

SECTION 10

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**CIVIL RIGHTS**



## A. INTRODUCTION

This section begins with an overview of federal civil rights legislation. It then examines the requirements imposed upon federal transit fund recipients, particularly in terms of affirmative action and disadvantaged business enterprise contracting. This is followed by a review of the means by which a citizen may pursue a state or local transit provider for violation of his or her civil rights. The section then examines issues of employment discrimination, a subject that could have been included in the preceding section on “Labor Law.” This is followed by a review of discrimination in transportation issues, including racial and disabilities discrimination, and requirements to improve access for disabled passengers.

## B. FEDERAL CIVIL RIGHTS LEGISLATION—AN OVERVIEW

Several federal laws have been enacted and programs<sup>1</sup> created to prohibit various forms of discrimination. These include:

- Title VI of the Civil Rights Act of 1964<sup>2</sup> prohibits discrimination on the basis of race, color, or national origin;<sup>3</sup> Title VII prohibits such discrimination in the context of employment;<sup>4</sup> Title VIII requires nondiscrimination in the sale, rental, or financing of housing;
- The Federal Transit Act<sup>5</sup> also prohibits discrimination on the basis of race, color, creed, national origin, sex, or age, and prohibits discrimination in employment or business opportunity;<sup>6</sup>
- Title IX of the Education Amendments of 1972<sup>7</sup> prohibits discrimination on the basis of sex;<sup>8</sup>

<sup>1</sup> The major federal programs include Title VI of the Civil Rights Act of 1964 (Service Delivery/Benefits); Equal Employment Opportunity (EEO); Disadvantaged Business Enterprise (DBE) Program; and the Americans with Disabilities Act (ADA) Program.

<sup>2</sup> 42 U.S.C. § 2000d (2000). This requirement is implemented by U.S. DOT Regulations, “Nondiscrimination in Federally-Assisted Programs of the Department of Transportation—Effectuation of Title VI of the Civil Rights Act,” 49 C.F.R. pt. 21 (2002).

<sup>3</sup> Requirements prohibiting discrimination on the basis of race, color, or national origin are set forth in Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2000), and U.S. DOT regulations, “Nondiscrimination in Federally-Assisted Programs of the Department of Transportation—Effectuation of Title VI of the Civil Rights Act,” 49 C.F.R. pt. 21 (2002). See Sections 10.E.6 through 10.E.8, below.

<sup>4</sup> 42 U.S.C. § 2000e (2000). See Section 10.E, below.

<sup>5</sup> 49 U.S.C. § 5332 (2000).

<sup>6</sup> See U.S. DOT Regulations, “Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs,” 49 C.F.R. pt. 26 (2002) (All references to C.F.R. are to 002 edition unless otherwise noted). See Section 10.E, below.

<sup>7</sup> 20 U.S.C. §§ 1681, 1683, and 1685 through 1687 (2000).

<sup>8</sup> See Section 10.E.10, below.

• The Age Discrimination Act of 1975<sup>9</sup> prohibits age discrimination.<sup>10</sup>

• Section 504 of the Rehabilitation Act of 1973<sup>11</sup> and the ADA of 1990<sup>12</sup> prohibit discrimination on the basis of handicaps;<sup>13</sup>

• Title IX of the Education Amendments of 1972<sup>14</sup> and the Drug Abuse Office and Treatment Act of 1972<sup>15</sup> prohibit discrimination on the basis of drug abuse;

• The Comprehensive Alcohol Abuse and Alcoholism Prevention Act of 1970<sup>16</sup> prohibits discrimination on the basis of alcohol abuse or alcoholism;<sup>17</sup>

• The Public Health Service Act<sup>18</sup> requires confidentiality of alcohol and drug abuse patient records;<sup>19</sup>

• Section 1101(b) of TEA-21<sup>20</sup> provides for participation of disadvantaged business enterprises in FTA programs.<sup>21</sup> DOT’s implementing regulations (49 C.F.R. Part 26) are among the most problematic issues for grantees;

<sup>9</sup> 42 U.S.C. §§ 6101 *et seq.* (2000).

<sup>10</sup> See Section 10.E.12, below.

<sup>11</sup> 29 U.S.C. § 794 (2000). U.S. DOT Regulations, “Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance,” 49 C.F.R. pt. 27, implementing 29 U.S.C. § 794 and 49 U.S.C. § 5310(a) & (f).

<sup>12</sup> 42 U.S.C. §§ 12101 *et seq.* (2000); U.S. DOT regulations, “Transportation Services for Individuals with Disabilities (ADA),” 49 C.F.R. pt. 37 (2002). U.S. Equal Employment Opportunity Commission, “Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act,” 29 C.F.R. pt. 1630 (1999); Joint U.S. Architectural and Transportation Barriers Compliance Board/U.S. DOT regulations, “Americans With Disabilities (ADA) Accessibility Specifications for Transportation Vehicles,” 36 C.F.R. pt. 1192 and 49 C.F.R. pt. 38 (2002); U.S. DOJ regulations, “Nondiscrimination on the Basis of Disability in State and Local Government Services,” 28 C.F.R. pt. 35; U.S. DOJ regulations, “Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities,” 28 C.F.R. pt. 36 (1999); U.S. GSA regulations, “Accommodations for the Physically Handicapped,” 41 C.F.R. subpt. 101-19 (1999); U.S. DOT Regulations, “Transportation Services for Individuals with Disabilities (ADA),” 49 C.F.R. pt. 37, subpt. H, “Over-the-Road Buses,” and joint U.S. Architectural and Transportation Barriers Compliance Board/U.S. DOT Regulations, “Americans With Disabilities (ADA) Accessibility Specifications for Transportation Vehicles,” 36 C.F.R. pt. 1192 and 49 C.F.R. pt. 38; FTA Regulations, “Transportation for Elderly and Handicapped Persons,” 49 C.F.R. pt. 609, implementing 29 U.S.C. § 794 and 49 U.S.C. §§ 5307(d) & 5308(b).

<sup>13</sup> See Sections 10.E.14 and 10.F.2, below.

<sup>14</sup> 20 U.S.C. §§ 1681, 1683, 1685-87 (2000).

<sup>15</sup> Pub. L. 92-255, Mar. 21, 1972, 86 Stat. 65 (as amended).

<sup>16</sup> Pub. L. 91-616, Dec. 31, 1970, 84 Stat. 1848 (as amended).

<sup>17</sup> See Section 10.E.13, below.

<sup>18</sup> See 42 U.S.C. 290 dd-2.

<sup>19</sup> See Section 10.E.13, below.

<sup>20</sup> 23 U.S.C. § 101 note (2000) (Pub. L. 105-178, tit. I § 1101(b)).

<sup>21</sup> See Section 10.C.3, below.

- The Equal Pay Act of 1963<sup>22</sup> protects individuals who perform substantially equal work in the same company from sex-based wage discrimination;<sup>23</sup> and

- The Civil Rights Act of 1991<sup>24</sup> provides compensatory and punitive damages and attorneys' fees in cases of intentional employment discrimination.<sup>25</sup>

These statutes have generated a robust volume of litigation against transit providers. Among the types of discriminatory practices prohibited under these statutes are the following:

- "Harassment," "discrimination," or "disparate treatment" on the basis of race, color, religion, sex, national origin, disability, or age;

- Retaliation against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices;<sup>26</sup>

- Employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain sex, race, age, religion, or ethnic group, or individuals with disabilities; and

- Denying employment opportunities to a person because of marriage to, or association with, an individual of a particular race, religion, or national origin, or an individual with a disability. Title VII also prohibits discrimination because of participation in schools or places of worship associated with a particular racial, ethnic, or religious group.<sup>27</sup>

## C. CONTRACTING REQUIREMENTS OF FEDERAL GRANTEES

### 1. Equal Employment Opportunity Program

Grantees with 50 or more employees that have received in the previous fiscal year federal capital and/or operating funds of more than \$1 million, or technical studies grants totaling over \$250,000, must develop an Equal Employment Opportunity (EEO) program.<sup>28</sup> The program must be submitted to the FTA for approval. Each FTA Regional Office has a civil rights officer who serves as the point of contact for civil rights issues. Each year, the grantee must submit an Equal Employment Opportunity (EEO) report to FTA. Among the report's contents should be a listing of every person employed by the grantee identified by gender, and a similar listing of hiring and promotions since the most

<sup>22</sup> Equal Pay Act of 1963, Pub. L. No. 88-38, 29 U.S.C. § 206(d) (2000).

<sup>23</sup> See Section 10.E.11, below.

<sup>24</sup> Pub. L. 102-166 (Nov. 21, 1991); 105 Stat 1071; 42 U.S.C. § 1981 (2000).

<sup>25</sup> See Section 10.E, below.

<sup>26</sup> See Section 10.E.4, below.

<sup>27</sup> U.S. Equal Employment Opportunity Commission, *Federal Laws Prohibiting Job Discrimination, Questions and Answers* (last modified June 27, 2001), <http://www.eeoc.gov/facts/qanda.html>.

<sup>28</sup> FTA Circular 4704.1, "Equal Employment Opportunity Program Guidelines for [FTA] Recipients."

recent report; confirmation of the ongoing validity of the grantee's EEO policy statement; a statement that the grantee has an EEO Officer who is autonomous and reports to the General Manager, Board Chair, or other top official; and complaints received since the most recent report and status/disposition thereof. The Grantee Attorney certificate on each application for FTA financial assistance and the Grantee Attorney certificate on the Annual Certifications and Assurances each require the Grantee Attorney to certify that the grantee is in compliance with its legal obligations regarding its EEO Program.

Recipients of federal funds may not discriminate against any employee or applicant for employment because of race, color, creed, sex, disability, age, or national origin.<sup>29</sup> The grantee may require any documentation it may deem necessary to ensure that subrecipients do not discriminate. FTA reviews subrecipient compliance when performing a state management or other state review.<sup>30</sup> FTA also reviews the grantee's performance of its EEO program against FTA's requirements.

