DISABILITY LAW
NEWSLETTER

This Issue

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Published by the Disability Law Section of the Oregon State Bar

Explore the NW ADA & IT Center

A Resource on Disability Law

By Meg Nightingale

The Northwest Americans with Disabilities Act and Information Technology Center is potentially a valuable resource for disability law practitioners, as well as their clients. One of 10 regional Disability and Business Technical Assistance Centers (DBTACs) funded by the U.S. Department of Education's National Institute on Disability and Rehabilitation Research, the Center is located at Oregon Health & Science University in Portland. It serves Oregon, Washington, Alaska, and Idaho with the help of state affiliates and partners.

The Center provides free information, technical assistance, and training regarding the ADA (as well as other major federal disability laws, such as the Rehabilitation Act, Fair Housing Act, Individuals with Disabilities Education Act, and Air Carriers Access Act) and accessible information technology.

The Center is not an enforcement agency and does not have attorneys on staff. It cannot provide legal advice or advocacy, and it cannot initiate contact with "opposing parties"—at a caller's request or on its own. Those needs are better met by contacting protection and advocacy agencies, the Oregon Disabilities Commission, the EEOC, BOLI, or a state or federal Department of Justice.

But as a source of free information and training, the Center is well worth exploring. So far, the Center has received relatively few calls from attorneys in the two years it has been based in Oregon. Its staff professes a willingness to respond to the needs of attorneys. Therefore, we would do well to "test drive" the Center and further develop it as a useful resource.

The Center's free services may be useful to practicing attorneys in several ways, as discussed below.

Materials

The Center maintains a clearinghouse of written materials (in hard and electronic formats) about disability laws and accessible technology. You can access most of these materials online, call the Center to request a copy, or visit the Center at OHSU. Materials can be copied and mailed to you or your clients for free. Sample items include EEOC and U.S. DOJ publications, ADA technical assistance manuals, compliance bulletins, the *ADA Accessibility Guidelines,* accessibility checklists, the *ADA Guide for Small Businesses,* and the *ADA Guide for*

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NEWSLETTER

The Disability Law Section Executive Committee welcomes your comments, suggestions, and submissions for publication. Please feel free to contact any executive committee member to inquire about the section or the newsletter. If you have any ideas for possible stories, please call Paul Alig, chair of the newsletter committee.

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The purpose of the *Disability Law Newsletter* is to provide information on current developments in disability law and to provide a forum for the exchange of legal opinions and perspectives. Unless otherwise stated, opinions expressed in any article are solely those of the author and are not necessarily endorsed by the executive committee, the Disability Law Section, or the Oregon State Bar.

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Message from the Past Chair

Welcome to the Fall Edition of the *Disability Law Newsletter.* This edition is the first in the section's effort to make your newsletter a more helpful tool in the daily practice of disability law. As a part of our effort, the section has enlisted the assistance of Elise Gautier to provide professional editing and layout services. We have also established a small, focused newsletter committee to identify topics and recruit authors. Joining me on that committee are Meg Nightingale and Allyson S. Krueger. Ms. Nightingale is an adjunct professor teaching disability law at Lewis & Clark Law School and maintains a private practice in dispute resolution; she's also a trainer and policy analyst. Ms. Krueger is a partner in the employment law firm of Barran, Liebman, LLP. Thank you, Meg and Allyson, for your assistance on the committee.

Other improvements include switching to email and internet delivery to save printing costs and producing two newsletters per year to allow for more focused and useful content. If you are interested in helping with our newsletter, by offering content or in other ways, please let us know.

In August I stepped down as section chair due to a career change that has brought me to the state of Washington. Your new chair is Elizabeth Stevenson. Thank you, Elizabeth, for taking over in time to represent our section at the bar's annual meeting in September. ❖

—— Paul Alig, Past Chair

CASE NOTES: Fair Housing Decisions

By Ed Johnson, Oregon Law Center

***Sanghvi v. City of Claremont,* 328 F.3d 532 (9th Cir. 2003)**

Property owners wanted to expand their residential Alzheimer's care facility located adjacent to the city, but the city denied their request to obtain sewer service without annexation. The property owners alleged discrimination and retaliation claims under 42 U.S.C. § 1983 and the Fair Housing Act (FHA). The jury ruled in favor of the defendants on the FHA disparate treatment claims and the reasonable accommodation claim.

