1630.2(p).
105 See supra notes 41 & 42 and accompanying text.
106 See supra note 42 and accompanying text.
where the individual works be examined or, if there are numerous sites, that the financial resources of the larger entity be looked at.\textsuperscript{107} Where the employing entity is a subsidiary of a parent company, the EEOC directs examination of the resources available to the parent company.\textsuperscript{108} Even where an employer has set up distinctive corporate entities to separate and insulate the parent company from liability and responsibility for employment-related expenses, under the single employer doctrine, those separate entities might be considered as one in determining undue hardship issues.\textsuperscript{109}

Also, generally, employers do not want a jury in a public hearing to be confronted with evidence of its financial resources to determine whether an accommodation is "reasonable." From a litigation standpoint, if an employer denies an employee's requested accommodation on the ground that it costs too much, the employer should know that its financial resources are fair game at trial.

The last factor is the size of the entity and number of persons it employs. Large employers, in particular, will have a difficult task demonstrating that any accommodation is an undue hardship.\textsuperscript{110}

In general, the guidelines for determining a "reasonable accommodation" are vague. The intent of Congress was that the determination be made on a case-by-case basis.\textsuperscript{111} Similarly, the EEOC suggests that an analysis of a "reasonable accommodation" is "best determined by a flexible, interactive process."\textsuperscript{112} The determination becomes fact intensive, based on the type of accommodation that the employee needs as balanced against the resources of the company. It should be noted that there are very few published ADA decisions on this issue, and the few available have not provided practical guidance. Employers should be mindful of these issues when taking discipline against an employee. At that early stage, the attorney should discuss with the employer which issues the employer is likely to succeed with before a jury.

\textsuperscript{107} 42 U.S.C. § 12111(10)(B). A factor to be considered in this analysis is whether the facility is financially independent from the other sites or a parent company. If financial independence exists, an examination into that facilities' resources alone may be considered. 29 C.F.R. § 1630.2(p) (1994).
\textsuperscript{108} 29 C.F.R. § 1630.2(p); 42 U.S.C. § 12111(10)(B).
\textsuperscript{109} H.R. REP. No. 485(II), supra note 4, at 40-41, reprinted in 1990 U.S.C.C.A.N. at 463-64. Congress noted that both the resources of the local facility and the parent company will be relevant to the undue hardship determination. \textit{Id}.
\textsuperscript{111} See supra note 97.
\textsuperscript{112} 29 C.F.R. § 1630.9 (1994).
III. Hiring Procedures

Another issue of concern with the ADA is the use of medical examinations for employment. The act clearly prohibits pre-employment medical examinations.\textsuperscript{113} Parishes and schools that previously ordered physicals as a means of screening out workers compensation risks cannot do so anymore. Post-offer employment physical examinations are allowed if not discriminatory.\textsuperscript{114} As a general rule, questions on job applications or inquiries made during interviews regarding physical limitations are prohibited by the ADA.\textsuperscript{115} Similarly, an employer cannot ask potential employees on job applications or during the interview process whether they suffer from any disability.\textsuperscript{116} Asking applicants to list illnesses or injuries that they have is prohibited, even if asked only from a safety standpoint.\textsuperscript{117}

After an applicant is hired, if the employer believes there is something the school nurse or front office should know about an employee, that information can be solicited separately and must be maintained separate from the personnel file.\textsuperscript{118} For example, inquiring whether the new employee has any allergies, in the event there could be some medical emergency, would be permissible if the employee's response was kept separate from the employment records.

The EEOC Manual contains recommendations for an approach to asking questions regarding the applicant's medical status.\textsuperscript{119} Although some disabilities are not obvious upon sight, the employer need not be left guessing whether the interviewee has any physical conditions that may limit his ability to perform essential functions of the job. The EEOC guidelines allow the employer to take a written job description that lists the essential functions of the job, hand it to the applicant during either the application or interview process, and ask the applicant whether he or she can perform the job either with or without accommodation.\textsuperscript{120} That is the full extent to which an employer can make this type of inquiry.