### 2. Certification of Nondiscrimination

Federal statutes applicable to FTA grant programs provide that no person may be excluded from participation in, be denied the benefits of, or be subject to discrimination under any project, program, or activity funded in whole or in part through federal financial assistance on the basis of race, color, creed, national

<sup>29</sup> 49 U.S.C. § 5332 (2000) (which prohibits discrimination on the basis of race, color, creed, national origin, sex, or age, and prohibits discrimination in employment or business opportunity), Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d (2000), and U.S. DOT regulations, "Nondiscrimination in Federally-Assisted Programs of the Department of Transportation—Effectuation of Title VI of the Civil Rights Act," 49 C.F.R. pt. 21 (2002). An applicant for FTA funding must assure that it will comply with all requirements of 49 C.F.R. pt. 21, FTA Circular 4702.1, "Title VI Program Guidelines for Federal Transit Administration Recipients." Discrimination on the basis of race, color, creed, national origin, sex, or age in employment or business opportunity is prohibited. 49 U.S.C. § 5332 (2000). Title VII of the Civil Rights Act of 1964; 42 U.S.C. § 2000 (2000), and 49 U.S.C. § 5332 (2000). U.S. Department of Labor (U.S. DOL) regulations, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor," 41 C.F.R. pts. 60 *et seq.* (2002) (which implement Executive Order No. 11246, "Equal Employment Opportunity," as amended by Executive Order No. 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and E.O. 12086 (43 Fed. Reg. 46501)); 42 U.S.C. § 2000(e) note (2000). The FTA's Master Agreement also bars discrimination in federal transit programs. See U.S. Department of Transportation, Federal Transit Administration, *Master Agreement* (last modified Oct. 1, 1999), <http://www.fta.dot.gov/library/legal/agreements/2000/ma.html>.

<sup>30</sup> FTA Circular 9040.1E, ch. 9.

origin, sex, or age.<sup>31</sup> Specifically, Title VI of the Civil Rights Act of 1964 provides, “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Title VI bars both intentional discrimination as well as discrimination that results in a disparate impact (i.e., a neutral policy that has a disparate impact on protected groups).<sup>32</sup> For example, if a grantee receives FTA funds to purchase new buses, Title VI requires that the vehicles be used by the grantee in all portions of its service area, and not primarily in affluent (and often nonminority) neighborhoods. As explained below, Title VI has recently formed the basis of litigation to challenge fare increases and decisions as to the placement of light rail systems (e.g., that a transit system invested large sums in a light rail system serving affluent nonminority neighborhoods, and smaller sums on new buses to provide service in minority neighborhoods).<sup>33</sup>

President Clinton’s Environmental Justice Executive Orders amplified Title VI, requiring that “each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.” The stated objective is to encourage federal agencies to incorporate environmental justice into their mission by addressing adverse health and societal impacts on minority and low-income populations.<sup>34</sup> In addition to the discussion below, environmental justice is also discussed in Section 3—Environmental Law.

The grantee must annually certify to FTA the grantee’s compliance with its civil rights requirements through the Annual Certifications and Assurances for FTA Grants.<sup>35</sup> In addition, applicants for FTA funding must certify that each project will be conducted, property acquisitions undertaken, and project facilities operated in accordance with all applicable requirements of 49 U.S.C. § 5332 of the Federal Transit Act (which prohibits discrimination on the basis of race, color, creed, national origin, sex, or age, and prohibits discrimina-

tion in employment or business opportunity); Title VI of the Civil Rights Act of 1964;<sup>36</sup> USDOT regulations;<sup>37</sup> and all other statutes relating to discrimination.<sup>38</sup> An applicant for FTA funding must also certify that no otherwise qualified person with a disability shall be, solely by reason of that disability, excluded from participation in, denied the benefits of, or otherwise subjected to discrimination in, any program or activity receiving or benefiting from federal assistance.<sup>39</sup>

Compliance with these regulations is a condition of receiving federal financial assistance from DOT.<sup>40</sup> The FTA MA contains these requirements, and the grantee attorney is required to sign a certification that incorporates these and other FTA requirements.<sup>41</sup> The rules also make clear that any private entity that contracts with public entities for the provision of public transit, “stands in the shoes of the public entity for purposes of determining the application of ADA requirements.”<sup>42</sup> FTA may withhold funds to the state or instruct the

<sup>36</sup> 42 U.S.C. § 2000d (2000).

<sup>37</sup> “Nondiscrimination in Federally-Assisted Programs of the Department of Transportation—Effectuation of Title VI of the Civil Rights Act,” 49 C.F.R. pt. 21 at 21.7 (2002).

<sup>38</sup> Applicants for FTA funding must certify that they will comply with all statutes relating to nondiscrimination, including:

- Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, prohibits discrimination on the basis of race, color, or national origin;
  - Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681, 1683, and 1685 through 1687, prohibits discrimination on the basis of sex;
  - Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 prohibits discrimination on the basis of handicaps;
  - The Age Discrimination Act of 1975, 42 U.S.C. §§ 6101 through 6107, prohibits discrimination on the basis of age;
  - The Drug Abuse Office and Treatment Act of 1972, Pub. L. 92-255, Mar. 21, 1972, 86 Stat. 65, as amended, provides for nondiscrimination on the basis of drug abuse;
  - The Comprehensive Alcohol Abuse and Alcoholism Prevention Treatment and Rehabilitation Act of 1970, Pub. L. 91-616, Dec. 31, 1970, 84 Stat. 1848, as amended, 42 U.S.C. 4541 *et seq.*, provides for nondiscrimination on the basis of alcohol abuse or alcoholism;
  - The Public Health Service Act of 1912, 42 U.S.C. §§ 290dd-3 and 290ee-3, provides for confidentiality of alcohol and drug abuse patient records;
  - Title VIII of the Civil Rights Act (Fair Housing Act), 42 U.S.C. § 3601 *et seq.*, provides for nondiscrimination in the sale, rental, or financing of housing; and
  - Section 1101(b) of the Transportation Equity Act for the 21st Century, 23 U.S.C. § 101 note, provides for participation of disadvantaged business enterprises in FTA programs.
- <sup>39</sup> Rehabilitation Act of 1973, 29 U.S.C. 794 (2000), Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* (2000); 49 C.F.R. pts. 27, 37, and 38 (2002).
- <sup>40</sup> 49 C.F.R. § 27.19 (2002).
- <sup>41</sup> U.S. Dep’t of Transp., Federal Transit Admin., *Master Agreement* (last modified Oct. 1, 1999), <http://www.fta.dot.gov/library/legal/agreements/2000/ma.html>.
- <sup>42</sup> 55 Fed. Reg. 40766 (Oct. 4, 1990).

<sup>31</sup> 49 U.S.C. § 5332 (formerly § 19 of the FT Act). Title VI of the Civil Rights Act of 1964.

<sup>32</sup> 65 Fed. Reg. 31803 (May 19, 2000).

<sup>33</sup> *Labor/Community Strategy Center v. L.A. County Metro. Transp. Auth.*, 263 F.3d 1041, 1043 (9th Cir. 2001).

<sup>34</sup> Exec. Order No. 12,898 (Feb. 11, 1994). Michael Knorr, *Environmental Injustice: Inequities Between Empirical Data and Federal, State Legislative and Judicial Responses*, 6 U. BALT. J. ENVTL. L. 71 (1997).

<sup>35</sup> Each recipient of FTA financial assistance must have its Title VI submission approved by FTA and annually certify compliance regarding the level and quality of transit service. FTA Circular 4702.1, “Title VI Program Guidelines for Urban Mass Transportation Recipient.”

state to defer provision of Federal Section 5311 funds to any noncompliant subrecipient. FTA may also refer the issue of noncompliance to the Attorney General for civil action.<sup>43</sup>

DOT has issued a policy statement requiring transit operators, MPOs, and state DOTs to develop a transportation planning public involvement process to engage minority and low-income populations in the decision-making function.<sup>44</sup> Each of these recipients of federal funds must self-certify its compliance with Title VI. In implementing the Environmental Justice Executive Order in their state planning and research and UPWPs, the policy statement provides that FHWA and FTA should, at minimum, review how Title VI is addressed in their public involvement and plan development process.<sup>45</sup>

During certification reviews, MPOs must self-certify compliance with Title VI, and FTA/FHWA must certify such compliance in making the statutory finding that the state TIP is consistent with the planning requirements. FTA/FHWA should identify strategies and efforts the planning process has developed for compliance with Title VI. The planning process should also develop a demographic profile that identifies the locations and needs of socioeconomic groups, including low-income and minority populations covered by the Environmental Justice and Title VI requirements.<sup>46</sup>

### 3. Disadvantaged Business Enterprises

#### a. Federal Legislation

Congressional authorization for the current disadvantaged business enterprise (DBE) requirements is located in numerous legislative sources.<sup>47</sup> Congress enacted the Small Business Act of 1958 (SBA),<sup>48</sup> STAA,<sup>49</sup> and STURAA<sup>50</sup> to achieve minority business participation goals.<sup>51</sup> The SBA states that “[it] is the policy of the United States that small business concerns, ...owned

and controlled by socially and economically disadvantaged individuals, ...shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency.”<sup>52</sup> Economically disadvantaged individuals are defined by the Act as “those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.”<sup>53</sup>

Replacing regulations that had resulted in significant judicial setbacks,<sup>54</sup> in 1999 DOT promulgated new

<sup>52</sup> 15 U.S.C. § 637(d)(1) (2000).

<sup>53</sup> 15 U.S.C. § 637(a)(6)(A) (2000).

<sup>54</sup> Prior to promulgation of 49 C.F.R. pt. 26 (2000), the federal program defined minority-group membership as an individual who claims membership as a minority and who is “so regarded by that particular minority community.” 49 C.F.R. § 23.53 (1997). The federal program used “minority,” “socially and economically disadvantaged individuals,” “small business concern,” and “disadvantaged” interchangeably. It required awarding contracts to people defined by sex, race, and ethnicity and that the grant recipient maintain a disadvantaged program with “practical” numerical goals as a condition for federal grants. 49 C.F.R. § 23.41-53 (1997). The principal objective of the regulations was to eliminate discrimination and require affirmative action, “to ensure nondiscriminatory results and practices in the future, and to involve minority business enterprises fully in contracts and programs funded by the Department.” 49 C.F.R. § 23.5 (1997). The overall goal for federal fund recipients was for disadvantaged business enterprise participation to be “practical and related to the availability of [DBEs] in desired areas of expertise.” 49 C.F.R. § 23.45(g) (1997). DBEs were defined as small businesses (those employing fewer than 500 employees) owned and controlled by socially and economically disadvantaged individuals; or in the case of any publicly-owned business, at least 51 percent of the stock must be owned by one or more socially and economically disadvantaged individual. DOT did not conduct certifications, but relied on certification from the Small Business Administration and state Departments of Transportation. The federal regulations required that the certifying entity presume that African Americans, Hispanics, Asian Pacific Americans, Subcontinent Asians, Native Americans, or members of other groups who from time to time were so designated by the Small Business Administration were socially disadvantaged. Women were also presumed to be socially disadvantaged. Business owners who certified that they were members of those named groups were considered socially and economically disadvantaged. 49 C.F.R. § 23.62 (1997). Other individuals could qualify as socially and economically disadvantaged if they could demonstrate it. 13 C.F.R. 124.1-1 (2000). These included those who could show they were socially or economically disadvantaged, and women-owned businesses. Since STURRA, women have been presumed to be socially and economically disadvantaged for purposes of the DBE program, and therefore no demonstration of eligibility has since been required of them.

