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*Work Incentive Support Center*

*Policy and Practice Brief:*

# Funding of Assistive Technology to Make Work a Reality, Part II

Using the Americans with Disabilities Act to Fund AT

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This is one of a series of articles written for benefits specialists employed by Benefits Planning, Assistance and Outreach projects and attorneys and advocates employed by Protection and Advocacy for Beneficiaries of Social Security programs. Materials contained within this policy brief have been reviewed for accuracy by the Social Security Administration (SSA), Office of Employment Support Programs and Cornell University’s Northeast ADA & IT Center. However, the thoughts and opinions expressed in these materials are those of the authors and do not necessarily reflect the viewpoints or official policy positions of the SSA. The information, materials and technical assistance are intended solely as information guidance and are neither a determination of legal rights or responsibilities, nor binding on any agency with implementation and/or administrative responsibilities.

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## I. Introduction

### A. The Purpose of this Article

This is a continuation of *Funding of Assistive Technology to Make Work a Reality* (Work and AT), Article # 3 in this Policy and Practice Brief Series.<sup>1</sup> As noted in the introduction to Work and AT, the availability of assistive technology (AT) can make a significant difference in the ability of an individual with a disability to work. Work and AT looked at several of the major funding sources of AT which may be needed to enable an individual with a disability to prepare for, travel to, or be successful in work: special education, vocational rehabilitation (VR), Medicaid, Medicare, and the Supplemental Security Income (SSI) program's Plan for Achieving Self Support (PASS).

This article will review the provisions of the Americans with Disabilities Act (ADA), with a particular emphasis on how the ADA can be used to ensure that a person with a disability has access to needed AT to do the job, or to ensure the AT user has access to the job site. Once again, we are writing this for a primary audience of individuals who work for either a Benefits Planning, Assistance and Outreach (BPA&O) project or a Protection and Advocacy for Beneficiaries of Social Security (PABSS) program, both of which are mandated to serve individuals with disabilities who receive either SSI or Social Security Disability Insurance (SSDI) benefits. We assume that this article will also be distributed to many SSI and SSDI beneficiaries, their families, and the agencies that serve them. Accordingly, this article will not be overly technical. However, it will review the major Supreme Court cases interpreting the ADA to date, in at least some detail. The reader interested in more specific, Circuit court decisions interpreting the ADA, is referred to the Neighborhood Legal Services website, for a summary, by Circuit, of many of these decisions.<sup>2</sup> Additional ADA-related resources and technical supports are available by region through the network of ADA & IT Centers.<sup>3</sup>

Conceptually, there are two most likely ways in which an individual with a disability may obtain AT through the ADA. First, a person with a disability may need AT to gain access to a covered entity's services. For example, a person using a wheelchair may need to have a restaurant install a ramp in order to enter the restaurant. Second, an individual with a disability may need AT as a "reasonable accommodation" to obtain equal enjoyment of a covered entity's services. For example, a hotel which provides telephones in its rooms for guests will need to have a telecommunication device for the deaf (TDD) available for an individual who is deaf and needs such a device to make telephone calls.

The respective roles of the BPA&O and PABSS advocates may differ with respect to ADA issues. For BPA&O advocates, the major role will be to identify the potential ADA issues and then make an appropriate referral if the beneficiary will need assistance to enforce the law. The PABSS agency may be one of the BPA&O referral sources and is authorized to enforce ADA-related protections through administrative appeals or court action if it will help the beneficiary overcome a barrier to work.

<sup>1</sup> This article is available at [www.ilr.cornell.edu/ped/PP\\_3.pdf](http://www.ilr.cornell.edu/ped/PP_3.pdf) or [www.ilr.cornell.edu/ped/dep/PP\\_3.txt](http://www.ilr.cornell.edu/ped/dep/PP_3.txt).

<sup>2</sup> See [www.nls.org/adacsest.htm](http://www.nls.org/adacsest.htm).

<sup>3</sup> See [www.adata.org](http://www.adata.org).

## B. Case Scenario to be Addressed in this Article

To give context for this article, we will continue the “Sharon” case scenario, which we developed in Work and AT (Policy & Practice Brief #3). For each of the titles of the ADA, we will do a general overview of the key provisions of that title, and then do an analysis of how the provisions will apply to Sharon.

### 1. Background on Sharon

In Work and AT, Sharon was 17 years old and attending her junior year in high school. She hoped to go to Cornell University in Ithaca, New York and attend the School of Industrial and Labor Relations, with the goal of some day becoming an attorney. As you may recall, Sharon has cerebral palsy, a diagnosis she has had since birth. She is now in her second year at the School of Industrial and Labor Relations at Cornell. Sharon presently uses the following AT: a power wheelchair, an augmentative and alternative communication (AAC) device, and a laptop computer with adapted keyboard and voice input software.

Through her school's placement office, Sharon has found a job at a local law firm in the adjacent City of Golden Dreams (a fictional metropolis). She will work 15 hours per week during the Spring semester and full time during the summer. The law firm specializes in asbestos litigation and Sharon's job is to conduct telephone interviews of clients and family members, using a standard questionnaire. She is to input this information onto the firm's computer database and, with secretarial support, prepare a draft complaint for one of the firm's lawyers.

### 2. Sharon's Problems

**Transportation to the law firm.** Sharon is living at home and commuting to Cornell. The state VR agency is paying to transport her to and from campus in a specially equipped van. Sharon plans to go to her part-time job directly from Cornell, using a university shuttle to take her to the appropriate bus stop for the City of Golden Dream's public transportation system.

The problem is that Golden Dreams is in the process of modernizing its fleet of buses, and at this time only two thirds of the buses are equipped with lifts to accommodate wheelchair users. Additionally, there are frequent problems with the lifts not working properly on the buses that are lift-equipped. As a result, based on prior experiences, Sharon has regularly had to wait for several buses to go by before one is able to accommodate her.

**Access to the building.** The law firm is located in a large office building holding the offices of several other law firms, a state agency and a number of non-profit agencies. The main entrance to the law firm's building has seven steps. It leads out to a large parking lot with adequate accessible parking for persons in wheelchairs.

The only accessible entrance, however, is in the rear of the building, next to a large garbage dumpster. To enter, Sharon must press a buzzer and wait for a person to come and open the door. When she enters the building, she must travel through an employee break room established for another tenant of the building (a branch office of the State Department of Labor). The law firm has said it would be happy to try to make other arrangements, including placing a ramp at the front of the building. Thus far the landlord has refused, saying it will be unsightly and too expensive.

**Access to the telephone.** A significant part of Sharon's job will be to use the telephone to interview clients and family members. Based on past experience, Sharon knows that the majority of clients and family members will have difficulty understanding her speech over the telephone. Based on an AT evaluation funded by her state's VR agency, Sharon believes the optimal solution would be the purchase of software for \$350 that would allow Sharon to go through the questionnaire, over the telephone, using a pre-programmed computer voice and optional prompts.

The VR agency says that it is the employer's obligation to buy this as an accommodation under the ADA. The employer has no problem with the \$350, but the software is not compatible with the older version of Windows on Sharon's assigned computer and also will not run off her laptop computer. The employer is not willing to spend the money to purchase a new desktop computer for her, particularly since Sharon is only a student intern and not a regular employee of the firm.