The appellate court determined that the district court did not err in denying the property owners' post-trial motions. The property owners may have established a prima facie case of discrimination under the FHA, but the city had a legitimate, nondiscriminatory reason for denying the sewer connection; by annexing the property, the city could have required the property owners to conform their properties to the city's general development plan. The reasonable accommodation claim failed because the sewer service was not a therapeutic concern for the patients. Rather, it was a financial accommodation request made by the nondisabled property owners. In addition, it was harmless error for the district court to instruct the jury on the McDonnell Douglas framework.

***Gabbard v. Linn-Benton Hous. Auth.,* 219 F. Supp. 2d 1130 (D. Or. 2002)**

In an FHA/ADA complaint, a tenant suffering from multiple chemical sensitivities (MCS) asserted that the use of various chemicals by the housing authority (in pesticides and glues from the carpet and paneling) caused him to suffer bodily injury, such as stomachaches, headaches, nausea, vision problems, and sleep loss. The court noted that a diagnosis of MCS had not yet been found sufficiently reliable to be admissible under the Daubert test. The science of MCS had not progressed from hypothetical to knowledge capable of assisting a factfinder, jury, or judge. There was no reliable scientific and medical literature to support the claim. The unfairness of subjecting defendants to civil rights and torts liability based on subjective self-diagnosis beyond the pale of scientific or otherwise reliable validation required exclusion of the evidence.

Other Circuits

***Gaona v. Town & Country Credit,* 324 F.3d 1050 (8th Cir. 2003)**

Hearing-impaired borrowers obtained a residential mortgage loan from the lender; the loan was eventually assigned to the bank. Although the borrowers requested a sign language interpreter, none was provided. The borrowers defaulted on the loan the next year, and sent the bank notice of their intent to rescind the mortgage. The lender responded that the borrowers

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BOLI Civil Rights Complaints

By David Gerstenfeld, Oregon Bureau of Labor and Industries

The Civil Rights Division (CRD) of the Oregon Bureau of Labor and Industries (BOLI) answers inquiries from people who believe they may have been subjected to unlawful discrimination or certain other statutory violations, and also investigates complaints involving these laws.

The investigative process begins with the filing of a formal complaint. Normally, CRD drafts the complaint based on information obtained from the complainant (over the phone and on our questionnaire). Our intake personnel then use this information to decide whether we have jurisdiction and, if we do, to draft a formal complaint, which is then sent to the complainant for him or her to sign and return. Some attorneys prefer to draft the complaint themselves and file it with CRD. Remember that to be considered a complaint, a document must include the following:

- The complainant's name and address. If your client does not want information sent to his or her home address, clearly indicate on the complaint that the address is "care of" your office.
- The respondent's name and address. Be sure to name the proper legal entity. If the wrong legal entity is named, the complaint may have to be amended later, improper notice may be sent to the responsible party, or a "right to sue" notice may be issued listing the wrong legal entity.
- A statement of the protected class(es) involved.
- A description of the acts being complained of, including when they occurred and how they harmed the complainant.
- Facts showing a causal connection between the protected class and the complained-of acts.
- A notarized signature—either your client's signature or your own signature as his or her legal representative. ORS 659A.820; OAR 839-003-0005(4).

CRD has a relationship with the federal Equal Employment Opportunity Commission (EEOC) so that if a complaint is covered by state law and federal law, you can file a single complaint with BOLI and it will be considered filed with the EEOC on the same date. Most state laws require you to file a complaint with CRD within one year of the date of harm, but to be filed with the EEOC, the complaint must be filed within 300 days (and preferably within 240 days to avoid some procedural complications).[1]

Sometimes people who feel they have been discriminated against have an overly optimistic view of what evidence exists to support their claims, how much evidence is needed for CRD to make a substantial-evidence finding, or the damages they are entitled to if a violation is found. Explaining these issues to your clients may prevent unrealistic expectations about the investigative process and outcome. Additionally, here are a few simple things attorneys can do to help ensure that CRD's investigation is done as thoroughly and promptly as possible:

- Ensure that CRD is notified of any change in contact information.
- If you are aware of legal authority that is dispositive of an essential issue in the case, notify CRD so we can determine its applicability.
- If there are witnesses we should speak with, provide any contact information you have.
- If you are aware of documentary evidence that would help establish contested facts, let CRD know what the documents are and who has them. This will enable us to request, and if necessary subpoena, those records.