A transit grantee that issued a federally assisted contract was required to implement a DBE affirmative action program, and submit its overall goals to the appropriate Federal Transportation Administrator for approval. SANDRA VAN DE WALLE, THE IMPACT OF CIVIL RIGHTS LITIGATION UNDER TITLE VI AND RELATED LAWS ON TRANSIT DECISION MAKING (TCRP Legal

<sup>43</sup> FTA Circular 9040.1E, ch. 9.

<sup>44</sup> The FHWA and FTA perform federal review and certification of MPOs. The Secretary of Transportation must certify the metropolitan planning process not less than every 3 years. The certification consisted of a desk audit by FHA/FHWA field staff of documentation pertaining to the planning process, a site visit, a public meeting, and preparation of a report on the certification review. See Section 2—Transportation Planning, for a more detailed description of the MPO certification and review process.

<sup>45</sup> 65 Fed. Reg. 31,803 (May 19, 2000).

<sup>46</sup> 65 Fed. Reg. 31,803 (May 19, 2000); 49 C.F.R. pts. 619 & 622 (2002).

<sup>47</sup> 23 U.S.C. § 324 (2000); 42 U.S.C. § 2000d, *et seq.* (2000); 49 U.S.C. §§ 1615, 47107, 47113, 17123 (2000); § 1101(b), Pub. L. 105-178, 112 Stat. 107, 113.

<sup>48</sup> Pub. L. No. 85-536 (July 18, 1958), 72 Stat. 384.

<sup>49</sup> Pub. L. No. 97-424 (Jan. 6, 1983), 96 Stat. 2097.

<sup>50</sup> Pub. L. No. 100-17 (Apr. 2, 1987), 101 Stat. 132.

<sup>51</sup> *Harrison & Burrowes Bridge Constructors v. Cuomo*, 981 F.2d 50, 53 (2d Cir. 1992).

regulations at 49 C.F.R. Part 26 [Part 26].<sup>55</sup> The DBE regulations were issued after a series of major affirmative action lawsuits, intense debate in the halls of Congress, and a rulemaking process that took more than 3 years to complete.<sup>56</sup> After the U.S. Supreme Court decision in *Adarand* (discussed below), President Clinton directed DOT and the other Executive Branch agencies to gather particularized evidence of discrimination to determine whether their affirmative action programs were narrowly tailored to serve a compelling government interest, and to reform or eliminate those programs that were not.<sup>57</sup> In order to survive strict scrutiny analysis, DOT revised its DBE rules in February of 1999.<sup>58</sup> DOT knew that the regulations were at the vanguard of the anti-affirmative action agenda, and drafted Part 26 with the greatest possible care to survive judicial challenge. The new rules are designed to establish a narrowly tailored program that provides a “level play-

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Research Digest, 1997). Thus, the recipient developed and administered the DBE program, and set its goals and objectives on a contract-by-contract basis, subject of course to compliance with DOT regulations and approval by FTA. *Id.* at 5–6. 49 C.F.R. § 23.45(g) (1997). Bidders failing to meet the individual DBE goal could, however, nevertheless be awarded projects provided that the bidder could demonstrate good faith efforts to obtain DBE participation. 49 C.F.R. § 23.45(h)(2) (1997); *Tenn. Asphalt Co. v. Farris*, 942 F.2d 969, 970 (6th Cir. 1991).

Annually, each state recipient of federal funds was required to submit its goal to the DOT Secretary. Prior to 1999, if the goal submitted was less than 10 percent, a state was required to show its efforts to locate disadvantaged businesses, to make such businesses aware of contracting opportunities, and to encourage disadvantaged businesses, and must provide information concerning legal or other barriers impeding participation of disadvantaged businesses, the availability of such businesses to work on the recipient’s contracts, the size and other characteristics of the minority population in the recipient’s jurisdiction, and the relevance of such statistics to the potential availability of such businesses. 49 C.F.R. §§ 23.64 and 23.65 (1997). If a recipient requested approval of a goal of less than 10 percent, it had to submit additional justification therefore, which the Administrator could approve or deny. 49 C.F.R. §§ 23.64(e), 23.65, and 49 C.F.R. pt. 23, subpt. D, App. (1997). *See Ellis v. Skinner*, 961 F.2d 912, 915 (10th Cir.), *cert. denied sub nom. Ellis v. Card*, 506 U.S. 939 (1992). 49 C.F.R. §§ 23.64(e), 23.65 (1997). The Administrator held authority to approve a goal less than 10 percent if a finding was made that the recipient was making all appropriate efforts to increase disadvantaged business participation to 10 percent, and that despite such efforts, the lower goal was a reasonable expectation given the availability of disadvantaged businesses. 49 C.F.R. § 23.66 (1997).

<sup>55</sup> Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs, 49 C.F.R. pt. 26 (1999).

<sup>56</sup> Participation by Disadvantaged Business Enterprises in Department of Transportation Programs, 57 Fed. Reg. 58288 (Dec. 9, 1992) (codified at 49 C.F.R. pt. 23); 62 Fed. Reg. 29548 (May 30, 1997) (codified at 49 C.F.R. pts. 23 and 26); 64 Fed. Reg. 5096 (Feb. 2, 1999) (codified at 49 C.F.R. pts. 23 and 26).

<sup>57</sup> VAN DE WALLE, *supra* note 54, at 7.

<sup>58</sup> 64 Fed. Reg. 5096 (Feb. 2, 1999).

ing field” for small economically and socially disadvantaged businesses.<sup>59</sup>

### *b. DBE Certification*

Eligibility to participate in the DBE program as a DBE is based on economic and social factors.<sup>60</sup> Applicants have the burden of proof to show that they meet the size, ownership and control standards, and group membership for DBE participation.<sup>61</sup> Pursuant to Part 26, a DBE is defined as a for-profit small business:

1. That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and

2. Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.<sup>62</sup>

Social and economic disadvantage is rebuttably presumed for “women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA,....”<sup>63</sup> Individuals not presumed socially and economically disadvantaged may also be eligible for DBE certification if their personal net worth is below \$750,000 and their businesses do not exceed small business standards.<sup>64</sup> The new rules impose a personal net worth eligibility cap of \$750,000 irrespective of race, gender, or size of the business.<sup>65</sup>

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<sup>59</sup> 66 Fed. Reg. 23208 (May 8, 2001).

<sup>60</sup> 49 C.F.R. §§ 26.61, 26.63, 26.65, 26.67, 26.69, 26.71. U.S. Dep’t of Transp., Office of Small and Disadvantaged Business Utilization, *The New DOT DBE Rule is Narrowly Tailored* (visited Oct. 28, 2001), <http://www.osdbuweb.dot.gov/business/dbe/ntcht.htm>.

<sup>61</sup> U.S. Dep’t of Transp., Office of Small and Disadvantaged Business Utilization, *What’s New in the New DOT DBE Rule?* (visited Oct. 28, 2001), <http://www.osdbuweb.dot.gov/business/dbe/summary.htm>.

<sup>62</sup> 49 C.F.R. § 26.5 (2002). DBEs also must be (1) U.S. citizens or legal permanent residents, (2) not have an average gross income of more than \$17,420,000 over 3 years, (3) be at least 51 percent owned and controlled by economically disadvantaged individuals, (4) meet the SBA small size in the primary industry group under 13 C.F.R. pt. 121 (1999), (5) if owned by ANCs, Indian Tribes, and Native Hawaiian Organizations, meet the small business size requirements and be controlled by socially and economically disadvantaged individuals, (6) meet the requirements of pt. 26 concerning licenses and credentials, and (7) be for-profit. 66 Fed. Reg. 23219 (May 8, 2001).

<sup>63</sup> 49 C.F.R. § 26.67 (2002).

<sup>64</sup> *Id.*, 49 C.F.R. § 26.69 (2002). United States Dep’t of Transp., *President Clinton Announces Significant New Rule on Disadvantaged Business to Help Ensure Fair Competition for DOT Contracts* (Jan. 29, 1999) (News Release), available in 1999 WL 38999. 13 C.F.R. pt. 121 (2001) (defining small business standards under the SBA).

<sup>65</sup> 49 C.F.R. § 26.67 (2002).