## II. Overview of The Americans with Disabilities Act

The ADA was modeled on section 504 of the Rehabilitation Act of 1973.<sup>4</sup> Section 504 prohibits discrimination on the basis of disability in any program or activity receiving federal funds, as well as any program operated by the federal government. The ADA essentially extends the coverage of section 504 to a number of additional entities, whether or not they receive federal funds. But, the ADA does not apply to the federal government, since it is already covered by section 504.

The ADA adopts the principle of "reasonable accommodation" built into section 504. In *Southeastern Community College v. Davis*,<sup>5</sup> the Supreme Court ruled that section 504's prohibition on discrimination was not a mandate for affirmative action and did not require a recipient of federal funds to undertake "substantial" revision of its program. The Court left open, however, the possibility that in certain circumstances a recipient would be required to take some affirmative steps to avoid discriminatory treatment. This would be particularly true if those steps did not impose "undue" financial and administrative burdens.<sup>6</sup>

<sup>4</sup> 29 U.S.C. § 794.

<sup>5</sup> 442 U.S. 397 (1979).

<sup>6</sup> *Id.* at 412. See also *New Mexico ARC v. New Mexico*, 678 F.2d 847 (10th Cir. 1982).

The regulations and case law under section 504 are important in interpreting the meaning of the ADA because built right into the ADA is the requirement that:

Except as otherwise provided in [the ADA], nothing in [the ADA] shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 [which includes section 504] or the regulations issued by federal agencies pursuant to such title.<sup>7</sup>

In fact, when interpreting the ADA, the Supreme Court itself has looked to the regulations and case law under section 504 because of this requirement. It has said this “directive requires us to construe the ADA to give at least as much protection as provided by the regulations implementing [section 504].”<sup>8</sup>

There are three primary Titles to the ADA, each concerning a major type of covered entity. Title I applies to employers of 15 or more people.<sup>9</sup> Title II applies to programs and services of state and local government.<sup>10</sup> Title III applies to private enterprises that provide goods or services to the public and are therefore considered “places of public accommodation.”<sup>11</sup>

The ADA was signed into law by then President Bush on July 26, 1990. However, the ADA went into effect in stages. Title II went into effect 18 months after enactment, on January 26, 1992. Title III went into effect on July 26, 1992, two years after enactment. Title I covered businesses with 25 or more employees starting on July 26, 1992 and now covers businesses with 15 or more employees.

These dates are important for several reasons. First, covered entities had several years to prepare for the implementation of the ADA before it went into effect. Yet casual observation today in most cities and towns across the country will reveal that compliance is still very spotty. Second, the ADA presumes that it is much more costly to retrofit an existing structure, as opposed to planning and building a new, fully accessible, structure. Accordingly, any new construction must be “readily accessible” to people with disabilities.

Although each title has definitions, which are specific to it, there are some definitions, which apply across the board to all of the Titles of the ADA. Notably, the definition of auxiliary aids and services, which is the most obvious source of AT under the ADA, is one of these definitions. The other is the definition of an individual with a disability.

## A. The Definition of Disability

The definition of disability is borrowed from section 504. An individual with a disability is defined as an individual who:

1. Has a physical or mental impairment which substantially limits one or more of a person's major life activities (e.g., walking, breathing, seeing or hearing, learning, working),

<sup>7</sup> 42 U.S.C. § 12201(a).

<sup>8</sup> *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998).

<sup>9</sup> 42 U.S.C. § 12111; 29 C.F.R. Part 1630.

<sup>10</sup> 42 U.S.C. § 12131; 28 C.F.R. Part 35.

<sup>11</sup> 42 U.S.C. § 12181; 28 C.F.R. Part 36.

2. Has a record of such an impairment (e.g., a cancer survivor with no impairment), or
3. Is regarded by others as having such an impairment (e.g., an individual with a communicable disease, such as tuberculosis, with no symptoms).<sup>12</sup>

There are a number of statutory exclusions from the definition of disability. First, current illegal drug users are not covered as people with disabilities when a covered entity acts on the basis of such use.<sup>13</sup> Second, homosexuality, transvestitism, sexual behavioral disorders, compulsive gambling, and several other enumerated conditions are also excluded from the definition of disability.<sup>14</sup>

### 1. Supreme Court Decisions

The United States Supreme Court has issued a number of decisions concerning who is covered by these definitions. In *School Bd. of Nassau County, Fla. v. Arline*,<sup>15</sup> the Supreme Court determined that a teacher who was fired because she had tuberculosis was a “handicapped individual” under section 504, which uses the same definition as an “individual with a disability” under the ADA. The Court reasoned that because Ms. Arline suffered a severe enough form of tuberculosis that she had to be hospitalized, she met the standard for having a physical impairment that substantially limited one or more of her major life activities. That she was hospitalized also meant she had a record of such an impairment.

Building on *Arline*, in *Bragdon v. Abbott*,<sup>16</sup> the Supreme Court held that an HIV positive individual in the “pre-symptomatic” phase was an individual with a disability under the ADA. The Court reviewed the medical course of HIV infection to determine it was a physical impairment and then concluded that it substantially limited the major life activity of reproduction. Even though HIV was not included in the ADA’s list of physical impairments and reproduction was not included in the ADA’s list of major life activities, the Court reasoned that both of these lists were meant to be illustrative, not exhaustive.

In spite of the Court’s decision in *Bragdon*, there have now been four cases in which the Court held that a person’s disability was not significant enough to meet the definition of disability under the ADA. Three of these decisions, *Sutton*, *Murphy*, and *Kirkingburg*, were decided on the same day.

#### a. The “*Sutton* Trilogy”

In *Sutton v. United Airlines, Inc.*,<sup>17</sup> the Court ruled that two sisters with uncorrected vision of 20/400 were not disabled under the ADA because their corrected vision was 20/20. The Court reasoned that although they were substantially limited in a wide variety of major life activities without corrective lenses, with their glasses they were not substantially limited in any major life activity. The Court held that determining whether a person is disabled “should be made with reference to measures that mitigate the individual’s impairment, including, in this instance, eyeglasses and contact lenses.”<sup>18</sup>

<sup>12</sup> 42 U.S.C. § 12102(2); 45 C.F.R. § 84.3(j).

<sup>13</sup> 42 U.S.C. § 12211; *See also* 29 U.S.C. § 706(8)(C).

<sup>14</sup> 42 U.S.C. § 12211.

<sup>15</sup> 480 U.S. 273 (1987).

<sup>16</sup> 524 U.S. 624 (1998).

<sup>17</sup> 527 U.S. 471 (1999).

<sup>18</sup> *Id.* at 475.



While the Court's decision seems entirely reasonable—of course people who wear eyeglasses and can see fine are not disabled—the irony is that the sisters were victims of a discriminatory policy. The airline used a requirement that applicants must have *uncorrected* vision of 20/100 to allow them to be global pilots. Shouldn't they be protected by the ADA as being “regarded as” having a disability? Relying on a narrow reading of the ADA, the Court determined that they were not regarded as having a disability either. The Court reasoned that to be regarded as having a disability, their employer would have had to regard them as being substantially limited in performing a broad class of jobs. Here, the employer only precluded them from performing one job, global airline pilot. They were still regarded as being capable of performing a number of other similar jobs, such as regional pilot or pilot instructor.<sup>19</sup>

Relying on *Sutton*, in *Murphy v. United Parcel Service, Inc.*,<sup>20</sup> the Court held that a mechanic with high blood pressure was not disabled under the ADA because with his medication he was not substantially limited in any major life activity. However, Mr. Murphy was fired from his job as a mechanic because he was required to have a commercial driver's license. But, even with his medication, his blood pressure was too high to get one. Nevertheless, because there was still a wide range of jobs he could do as a mechanic that did not require a commercial driver's license, he was not even found to be regarded as having a disability.

