

DOJ: Blazing New Trails Under ADA

New DOJ Disability Rights Chief Signals More Vigorous Enforcement Activity

By L. Irene Bowen, J.D.



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Now we have it from the person in charge: the U.S. Department of Justice will not only continue its strong enforcement of the Americans with Disabilities Act, but also venture into new arenas that affect people with all types of disabilities, various types of public accommodations, and state and local governments.

Rebecca Bond, who became chief of DOJ's Disability Rights Section in March and formerly served as a deputy chief of the division's Housing and Civil Enforcement

Section, made her first public presentation in that capacity as keynote speaker at an April 15 conference. The conference, hosted semi-annually by the National Association of ADA Coordinators, offers ADA training and insights from current and former officials from DOJ and the U.S. Equal Employment Opportunity Commission, as well as attorneys, architects, risk management officials and current and former ADA coordinators.

Education and Technology

Heralding a "critical juncture" between technology and people with disabilities and pledging to actively increase DOJ's profile in K-12 and secondary education settings, Bond recounted several recent developments:

- DOJ filed a brief in the successful appeal by a student with a hearing impairment in the 8th Circuit case of *Argenyi v. Creighton University* (703 F.3d 441 (2013)). DOJ supported the right of a student with a hearing impairment to be provided Communications Access Real Time Transcription and interpreters — his preferred means of communication — by a medical school. DOJ argued that the ADA and Section 504 of the Rehabilitation Act require covered entities to provide auxiliary aids and services to enable individuals with communication disabilities to participate fully and equally in their programs.
- The department entered into an agreement with Lesley University about its mandatory meal plan, under which the university will provide ready-made gluten- and allergen-free food options for students.
- DOJ entered agreements with two private schools (one about the alleged failure to admit a child with Down syndrome and other about the alleged failure to provide reasonable modifications to permit a child with bi-polar disorder and other disabilities to attend a private school accompanied by his service animal).
- Six colleges agreed not to require the use of e-book readers unless they are accessible.
- DOJ argued in *NAD v. Netflix* that the website and the "Watch Instantly" service (streaming video) of

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See *DOJ*, p. 3

Netflix is a public accommodation subject to Title III of the ADA, even if it has no physical structure where customers come to access its services.

Individuals with Epilepsy

Bond promised a “heightened focus” on the rights of people with epilepsy, which some courts had not considered a disability before the ADA Amendments Act. She illustrated this focus with a DOJ agreement with the University of Medicine and Dentistry of New Jersey, concerning the alleged rescission of admission of two individuals to two medical schools because they had Hepatitis B, based on “wrong assumptions” about what they can do as part of the curriculum.

Health Care

Touting DOJ’s Barrier-Free Health Care Initiative, Bond also pledged that the department will step up activities to ensure effective communication by health care providers and physical access to their facilities and equipment.

She cited 15 agreements already reached through this nationwide effort — with current participation by more than 40 U.S. Attorney’s offices. Most recently, three health care providers agreed to make changes as a result of allegations about their failure to provide interpreters for people who are deaf.

Other Public Accommodations

DOJ also is continuing its efforts to ensure access to other types of public accommodations. For example, the U.S. Attorney’s office of the Southern District of New York is reviewing 50 top-rated restaurants for compliance with the barrier-removal provisions of Title III of the ADA.

The Future of Project Civic Access

An April 19 agreement with the City of Jacksonville, Fla., brings to 204 the number of agreements reached under Project Civic Access, the department’s comprehensive reviews of the programs and activities of towns, counties and cities. Bond said that transportation facilities soon will be included in the reviews and reminded the audience that recreation facilities are newly regulated under the 2010 ADA accessibility standards for new construction and alterations, hinting that existing recreation facilities such as swimming pools, playgrounds, parks and golf courses also may be examined.

Expanding *Olmstead* Principles

DOJ has moved to intervene as a plaintiff in a case alleging that Oregon’s reliance on sheltered workshops, at the expense of integrated employment services for people with various disabilities, violates the ADA’s integration mandate as interpreted in the Supreme Court’s *Olmstead* decision. This move follows a letter from DOJ to the state in the summer of 2012, finding that Oregon’s reliance on sheltered workshops violated *Olmstead*. Bond also noted DOJ’s intention to apply the “integrated setting” provisions not only to state-operated psychiatric institutions but also to privately-run institutions that are covered by the ADA.