The presumption of social advantage for individuals with certain specified racial and national origin (e.g., Pakistanis are deemed socially disadvantaged, while Polish immigrants are not) classifications has been criticized as over inclusive.<sup>66</sup> DOT noted that the list was produced by Congress, and indicated that the list created a rebuttable presumption challengeable by anyone seeking to overcome the presumption.<sup>67</sup> A white male can also make an individual showing of social and economic disadvantage to seek to achieve eligibility under the program.<sup>68</sup>

### c. Quotas, or Aspirational Goals?

DOT's DBE program was criticized as a *de facto* quota program in which recipients insisted that contractors meet numerical goals irrespective of other considerations and did not take the good faith efforts of contractors seriously, and the DBE program imposed a set-aside regardless of the availability of race-neutral solutions. In response, DOT emphasized that the "DBE program is not a quota or set-aside program, and is not intended to operate as one."<sup>69</sup> The 10 percent national statutory goal is "aspirational" only. Unlike the regulations they replaced (49 C.F.R. Part 23), the new rules do not require recipients to provide a special justification to DOT if their overall goal is less than 10 percent.<sup>70</sup> Recipients set their own goals based on local market conditions.<sup>71</sup> Goals are to be established based on the number of "ready, willing and able DBEs" in the local market.<sup>72</sup> Recipients must meet the maximum feasible portion of their overall goals via race-neutral means, such as outreach and technical assistance.<sup>73</sup> The new regulations explicitly prohibit the use of quotas under any circumstances, and prohibit set-asides except when no other approach is likely to redress egregious discrimination.<sup>74</sup> Bidders now can satisfy the "good faith efforts" requirement either by having enough DBE participation to meet the goal, or if not, by documenting good faith efforts of their attempt to meet the goal.<sup>75</sup>

Congress also enacted the SBA<sup>76</sup> to assist businesses owned and controlled by the socially and economically

disadvantaged. Both ISTEA<sup>77</sup> and TEA-21<sup>78</sup> set an aspirational goal of 10 percent of transportation contracting funds to projects employing DBEs.<sup>79</sup> This 10 percent target is considered by DOT to be a flexible goal.<sup>80</sup>

Prior to the seminal U.S. Supreme Court decision in *Adarand*, discussed below, the judicial inquiry into compelling interest was different when a local entity, rather than Congress, utilized a racial classification. While Congress has the authority to address problems of nationwide discrimination with legislation that is nationwide in application,<sup>81</sup> a state or local government has only "the authority to eradicate the effects of discrimination within its own legislative jurisdiction."<sup>82</sup> Thus, in analyzing the purely local component of a DBE program, the question is whether the agency crafted a narrowly tailored program to serve the compelling interest presented in its locality.<sup>83</sup> A minority business enterprise provision could pass constitutional muster if the following two conditions are met: (1) the provision was supported by a finding of a competent judicial, legislative, or administrative body that unlawful discrimination had in the past been perpetrated against minority business enterprises; and (2) the minority business enterprise requirement was narrowly drawn to remedy the prejudicial effects flowing from the specific prior discrimination.<sup>84</sup>

### d. Recipient Eligibility

FTA recipients who receive more than \$250,000 in FTA assistance during a fiscal year must establish a DBE program.<sup>85</sup> FTA must approve a transit agency's DBE program as a condition of receipt of FTA financial assistance.<sup>86</sup> The DBE program is both a requirement for eligibility as a recipient and a condition of the continued receipt of FTA funds.<sup>87</sup> A transit grantee that receives FTA funds must develop a DBE program, submit it to the appropriate operating administration (OA) for approval, and implement the approved DBE program.<sup>88</sup>

<sup>77</sup> Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240 (Dec. 18, 1991), 105 Stat. 1919.

<sup>78</sup> Pub. L. 105-178 (June 9, 1998), 112 Stat. 113.

<sup>79</sup> FTA Circular 4716.1A, "Disadvantaged Business Enterprise Requirements for Recipients and Transit Vehicle Manufacturers."

<sup>80</sup> VAN DE WALLE, *supra* note 54, at 12.

<sup>81</sup> See *City of Richmond v. Croson*, 488 U.S. 469, 504 (1989).

<sup>82</sup> *Id.* at 491-92.

<sup>83</sup> *Houston Contractors Ass'n. v. Metropolitan Transit Auth. of Harris County*, 1999 U.S. App. Lexis 15100 (June 28, 1999) (189 F.3d 467).

<sup>84</sup> See *University of Cal. Regents v. Bakke*, 438 U.S. 265 (1978); see also *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

<sup>85</sup> 49 C.F.R. § 26.21.

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

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

<sup>88</sup> 49 C.F.R. § 26.21 (2002). 49 C.F.R. § 26.5 (defining operating administration as the following parts of the DOT: FAA; FHWA; and FTA).

<sup>66</sup> 64 Fed. Reg. at 5099.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*, 49 C.F.R. § 26.67 (2002).

<sup>69</sup> 64 Fed. Reg. at 5097.

<sup>70</sup> 49 C.F.R. § 26.41 (2002).

<sup>71</sup> 49 C.F.R. § 26.45 (2002). The overall goals must be based on evidence of the relative availability of ready, willing, and able DBEs in the area. *Id.*

<sup>72</sup> U.S. GENERAL ACCOUNTING OFFICE, DISADVANTAGED BUSINESS ENTERPRISES (June 2001).

<sup>73</sup> 49 C.F.R. § 26.51 (2002).

<sup>74</sup> 49 C.F.R. § 26.43 (2002).

<sup>75</sup> 49 C.F.R. § 26.53 (2002).

<sup>76</sup> Pub. L. 87-305 (Sept. 26, 1961), 75 Stat. 667. 15 U.S.C. § 637(d)(1) (2000).



Once certified to participate in the DBE program, recipients must set annual overall goals.<sup>89</sup> Goals must be based on evidence of DBE availability, readiness, and willingness to participate.<sup>90</sup> Recipients should determine realistic goals by researching DBE directories, bidders lists, and census information and imputing these figures into a formula to determine the rate of DBE participation.<sup>91</sup> Goals are only to be met using “race-neutral” means, without the use of quotas and only the very limited use of minority set-asides.<sup>92</sup> Recipients must also establish a monitoring and enforcement mechanism to ensure work committed to DBEs is actually performed by them.<sup>93</sup>

Though DOT could withhold funding to a recipient that failed to meet its goals, DOT insisted it had never imposed such sanctions.<sup>94</sup> A new provision was added to explicitly state that a recipient cannot be penalized or treated as being in noncompliance on grounds that its DBE participation falls short of its overall goal.<sup>95</sup> DOT will only penalize recipients if the noncompliance and inappropriate administration was in bad faith.<sup>96</sup> However, the rules also provide that failure to comply with them may result in the imposition of sanctions, including “the suspension or termination of Federal funds, or

refusal to approve projects, grants or contracts until deficiencies are remedied.”<sup>97</sup>

Statutory low-bid requirements exist for prime contractors. DOT emphasized that the new regulations do not require a grant recipient to accept a higher bid for a prime contract from a DBE when a non-DBE has submitted a lower bid. Prime contractors, however, must make good faith efforts to achieve DBE-contract goals.<sup>98</sup> Prime contractors are also free to accept whatever sub-contractor bid they wish.<sup>99</sup>

Coordinating its program with the SBA,<sup>100</sup> DOT has developed a standard certification form for DBE eligibility,<sup>101</sup> and a uniform reporting form for all its agencies, including FTA.<sup>102</sup> DOT has also established a model DBE program that recipients may adopt to help them comply with Part 26.<sup>103</sup> Both were in proposed form as of July 2003.

#### *e. Adarand*

The most significant case assessing the Constitutionality of DOT race-based preferences was *Adarand Con-*

<sup>89</sup> 49 C.F.R. § 26.45 (2002). Goals must be set on August 1 of each year.

<sup>90</sup> *Id.* According to FTA, goal-setting involves a two-step process. In the first

you are trying to determine what percentage DBEs (or firms that could be certified as DBEs) represent of all firms that are ready, willing, and able to compete for DOT-assisted contracting. This percentage is calculated by dividing the number of DBEs ready, willing, and able to bid for the types of work you will fund this year, by the number of all firms (DBEs and non-DBEs) ready, willing, and able to bid for the types of work you will fund this year. That is, the number of DBEs will be in the numerator, and the number of all firms (DBEs and non-DBEs) will be in the denominator. This is true regardless of the type of data you are employing to measure the relative availability (e.g., bidders list, census data and DBE directory, disparity study, alternate method, etc.)

In the second, the step one base figure is adjusted so as to make it as precise as possible. These are described in detail at <http://osdbuweb.dot.gov/business/dbe/tips.html> (visited Dec. 27, 2001).

<sup>91</sup> 49 C.F.R. § 26.45 (2002). Tips for setting goals may be found at <http://osdbuweb.dot.gov/business/dbe/tips.html> (visited Dec. 27, 2001). According to FTA

it is extremely important to include all of your calculations and assumptions in your submission. In other words, you must “show your work.” When you submit your overall goals (and the race/gender-neutral and race/gender-conscious portions of your goals), it is important that we can follow your thinking process. Set out explicitly what your data sources were, what assumptions you made, how you calculated each step of the process, etc.

<sup>92</sup> 49 C.F.R. §§ 26.51 and 26.43 (2002).

<sup>93</sup> 49 C.F.R. § 26.37 (2002).

<sup>94</sup> 64 Fed. Reg. at 5098.

<sup>95</sup> 49 C.F.R. § 26.47 (2002).

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

<sup>97</sup> 49 C.F.R. § 26.101(a) (2002).

<sup>98</sup> 49 C.F.R. § 26.53 (2002).

<sup>99</sup> 64 Fed. Reg. at 5099–5100.

<sup>100</sup> SBA will accept firms certified as DBEs by DOT recipients, subject to the following additional requirements: (1) disadvantaged owners must be U.S. citizens (13 C.F.R. § 124.1002(d) (2002)); (2) the disadvantaged owner must have a personal net worth less than \$750,000.00 (13 C.F.R. § 124.1002(c) (1999)); (3) owners of firms who are women and are not members of one of the designated groups presumed to be socially disadvantaged under 13 C.F.R. § 124.103(b), must provide personal statements relating to their individual social disadvantaged status, § 24.1008(e)(2) (2002); and (4) with respect to DBE airport concessionaires, firms must meet the SBA size standard corresponding to their primary SIC code. See <http://osdbuweb.dot.gov/business/legislation/memofunder.html> (visited Dec. 27, 2001).

<sup>101</sup> See Notice of proposed Rulemaking, 66 F.R. 23208 (May 8, 2001). All DOT recipients in a state must have tendered to DOT a signed agreement creating a Uniform Certification Program for the state by March 4, 2002. Notice of proposed rulemaking.

<sup>102</sup> 66 Fed. Reg. 23208 (May 8, 2001), Notice of Proposed Rulemaking.

<sup>103</sup> See <http://osdbu.dot.gov/programs/dbe.htm>; and <http://navigation.helper.realnames.com/framer/1000/default.asp?realame=DOT&cc=US&lc=en%2DUS&frameid=1565&providerid=262&url=http%3A%2F%2Fwww%2Edot%2Egov> (visited Dec. 27, 2001). DOT notes that, “We have put a sample program document on our web site. This provides a model you can (but are not required to) use for the document, which may save you time in creating your own program. The key to a good program is including information about what you are doing in your state or locality to carry out the basic requirements outlined in the sample.” [Http://osdbuweb.dot.gov/business/dbe/hottips.html](http://osdbuweb.dot.gov/business/dbe/hottips.html) (visited Dec. 27, 2001).