BOLI, like the rest of Oregon's government, is having to deal with significant budget cuts. This cycle of budget reductions is just the most recent in a series of cuts BOLI has endured. The increase in Oregon's population, coupled with the diminution of our budget, has made it increasingly challenging for CRD to fulfill its mission as fully, quickly, and efficiently as we would like.

Earlier this year, Dan Gardner became BOLI's commissioner, and Amy Klare became the administrator of CRD. This has led to a reevaluation of priorities and procedures, and we are looking at ways to improve our operations. Some of the changes likely to be implemented will be rather minor but should result in some stream-

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Explore the NW ADA & IT Center

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Small Towns. Some materials are available in foreign languages.

The Center can be a helpful adjunct to the law library and an easy way to build up your in-house library with free materials. Similarly, it gives your clients access to pertinent materials.

Technical Assistance

You or your clients can contact the Center with questions about rights or responsibilities under the ADA and related laws. Questions may be answered on the spot, or researched and provided later. Among the hot topics on which the Center is currently fielding questions are the provision of auxiliary aids and services, telecommuting, making websites accessible, and accommodations for unionized workers. Your questions may concern your own compliance with the ADA, or compliance issues arising for your clients. If you have clients in other regions, the same toll-free number will connect them to their regional DBTAC.

If you need to identify potential consultants or experts on a matter, such as to evaluate accessibility or conduct site evaluations for ADA compliance, the Center may be able to make referrals. On a case-by-case basis, the Center may even agree to serve as an expert itself.

Getting on the Center's email list for its information bulletins can help keep you and your clients updated on current topics regarding the ADA and accessible information technology. For example, a recent bulletin highlighted tax benefits available to businesses (including law practices) that hire or accommodate people with disabilities.

Training

Free training is available on an ongoing basis, as well as at periodic events. In addition, the Center can present trainings on request, including trainings tailored to specific topics and audiences.

The website offers examples of training topics potentially of interest to businesses, schools, social service organizations, and state and local governments. Sample topics include Avoiding ADA Lawsuits, Making Your Website Accessible, Providing Accommodations without Breaking the Bank, and Hiring without Fear.

Ongoing training includes a monthly brown-bag series at OHSU on the first Thursday of each month, a monthly series at Independent Living Resources in SE Portland on the second Tuesday of each month, and the ADA Distance Learning Teleconference Series. Details on topics, dates, times, and locations are posted on the website. Get on the Center's email list for the training calendar and announcements of upcoming trainings.

Trainings may include PowerPoint presentations, with handouts of slides and information packets. Large-scale trainings can be arranged if needed. Lawyers can attend trainings for their own professional development, as well as recommend trainings to clients. Consider that tailored trainings for clients might be valuable either as a proactive measure or as part of a settlement of a disputed issue. Having a free training resource to suggest may be a significant boon. ❖

For more information, please contact the Center:

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BOLI Complaints

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lining of the complaint and investigative processes. Others are larger in scope, including reexamining the types of cases to which we will be able to dedicate most of our resources. As we reevaluate our operations, we welcome any constructive input you can offer us.

We recognize that a combination of factors (including an economic downturn, high unemployment rates, and severe cuts to many agency budgets) has put increased stresses on the disabled population of Oregon. While CRD is also facing these same stressors, we hope to continue to improve our processes as much as possible within our budgetary constraints. We hope this information will help those of you who deal with us to have as positive an experience as possible. ❖

Endnote

1. For an in-depth discussion of these timing issues, see *Mohasco Corp. v. Silver,* 447 U.S. 807, 100 S. Ct. 2486 (1980).

Summary of Selected 2003 Disability-Related Laws

By Bob Joondeph, Executive Director, Oregon Advocacy Center

The following bills affecting individuals with disabilities were passed by the 2003 Legislative Assembly and signed into law by the governor.

House Bill 2101

States that a petition under the Elderly and Disabled Person Abuse Prevention Act may be filed only in the county in which the petitioner or respondent resides. Any contempt proceeding for violation of a restraining order may be conducted by the court that issued the order or in the county where the alleged violation occurred. Took effect on June 11, 2003.