The third decision decided on the same day was *Albertson's Inc. v. Kirkingburg*.<sup>21</sup> In *Kirkingburg*, the employee had monocular vision, and, therefore, should not have been certified as an interstate truck driver. He was fired from his job when the mistake was discovered. The Court found that a person with monocular vision is not automatically a person with a disability under the ADA. Such a decision must be made on an individual, case-by-case basis, including an analysis of how well the individual has been able to compensate for the impairment. Relying on *Sutton*, the Court reasoned:

Mitigating measures must be taken into account in judging whether an individual possesses a disability. We see no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems.<sup>22</sup>

#### b. The *Williams* Case

The fourth in the line of Supreme Court cases addressing who is a person with a disability under the ADA is *Toyota Manufacturing, Kentucky, Inc. v. Williams*,<sup>23</sup> which deals with a person with carpal tunnel syndrome and other related impairments. The Court's restrictive view on who will qualify as a person with a disability is best reflected by the following quote:

That these terms need to be interpreted strictly to create a *demanding* standard for qualifying as disabled is confirmed by the first section of the ADA, which lays out the legislative findings and purposes that motivate the Act.<sup>24</sup>

<sup>19</sup> *Id.* at 493.

<sup>20</sup> 527 U.S. 516 (1999).

<sup>21</sup> 527 U.S. 555 (1999).

<sup>22</sup> *Id.* at 565, 566.

<sup>23</sup> 534 U.S. 184(2002).

<sup>24</sup> *Id.* at 197 (emphasis added).



Knowing that this is the Court's mind set, we can expect that people with what are perceived to be "minor" impairments are going to have a much more difficult time qualifying as a person with a disability under the ADA. As noted above, if you are not found to be a person with a disability, even if you are being discriminated against, you have no protection under the ADA. Of course, one can also look to any applicable state law to see if it has greater protections than the ADA in such a case.

The *Williams* case is illustrative. Ms. Williams worked on Toyota's assembly line for a number of years and, as a result, developed carpal tunnel syndrome and tendinitis. As a reasonable accommodation, she was eventually given a position performing two parts of the final inspection of finished cars, which did not require her to keep her arms up for extended periods. Everyone agreed she was capable of performing these tasks and that she performed them well. Unilaterally, Toyota decided to require all inspectors to perform all four parts of the final inspection process, including two that would require Ms. Williams to hold her arms at shoulder height for several hours at a time. Needless to say, Ms. Williams' condition worsened and she could no longer perform her job. Toyota's alleged refusal to return her to her original position led to the lawsuit. However, even if Ms. Williams has a good claim that her employer violated the ADA by failing to maintain the accommodation it had been providing, if she is found to not be a person with a disability, she cannot pursue her claim.

Having said all of that, the actual decision in *Williams* is quite limited. First, and probably most important, the case does not deal with whether or not Ms. Williams would qualify as a person with a disability based on the impact on her ability to work.<sup>25</sup> It only looks at whether she would qualify based on the effect of her impairments on her ability to perform "manual tasks." Second, the Court held that it is insufficient to establish "disability status under this test to merely submit medical diagnosis of an impairment."<sup>26</sup> The person must show the extent of the limitations caused by the impairment in their life. Third, the Court determined that you could not use limitations at work to establish you are substantially limited in performing manual tasks. An individual must show that they have a permanent or long-term "impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."<sup>27</sup> In Ms. Williams case, her condition "caused her to avoid sweeping, to quit dancing, to occasionally seek help dressing, and to reduce how often she plays with her children, gardens and drives long distances."<sup>28</sup> However, "she could still brush her teeth, wash her face, bathe, tend her flower garden, fix breakfast, do laundry and pick up around the house."<sup>29</sup> Accordingly, the Court found that her limitations "did not amount to such severe restrictions ... to establish a manual-task disability as a matter of law."<sup>30</sup>

## 2. Implications of the Supreme Court's Holdings

What are the implications for the AT user? Will the wheelchair Sharon uses be found to be similar to the eyeglasses in *Sutton*, and, therefore, will Sharon not be found to have a disability at all? Thankfully, the Supreme Court did indicate that not all users of a "corrective device" would be found to not be a person with a disability. The question will be whether, even with the corrective device, the person is "sub-

<sup>25</sup> *Id.* at 193.

<sup>26</sup> *Id.* at 198.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 202.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* The lower court, the Court of Appeals, had ruled in Ms. Williams favor on this point. The Supreme Court is saying that the Court of Appeals had used the wrong legal standard, but the Supreme Court did not explicitly say that Ms. Williams did not qualify on the basis of her limitations in performing manual tasks. However, it certainly is strongly implying this.

stantially limited” in a major life activity. The Court specifically cites as an example the person who uses prosthetics or a wheelchair. The Court notes that such a person “may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run.” Similarly, a person who takes medication to lessen the symptoms of an impairment may still qualify as a person with a disability if, even with the medication, they “remain substantially limited.”<sup>31</sup>

Another implication, which will still need to be resolved, especially for the person with what may be regarded as a minor disability, is the Supreme Court’s reluctance to consider work itself as a major life activity. We saw that this was not an issue before the Court in *Williams*. But, it will most likely be addressed at some point. Specifically, in *Sutton*, the Court stated, “there may be some conceptual difficulty in defining ‘major life activities’ to include work.”<sup>32</sup> In spite of the Court’s concern, the regulations implementing section 504, which the Court has said it will follow when interpreting the ADA, specifically include work in the list of examples of major life activities.<sup>33</sup> Nevertheless, even if work is acknowledged by the Court to be a “major life activity,” to be “substantially limited,” a person will have to show that they are unable to work in a broad class of jobs, not just one particular job.<sup>34</sup>

## B. Auxiliary Aids and Services

As noted above, the most obvious place to find AT in the ADA is in the provision of “auxiliary aids and services.” The definition of auxiliary aids and services is also applicable to all three titles of the ADA. Examples of auxiliary aids and services include:<sup>35</sup>

1. Qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
2. Qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;
3. Acquisition or modification of equipment or devices; and
4. Other similar services and actions.

The ADA does not require a covered entity to provide what would be considered personal devices (wheelchairs) or personal services (assistance with eating).<sup>36</sup> In this way, the definition of auxiliary aids and services under the ADA differs from the definition of AT under the Technology-Related Assistance for Individuals with Disabilities Act of 1988 (Tech Act).<sup>37</sup> In 1998, congress renamed this legislation the Assistive Technology Act of 1998 (AT Act),<sup>38</sup> but retained the definitions from the original Tech Act. This definition of AT would clearly cover devices for personal use.<sup>39</sup>

<sup>31</sup> *Sutton*, 527 U.S. at 488.

<sup>32</sup> *Id.* at 492.

<sup>33</sup> 45 C.F.R. § 84.3(j)(ii).

<sup>34</sup> *Sutton*, 527 U.S. at 491.

<sup>35</sup> 42 U.S.C. § 12102(1).

<sup>36</sup> 28 C.F.R. § 35.135.