*structors v. Pena.*<sup>104</sup> The case involved the Central Federal Lands Highway Division (CFLHD) of DOT and its award of a highway contract that included a Subcontractor Compensation Clause (SCC) (which the SBA requires all federal agencies to include in their prime contracts). The SCC rewards the prime contractor with a financial bonus of up to 10 percent of the value of the subcontract for subcontracting with DBEs.<sup>105</sup> Adarand, a Caucasian, was the low bidder for a subcontract, but to satisfy the SCC requirements, the prime contractor instead awarded the subcontract to a bidder previously certified by the state DOT as a DBE. Adarand brought suit alleging violation of the Equal Protection Clause of the U.S. Constitution.<sup>106</sup>

Overruling prior decisions, which had used intermediate scrutiny to assess federal “benign” race preferences,<sup>107</sup> the Supreme Court subjected DOT’s use of race-based measures in its regulations to strict scrutiny analysis.<sup>108</sup> Stated differently, *Adarand* extended strict scrutiny analysis to federal affirmative action programs that use racial or ethnic criteria as a basis for decision-making, a standard that had previously only been applied to state or local programs.<sup>109</sup> The Court held, “that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling government interests.”<sup>110</sup> Thus, affirmative action programs—whether federal, state, or local—are now subjected to “strict scrutiny.”<sup>111</sup> They will pass Constitutional muster only if they are narrowly tailored to serve a compelling government interest.<sup>112</sup> What is encompassed by the “narrowly tailored” criterion? The Supreme Court in *Adarand* specified the first two factors listed below. The remaining factors were set forth by Justice Brennan in *United States v. Paradise*,<sup>113</sup> and

<sup>104</sup> 515 U.S. 200 (1995), *remanded* Adarand Constructors, Inc. v. Pena, 965 F. Supp. 1556 (D. Colo. 1997), *vacated sub nom.* Adarand Constructors, Inc. v. Slater, 169 F.3d 1292 (10th Cir. 1999), *rev’d* Adarand Constructors, Inc. v. Slater, 528 U.S. 216 (2000), *remanded* Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000), *amended sub nom.* Adarand Constructors, Inc. v. Mineta, 121 S. Ct. 1401 (2001), *cert. granted*, Adarand Constructors, Inc. v. Mineta, 121 S. Ct. 1598 (2001).

<sup>105</sup> 15 U.S.C. § 637(d) (2000).

<sup>106</sup> U.S. CONST. amend. V.

<sup>107</sup> *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990).

<sup>108</sup> 515 U.S. at 237–39.

<sup>109</sup> VAN DE WALLE, *supra* note 44, at 3.

<sup>110</sup> 616 U.S. 227, 115 S. Ct. at 2113.

<sup>111</sup> Under strict scrutiny, affirmative action programs pass constitutional muster if they are narrowly tailored to serve a compelling governmental interest. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

<sup>112</sup> *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995). VAN DE WALLE, *supra* note 44.

<sup>113</sup> 480 U.S. 149 (1987).

later adopted by the Justice Department in its survey of the case law.

1. Did the government entity give any consideration to the use of race-neutral means to increase minority participation in governmental contracting?

2. Is the program limited in time so that it will not last longer than the discriminatory effects it is designed to eliminate?

3. What is the scope of the program, and is it flexible?

4. Is race relied on as the sole factor in determining eligibility, or is it only one of several factors?

5. Is the numerical target reasonably related to the number of qualified minorities in the applicable pool?

6. What is the extent of the burden placed on non-beneficiaries of the program?<sup>114</sup>

With respect to what encompasses a “compelling government interest,” the Supreme Court in *Adarand* observed that the “unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.”<sup>115</sup> Section 5 of the 14th Amendment confers upon Congress the power “to enforce, by appropriate legislation, the provisions of this article” guaranteeing due process and equal protection. This Constitutional grant may give the federal government more discretion in finding a compelling government interest to arrest discrimination than accorded the states.<sup>116</sup>

In the transit context, the “narrowly tailored” criterion is satisfied by having transit grantees develop contract goals according to the criteria of Part 26.<sup>117</sup> On the

<sup>114</sup> VAN DE WALLE, *supra* note 44. *See* *United States v. Paradise*, 480 U.S. 149, 171 (1987).

<sup>115</sup> 515 U.S. at 237.

<sup>116</sup> *See* Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000) (discussing both “compelling governmental interest” and Congress’s authority to enforce remedies to address the lingering effects of discrimination).

<sup>117</sup> The regulations provide:

To ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination, you must adjust your use of contract goals as follows:

(1) If your approved projection...estimates that you can meet your entire overall goal for a given year through race-neutral means, you must implement your program without setting contract goals during that year.

(2) If, during the course of any year in which you are using contract goals, you determine that you will exceed your overall goal, you must reduce or eliminate the use of contract goals to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal. If you determine that you will fall short of your overall goal, then you must make appropriate modifications in your use of race-neutral and/or race-conscious measures to allow you to meet the overall goal.

(3) If the DBE participation you have obtained by race-neutral means alone meets or exceeds your overall goals for two consecutive years, you are not required to make a projection of the amount of your goal you can meet using such means in the next year. You do not set contract goals on any contracts in the next year. You continue using only race-neutral means to meet your

issue of whether there is a “compelling government interest,” a commentator has noted that it is unlikely that

achieving diverse racial and ethnic sources from which to procure construction and supplies would be found to constitute a compelling government interest. It appears more likely that...the courts will hold that racial classifications in procurement may only be justified by a compelling government interest to remedy the effects of past discrimination.<sup>118</sup>

As a subsequent transit case noted, when a government makes it more difficult for one group to participate in a governmental program, that group may have been denied its Constitutional right to equal protection.<sup>119</sup>

As noted above, after the first U.S. Supreme Court decision in *Adarand*, President Clinton directed DOT and the other Executive Branch agencies to gather particularized evidence of discrimination to determine whether their affirmative action programs were narrowly tailored to serve a compelling government interest, and to reform or eliminate those programs that were not.<sup>120</sup> In order to survive strict scrutiny analysis, DOT revised its DBE rules in February of 1999.<sup>121</sup> The old Part 23 rules required maximum reasonable participation by minorities in federally-funded transportation projects. The new Part 26 regulations attempt to create a level playing field through race neutral means. These “narrowly tailored”<sup>122</sup> rules have been described above.

#### *f. Adarand Reprise*

*Adarand* continued on in the federal courts on remand for several years. After the first U.S. Supreme Court decision remanding the case for strict scrutiny analysis, the federal district court held the SCC program unconstitutional. The court found the SCC program both over- and under-inclusive—by including minority individuals who were not actually disadvantaged, and failing to include nonminority individuals who were disadvantaged. The court noted that Congress had failed to inquire whether entities seeking a racial preference had in fact suffered from the effects of past discrimination. The court concluded it was “dif-

ficult to envisage a race-based classification” that could ever be found to be narrowly tailored.<sup>123</sup>

On appeal, the 10th Circuit found *Adarand* lacked standing because he had been granted DBE status by the Colorado Department of Transportation. The Supreme Court sternly rebuked the 10th Circuit’s construction of the law, and reversed and remanded the decision, finding both that *Adarand* did indeed have standing, and that the case was not moot. The Supreme Court reasoned that, “it is impossible to conclude that respondents have borne their burden of establishing that it is ‘absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur’ if petitioner’s cause of action remains alive.”<sup>124</sup>

Once again on remand, the 10th Circuit reviewed the SCC program under the strict scrutiny standard and concluded that although the SCC as it existed in 1996 (when it adversely affected Mr. *Adarand*) was unconstitutional as insufficiently narrowly tailored, its defects had been remedied by Part 26, and that the current SCC program did pass strict scrutiny analysis.<sup>125</sup> Among the reasons identified by the court was the fact that the 1996 program had been based on FHWA’s allegedly mandatory 12–15 percent minority goal, as opposed to a 5–10 percent “aspirational” goal mandated by Congress.<sup>126</sup> The 1996 SCC program also presumed economic disadvantage based on membership in certain racial groups, and was therefore insufficiently narrowly tailored.<sup>127</sup> As to a compelling government interest, the 10th Circuit found, “Congress repeatedly has considered the issue of discrimination in government construction procurement contracts—especially construction contracts—necessitating a race-conscious remedy.”<sup>128</sup>

In 2001, the Colorado Department of Transportation announced a more aggressive affirmative action minority contracting program, which would set an overall DBE goal of 10.93 percent of design and construction

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overall goals unless and until you do not meet your overall goal for a year.

(4) If you obtain DBE participation that exceeds your overall goal in two consecutive years through the use of contract goals (i.e., not through the use of race-neutral means alone), you must reduce your use of contract goals proportionately in the following year.

49 C.F.R. § 26.51(f) (2002).

<sup>118</sup> VAN DE WALLE, *supra* note 44, at 11.

<sup>119</sup> *Houston Contractors Ass’n v. Metropolitan Transp. Auth.*, 993 F. Supp. 545 (S.D. Tex. 1997).

<sup>120</sup> VAN DE WALLE, *supra* note 44, at 13.

<sup>121</sup> 64 Fed. Reg. 5096 (Feb. 2, 1999).

<sup>122</sup> DOT insists its new rules are “narrowly tailored.” See <http://osdbuweb.dot.gov/business/DBE/NTcht.html>. (visited Dec. 27, 2001). However, at this writing, this is still an issue being litigated in the courts.

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<sup>123</sup> *Adarand Constructors v. Pena*, 965 F. Supp. 1556, 1580 (D. Colo. 1997).

<sup>124</sup> *Adarand Constructors v. Slater*, 528 U.S. 216, 224 (2000).

<sup>125</sup> *Adarand Constructors v. Slater*, 228 F.3d 1147 (10th Cir. 2000).

<sup>126</sup> 228 F.3d at 1182.