House Bill 2120

Local commissions on children and families are to include in their plans reference to local service plans for the delivery of mental health services for children and their families and local public health plans. Clarifies the approval authority of the State Commission on Children and Families. Took effect on July 8, 2003.

House Bill 2305

Brings many provisions of the federal Health Insurance Portability and Accountability Act (HIPAA) into state law. Sets out a form for authorized disclosure of information that, if used, provides a safe harbor from liability. Sets a maximum copying charge for records duplication. Took effect May 24, 2003.

House Bill 2306

Establishes standards for health insurers that are subject to HIPAA and the federal Gramm-Leach-Bliley Act regarding the use and disclosure of personal information, access of individuals to personal information, amendment of personal information, and accounting of disclosures of personal information. Took effect May 24, 2003.

House Bill 2307

The purpose of this bill is to make the state law governing confidentiality of medical records in state institutions; community mental health, developmental disability and substance abuse programs; public health programs; and Department of Corrections programs consistent with federal HIPAA law. Took effect May 24, 2003.

House Bill 2309

Specifies that a physician or psychologist can give confidential medical information to a court visitor in the course of a guardianship proceeding only with the consent of the patient or in response to a court order. Took effect May 24, 2003.

House Bill 2449

Amends the Elderly and Disabled Person Abuse Prevention Act to permit an elderly or incapacitated person who suffers injury, damage, or death by reason of abuse to recover an amount equal to three times all economic and noneconomic damages. Applies only to cases filed on or after the effective date of the bill: January 1, 2004.

House Bill 2450

Permits a parent who applies for or receives temporary assistance for needy families (TANF) to enroll in and attend a two- or four-year program at an educational institution as an allowable work activity. Applies only if applicable federal waivers permit. Takes effect on January 1, 2004.

House Bill 2490

Continues a planning and advisory committee to make recommendations on how to improve the health and well-being of children whose parents are involved in the criminal justice system. Took effect on June 24, 2003.

House Bill 2522

States that the Oregon Health Plan ombudsman shall be appointed by the director of the Department of Human Services (DHS) with the concurrence of the governor and shall make quarterly reports to the governor. Renames the Office of Children's Ombudsman to the Office of Children's Advocate and moves it from the State Commission on Children and Families to DHS. The advocate will be appointed by the director of DHS with the concurrence of the governor and report to the governor quarterly. The ombudsman for injured workers will be appointed by the director of Consumer and Business Services with concurrence of the governor and will report to the governor quarterly. If any other agency designates a person to conduct ombudsman services, the person will report to the governor in writing at least quarterly. Took effect on July 17, 2003.

House Bill 2537

Directs the Insurance Pool Governing Board to provide health

benefit plans that are not eligible for subsidy under ORS 735.724 only for small employers that did not provide a health benefit plan for eligible employees on July 1, 2003. Essentially, this allows the board to create an insurance package for some small employers that may not provide coverage that is otherwise mandated in state law. Took effect on September 2, 2003.

House Bill 2987

Permits health insurance carriers to impose a waiver of coverage in an individual health benefit plan for one or more preexisting conditions at the time the person is first enrolled if the condition is specifically set out by disease code, the waiver is agreed to in writing by both parties, and the period of waiver is not less than six months or greater than 24 months following the person's effective date of coverage. A person who is accepted for coverage by a plan that imposes a waiver of coverage is eligible to apply for coverage under the Oregon Medical Insurance Pool. Takes effect January 1, 2004. Sunsets January 2, 2008.

House Bill 3431

States that if a person is accepted for coverage under an individual health benefit plan, the carrier may limit the plans in which the person may elect to enroll. If the person is denied coverage under the initial plan that he or she elects, the person is eligible to apply for coverage under the Oregon Medical Insurance Pool. Takes effect January 1, 2004. Sunsets January 2, 2008.

House Bill 3522

Directs the Department of Transportation to adopt rules for implementing the Elderly and Disabled Special Transportation Fund, which may include restrictions and requirements regarding distribution of money received from the fund. Takes effect on January 1, 2004.

House Bill 3638

States that certain previously mandatory services to be provided by community mental health and developmental disability programs will now be "subject to available funds." These include outpatient services for mental health, developmental disabilities, and drug and alcohol dependence; aftercare for people released from hospitals; community and professional training; and interagency collaboration. Took effect on September 17, 2003.