<sup>37</sup> P.L. 100-407, 102 Stat. 1044, former 29 U.S.C. §§ 2201 *et seq.*

<sup>38</sup> 29 U.S.C. §§ 3001 *et seq.*

<sup>39</sup> 29 U.S.C. § 3002(a)(3).

### III. Title I — Employment

#### A. Overview of Title I

Title I now applies to all businesses employing 15 or more people.<sup>40</sup> However, as noted above, the ADA is not an affirmative action statute. It does not require special hiring preferences, nor does it give any direct financial incentives for hiring people with disabilities. It prohibits discrimination against a *qualified* individual with a disability in job applications, the hiring process, job training, pay, promotions, discharge, and any other terms or conditions of employment.<sup>41</sup> A person is qualified if he or she can perform the *essential* functions of the job with or without a “reasonable accommodation.”<sup>42</sup> It also prohibits discrimination against a qualified individual because of the known disability of a person the qualified individual is associated with.<sup>43</sup>

#### 1. SSI and SSDI Applicants and Recipients

What happens to the person who is filing a claim for employment discrimination under the ADA who is receiving, or is applying for, SSI or SSDI? Does not receipt of SSI and SSDI, as in Sharon’s case, require a finding that a person is too disabled to work? Yet, to be protected under the ADA, a person must be otherwise qualified to do the job, with or without reasonable accommodation. Are not these principles inherently contradictory?

In *Cleveland v. Policy Management Systems Corp.*,<sup>44</sup> the Supreme Court held that the two statutory systems are not necessarily inconsistent with each other. In fact, the Court recognized that “SSA sometimes grants SSDI benefits to individuals who not only can work, but are working,”<sup>45</sup> using the SSDI nine-month trial-work period as an example. The Court therefore acknowledged that a person could meet the ADA’s “otherwise qualified” requirement, particularly with a reasonable accommodation, while at the same time meeting SSDI’s definition of disability.<sup>46</sup> However the SSDI recipient or applicant must be able to explain how the contentions made in the SSDI claim are consistent with being able to perform the “essential functions” of the job, at least with reasonable accommodation, under the ADA.<sup>47</sup>

#### 2. Reasonable Accommodations

Title I requires that employers provide reasonable accommodations to the *known* disabilities of the employee, unless it would be an undue hardship to the employer to provide the accommodation.<sup>48</sup> Therefore, unless the disability is otherwise known to the employer, an individual with a disability must ask for the accommodation.<sup>49</sup>

The concept of an undue hardship is really the flip side of reasonable accommodations. If something is an undue hardship, it is not a reasonable accommodation. Undue hardship is defined as creating an undue financial *or* administrative burden on the employer, when looking at the resources and operation of the *entire* covered entity.<sup>50</sup>

<sup>40</sup> 42 U.S.C. § 12111(5)(A).

<sup>41</sup> 42 U.S.C. § 12112(a) (emphasis added).

<sup>42</sup> 42 U.S.C. § 12111(8) (emphasis added).

<sup>43</sup> 42 U.S.C. § 12112(b)(4).

<sup>44</sup> 526 U.S. 795 (1999).

<sup>45</sup> *Id.* at 805.

<sup>46</sup> *Id.* at 803.

<sup>47</sup> *Id.* at 798.

<sup>48</sup> 42 U.S.C. § 12112(b)(5)(A) (emphasis added).

<sup>49</sup> ADA Handbook, I-61.

<sup>50</sup> 42 U.S.C. § 12111(10) (emphasis added).

Listed examples of reasonable accommodations under Title I include:<sup>51</sup>

- \$ Modification of facilities,
- \$ Job restructuring and modification of work schedule,
- \$ Reassignment to a vacant position,
- \$ Acquisition or modification of equipment,
- \$ Appropriate modification of examinations, training materials or policies,
- \$ Provision of qualified readers or interpreters.

This list of reasonable accommodations under the ADA has been the subject of a few Supreme Court decisions. First, under section 504, in the *Arline* case discussed above, the Supreme Court noted that if a person is not otherwise qualified to perform the essential functions of the job in question, section 504 requires an analysis of whether or not the person would be able to perform those functions through a reasonable accommodation.<sup>52</sup> This is exactly what the ADA now requires.

### 3. Job Reassignment

One of the possible reasonable modifications listed above for the ADA is reassignment to a vacant position. In interpreting that concept under section 504, in *Arline*, the Supreme Court stated that while employers “would not be required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer’s existing policies.”<sup>53</sup>

Another Supreme Court decision, *US Airways, Inc. v. Barnett*,<sup>54</sup> dealt more explicitly with the question of whether it would be reasonable under the ADA to assign a person to a position for which someone else had greater seniority based on a union contract or employer-created personnel policy. The Court refused to hold that an employer’s seniority system always trumps a person with a disability’s request for a reasonable accommodation. However, the Court found that ordinarily it would not be reasonable to require an employer to violate its seniority system. But, the employee can try to “show that special circumstances warrant a finding that, despite the presence of a seniority system (which the ADA may not trump in the run of cases), the requested ‘accommodation’ is ‘reasonable’ on the particular facts.”<sup>55</sup> For example, if an employer with the right to ignore the seniority system does so fairly frequently, thereby “reducing employee expectations that the system will be followed – to the point where one more departure, needed to accommodate an individual with a disability, will not likely make a difference,”<sup>56</sup> that accommodation should be reasonable.

### 4. Direct Threat to Self or Others

Employers are not required to hire an individual who poses a direct threat to the health and safety of another.<sup>57</sup> This provision is also based on the Supreme Court’s decision under section 504 in the *Arline* case. There, the Court noted that the fact that Ms. Arline was contagious was not enough to remove her from the coverage of section 504. The Court reasoned that to allow “discrimination based on the conta-

<sup>51</sup> *Id.* § 12111(9).

<sup>52</sup> *Arline*, 480 U.S. at 287, n. 17.

<sup>53</sup> *Id.* at 289, n. 19.

<sup>54</sup> 535 U.S. 391 (2002).

<sup>55</sup> *Id.* at 405.

<sup>56</sup> *Id.*

<sup>57</sup> 42 U.S.C. §§ 12113(b) and 1211(3).

gious effects of a physical impairment would be inconsistent with the basic purpose of § 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or ignorance of others.”<sup>58</sup>

The ADA builds in this reasoning. If there is a direct threat, it does not matter whether or not the threat is caused by the individual's disability. However, there must be a significant risk of substantial harm that cannot be eliminated by a reasonable accommodation. Furthermore, the threat must be based on actual facts, not fears or generalizations. For example, an employer can refuse to assign a person with one of several listed infectious diseases to a job handling food, if the disease can be transmitted through food handling and the risk cannot be eliminated by a reasonable accommodation.<sup>59</sup> According to the Supreme Court:

The direct threat defense must be “based on a reasonable medical judgement that relies on the most current medical knowledge and/or the best available objective evidence,” and upon an expressly “individualized assessment of the individual's present ability to safely perform the essential functions of the job,” reached after considering, among other things, the imminence of the risk and the severity of the harm portended. 29 C.F.R. § 1630.2(r) (2001).<sup>60</sup>

In such cases, even if the threat of harm is not to others, but to the person with a disability, the employer is justified in refusing to hire them.<sup>61</sup>