<sup>127</sup> 228 F.3d at 1184. The court found that more narrowly-tailored race-neutral measures were not considered as an alternative to race-conscious measures, the measures adopted were insufficiently temporally limited, and failed to take an individualized inquiry in determining economic disadvantage, and there was a complete absence in the record of why FHWA adopted a 12–15 percent goal. The 10th Circuit Court of Appeals suggests that the 1996 SCC program did not pass strict scrutiny analysis because it “is not narrowly tailored insofar as it obviates an individualized inquiry into economic disadvantage.” The 10th Circuit required state certification standards “to incorporate an individualized inquiry into economic disadvantage.”

<sup>128</sup> 228 F.3d at 1167.

contracts.<sup>129</sup> Adarand's petition for *certiorari* of the 10th Circuit decision was initially granted,<sup>130</sup> then subsequently vacated, by the U.S. Supreme Court.<sup>131</sup>

## D. CONSTITUTIONAL CLAIMS AGAINST STATES AND THEIR SUBDIVISIONS

### 1. Section 1983 Claims

Typically, a plaintiff who alleges discrimination against a public transit operator may allege a violation of a federal statute and a Constitutional right (such as the 14th Amendment's protection of due process and equal protection). 42 U.S.C. § 1981 prohibits discrimination with respect to making and enforcing contracts. The Civil Rights Act of 1991 amended § 1981 to include within its scope both contract performance as well as contract formation.<sup>132</sup>

The Civil Rights Act of 1871, now codified at 42 U.S.C. § 1983, grants a civil remedy (damage awards and equitable redress) to persons deprived of constitutional rights by persons acting under the color of state law, in federal court without regard to the amount in controversy.<sup>133</sup> It provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or any other proper proceeding for redress.<sup>134</sup>

To establish a *prima facie* case under § 1983, the plaintiff must prove that (1) he or she was deprived of a right or interest secured by the Constitution and the laws of the United States, and (2) the deprivation occurred under color of state law.<sup>135</sup> Section 1983 does not create substantive rights; to prevail under it, the plaintiff must prove violation of an independent Constitu-

tional or federal statutory right.<sup>136</sup> The Civil Rights Attorney's Fees Award Act of 1976<sup>137</sup> allows recovery of reasonable attorney's fees in a successful § 1983 action.<sup>138</sup>

Local governments may be held liable under § 1983. However, they may not be held liable under a *respondent superior* theory.<sup>139</sup> Instead, the Constitutional deprivation must be the result of an official governmental policy or custom.<sup>140</sup> Thus, when presented with a 1983 claim, the transit attorney will examine closely the conduct of the employee. If the employee failed to act in accordance with the agency's policy or custom, the transit attorney may choose to send a reservation of rights letter to the employee or a notice that the agency reserves the right to decline responsibility in the event the proof shows that the employee acted outside the scope of the agency's policy or custom. The agency may file a motion to dismiss based on the actions of the employee being outside the scope of the agency's policy or custom (e.g., an assault by the employee). If successful, the dismissal of the agency means that the agency has no responsibility to reimburse a judgment obtained against the employee. For this reason, the initial notice to the employee must clearly state the extent to which the agency is willing to provide counsel, and also set forth the employee's right to retain counsel of his/her choice.

A governmental entity can be sued under § 1983 for (1) an express policy that, when enforced, causes a Constitutional deprivation, (2) a widespread practice that, though not authorized by law or express municipal policy, is so permanent and well-settled as to constitute a "custom or usage" with the force of law, or (3) a Constitutional injury that was caused by a person with final policymaking authority.<sup>141</sup> However, absent a Constitutional deprivation, ordinary tort actions, though cast as civil rights claims, are not cognizable under § 1983.<sup>142</sup>

<sup>129</sup> Kevin Flynn, *Getting Diversity Back On the Road*, ROCKY MOUNTAIN NEWS, Apr. 19, 2001, at 5A.

<sup>130</sup> *Adarand Constructors, Inc. v. Mineta*, 121 S. Ct. 1598 (2001).

<sup>131</sup> *Adarand Contractors, Inc. v. Mineta*, 534 U.S. 103 (2001). The Supreme Court dismissed the writ on grounds that Adarand challenged issues not decided by the 10th Circuit, and nowhere challenged its finding that Adarand lacked standing.

<sup>132</sup> 42 U.S.C. § 1981 (2000). *Allen v. Chicago Transit Auth.*, 2000 U.S. Dist. Lexis 11499 (N.D. Ill. 2000).

<sup>133</sup> 28 U.S.C. § 1343(3) (2000).

<sup>134</sup> 42 U.S.C. § 1983 (2000). *See, e.g., Monell v. Dep't of Social Services of the City of N.Y.*, 436 U.S. 658, 691 (1978).

<sup>135</sup> *Doe v. Rains County Indep. Sch. Dist.*, 66 F.3d 1402, 1406 (5th Cir. 1995). The U.S. Supreme Court has rejected the defense that the "under color of" language applies only to conduct authorized and not forbidden by state law. *Monroe v. Pape*, 365 U.S. 167 (1961).

<sup>136</sup> *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-18 (1979). In this case, a federal statutory right was invoked, namely the right to emergency assistance protected by 406(e)(1) of the Social Security Act (42 U.S.C. § 606(e)(1) (2000)).

<sup>137</sup> 42 U.S.C. § 1988 (2000).

<sup>138</sup> *See Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Resources*, 532 U.S. 598 (2001) (holding that the fee-shifting provisions of the ADA and Fair Housing Amendments Act require a party to receive a court ordered decree or judgment on the merits, rather than act as a "catalyst," to be a "prevailing party," and receive attorney's fees.) Attorneys fees are recoverable even if the attorney did the work on a *pro bono* basis. *Blum v. Stenson*, 465 U.S. 886 (1984).

<sup>139</sup> *Monell v. Dep't of Social Services of the City of N.Y.*, 436 U.S. 658, 691 (1978).

<sup>140</sup> *Id.* at 691.

<sup>141</sup> *Allen v. Chicago Transit Auth.*, 2000 U.S. Dist. Lexis 11499 (E.D. Ill. 2000).

<sup>142</sup> "Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law." *Daniels v. Williams*, 474 U.S. 327 at 332

Thus, for example, a *pro se* plaintiff unsuccessfully pursued a 1983 action against the State of New Jersey alleging it had injected him in the left eye with a radium electric beam, and that as a result, someone talks to him inside his brain.<sup>143</sup> Section 1983 actions have been brought against transit agencies for a number of alleged Constitutional violations, including restrictions against advertising,<sup>144</sup> the imposing of drug testing on employees,<sup>145</sup> racially-motivated employee dismissal,<sup>146</sup> and assault and battery or other abuse of patrons by transit police.<sup>147</sup> However, relatively few plaintiffs have prevailed in such litigation.

But note that private transit operators stand on a different footing, for the 14th Amendment applies to the states and their subdivisions (such as public transit operators). Even though a private transit company may be subject to economic and other regulation, where the regulatory agency exerts no jurisdiction over the practice in question, a Constitutional claim against the private company will fail.<sup>148</sup>

However, a relevant federal statute promulgated under the Commerce Clause may be invoked against a private transit operator. Thus, private firms that employ 15 or more individuals are subject to both Title VII of the Civil Rights Act and the ADA, and those with 20

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(1986) (fall by a prisoner occasioned by a pillow negligently left there by prison officials may constitute negligence, but is not a Constitutional deprivation, for due process protects against deliberate, not negligent, deprivations of life, liberty, or property). However, damages in a § 1983 action are “ordinarily determined according to principles derived from the common law of torts.” *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299 at 306 (1986).

<sup>143</sup> *Searight v. State of N.J.*, 412 F. Supp. 413 (D. N.J. 1973). Numerous cases have been litigated where a party successfully states a claim under § 1983. For one such example, see *Monell v. Dep’t of Social Services*, 436 U.S. 658 (1978) (local governing bodies are “persons” within § 1983 and can be sued directly. However, the 11th Amendment provides state immunity under § 1983. *JAMES HENDERSON, JR., RICHARD PEARSON & JOHN SILICIANO, THE TORTS PROCESS* 803 (5th ed. 1999).

<sup>144</sup> Examples of such cases include *Planned Parenthood Ass’n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985) (claim brought under 1983 for denial of advertising); *Lebron v. WMATA*, 585 F. Supp. 1461 (D. D.C. 1984) (1983 claim brought for restrictions on advertising).

<sup>145</sup> *Tanks v. Greater Cleveland Regional Transit Auth.*, 930 F.2d 475 (6th Cir. 1991) (1983 action brought against drug testing); *Moxley v. Regional Transit Services*, 722 F. Supp. 977 (W.D. N.Y. 1977) (1983 claim brought against drug testing); *Dykes v. SEPTA*, 68 F.3d 1564 (3d Cir. 1995) (1983 action brought challenging drug test).

<sup>146</sup> *Morris v. WMATA*, 781 F.2d 218 (D.C. Cir. 1986).

<sup>147</sup> *Ricciuti v. N.Y. City Transit Auth.*, 941 F.2d 119 (2d Cir. 1991) (1983 action brought against assault and battery by transit police); *Fischer v. WMATA*, 690 F.2d 1113 (D.C. Cir. 1982) (1983 action brought for arrest, search and seizure, and stripping of patron).

<sup>148</sup> See, e.g., *Brown v. D.C. Transit System*, 523 F.2d 725 (D.C. Cir. 1975).

or more employees fall under the Age Discrimination in Employment Act.

Though the federal government is not explicitly subject to § 1983, in *Bivens v. Six Unknown Federal Narcotics Agents*, the U.S. Supreme Court held that federal officials may be sued for damages flowing from their denial of a person’s Constitutional rights, implying a cause of action from the Constitution itself.<sup>149</sup> In *Bivens*, the plaintiff alleged that police officers entered and searched his apartment and arrested him on narcotics charges without a warrant and without probable cause. In another case, the Court held a plaintiff must show (1) a constitutionally or statutorily protected right, (2) an invasion of that right, and (3) that the requested relief is appropriate.<sup>150</sup> A private cause of action against deprivation of a constitutionally protected right may be pursued against the federal government unless (a) special factors counsel hesitation, or (b) Congress has explicitly decreed an alternative remedy to be a substitute for recovery directly under the Constitution and that remedy is viewed as equally effective.<sup>151</sup> Thus, *Bivens* and progeny serve as an effective means of pursuing federal officials for Constitutional violations in the same way § 1983 provides a cause of action against state and local officials.<sup>152</sup>

The courts have created two types of immunity from 1983 and *Bivens* actions—absolute immunity and qualified immunity. Courts have conferred absolute immunity from § 1983 and *Bivens* actions to certain types of government officials, including judges,<sup>153</sup> prosecutors,<sup>154</sup>

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<sup>149</sup> *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). The Court briefly summarized the facts:

This case has its origin in an arrest and search carried out on the morning of November 26, 1965. Petitioner’s complaint alleged that on that day respondents, agents of the Federal Bureau of Narcotics acting under claim of federal authority, entered his apartment and arrested him for alleged narcotics violations. The agents manacled petitioner in front of his wife and children, and threatened to arrest the entire family. They searched the apartment from stem to stern. Thereafter, petitioner was taken to the federal courthouse in Brooklyn, where he was interrogated, booked, and subjected to a visual strip search.