Senate Bill 17

Creates an enforceable right to be free of disability-based discrimination in the services, programs, and activities of state government. Takes effect January 1, 2004.

Senate Bill 18

Requires reporting and investigation of neglect that leads to physical harm of recipients of community mental health or developmental disability services. Requires investigators to receive the training and consultation necessary to conduct thorough and unbiased investigations. Takes effect January 1, 2004.

Senate Bill 119

Grants the attorney general or any district attorney the authority to investigate instances of abuse against elderly and disabled persons. Takes effect January 1, 2004.

Senate Bill 127

States that if a child is receiving early childhood special education, a review of the individualized family service plan may be conducted every six months. Took effect on July 1, 2003.

Senate Bill 456

States that school officials may not recommend that a student seek a prescription for a medication that is prescribed with the intent of affecting or altering the thought processes, mood, or behavior of the student. Does not prohibit an official from communicating with a parent about a student's behavior at school or relieve a school district of the duty to identify, locate, and evaluate students with disabilities. Took effect on June 26, 2003.

Senate Bill 554

States that when DHS changes a benefit standard that results in the reduction, suspension, or closure of a grant of general or public assistance, DHS shall mail a notice of intended action at least 30 days before the effective date of the action. If DHS has fewer than 60 days to take action, it must mail notices as soon as practicable but at least 10 days before the effective date of the action. Took effect on July 1, 2003.

Senate Bill 833

States that the Housing and Community Services Department may not provide funding for the development of new rental housing that is a subsidized development unless each dwelling unit has certain "visitable" features. "Visitable" means "capable of being approached, entered and used by individuals with mobility impairments, including but not limited to individuals using wheelchairs." Exemptions are available under certain circumstances. Takes effect January 1, 2004. ❖

CASE NOTES: **ADA Employment Decisions**

By Allyson S. Krueger, Barran Liebman, LLP

U.S. Supreme Court

***U.S. Airways, Inc. v. Barnett,* 535 U.S. 391, 122 S. Ct. 1516 (2002)**

In *U.S. Airways, Inc. v. Barnett*, the U.S. Supreme Court ruled that an employer's showing that a requested accommodation under the Americans with Disabilities Act (ADA) conflicts with seniority rules is ordinarily sufficient to demonstrate that a requested accommodation is "not reasonable." The Court left open the possibility that an individual employee-plaintiff may present evidence of "special circumstances" that make an exception to seniority rules reasonable.

Barnett involved an employee who was injured on the job and, after returning to work, discovered that he was no longer able to perform some of the duties of his position. U.S. Airways, although nonunion, maintained a seniority system, and Barnett was able to use his seniority to transfer to the mailroom. Subsequently, Barnett learned that two of his co-workers with greater seniority planned to exercise their transfer rights, and as a result, Barnett would be "bumped" from his position in the mailroom. Because of his injury, Barnett was not physically able to perform in any other position.

Barnett wanted U.S. Airways to accommodate his disability by allowing him to remain in the mailroom. This accommodation would have required U.S. Airways to make an exception to its seniority policy. U.S. Airways declined Barnett's request, stating that the seniority system gave Barnett the right to apply and compete for reassignment and nothing more.

In 2000, the Ninth Circuit concluded that U.S. Airway's decades-old seniority system was not a per se bar to reassignment. Instead, the Ninth Circuit found that a non–collectively bargained seniority system could be a bar to reassignment as a reasonable accommodation only if diverging from that seniority system would result in an undue hardship to the employer.

The U.S. Supreme Court disagreed with the Ninth Circuit, finding that even a non–collectively bargained seniority system will trump a requested accommodation in the "run of cases."

Thus, to show that a requested reassignment accommodation is not reasonable, the employer must show only that the reassignment would require the employer to violate the rules of a seniority system. However, the employee-plaintiff may also demonstrate that despite the presence of a seniority system, the requested reassignment is a reasonable accommodation. For example, the employee-plaintiff may show that the employer retains the right to change the seniority system unilaterally and exercises that right fairly frequently, "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" or that the system already contains exceptions so that one further exception might not matter.