\begin{itemize}
\item \textsuperscript{113} 42 U.S.C. § 12112(d)(2)(A) (Supp. V 1993). Pre-employment medical examinations of job applicants are prohibited by the ADA. \textit{Id.} However, certain agility tests that are not considered medical tests may be given at any time, as long as all applicants are tested. 29 C.F.R. § 1630.14(a).
\item \textsuperscript{114} 42 U.S.C. § 12112(d)(3) (Supp. V 1993). Once an offer is extended, an employer may conduct a medical examination or ask health related questions as long as all offerees are required to do so. \textit{Id.}
\item \textsuperscript{115} Id. § 12112(d)(1).
\item \textsuperscript{116} Id. § 12112(d)(2)(A).
\item \textsuperscript{117} EEOC Manual, supra note 55, at § 5.5(b).
\item \textsuperscript{118} 42 U.S.C. § 12112(d)(3)(B) (Supp. V 1993). The information in the files would only be released if necessary for treatment, to provide accommodation, or for a government investigation. \textit{Id.}
\item \textsuperscript{119} EEOC Manual, supra note 55, at § 5.5.
\item \textsuperscript{120} Id. at § 5.5; 29 C.F.R. § 1630.14(a) (1994); 42 U.S.C. § 12112(d)(4)(B) (Supp. V 1993).
\end{itemize}
However, if the applicant responds that he or she could perform the job, but only with accommodation, the employer may follow up to determine how the applicant would do the job and the type of accommodation that would be required. But, again, if the applicant simply answers "no," the questioning must stop there. The employer is protected from most claims because the ADA only requires reasonable accommodation of known disabilities.\textsuperscript{121} It is, therefore, essential for employers to have some process in place to demonstrate to the EEOC or a jury that they attempted to solicit from the employee information regarding any accommodation they may require. If the employee does not disclose the need for accommodation, the employer is not at fault and cannot be later accused of discriminating against that employee.\textsuperscript{122}

IV. Litigation Techniques

Attorneys defending an employer against an ADA Title I lawsuit should keep in mind three basic but important points, and should remember that an ADA lawsuit is essentially similar to a civil rights case.\textsuperscript{123} The first point to examine in a lawsuit under Title I is whether the employee exhausted administrative remedies.\textsuperscript{124} Unlike other titles of the ADA,\textsuperscript{125} Title I requires that an employee file an administrative charge of discrimination with the EEOC before going into federal court.\textsuperscript{126} The employee can file a suit only after the EEOC has issued that person a right-to-sue letter.\textsuperscript{127}

The second important point, as has been illustrated in age discrimination and Title VII cases, is to scrutinize the timeliness of the claim. Under Title I of the ADA, an employee has 180 days within which to file a disability claim with EEOC.\textsuperscript{128} By contrast, in a state such as Virginia which has a Fair Employment Practices Agency that is empowered to

\textsuperscript{121} 42 U.S.C. § 12112(b)(5)(A) (Supp. V 1993). Reasonable accommodation is only required if the physical or mental limitation is known to the employer. \textit{Id.}

\textsuperscript{122} Id.


\textsuperscript{124} Id. § 12117(a). By express reference, the ADA incorporates the enforcement provision of Title VII of the Civil Rights Act of 1964. Id. Under Title VII, a claimant needs a right-to-sue letter to bring suit in federal court. Id. § 2000e-5(f)(1). The claimant must have originally notified the EEOC of the discriminatory act within 180 days of its occurrence. Id. The EEOC has the choice of settling the claim, initiating a lawsuit, dropping the matter, or issuing a right-to-sue letter. Id.

\textsuperscript{125} Id. § 12133. Claims under the ADA prohibiting discrimination in public services do not require the exhaustion of administrative remedies. \textit{Id.; see} Noland v. Wheatley, 835 F. Supp. 476, 482 (N.D. Ind. 1993) (noting claim under Title II of ADA does not require exhaustion of administrative remedies).


\textsuperscript{127} Id.

\textsuperscript{128} Id. §§ 12117(a), 2000e-5(e).
investigate violations of disabilities laws, the employee has 300 days within which to file a discrimination claim.\textsuperscript{129} Employers should not overlook the timeliness defense where applicable. Some plaintiff's attorneys think that 180 days is equal to 6 months, which is not the same since some months have more than 30 days. Although this may seem like an insignificant, procedural technicality, the law in all the federal circuits is that 180 days \textit{means} 180 days, and if the claim is filed on the 181st day, the court is denied subject matter jurisdiction.\textsuperscript{130} The same principle applies with the 300 day filing requirement in states with fair practice employment agencies. Similarly, with respect to right-to-sue letters,\textsuperscript{131} once the EEOC completes its administrative investigation and gives an employee a right-to-sue letter, the employee has 90 days within which to file suit.\textsuperscript{132} It is important for attorneys to be aware of these specific time limitations as these lawsuits arise.