403 U.S. at 389.

<sup>150</sup> *Davis v. Passman*, 442 U.S. 228 (1979).

<sup>151</sup> *Id.*

<sup>152</sup> See *Saucier v. Katz*, 533 U.S. 194 (9th Cir. 2001) (plaintiff prevailed in Fourth Amendment claim against a federal military officer for use of excessive force during a protest); *Booth v. Churner*, 532 U.S. 731 (2001) (plaintiff’s claim against a federal corrections officer for mistreatment otherwise states a claim except that plaintiff failed to exhaust an administrative review process before filing suit); *Hanlon v. Berger*, 526 U.S. 808 (1999) (plaintiff’s claim is denied because of qualified immunity of federal game officials because of legal uncertainties regarding media accompaniment of law enforcement officials at time of search).

<sup>153</sup> *Stump v. Sparkman*, 435 U.S. 349 (1978).

<sup>154</sup> *Imbler v. Pachtman*, 424 U.S. 409 (1976) (immunity when acting “within scope of duties.”).

legislators,<sup>155</sup> and the President.<sup>156</sup> However, most other government officials enjoy only qualified immunity. Such qualified immunity protects them from liability in circumstances when they have acted in a good faith belief that their actions are lawful, and have not violated the constitutional rights of others. However, the official is not immune when he or she knew or reasonably should have known that the action taken would violate the Constitutional rights of others, or taken with the malicious intent of causing a deprivation of a Constitutional right or causing other injury.<sup>157</sup>

Federal employees are protected from personal liability for common law torts committed within their scope of employment; the suit is instead brought against the U.S. Government.<sup>158</sup> The Supreme Court has held that a suit brought against individual officials for violation of federal law<sup>159</sup> is not prohibited by the 11th Amendment prohibition against suits brought against states.<sup>160</sup>

## 2. Due Process

The 5th and 14th Amendments to the U.S. Constitution protect individuals against deprivation of life, liberty, and property without due process of law. In due process analysis, the initial question is whether life, liberty, or property is implicated by the government action at issue. Though early on, the jurisprudence focused on whether the individual had a “right” or a “privilege” in the liberty or property (the former conferring the right to due process, and the latter not), today, the courts look not to the weight, but to the nature of the interest at stake.<sup>161</sup> To have a property interest in a benefit, the individual must have more than an abstract need or desire for it, and more than a unilateral expectation of it; he or she must have a “legitimate claim of entitlement.”<sup>162</sup> The concept of property denotes a broad range of interests secured by existing rules or under-

standings.<sup>163</sup> Property rights are not created by the Constitution, but stem from an independent source, such as state law.<sup>164</sup>

For example, in *Ward v. Housatonic Area Regional Transit District*,<sup>165</sup> a federal district court held that a passenger denied the opportunity to ride transit buses had failed “to point to the existence of any state law which would allow him to assert [a property] interest in fixed route bus service.”<sup>166</sup> In *Medellin v. Chicago Transit Authority*,<sup>167</sup> a federal district court held that the relevant state statutes created neither a property interest in, nor a legitimate claim of entitlement for, employment. Some courts have taken the position that, absent a statute that confers a right to employment, employment is “at will,” and not a property interest to which due process applies.<sup>168</sup> Hence, as part of the analysis of whether a property right exists, the transit attorney must check applicable state or local law. Is it a right-to-work state? Is the employee subject to civil service laws?

Other courts have held that one is not deprived of a liberty when he or she “is not rehired in one job, but is free as before to seek another.”<sup>169</sup> In the seminal case of *Cleveland Board of Education v. Loudermill*,<sup>170</sup> the U.S. Supreme Court observed, “While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once committed, without appropriate procedural safeguards.” Moreover, due process requires “some kind of hearing prior to the discharge of an employee who has a constitutionally protected property interest in his employment.”<sup>171</sup> This is sometimes referred to as a “name-clearing hearing.”

Once a liberty or property interest is identified, the second question is what process is due for its deprivation? Notice and an opportunity for comment are the essential components of due process. Must the opportunity for comment be conducted pre- or post-deprivation, and may it be in writing, or must it use oral procedures (including a trial-type hearing)? In assessing a due process claim, the courts employ a flexible approach, evaluating: (1) the private interest affected; (2) the risk of erroneous deprivation of that interest through the

<sup>155</sup> *Lake County Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) (immunization for planning agency officials, created by Nevada and California, when officials are acting in a capacity comparable to that of members of a state legislature).

<sup>156</sup> *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (absolute immunity when acts upon which liability is predicated are official acts).

<sup>157</sup> *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

<sup>158</sup> *The Westfall Act*, Pub. L. No. 100-694, 102 Stat. 4563 (1988). A plaintiff may, however, pursue damages against the federal government under the Federal Tort Claims Act. 38 U.S.C. § 2680 (2000). The immunity in the Westfall Act is qualified in the sense that it rests on those injuries caused by an employee acting within the scope of his/her employment as determined by the Attorney General.

<sup>159</sup> 28 U.S.C. §§ 1331, 1343 (2000).

<sup>160</sup> *See Ex parte Young*, 209 U.S. 123 (1908); *see also Seminole Tribe v. Fla.*, 517 U.S. 44, 116 S. Ct. 1114 (1996).

<sup>161</sup> *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

<sup>162</sup> *Id.* at 577.

<sup>163</sup> *Perry v. Sinderman*, 408 U.S. 593 (1972).

<sup>164</sup> *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

<sup>165</sup> 154 F. Supp. 2d 339 (D. Conn. 2001).

<sup>166</sup> 154 F. Supp. 2d at 347.

<sup>167</sup> 1994 U.S. Dist. Lexis 10370 (N.D. Ill. 1994).

<sup>168</sup> *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951); *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961).

<sup>169</sup> *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 575 (1972).

<sup>170</sup> 470 U.S. 532 at 541 (1985).

<sup>171</sup> *Id.*

existing procedures and the value of additional safeguards; and (3) the government's interest.<sup>172</sup>

Public employees subject to dismissal who have a property interest in their job created by common law or by statute (sometimes referred to as a "legitimate claim of entitlement") may not be discharged<sup>173</sup> or suspended<sup>174</sup> without due process. Thus, before taking an adverse employment action against an employee, a public entity must give such an employee notice of the charges against him or her, and an opportunity to be heard.

In *Loudermill*, the Supreme Court addressed the summary dismissal of a security guard on grounds he lied on his job application. The Court held that there must be a pre-termination hearing, though it need not be elaborate. It should serve as

an initial check against mistaken decisions—essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.... The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.<sup>175</sup>

However, temporary job suspension stands on a different footing. There, the Supreme Court has required only a prompt post-suspension hearing.<sup>176</sup>

Beyond employment claims, another example of a due-process violation is denial of eligibility to a disabled person for paratransit services, for disability rights have also been deemed civil rights. DOT has opined, "Once an entity has certified someone as eligible, the individual's eligibility takes on the coloration of a property right.... Consequently, before eligibility may be removed 'for cause'...the entity must provide administrative due process to the individual."<sup>177</sup>

Even where a property interest is not implicated, the government may not deny a person a benefit on a basis

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<sup>172</sup> *Mathews v. Eldridge*, 424 U.S. 319 (1976). See *Dimino v. N.Y. City Transit Auth.*, 64 F. Supp. 2d 136, 158–59 (E.D. N.Y. 1999) (holding that a transit employee who was involuntarily placed on medical leave for pregnancy suffered only a temporary loss of job and salary that was "relatively minor and correctable at a later point. Furthermore, the procedural safeguards that were in place, and the government's overwhelming interest more than satisfy the limited due process protections implicated."). *Id.* at 159.

<sup>173</sup> *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 578 (1972).

<sup>174</sup> *Gilbert v. Homar*, 520 U.S. 924 (1997).

<sup>175</sup> 470 U.S. 532 at 546 (1985).

<sup>176</sup> *Gilbert v. Homar*, 520 U.S. 924 (1997). This case involved the suspension of a university police officer who was arrested and charged with drug offenses. Where the justification for suspension is not so clear cut, the courts may reach a different conclusion. See, e.g., *Winegar v. Des Moines Indep. Community Sch. Dist.*, 20 F.3d 895 (8th Cir. 1994).

<sup>177</sup> *Transportation for Individuals with Disabilities*, 56 Fed. Reg. 45584-01 (Sept. 6, 1991) (codified at 49 C.F.R. pts. 27, 37, and 38); 49 C.F.R. pt. 37, App. D. See generally *Goldberg v. Kelly*, 397 U.S. 254 (1970).

that infringes on his or her Constitutional rights, for such a decision would be patently arbitrary and discriminatory, and therefore a denial of due process.<sup>178</sup> Such un-Constitutional means, for example, might include deprivation of a privilege on grounds of racial discrimination,<sup>179</sup> or retaliation for exercise of free speech.<sup>180</sup> Vagueness in the standards governing public officials has led to claims of arbitrary and discriminatory conduct on behalf of transit officials in denying proposed bus advertising.<sup>181</sup>

### 3. Equal Protection

Another method of protection against discrimination is via the Equal Protection Clause of the 14th Amendment, which guarantees "a right to be free from invidious discrimination in statutory classifications and other governmental activity."<sup>182</sup> It requires that all similarly situated people be treated alike.<sup>183</sup> The Equal Protection Clause not only protects fundamental rights, and protects citizens against suspect classifications such as race, it also protects them from arbitrary and irrational state action.<sup>184</sup> Such a claim is analyzed under the

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<sup>178</sup> *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961).