## 5. Application Process and Medical Examinations

As noted above, the ADA applies from the initial announcement of a job. This entire process must be accessible. For example, employment tests must be modified to accommodate a person's disability.<sup>62</sup> At job interviews, or on application forms, employers cannot ask if a person has a disability.<sup>63</sup> They can ask questions to determine if a person can perform the job in question (e.g., “How many words per minute do you type?”).<sup>64</sup>

There is a different standard for medical examinations given before someone is employed and those given post-employment. Pre-employment medical examinations may only be given after a job offer. They are allowed only if they are given to all employees for a particular job and the results must be kept confidential.<sup>65</sup> If a job offer is withdrawn following a medical examination, it must be based on job related criteria and the employer must consider whether the person will be able to do the job with reasonable accommodations.<sup>66</sup> For people who are currently employed, medical examinations may be given “when there is a need to determine whether an employee is still able to perform the essential functions of his or her job.” Employers are also permitted “to make inquiries or require medical examinations necessary to the reasonable accommodation process.”<sup>67</sup> Tests to determine whether someone is using illegal drugs are not considered medical examinations and, therefore, are not subject to these limitations.<sup>68</sup>

<sup>58</sup> *Arline* at 284. Movie buffs may recall that this was the case referred to in the movie *Philadelphia*.

<sup>59</sup> 42 U.S.C. § 12113(d)(2).

<sup>60</sup> *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 86 (2002).

<sup>61</sup> *Id.*

<sup>62</sup> 42 U.S.C. § 12112(b)(7).

<sup>63</sup> *Id.* § 12112(d)(2)(A).

<sup>64</sup> *Id.* § 12112(d)(2)(B).

<sup>65</sup> *Id.* § 12112(d)(3).

<sup>66</sup> *Id.* § 12113(a).

<sup>67</sup> ADA Handbook, p. I-74, commenting on 29 C.F.R. § 1630.14(c).

<sup>68</sup> 42 U.S.C. § 1630.2(o)(2)(i) (emphasis added).

## B. Application of Title I of the ADA to Sharon

Sharon has two concerns regarding her internship with the law firm. First, she is concerned about not being able to enter the firm's office from the front of the building, where the accessible parking is located. Second, she will need special software and a different computer to be able to do her job of conducting telephone interviews. Both of these concerns fit within the scope of reasonable accommodations under Title I. We will look at each of her concerns in turn.

### 1. Access to Job Site

The main entrance to the firm's office has seven steps. Because Sharon is a wheelchair user, the only way she can enter the building is by ringing a buzzer in the rear of the building by a garbage dumpster and waiting for someone to open the door. When she enters, she must go through the break room of the offices of the State Department of Labor. The law firm says it is willing to install a ramp at the main entrance, but the landlord refused to allow it, saying it would be unsightly and too expensive.

Does Title I allow an employer, or a landlord, to refuse to make structural changes to a building, but offer, as an alternative, entrance through the "back door"? First, one of the listed examples, in the ADA regulations, of types of reasonable accommodations includes "making existing facilities used by employees *readily* accessible to and usable by individuals with disabilities."<sup>69</sup> More specifically, installing a ramp at the entrance to a building is one of the examples listed in the ADA Technical Assistance Manual as a means to provide access to a job site.<sup>70</sup>

Even if a specific accommodation is listed, an employer need not provide it if it would amount to an "undue hardship."<sup>71</sup> An undue hardship is defined as "significant difficulty or expense" to the employer.<sup>72</sup> Factors to consider include the net cost of the accommodation, looking at the availability of tax credits or deductions, or outside funding; the overall financial resources of the employer; the number of employees; and the effect on expenses and resources.<sup>73</sup>

Here, the employer seems to concede that it would not be an undue financial burden, as it would be willing to install the ramp. However, the landlord's refusal to allow its installation is probably a "significant difficulty," as it would be unlikely that a commercial lease would allow modifications to common areas or to the exterior of a building without the landlord's consent. Nevertheless, as will be seen in the discussion of Title III, below, the landlord is covered by Title III. Installing a ramp for seven steps in this case will most likely meet the "readily achievable" standard for Title III. Therefore, the landlord will not be able to argue that it has no duty to install the ramp.

In any event, can the employer argue that the alternative arrangements are satisfactory to provide Sharon with access to the job site? After all, the comments to the regulations state the employer "has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or

<sup>69</sup> 29 C.F.R. 1630.2(o)(2)(i) (emphasis added).

<sup>70</sup> ADA Title I Technical Assistance Manual, p. 30.

<sup>71</sup> 29 C.F.R. § 1630.9(a).

<sup>72</sup> *Id.* § 1630.2(p)(1).

<sup>73</sup> *Id.* § 1630.2(2)(i)-(iii).



the accommodation that is easier to provide.”<sup>74</sup> The comments also note the accommodation “does not have to be the ‘best’ accommodation possible, so long as it is sufficient to meet the job-related needs of the individual.”<sup>75</sup> Here, although highly inconvenient and demeaning, Sharon is able to get to her job site.

But, Title I also prohibits an employer from limiting, segregating or classifying “a job applicant or employee in a way that adversely effects his or her employment opportunities or status on the basis of disability.”<sup>76</sup> The comments give a number of examples of how this requirement is to be implemented. While none of them speak directly to Sharon’s circumstances, those, which seem applicable to her concerns state:

[Employers] are also prohibited from segregating qualified employees with disabilities into separate work areas or into separate lines of advancement. ... [I]t would be a violation for an employer to assign or reassign (as a reasonable accommodation) employees with disabilities to one particular office or installation, or to require employees with disabilities to only use particular employer provided non-work facilities such as segregated break-rooms, lunch rooms, or lounges.<sup>77</sup>

Clearly, the refusal to install a ramp has the effect of requiring Sharon to use a separate, segregated entrance to her work site. Moreover, as noted above, in making its facilities accessible, they must be “*readily* accessible to and useable by” Sharon. It is hard to imagine that requiring Sharon to wait for someone to answer the back door buzzer and then to intrude on another entity’s facility would make the law firm’s office readily accessible to her.

## 2. Need for Auxiliary Aids and Services

Sharon’s other concern is her need for special software and a different computer to enable her to use the telephone to conduct client interviews. The law firm is willing to purchase the software, but not the computer. The VR agency has also refused to help, stating it is the firm’s obligation under the ADA. In analyzing Sharon’s concern, we will first look at whether the software and computer are covered as reasonable accommodations, and then briefly examine what the VR agency’s responsibility may be.

The list of examples of reasonable accommodations specifically includes “acquisition or modification of equipment or devices.”<sup>78</sup> While computer software is not explicitly included, it is clear that software necessary to enable a person with a disability to perform his or her job would be covered. The Technical Assistance Manual for Title I specifically includes “special software for standard computers and other equipment” to enlarge print or convert print to spoken words.<sup>79</sup>

It is very easy to see how this could be applied to cover Sharon’s concern for an accommodation to enable her to use the telephone. The list of examples of reasonable accommodations is not intended to be exhaustive. The intent of providing a reasonable accommodation is to enable “employers’ employees with disabilities to

<sup>74</sup> ADA Handbook, p. 1-64.

<sup>75</sup> *Id.* p. 1-61.

<sup>76</sup> 29 C.F.R. § 1630.5.

<sup>77</sup> ADA Handbook, p. 1-53.

<sup>78</sup> 29 C.F.R. § 1630.2

(o)(2)(ii).