The time period within which to file a claim with the EEOC begins on the date of the actual discriminatory act—the date the employee was informed he or she was fired, denied a promotion, or demoted.\textsuperscript{133} The 90 days within which to file suit in federal court starts running the day that the employee receives the right-to-sue letter from the EEOC.\textsuperscript{134}

The third point to remember is to compare the claims in the lawsuit against the claims in the administrative charge that was filed with the EEOC. If an employee makes allegations in a lawsuit that were not

\textsuperscript{129} See 29 C.F.R. § 1601.13(a)(4)(ii) (1994). The state's agency must have subject matter jurisdiction over the charges of discrimination for the extended timeliness provision to apply. \textit{Id.}


\textsuperscript{131} See 29 C.F.R. § 1601.28(b)(1) (1994).

Where the Commission has found reasonable cause to believe that Title VII or the ADA has been violated, has been unable to obtain voluntary compliance with Title VII or the ADA and where the Commission has decided not to bring a civil action against the respondent, it will issue a notice of right to sue on the charge as described in § 1601.28(e) to: [the aggrieved party].

\textsuperscript{132} See \textit{id.} § 1601.28(e)(1). "The notice of authorization of right to sue shall include: (1) authorization to the aggrieved person to bring a civil action under . . . the ADA . . . within 90 days of receipt of such authorization." \textit{Id.}

\textsuperscript{133} See \textit{id.} § 1601.13(a)(1). "Such charges are timely filed if received by the Commission within 180 days from the date of the alleged violation." \textit{Id.}

\textsuperscript{134} The EEOC sends the right-to-sue letter by certified mail and gets a green card that the employee signs upon receipt. This is often the source of side litigations because, many times, the employee's family member signed for receipt, leading to a factual dispute as to when the employee got notice and when the 90 days started running.
raised before the EEOC in an administrative charge of discrimination, those allegations should be stricken by the court. This situation commonly arises when parties are added to a lawsuit. For example, assume a teacher who was fired files a disability complaint against St. Peter's parish with the EEOC. The charge is investigated and the EEOC finds probable cause. Assume further that the teacher retains counsel and files suit against St. Peter's parish, naming either the diocese or the Bishop individually as parties. The parish's first technical argument is that, since the teacher did not name the diocese or Bishop in the charge of discrimination before the EEOC, the teacher did not exhaust the administrative remedies available with respect to the diocese or the Bishop. This is a valid defense and one that the employer's attorney should raise vigorously.

Moreover, employers charged with violating Title I of the ADA should be warned against responding without counsel. The employer may have responded to EEOC charges before and obtained a "no probable cause" determination. This is dangerous because the EEOC's written determination is admissible at trial in federal court. If an employee is successful in obtaining a "probable cause" determination, this evidence can be very compelling to a jury, despite the fact that the employee must still prove a valid case.

V. TITLE III OF THE ADA: PUBLIC ACCOMMODATIONS AND COMMERCIAL FACILITIES

Title III contains provisions of the ADA covering public accommodations and commercial facilities. This provision of the ADA received a

135 See id. § 1601.21(a). "A determination finding reasonable cause is based on, and limited to, evidence obtained in the Commission and does not reflect any judgment on the merits of allegations not addressed in the determination." Id.

136 See 42 U.S.C. § 12117(a) (Supp. V 1993) (noting that remedies and procedures available under ADA are identical to procedures of 42 U.S.C. § 2000(e)-4 to (e)-9; see also Kent v. Director, Missouri Dept of Elementary and Secondary Educ. and Div. of Vocational Rehabilitation, 792 F. Supp. 59 (E.D. Mo. 1992) (dismissing without prejudice plaintiff who did not comply with requirements of Title VII).

137 See 29 C.F.R. § 1601.19 (1994). "Where the Commission completes its investigation of a charge and finds that there is not reasonable cause to believe that an unlawful employment practice has occurred or is occurring as to all issues addressed in the determination, the Commission shall issue a letter of determination to all the parties to the charge indicating the finding." Id.

138 Fed. R. Evid. 402 (admitting "[all relevant evidence"); Fed. R. Evid. 803(8) (excluding public reports from exclusion by hearsay rule).