***Clackamas Gastroenterology Associates P.C. v. Wells,* __ U.S. __, 123 S. Ct. 1673 (2003)**

To be considered an "employer" under the Americans with Disabilities Act, an entity must have 15 or more "employees" during certain times. In cases involving small businesses, it is therefore critical to determine which individuals are counted as "employees." In *Clackamas Gastroenterology Associates P.C. v. Wells*, the Supreme Court concluded that there is no bright line definition of "employee." Instead, courts must consider several factors that are geared toward establishing the amount of control the individual has over the business.

Wells involved a small medical clinic that employed 12 to 15 people in addition to four physicians who were shareholders and directors. After her termination, Wells, a bookkeeper for the clinic, filed a discrimination lawsuit under the ADA. The clinic disputed that it was an "employer" under the ADA, claiming that the physician-shareholders should not be considered "employees." Wells argued that the physician-shareholders should be included when calculating the total number of employees.

Noting that the ADA itself does not provide a helpful definition of "employee," the Court adopted EEOC factors to determine whether the physicians ought to be counted as "employees." The guidepost underlying the factors, the Court explained, is the "control test." In other words, courts must ultimately decide whether the

individual is independent and in control of the business, or whether he or she is *subject to* the control of the business or its managers. The Court made it clear that titles, such as "director" or "partner," will not determine whether that person is an "employee" under the ADA.

The new control test really means that small employers—ranging from family businesses to accounting firms—should count "employees" by looking to the *substance* of the individual's relationship with the business, rather than job titles. Whether the individual has actual control over the business and its employees may determine whether the employer is subject to ADA lawsuits. Oregon employers should also be aware that Oregon's disability discrimination statute applies to employers who employ six or more persons.

Ninth Circuit

***Echazabal v. Chevron USA, Inc.,* 336 F.3d 1023 (9th Cir. 2003)**

The Ninth Circuit recently concluded that the ADA requires an employer to hire a medical expert whenever it wants to deny an individual employment because he or she may pose a direct threat to himself or herself. In its 2000 *Echazabal* decision, the Ninth Circuit rejected the "direct threat" defense set forth in the regulations promulgated by the EEOC. The defense, as articulated under the regulation, allowed employers to screen out a potential disabled worker who would pose a direct threat to others or to his or her own health. Last year the U.S. Supreme Court unanimously reversed that Ninth Circuit decision, concluding that the EEOC regulation appropriately extended the affirmative defense to include direct threats to a worker's own health and not just threats to other employees. It also emphasized that its own interpretation avoided a potential conflict with OSHA's policy of ensuring "the safety of 'each' and 'every' worker."

The Supreme Court then remanded the case to the Ninth Circuit for a determination of whether Chevron met the requirements of the direct threat defense. The Supreme Court noted that the direct threat defense, as applied to the impact of the individual's condition on himself or herself, must be based on a "reasonable medical judgment that relies on the most current medical knowledge and/or the best available object evidence," and on an expressly "individualized assessment of the individual's present ability to safely perform the essential functions of the job."

The Ninth Circuit found that Chevron had not met its burden of proving the defense. In so ruling, it rejected the company doctors' evaluations, finding that the doctors lacked expertise in the area of Echazabal's liver condition. Over the dissent of one judge, the panel held that the ADA requires more than reliance on the advice of a general practitioner and/or a preventative medicine expert. According to the panel, the ADA requires that employers consult an outside physician who is qualified as an expert in the field on the specific condition from which the individual suffers. The expert must consider the "severity, imminence and potential likelihood of harm" caused by the individual's disability as it relates to the demands and conditions of the particular job. The employer also may have to consider relevant information about an employee's past work history. Under the current state of the law, employers now must consult a medical expert to evaluate the disabled individual and, with the expert's assistance, carefully examine the job requirements and potential risk before rejecting the individual.

***Kaplan v. City of North Las Vegas,* 323 F.3d 1226 (9th Cir. 2003)**

The ADA prohibits discrimination against individuals with disabilities who are able to perform the essential job functions "with or without reasonable accommodation." The ADA defines "disabled" to include persons who are "regarded as" having a disability, even though they may not in fact be disabled. To comply with the ADA, employers are generally required to provide accommodations to disabled persons who can otherwise perform the job functions. Reasonable accommodations may include making facilities accessible, adjusting work policies, or reassigning people to vacant positions.