<sup>79</sup> Title I Technical Assistance Manual, 3.10.6, example, p. 34.



perform the essential functions of the position.”<sup>80</sup> Clearly, without the software, Sharon will not be able to perform her job of interviewing clients via the telephone. Moreover, the legislative history to the Tech Act, which was enacted two years before the ADA, explicitly notes that software is included in the definition of AT devices.<sup>81</sup> While the Tech Act definition is not directly applicable to the ADA, it does indicate that when Congress used a similar term elsewhere, it contemplated including software in that definition.

Even though the software and computer may be covered as reasonable accommodations, as noted above, the employer need not provide them if doing so would be an undue hardship. In this case it would be hard to imagine that the employer will be able to argue undue hardship. The software costs \$350 and these days a powerful computer can be purchased for under \$1000. Additionally, as noted above, the definition of undue hardship indicates it is the net cost of an accommodation, after considering the availability of tax credits and deductions, or outside sources of funding.<sup>82</sup>

The Technical Assistance Manual indicates that as of 1990 tax credits were made available for small businesses for up to \$5,000 per year for the cost of accommodations under the ADA. The credit is one half the cost of the expenditures, which are more than \$250, but less than \$10,500. A “small business” is defined as “one with gross receipts of \$1 million or less for the taxable year, or 30 or fewer full time employees.”<sup>83</sup> Given the total cost of about \$1,350 could be offset by a tax credit of \$575, it is hard to see how it would be an undue hardship. If the law firm’s gross receipts are greater than \$1 million, thus disqualifying it for the tax credit, it is also hard to see that it could be an undue hardship to spend \$1,350.

### 3. Obligations of the VR Agency

The total cost of the software and computer could also, potentially, be further offset by assistance from the state VR agency, notwithstanding its comment that it is the employer’s obligation under the ADA. The obligations of state VR agencies are covered in depth in the first policy and practice brief in this series, *State and Federal Vocational Rehabilitation Programs*.<sup>84</sup> For our purpose, it is sufficient to mention that the U.S. Department of Education’s Rehabilitation Services Administration (RSA), which enforces the federal VR laws, has issued a Technical Assistance Circular (TAC), governing the provision of “rehabilitation technology” (which includes AT).<sup>85</sup>

This TAC notes that AT is the responsibility of the VR agency for its VR consumers who need AT to achieve an employment outcome as spelled out in their individualized plan for employment (IPE). Moreover, AT is exempt from the general VR requirement to look to other available sources of funding for VR services (called the comparable benefit requirement). Employers are not considered comparable benefits either.

<sup>80</sup> ADA Handbook, p. I-41.

<sup>81</sup> Senate Report No. 100-438, 1988 U.S. Code Cong. & Admin. News, p. 1045.

<sup>82</sup> 29 C.F.R. § 1630.2(p)(2)(ii).

<sup>83</sup> Title I Technical Assistance Manual, 3.11.a.1, pp. 37-38.

<sup>84</sup> [www.cornell.ilr.edu/ped/dep/PP\\_1.pdf](http://www.cornell.ilr.edu/ped/dep/PP_1.pdf) or [www.cornell.ilr.edu/ped/dep/PP\\_1.txt](http://www.cornell.ilr.edu/ped/dep/PP_1.txt).

<sup>85</sup> RSA-TAC-98-04 (9/22/98).

Accordingly, it is the VR agency's responsibility to ensure that AT listed in an individual's IPE is provided "at the time the individual needs the equipment to progress toward achieving the employment outcome."<sup>86</sup> Since the VR agency funded the evaluation, which discovered what Sharon needed to be able to use the telephone, it is presumed that Sharon's job at the law firm is one of the steps toward achieving her employment outcome. Therefore, it would be the VR agency's ultimate responsibility to ensure Sharon has the software and computer when she starts work at the law firm, even though it is also the employer's responsibility under the ADA.

As a practical matter, the TAC goes on to note the VR agency can look to another source of funding for AT, including employers, "it knows is 'readily available' at the time the service is needed."<sup>87</sup> What this would mean is that if the employer is willing to provide the AT, the VR agency can look to the employer, and it would not have to provide the AT itself. But, if the employer balks, the VR agency would have to provide the AT to ensure the VR consumer is not caught in the middle without the AT, at the time it is needed.

In Sharon's case, it would seem to make more sense to have the VR agency provide the AT. It is very likely Sharon will need it to be able to use a telephone in any job she may have as a student or as an attorney after she graduates, and if it is purchased by the VR agency Sharon could take it with her to other jobs. As an alternative to purchasing the software and a new computer, it may make more sense to purchase a new laptop which can also function as an AAC device, and which can be configured to be used with the telephone. This would have the added advantage of combining all of her communication related AT needs into one device. As a practical matter, an employer would never be required to purchase the laptop (with or without the ability to dually function as an AAC device) if Sharon is to keep it after the job ends.

#### 4. Employee Status

As a final note, it seems the employer is not that concerned with the actual cost of Sharon's requested accommodation. The law firm is more concerned with Sharon's status as a student as opposed to a regular employee. The nature of an employee's status is not the basis for refusing to provide a reasonable accommodation. This obligation extends to all of its employees. As stated in the Technical Assistance Manual:

Congress rejected a proposed amendment that would have established an undue hardship if an accommodation exceeded 10 % of an individual's salary. This approach was rejected because it would unjustifiably harm lower-paid workers. Instead, Congress clearly established that the focus for determining undue hardships should be the resources available to the employer.<sup>88</sup>



<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Title I Technical Assistance Manual, 3.9.5, Other Cost Issues, p. 28.

## IV. Title II — State and Local Governmental Services

### A. Overview of Title II

Title II applies to all services and programs of all branches of state and local government. Examples of covered programs and services include:

- \$ Public schools and colleges,
- \$ Courts,
- \$ Agency offices, programs and services,
- \$ Employment by state and local governmental units—they must comply with Title I.

Readers may have heard about a Supreme Court decision, *Bd. of Trustees of the University of Alabama v. Garrett*,<sup>89</sup> dealing with the ADA's application to a state based on the 11<sup>th</sup> Amendment, and be wondering how much of Title II of the ADA is still enforceable. The Supreme Court decision was actually quite limited and, technically, did not cover Title II of the ADA at all. What the Court held was that, because of the 11<sup>th</sup> Amendment, employees of a state cannot recover money damages from the state because of its failure to comply with Title I of the ADA.

Even if the Court later applies this same analysis to Title II of the ADA, there are still several very important comments to show how limited the Court's decision actually is. First, the Court did not invalidate the ADA. Second, the case, as well as all of the Supreme Court's 11<sup>th</sup> Amendment cases, only applies to the State, not to branches of local government.<sup>90</sup> So, in Sharon's hypothetical, where the transportation system was run by a city, the Court's decision would not apply at all. Third, the Supreme Court said that even in a suit against the State under the ADA, a person can still obtain what is called "injunctive relief."<sup>91</sup> Therefore, even if the State was running the transportation system, Sharon could still sue to have the State be ordered to ensure the busses were accessible to her.