Rulemaking

In July 2010 DOJ issued advance notices of proposed rulemaking on four issues: accessibility of web information and services; movie captioning and video description; accessibility of next generation 9-1-1; and equipment and furniture.

DOJ has taken no public action on any of these, and little was mentioned as part of the NAADAC presentation. But Bond did note that DOJ has urged compliance with the effective communication provisions of the statute and regulations as to websites (for example, in the *Netflix* brief) and predicted publication of a proposed rule on web accessibility in 2013.

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EEOC (cont. from p. 1)

employer showed that its testing was job-related and consistent with business necessity, earning summary judgment in the case. See *Random Alcohol Testing for Probationary Employees Does Not Violate ADA*, Court Rules, May newsletter.

Members of the House's Subcommittee on Workforce Protections also expressed concern about *EEOC v. Evan's Fruit Co.* (No. 2:11-cv-03093 (April 19, 2013, E.D. Wash.)), a case in which a court said the commission lacked evidence for its claims.

"[D]oes it serve the best interests of workers and employers when EEOC investigates businesses without evidence of wrongdoing?" Rep. Tim Walberg, R-Mich., asked.

Backlog

Lawmakers also expressed concern that these investigations into systemic discrimination are taking resources away from employees who actually have asked for help.

"The agency has set a goal that up to 24 percent of all litigated cases be systemic in nature," Walberg, chair of the subcommittee, said, citing EEOC's strategic enforcement plan. "Meanwhile, a backlog of more than 70,000 discrimination claims by workers continues to plague the commission."

The federal government should not divert resources away from workers who believe they have been harmed in order to follow a hunch, he continued. "And we should not be dragging our nation's job creators through unnecessary and costly investigations without a factual basis of wrongdoing."

EEOC's chair, Jacqueline A. Berrien, replied that the commission has made substantial progress in reducing its backlog. During the past two fiscal years, EEOC resolved more charges than it received, she said. The commission reduced its unresolved private sector inventory by "nearly 20 percent" since 2010, she said.

Walberg, however, wasn't satisfied. The commission should handle backlogged and incoming complaints first, he said, and EEOC employees should keep to a minimum "fishing or agenda-producing efforts."

General Counsel

Walberg also questioned whether recent high-profile EEOC losses have been the result of the commissioners giving away too much litigation power.

"Congress created a commission of five members to ensure accountability within the agency," he said. "Yet for almost 20 years the commission has delegated that authority to the Office of General Counsel."

"One case initiated by the general counsel was later rejected by a federal district judge. The judge described the commission's actions as a 'sue first, ask questions later litigation strategy,'" he said, referring to *EEOC v. CRST Van Expedited*, No. 07-CV-95-LRR (N.D. Iowa 2010). The district court fined the commission \$4.6 million for suing without conducting a thorough investigation but was later instructed by the controlling appellate court to reconsider the fine.

Berrien, however, pointed out that the commission has a higher than 90 percent success rate in its litigation efforts, and that its losses should be viewed alongside its successes.

I don't expect you to win every case," Walberg told Berrien. But it is important to remember that "sometimes the actual workplace knows the best practice better than [EEOC] or Congress," he said.

Reps. John Kline, R-Minn., and Larry Bucshon, R-Ind., echoed Walberg's concerns. ❖

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The Upshot

So what do those covered by the ADA need to know? Expect stronger enforcement across the board — from health care to education, from technology to barrier removal in existing facilities — from both the Disability Rights Section and U.S. Attorney's offices on the more local level. Don't be surprised if recreation facilities soon come under DOJ's watchful eye. And continue to keep up with developments in application of the ADA to technology and the internet. In particular, watch for proposed rules on web accessibility in 2013, which in the first round will most likely be limited to state and local governments, as opposed to public accommodations.

For more information

For details on DOJ's Disability Rights Section, visit www.ada.gov. For more information about NAADAC and its conferences, visit <http://askjan.org/naadac>. ❖

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