The Ninth Circuit recently limited that requirement in *Kaplan v. City of North Las Vegas*. The court held that the employee, who did not have an actual disability, was not entitled to a reasonable accommodation when his employer merely "regarded him as" having a disability. In doing so, the Ninth Circuit followed the majority of jurisdictions that have concluded that so-called "regarded as" plaintiffs are not entitled to reasonable accommodations under the ADA.

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CASE NOTES: **Special Education Decisions**

By Paul Alig

***Shapiro v. Paradise Valley USD 69,* 317 F.3d 1072 (9th Cir. 2003)**

The school district appealed a district court ruling that it did not provide a free appropriate public education (FAPE) to a profoundly deaf seven-year-old student with a cochlear implant. The district court determined that the school district violated several procedural mandates required by the Individuals with Disabilities Education Act (IDEA) in creating the student's individualized education program (IEP) and that the student's parents were, therefore, entitled to reimbursement for the costs of sending her to a private out-of-district school.

The court of appeals affirmed the district court's ruling that by failing to include a teacher from the student's private educational placement and her parents in her June 8, 1994, IEP meeting, the school district denied the student FAPE and the student's parents were entitled to the reimbursement. The school district's argument that "a teacher" met the requirement that "the teacher" be present at the meeting was rejected—the special education or speech/language teacher was required at the meeting, and a future teacher would not suffice. In failing to find a mutually agreed-upon time that the parents could attend the IEP meeting, the school district violated the IDEA by prioritizing its staff's schedules over the parents'. Mailing the parents the IEP and allowing them to participate in future meetings did not create meaningful participation for the purposes of the missed meeting.

These procedural errors resulted in a defective IEP that failed to provide FAPE. This factor, combined with the district court's decision that the private placement was reasonably calculated to provide an education benefit, established grounds for reimbursement of costs related to the private placement.

***Ms. S. v . Vashon Island School District,* No 99-36243 (9th Cir., July 31, 2003)**

The parent appealed a district court's ruling in favor of the school district's temporary placement of a transfer student with Down's syndrome in a special education classroom segregated from the general population until the child could be assessed. The parent claimed that the child should have been in the general education environment until the assessment could be completed. The court of appeals found that because the administrative law judge (ALJ) making the decisions was not present during the hearing and instead listened to imperfect tapes of the proceedings, the ALJ's credibility determinations were due little deference, even under the generally favorable "due weight" attributed to ALJ factual findings under the IDEA. However, any reliance on these findings was harmless error.

In determining whether the student had enrolled in the new school district, the court applied the definition of "enrolled" under Washington's school-funding apportionment statutes. Even though the student resided in the new district, he was never enrolled because he did not attend school until the school district proposed a new IEP. The court noted that a school district may not enter into an IEP meeting with a "take it or leave it" position, and that if it does so, the parent's decision not to cooperate does not excuse the district's error. The court determined that the district had made efforts to cooperate with the parent even though it arrived at the meeting with a proposed IEP, and that the only "take it or leave it" feature of its proposal was due to a difference of educational philosophy, on which the district's expertise is afforded appropriate weight.

Deferring to the position of OSEP, the federal agency that regulates the IDEA, the court held that when a dispute arises about the most appropriate educational placement for a transfer student, the new district will satisfy the IDEA if it implements the last agreed-upon IEP, and if it is not possible to implement that IEP, the district must adopt a plan that approximates the old IEP as closely as possible. The fact that the district did not have a general education teacher present at the IEP meetings was not procedural error because the parent had home-schooled the student the year before the transfer, and her presence could meet that requirement.

***M.L. v. Federal Way Sch. Dist.,* Civ. No. 02-35547, 103 LRP 3927 (9th Cir. 2003)**

The district failed to include a general education teacher on the

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CASE NOTES: **Fair Housing Decisions**

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received all their notices, and declined to rescind. The borrowers then filed suit.

The appellate court found that the district court did not err when it granted summary judgment to the lender and the bank on the Truth in Lending Act claims because the document relied on by the borrowers clearly informed them that despite the fact that the loan was conditioned on a satisfactory appraisal, the loan was consummated. Thus, the appraisal review notwithstanding, the borrowers became contractually obligated when the loan documents were executed on January 26, 1999, and the rescission period expired three days later. Because 42 U.S.C. § 3605 (the fair lending provision of the Fair Housing Act) did not define discrimination to include a lender's refusal to make reasonable accommodations, the lender was under no obligation under the FHA to provide a sign language interpreter for the borrowers.