The general rule is that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.<sup>92</sup> Title II applies to qualified individuals with disabilities who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meet the essential eligibility requirements for the receipt of services or the participation in the program in question.<sup>93</sup>

For existing facilities, Title II requires what is referred to as "program access." A covered entity is not required to make each existing facility fully accessible. However, it is required to ensure that all of the programs and services it provides are accessible to people with disabilities.<sup>94</sup> In providing program access, a covered entity may make architectural modifications, it may relocate a program or provide an alternative means of access, it may assign an aide or use a home visit. However, in deciding which alternative means to ensure program access, a covered entity must provide services in the most integrated setting appropriate for the person with a disability.<sup>95</sup> Unlike existing facilities, new facilities must be readily accessible to and useable by people with disabilities.<sup>96</sup>

<sup>89</sup> 531 U.S. 356 (2001).

<sup>90</sup> *Id.* at 369.

<sup>91</sup> *Id.* at 374, n.9.

<sup>92</sup> 42 U.S.C. § 12132.

<sup>93</sup> *Id.* § 12131(2).

<sup>94</sup> 28 C.F.R. § 35.150(b).

<sup>95</sup> *Id.* § 35.130(d).

<sup>96</sup> *Id.* 35.151.

In addition to ensuring physical entrance into a program or activity, a covered entity must ensure that all communications with people with disabilities are as effective as to people who are not disabled. This can be accomplished by using auxiliary aids and services.<sup>97</sup>

Any public transportation offered by a covered entity, whether local or intercity and commuter rail, is covered by Title II. Regarding local public transportation, it is illegal to purchase or lease new, or, with limited exceptions, used, vehicles after August 25, 1990, which are not wheelchair accessible.<sup>98</sup> If a covered entity operates a light rail or rapid transit system, at least one car per rapid or light rail train must be accessible by July 26, 1995.<sup>99</sup> Additionally, except where extraordinary structural changes are required, key stations in a light or rapid rail system must be accessible by July 26, 1993.<sup>100</sup> Although covered entities are not required to make existing buses accessible, they must also establish a paratransit system. The paratransit system must provide a comparable level of service for those who, because of the nature of their disability, cannot travel to or from a stop or get on the vehicle without individual assistance, and for routes at a time of operation where a wheelchair lift vehicle is not in use.<sup>101</sup>

For covered entities, which operate intercity or commuter rail transportation, at least one passenger car per train must be accessible by July 26, 1995.<sup>102</sup> All new passenger rail cars must be accessible.<sup>103</sup> All intercity rail stations must be fully accessible by July 26, 2010.<sup>104</sup> Key commuter rail stations must be fully accessible by July 26, 1993, unless extraordinarily expensive structural changes are needed.<sup>105</sup>

## B. Application of Title II of the ADA to Sharon

As noted above, Sharon's attempts to use the City of Golden Dreams' public transportation system have not been successful. She has found herself waiting for several buses to go by before finding one with a lift, in working condition that can allow her to get on the bus in her wheelchair. While the City is not required to retrofit existing buses, all new buses must be wheelchair accessible.<sup>106</sup> What are wheelchair users to do while an entity is in the process of converting from inaccessible to accessible vehicles? Such a process could take many years, as an entity retires its older buses and purchases replacements. The answer is that each entity must also establish a paratransit system. This system must be "comparable to the level of service provided to individuals without disabilities who use the fixed route system."<sup>107</sup> It must "be available throughout the same hours and days as the entity's fixed route service."<sup>108</sup>

The system must be made available to all individuals with disabilities who are unable to use accessible vehicles, without assistance, because of the nature of their disability. It also must be available to anyone with a disability, like Sharon, "who needs the assistance of a wheelchair lift or other boarding device" who wants to travel a route "during the hours of operation of the system" when an accessible vehicle "is not being used to provide designated public transportation on that route."<sup>109</sup> In other words, assuming Sharon is planning on going from the campus shuttle's drop-off

<sup>97</sup> *Id.* 35.160.

<sup>98</sup> 42 U.S.C. § 12142.

<sup>99</sup> *Id.* § 12148(b)(1).

<sup>100</sup> *Id.* § 12147(b).

<sup>101</sup> *Id.* § 12143.

<sup>102</sup> *Id.* § 12162(a) and (b).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* § 12162(e)(2)(A)(ii)(I).

<sup>105</sup> *Id.* § 12162(e)(2)(A)(ii)(II).

<sup>106</sup> *Id.* § 12142(a).

<sup>107</sup> 49 C.F.R. § 37.121(a); see *Anderson v. Rochester-Genesee Regional Transportation Authority*, 337 F.3d 201 (2nd Cir. 2003).

<sup>108</sup> 49 C.F.R. § 37.131(e).

<sup>109</sup> *Id.* § 37.123(3)(1) & (2).

point to the law firm when the busses are running, if there will not be a lift-equipped bus on her scheduled route, paratransit must be made available to her. Although Sharon is primarily interested in travel for employment, the paratransit service cannot be restricted based on the purpose of the trip.<sup>110</sup>

One of the other difficulties Sharon has encountered is the vehicles that are lift-equipped have not been working. While the regulations do “not prohibit isolated or temporary interruptions” in service,<sup>111</sup> the problems Sharon is encountering seem far to frequent to be considered isolated. To ensure that such problems do not occur, the entity must “establish a system of regular and frequent maintenance checks of its lifts.” Vehicle operators must then, in “the most immediate means available,” report any lift failure. The vehicle shall be taken out of service before its next service day until it is fixed, unless the vehicle is needed to maintain the transportation system’s level of service (i.e., there are no spare busses available). It may then keep the bus in service for no more than five days in service areas of 50,000 people or less, and no more than three days in service areas of over 50,000 people. Finally, once a vehicle is discovered to have an inoperable lift, if the next accessible vehicle will not be coming within 30 minutes, the entity must “promptly provide alternative transportation to individuals with disabilities who are not able to use” that vehicle.<sup>112</sup> One such form of alternative transportation could be the transportation system discussed above.

## V. Title III — Places of Public Accommodation

### A. Overview of Title III

Title III applies to private businesses that make their goods or services available to the public. However, it does not include private clubs or religious entities.<sup>113</sup> Examples of covered entities include:<sup>114</sup>

- \$ Restaurants, hotels, theaters, stadia,
- \$ Stores, shopping malls, dry-cleaners, beauty shops
- \$ Banks, doctor or lawyer offices,
- \$ Parks, zoos, museums, libraries,
- \$ Health spas, bowling alleys, golf courses,
- \$ Day care centers, senior citizen centers, schools (private).

The general rule is that a covered entity may not discriminate on the basis of disability.<sup>115</sup> It must remove architectural and communication barriers, if “readily achievable,” which means it can be carried out without much difficulty or expense.<sup>116</sup> But, in determining whether it is readily achievable, you consider the overall size, resources and nature of the operation of the covered entity.<sup>117</sup> If a covered entity is not required to make structural modifications, it must nevertheless make other arrangements to provide its goods and services.<sup>118</sup>

<sup>110</sup> *Id.* § 37.131(d).

<sup>111</sup> *Id.* § 37.161.

<sup>112</sup> *Id.* § 37.163.

<sup>113</sup> 42 U.S.C. § 12187.

<sup>114</sup> *Id.* § 12181(7).

<sup>115</sup> *Id.* § 12182(a).

<sup>116</sup> *Id.* § 12182(b)(2)(A)(iv).

<sup>117</sup> *Id.* § 12181(9).

<sup>118</sup> *Id.* § 12182(b)(2)(A)(v).