139 See 42 U.S.C. §§ 12181-12189 (Supp. V 1993); see also id. § 12181(2). Subsection 12181(2) defines "commercial facility" as "facilities — (A) that are intended for non-residential use; and (B) whose operations will effect commerce" and "public accommodation" as "[specific enumerated examples]." Id.
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splash of publicity by requiring restaurants, hotels, shopping centers, and professional offices to make their facilities accessible to the disabled.\textsuperscript{140} Title III treats public accommodations differently than commercial facilities. Commercial facilities are basically anything that is not a public accommodation and is nonresidential in nature, including office buildings, factories, and warehouses.\textsuperscript{141} Although both must adhere to regulations pertaining to new construction and alteration,\textsuperscript{142} only public accommodation facilities are subject to Title III's provisions addressing the removal of existing barriers.\textsuperscript{143}

A. Application to Religious Organizations

Before addressing the nuances of Title III's main provisions, it should be noted that an exemption for religious organizations is provided for in section 307 of Title III of the ADA.\textsuperscript{144} Based on the list of public accommodations covered by the ADA, it would appear that many of the entities run by the Catholic Church, such as day care centers, schools, and nursing homes, would be covered as public accommodations.\textsuperscript{145}

The general rule, however, is that the provisions do not apply to religious entities. Section 307 states: "The provisions of this Title shall not apply to . . . religious organizations or entities controlled by religious organizations . . . ."\textsuperscript{146} This section thus provides two exceptions: (1) religious organizations, and (2) entities controlled by religious organizations.\textsuperscript{147} Unfortunately, there is no case law to guide practitioners in the construction and application of the exceptions. For instance, the section 307 exemption for "entities controlled by religious organizations"\textsuperscript{148} does not clarify whether the entities controlled by religious organizations must be "religious" entities.

To illustrate the potential issues raised by this language, assume a parishioner leaves a will devising a gas station to the Church. A gas station, at first glance, is a place of public accommodation otherwise covered by Title III of the ADA; however, if the gas station is controlled by a religious organization, it is arguably exempt from Title III's coverage

\textsuperscript{140} See Peter A. Susser, The ADA: Dramatically Expanded Federal Rights for Disabled Americans, 16 EMPL. REL. L.J. 157, 169 (noting significant implications of Title III of ADA).
\textsuperscript{142} See id. § 12183.
\textsuperscript{143} See id. § 12182.
\textsuperscript{144} Id. § 12187 (exempting private clubs and religious organizations).
\textsuperscript{145} Entities such as day care centers, schools, nursing homes, office buildings, and rectories would normally fit under the statute's definitions of "public accommodation" and "commercial facility."
\textsuperscript{147} See id.
\textsuperscript{148} See id.
under a literal reading of section 307. Although this argument is likely to be unsuccessful, in its regulations, the Department of Justice takes a position that the religious exemption should be interpreted broadly.

The regulations indicate that religious organizations are exempt even when the religious organization is carrying out activities that would otherwise make it a public accommodation. The regulation gives examples, including a religious organization that runs a day care center open to the public, a nursing home, and a diocesan school system. All of those entities, although not necessarily religious in nature, are exempt if they are “controlled” by a religious organization. This holds true even if the entity has lay people on its board. The Justice Department makes an important distinction when a religious organization leases a portion of its facility to an entity that it does not control. For instance, consider a day care center that leases space in the basement of a Church school and is not controlled in any way by the parish. The Justice Department considers that entity, not the Church, subject to Title III of the ADA.

B. Provisions of Title III

There are three main provisions of importance under Title III. First, there are the new construction requirements. The general rule is that all construction of new facilities built for initial occupancy after January 26, 1993 must be designed and constructed in full compliance with the ADA accessibility guidelines issued by the Department of Justice. The Department of Justice regulations contain pictures and dimensions of the size of bathroom stalls, heights of drinking fountains, width of

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149 In the same way that Title I of the ADA is administered by the EEOC, id. § 12117(a) (referring to incorporating enforcement procedures of 42 U.S.C. § 2000e-4 (1988)), Title III is administered by the Department of Justice. See 42 U.S.C. § 12188 (incorporating enforcement procedures of 42 U.S.C. § 2000a-3(a), which refers to enforcement by Attorney General).

Unlike Title I, however, there are no administrative remedies that must be sought in the Department of Justice. The aggrieved party can file a Title III suit in federal court right away. See 42 U.S.C. § 2000a-3(a) (1988).

Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2000a-2 of this title, a civil action for preventive relief including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies the case is of general public importance.

Id.

150 See 28 C.F.R. § 36.102(c) (1993).


152 Id. Discrimination is defined as including “a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990 that are readily accessible to and usable by individuals with disabilities.” Id. at § 12183(a)(1).
handicapped accessible parking spots, and length of curb parking. The design requirements are not discretionary. Designers and architects are generally familiar with these regulations and the requirements are clearly elaborated. Nevertheless, attorneys should be aware of the regulations in the unlikely event an architect fails to conform.