Good Shepherd Manor Found., Inc. v. City of Momence,
323 F.3d 557 (7th Cir. 2003)

The owners provided housing and related services for developmentally disabled adults. The city shut off the water service to a lot that the owners purchased to build two additional houses for disabled adults after the owners failed to extend the water lines to the border of the property as agreed. The owners' primary challenge on appeal was to the district court's ruling that they could not present a theory of failure to reasonably accommodate.

The appellate court found that the owners presented nothing to suggest that the city's alleged rules or actions affected the developmentally disabled any differently than they affected all other people. Therefore, the district court appropriately prevented the owners from proceeding under the reasonable accommodation theory on their claims under the ADA, 42 U.S.C. § 12101 et seq., and the Fair Housing Amendments Act, 42 U.S.C. § 3601 et seq.

Oconomowoc Residential Programs, Inc. v. City of Milwaukee,
300 F.3d 775 (7th Cir. 2002)

A group home was denied a zoning variance to operate a community living facility in the city. As part of its zoning code, the city restricted the placement of community living arrangements. The plaintiffs alleged that the city's refusal to grant them an exception to the zoning ordinance violated both the FHA and the ADA.

The court of appeals held that the city's zoning ordinance did not provide a reasonable accommodation. The city failed to show that the group home would impose undue financial and administrative burdens on the city. There was simply no evidence anywhere in the record that group facilities impose on the city additional costs for emergency services. A denial of a variance due to public safety concerns or concerns for the safety of the residents themselves could not be based on blanket stereotypes about disabled persons rather than particularized concerns about individual residents. The mere fact that residents of the proposed group home would at times require the assistance of the local police and other emergency services did not rise to the level of imposing a cognizable administrative and financial burden on the community. ❖

CASE NOTES: **Special Education Decisions**

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IEP team even though the previous school district had recommended placement in integrated setting. It was in "some degree likely" that the student would be placed in a general education setting. The court held that the lack of a general education teacher on the IEP team did not result in loss of FAPE because the parents did not demonstrate that the student should not have been placed in the integrated setting or that the outcome would have been different had the general education teacher attended. The district was permitted to hold IEP meetings during normal school hours, and the parents' requests to hold IEP meetings during the weekends or early mornings were unjustified because the parents were able to attend during school hours.

To demonstrate denial of FAPE based on teasing, a parent must show that the district was deliberately indifferent to an extent "so severe that the child can derive no benefit from the services he or she is offered." The court upheld the placement in the integrated setting, noting that the student had previously received an educational benefit in an integrated preschool. ❖

Case Notes:
ADA Employment Decisions

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Oregon State Courts

Evans v. Multnomah County Sheriff's Office,
184 Or. App. 733 (2002)

The plaintiff, who worked as a corrections officer for the Multnomah County sheriff's office, became unable to have contact with inmates because such contact risked exacerbating a heart condition. He requested permanent assignment to noncontact posts as a reasonable accommodation. His employer denied the request and terminated him, reasoning that all deputies must be willing and able to rotate through every post. Evans sued, alleging that his termination violated Oregon's disability statute that requires employers to make reasonable accommodations for otherwise qualified disabled persons unless doing so imposes an undue hardship.

The court held that the proper test under Oregon law to determine whether a particular disability substantially impairs one's major life activity of employment is the same as the test under the federal ADA: the plaintiff must allege that he or she is unable to work in a broad class of jobs. Evans met this test because, the court said, a reasonable factfinder could conclude that Evans's condition rendered him unable to perform many jobs in, for example, construction, maintenance, law enforcement, and manufacturing.

Evans also argued that he was "otherwise qualified" for the job because he could perform its essential functions; he could do so because the job consisted of individual posts with little or no inmate contact to which a deputy could be assigned. The court agreed, holding that Oregon's broad public policy, as articulated in the statutory scheme, guaranteed "disabled persons the fullest possible participation in the social and economic life of the state, [and] to engage in remunerative employment," mandating a broad interpretation of the statute. The court's holding means that Oregon employers may not unilaterally declare an entire job classification off limits to disabled people on the ground that an employee's disability prevents the employee from performing some of the duties within that classification. Specifically, if a disabled employee with rotating job assignments can perform a limited number of posts, the employer may remain obligated to make reasonable accommodations. ❖

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