Covered entities must also make reasonable modifications to their rules, policies and procedures to accommodate the needs of people with disabilities, unless doing so would fundamentally alter the service in question.<sup>119</sup> They must also provide needed auxiliary aids and services, unless to do so would fundamentally alter the service or result in an undue burden.<sup>120</sup> Finally, any examinations or courses for education or professional or trade applications, licensing or certification must be offered in a place and manner which is accessible to people with disabilities.<sup>121</sup>

Under the premise that it is easier to build an accessible building than to retrofit an existing one, all new construction and alterations to existing facilities must be readily accessible to and useable by people with disabilities.<sup>122</sup> However, elevators are not required in new buildings of less than three stories or with less than 3,000 square feet per story, unless it is a shopping center or mall, or the professional office of a health care provider.<sup>123</sup>

## **B. Application of Title III of the ADA to Sharon**

Even though Sharon's access to the law firm is covered by Title I of the ADA, the firm is also obligated to ensure access to its services under Title III. Therefore, although not directly applicable to Sharon as an employee of the firm, we will analyze its obligations to its clients.

Readers may wonder why an article on Work and AT would discuss a section of the ADA that does not apply to workers at all. However, it has been our experience in working with groups representing people with disabilities, particularly independent living centers, that access to places of public accommodation is critical for increasing the number of people with disabilities in the workforce. The rationale that is given runs like this: before employers are really going to see people with disabilities as employees, people with disabilities have to be seen as people. To be seen as people, people with disabilities have to be seen. They have to be seen doing the kinds of things that everyone else does, out in the community—going shopping, to restaurants, to the movies. Without accessible places of public accommodation (stores, restaurants, movie theaters), this cannot happen.

Turning to the law firm in Sharon's case, as noted above, law firms are specifically enumerated as an example of covered entities under Title III, and Title III requires the removal of architectural barriers, if "readily achievable." Installing ramps is one of the specifically listed examples of ways to remove architectural barriers.<sup>124</sup> Therefore, the law firm would be required to install a ramp at the front of its building so long as it would be readily achievable.

The term readily achievable means "easily accomplishable and able to be carried out without much difficulty or expense."<sup>125</sup> The comments to the regulations emphasize that this is a less demanding standard than providing a reasonable accommodation under Title I.<sup>126</sup> Factors used in determining whether barrier removal is readily achievable include the nature and expense of the action, and the overall financial

<sup>119</sup> *Id.* § 12182(b)(2)(A)(ii).

<sup>120</sup> *Id.* § 12182(b)(2)(A)(iii).

<sup>121</sup> *Id.* § 12183(b).

<sup>122</sup> *Id.* § 12183.

<sup>123</sup> *Id.* § 12183(b).

<sup>124</sup> 28 C.F.R. § 36.304(b)(1).

<sup>125</sup> *Id.* § 36.304(a).

<sup>126</sup> ADA Handbook, p. III-87.



resources of the entity.<sup>127</sup> More specifically, regarding installation of ramps, the comments to the regulations note:

A public accommodation generally would not be required to remove a barrier to physical access posed by a flight of steps, if removal would require extensive ramping or an elevator. Ramping a single step, however, will likely be readily achievable, and ramping several steps will in many circumstances also be readily achievable.<sup>128</sup>

In Sharon's case, the office building only has seven steps leading up to the main entrance. Therefore, unless the layout of the entrance is such that it would require "extensive restructuring" to install such a ramp, it is hard to imagine that the law firm, which is large enough to hire summer associates and student interns, could argue that installing a ramp for seven steps would not be readily achievable.

Here, however, the law firm's biggest concern is with the landlord. This is a large office building and the other offices in the building are leased by several other law firms, a state agency and a number of non-profit agencies. The landlord has its own obligation to ensure access to the building,<sup>129</sup> and, given the size of the building, it is extremely difficult to see how the landlord could argue that it would not be readily achievable to install a ramp. The landlord also complains that a ramp would be unsightly. This is not a defense to denying barrier removal, and it is very likely untrue. Ramps can be very attractively done. Finally, since the other tenants are either places of public accommodation governed by Title III, or a state agency governed by Title II, they have independent obligations to ensure access to the building.

We must also consider, as we did with Title I, whether the proposal to have Sharon, and the firm's clients, use the back of the building is an acceptable alternative to installing the ramp. Under Title III, we do not even consider alternatives to barrier removal unless barrier removal itself is not readily achievable.<sup>130</sup> Here, since it is unlikely that either the law firm or the landlord will be able to successfully argue that it is not readily achievable to install the ramp, they cannot argue that using the "back door" complies with Title III.

If for some reason, it was not readily achievable to install the ramp, Title III does allow a place of public accommodation to provide access through another entrance. Like Title II, Title III requires that places of public accommodation offer their goods and services "in the most integrated setting appropriate."<sup>131</sup> This would seem to argue against allowing the use of a "back door" entrance. However, the Department of Justice has stated:

If making the main entrance to a place of public accommodation accessible is not readily achievable, the public accommodation can provide access to its facility through another entrance, even though use of the alternative entrance for individuals with disabilities would not be the most integrated setting appropriate.<sup>132</sup>

<sup>127</sup>ADA Technical Assistance Manual, III-4.4200.

<sup>128</sup>ADA Handbook, p. III-87.

<sup>129</sup>28 C.F.R. § 26.201(b).

<sup>130</sup>See 28 C.F.R. § 36.305(a).

<sup>131</sup>28 C.F.R. § 36.203(a).

<sup>132</sup>ADA Title III Technical Assistance Manual, III-3.1000, Illustration.



In this case, however, where all of the firm's clients with disabilities affecting their ability to climb steps would have to traipse through the offices of another entity, an office of the State Department of Labor, it is highly unlikely that this would be an appropriate alternative. Another option in this case, which is an acceptable alternative if barrier removal is not readily achievable, is to relocate an activity to an accessible location.<sup>133</sup> Here, if the firm was planning to meet someone who was a wheelchair user, the firm should probably make arrangements to use alternative office space in an accessible location. Even though the firm may have to pay for this space, it cannot pass the costs of an accommodation on to the client.<sup>134</sup>

## VI. Conclusion

This article, like our first policy brief involving Work and AT, has provided numerous examples of how AT can help a person overcome the effects of their disability on the road to work. While our earlier article discussed five key, federally sponsored programs that are potential funding sources for the AT devices and services, this article focused strictly on Titles I, II, and III of the ADA as potential sources to fund AT.

The earlier article focuses primarily on AT that Sharon would retain for her own use as she went from setting to setting. In order to obtain AT, like the power wheelchair or the AAC device, we looked at potential "purchasers of AT for Sharon," like the Medicaid and Medicare programs. By contrast, most of what we are looking for in terms of ADA enforcement is AT that will be made available by one of three entities - employers, public agencies, or places of public accommodation - within the entity's operations. With ADA enforcement, the AT in question would not typically become an individual's property; instead, like the ramp in front of the law firm or the City's accessible busses or paratransit system, the AT-related interventions would typically benefit a class of persons rather than the one person seeking to use it.

We hope that BPA&O advocates, using this policy brief as a guide, will increasingly look to make beneficiaries aware of their rights under the ADA, which may serve to break down barriers to successful employment. We also hope that PABSS advocates and attorneys will, in addition, begin to look at taking legal steps to enforce the ADA's provisions when necessary to overcome barriers to employment.

<sup>133</sup>28 C.F.R. § 36.305.  
<sup>134</sup>28 C.F.R. § 36.301(c).

**MY NOTES ON TRANSLATING THIS TO PRACTICE:**

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