In contrast to new construction—which must comply strictly with the architectural guidelines and requirements—there are existing facilities that are inaccessible or that contain standing barriers to the disabled. The general rule for existing buildings is that, as of January 1992, all architectural and communication barriers must be removed from existing facilities where such removal is readily achievable. The guidelines given by the Department of Justice for determining whether the barrier removal is "readily achievable" are close to the EEOC guidelines discussed earlier for determining "reasonable accommodations." The first factor is the cost of removing the barriers; the second factor is the financial resources of the entity involved; and the third factor, unique to Title III, pertains to safety issues that may be involved. Realizing that most entities have limited financial resources, the Depart-

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154 See id. § 36.508(a).
155 See id. § 36.302(a).

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.

Id. See also id. § 36.304.

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.

Id.

156 See id. § 36.104.
157 See Susser, supra note 140, at 165 (reviewing EEOC guidelines).

Readily Achievable means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable factors to be considered include —

(1) The nature and cost of the action needed under this part;
(2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site.

Id.
ment of Justice has prioritized the steps for barrier removal. The first priority is providing access to the building. The second priority is providing access to goods and services available to the public. The third priority is providing access to public rest rooms.

Requirements for alterations to existing facilities, including remodeling, renovating, and structural modifications, are less flexible than new building construction, but more rigid than the removal of prioritized barriers. Normal maintenance tasks such as re-roofing, painting, and wallpapering are excluded. The general rule is that, when alterations to an existing facility are made, the altered portion must, to the maximum extent feasible, comply with the Department of Justice's architectural regulations.

Finally, there is what is known as a “path-of-travel obligation” under Title III of the ADA. When alterations are performed, a clear, accessible path must be created, if one does not already exist, between a primary area—an area primarily used within a facility such as a lobby of a bank, a secretary's desk, or the offices of attorneys—and bathrooms, drinking fountains, and telephones. The Department of Justice is—

159 See id. § 36.304(c) (listing priorities).
160 See id. § 36.304(c)(1).
161 See id. § 36.304(c)(2).
163 See id. § 36.402(a) (defining alterations).
164 See id. § 36.402(b)(1).
165 Id.
166 See id. § 36.402(a)(1).

(1) Any alteration to a place of public accommodation or a commercial facility, after January 26, 1992, shall be made so as to ensure that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. Id. § 36.403(b). A “primary function” is defined as "a major activity for which that facility is intended." Id. Examples given include the “customer services lobby of a bank, the dining area of a cafeteria, the meeting rooms in a conference center." Id. Areas excluded from this definition include “boiler rooms, storage rooms, employee lounges or locker rooms, janitorial closets, entrances, corridors, and restrooms.” Id.

168 Primary areas of a facility are referred to in the Department of Justice regulations as “an area of a facility that contains a primary function.” Id. § 36.403(b). An alteration that affects or could affect the usability of or access to an area of a facility that contains a primary function shall be made so as to ensure that, to the maximum extent feasible, the path of travel to the altered area and the restrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless the cost and scope of such alteration is disproportionate to the cost of the overall alteration.
sued cost guidelines which relieve a building when the cost of setting up a path of travel from the primary area exceeds twenty percent of the overall cost of the alteration. Assume, for example, that a building owner is renting half of one floor to "DJ's Ambulance Service." DJ’s subsequently moves out of the building. The owner decides to renovate the space in order to attract a law firm as a new tenant. The cost to alter that primary area is $10,000. Under the Department of Justice regulation, the owner would not have to spend more than $2,000 to do whatever it takes to insure a path of travel to the restrooms, telephones, and drinking fountains.

CONCLUSION

Precautionary planning and compliance with the guidelines of the ADA provisions discussed will ensure that religious organizations do not leave themselves unnecessarily exposed to adverse claims and remedies when dealing with employment relationships outside the ministry. As the Church keeps pace with modern-day practical requirements, such as incorporation, and provides services overlapping the commercial sphere while employing lay persons, it is incumbent upon the parishes and dioceses to be cognizant of the statutory environment that is being entered.

\[\text{Id.}\]

170 See id. § 36.403(f)(1) ("Alterations made to provide an accessible path of travel to the altered area will be deemed disproportionate to the overall alteration when the cost exceeds 20% of the cost of the alteration to the primary function area").

171 Id.