<sup>179</sup> This was alleged in the Title VII employment context in *Pate v. Alameda-Contra Costa Transit Dist.*, 697 F.2d 870 (9th Cir. 1983). Plaintiffs failed to prove a grooming code violated Title VII as sexual discrimination in *Hearth v. Metropolitan Transit Comm'n*, 436 F. Supp. 685 (D. Minn. 1977). Fare increases were not deemed to be arbitrary or discriminatory in *D.C. Transit System, Inc. v. WMATA*, 466 F.2d 384 (D.C. Cir. 1972).

<sup>180</sup> See *Perry v. Sinderman*, 408 U.S. 583 (1972). Examples in the general area of transportation include: *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) (requiring that regulation limiting distribution of literature and solicitation to exterior of airport terminals be reasonable); *Jacobsen v. Howard*, 109 F.3d 1268 (8th Cir. 1997) (state regulation that bans newspaper machines from rest stops unreasonable infringement of newspaper's First Amendment rights); *Jews for Jesus, Inc. v. Board of Airport Comm'rs*, 785 F.2d 791 (9th Cir. 1986) (city ordinance that prohibits all U.S. Const. amend. I activity is unconstitutional).

<sup>181</sup> *United Food and Commercial Workers Union v. Southwest Ohio Regional Transit Auth.*, 163 F.3d 341 (6th Cir. 1998).

<sup>182</sup> *Harris v. McRae*, 448 U.S. 297, 322 (1980).

<sup>183</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

<sup>184</sup> *Hamlyn v. Rock Island County Metro. Mass Transit District*, 986 F. Supp. 1126 (C.D. Ill. 1997) (transit authority's reduced fare program violates the Equal Protection Clause because it discriminates against passengers with AIDS). In *Hamlyn*, because of his AIDS affliction, plaintiff had difficulty walking more than one block. However, the reduced fare program established by the transit agency excluded persons whose sole disability was AIDS from eligibility. The court found that AIDS was a qualifying disability under the ADA and Rehabilitation Act, and that discrimination against persons who have AIDS violates the 14th Amendment.

*McDonnell Douglas* burden-shifting framework for Title VII claims, described below.<sup>185</sup>

In a facial challenge, as opposed to an “as applied” challenge, of a governmental classification, a two-step analysis is pursued: (1) the plaintiff must first demonstrate that the state action, on its face, results in members of a certain group being treated differently from other individuals based on membership in the group;<sup>186</sup> (2) if it is proven a cognizable class is treated differently, the court assesses the appropriate level of scrutiny to determine whether the distinction between the groups is legitimate.<sup>187</sup> If the classification is one enumerated in the 14th Amendment (such as race-based), it is a “suspect classification,” entitled to heightened scrutiny. However, if the classification is not suspect, courts review state action under the highly deferential “rational basis” test.<sup>188</sup> If the challenge to the state action is on an “as applied” rather than a “facial” basis, plaintiff must prove the presence of an unlawful intent to discriminate against him or her for an invalid reason.<sup>189</sup>

#### 4. Free Speech

First Amendment free speech issues typically arise in five principal contexts for a transit operator: (1) when the employer attempts to restrict the speech of its employees; (2) when the transit provider seeks to restrict the speech of its patrons; (3) when the transit provider seeks to restrict advertising on its vehicles and facilities; (4) when the transit provider seeks to restrict the speech of members of the public who are not patrons, such as panhandlers and street musicians; and (5) when an employer retaliates against an employee for asserting his or her right to complain against employment conditions, or for otherwise speaking out on a matter of public concern.<sup>190</sup> The first four types are addressed in this section. The fifth type of First Amendment issue is discussed in Section 10.E.4.

When a public employer imposes restrictions on its employee’s speech, the courts employ the balancing test set forth by the U.S. Supreme Court in *Pickering v. Board of Education*.<sup>191</sup> It requires the courts to balance the interests of the employee, as a citizen, in commenting on matters of public concern, and the interest of the state, as an employer, in promoting the efficiency of the service it provides. Even where the governmental purpose is legitimate, it cannot be pursued by overbroad

means when more narrowly tailored alternatives exist.<sup>192</sup> Thus, a transit operator that imposed a rule prohibiting uniformed employees from wearing buttons, badges, or other insignia except by its permission was held to have imposed too broad a restriction. The employer attempted to justify the rule on grounds as being necessary for the transit system to operate in a “safe, efficient and harmonious fashion.” The court observed that, “a properly drafted rule, narrowly tailored to apply only to uniformed employees in circumstances that place them into contact with the public, with proper justification in the record, would pass constitutional muster.”<sup>193</sup>

A content neutral limitation may lawfully restrict speech if it is narrowly tailored to serve a substantial governmental interest; reasonably regulates the time, manner and place of speech; and leaves open alternative channels for expression.<sup>194</sup> The time, manner, and place restrictions are evaluated to determine whether the banned expression is basically incompatible with the normal activity of a location at a particular time.<sup>195</sup> The extent to which the government may regulate speech depends on the nature of the location in issue.<sup>196</sup> With respect to fora that are traditionally public (e.g., sidewalks, streets, and parks), or intentionally designated for expression, the government may only impose a content specific restriction if necessary to serve a compelling governmental interest, and if it is narrowly tailored to serve that purpose.<sup>197</sup> The Supreme Court has observed that airport terminals, like shopping malls, are not public fora.<sup>198</sup>

In *Jews for Jesus v. Massachusetts Bay Transportation Authority*,<sup>199</sup> the MBTA banned noncommercial expressive activity from the paid areas of all its subway stations, and from the free areas of 12 of its stations. MBTA claimed that its ban on leafleting was necessary to protect the public safety, insisting that “leafleting threatens public safety by disrupting passenger flow and by creating litter.”<sup>200</sup> MBTA also claimed that leafleting encouraged pickpocketing, and that litter more adversely affects handicapped passengers and causes accidents and fires and other disruptions in service. However, the U.S. Supreme Court has invalidated bans on leafleting, dismissing the danger to traffic conges-

<sup>185</sup> *Schlesinger v. N.Y. City Transit Auth.*, 2001 U.S. Dist. Lexis 632 (S.D. N.Y. 2001).

<sup>186</sup> *Jones v. Helms*, 452 U.S. 412, 423–24 (1981).

<sup>187</sup> *Plyler v. Doe*, 457 U.S. 202, 217–18 (1982).

<sup>188</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446–47 (1985).

<sup>189</sup> *Snowden v. Hughes*, 321 U.S. 1, 8 (1944).

<sup>190</sup> See generally NORMAN HERRING & LAURA D’AURI, RESTRICTIONS ON SPEEDY AND EXPRESSIVE ACTIVITIES IN TRANSIT TERMINALS AND FACILITIES (TCRP Legal Research Digest No. 10, 1998).

<sup>191</sup> 391 U.S. 563, 568 (1968).

<sup>192</sup> *NAACP v. Ala.*, 377 U.S. 288, 307–08 (1964).

<sup>193</sup> *Scott v. Myers*, 191 F.3d 82, 86, 87 (2d Cir. 1999).

<sup>194</sup> *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

<sup>195</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

<sup>196</sup> *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985).

<sup>197</sup> *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

<sup>198</sup> *International Soc’y of Krishna Consciousness v. Lee*, 505 U.S. 672 (1992).

<sup>199</sup> 984 F.2d 1319 (1st Cir. 1993).

<sup>200</sup> *Id.* at 1324.



tion, and recognizing it as a particularly unobtrusive form of expression.<sup>201</sup>

In *Jews for Jesus*, the First Circuit noted that MBTA “deliberately has invited into the subway system a range of expressive activities that can produce problems similar to those it attributes to leafleting,”<sup>202</sup> including business flyers, wandering newspaper hawkers, and the sale of food and beverages in disposable containers. The Supreme Court also has placed a heavier burden of justification for bans against the solicitation of signatures in public places.<sup>203</sup> However, the First Circuit noted that the transit authority may legitimately ban expressive activity during crowded peak hours when the dangers to the public are enhanced.<sup>204</sup>

In upholding a restriction on leafleting in order for SEPTA to provide “comfortable, efficient and safe commercial transit service,” a federal district court concluded, “Because the platforms and paid areas are non-public fora, SEPTA may regulate and even entirely ban expression in them so long as the regulations are viewpoint-neutral and reasonable.”<sup>205</sup>

In *Wright v. Chief of Transit Police*,<sup>206</sup> the First Circuit evaluated the decision of the New York City Transit Authority (NYCTA) to ban the effort of members of the Socialist Workers Party to sell its newspapers in the subway by hand and try to engage interested persons in conversations to persuade them to buy the newspapers. The court expressed sympathy for NYCTA’s concern over its passengers’ safety and convenience, space limitation, and possible inundation of its facilities by others who would seek the same rights. Nonetheless, the court insisted that the transit authority devise a means more narrowly tailored to protect those legitimate objectives other than a complete ban.<sup>207</sup>

In *Young v. New York City Transit Authority*,<sup>208</sup> the Second Circuit upheld a prohibition against begging and panhandling in the New York City subway system. Concluding that begging was more conduct than speech, the court expressed “grave doubt as to whether begging and panhandling in the subway are sufficiently imbued with a communicative character to justify constitutional protection.”<sup>209</sup> The court noted that, “The only message that we are able to espy as common to all acts of begging is that beggars want to exact money from those whom they accost. While we acknowledge that passengers generally understand this generic message, we

think it falls far outside the scope of protected speech under the First Amendment.”<sup>210</sup> Even if there were some protected speech in panhandling, the court observed that the purpose of the prohibition served legitimate public interests unrelated to the suppression of free speech and was content neutral; moreover, the court noted that the subway system was not a public forum.

Finally, the U.S. Supreme Court has broadly upheld a transit operator’s or transit regulator’s decision to impose content neutral restrictions or prohibitions on advertising. In *Lehman v. City of Shaker Heights*,<sup>211</sup> the Court upheld an advertising ban in transit vehicles. The court observed,

In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.... The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience.<sup>212</sup>

Transit systems tend to begin the defense of advertising and other restrictions by reliance on *Lehman* in general, and *Lehman’s* “captive audience” language in particular. However, there has been much academic criticism of *Lehman*, a 5-4 decision.<sup>213</sup>

<sup>210</sup> 903 F.2d at 154.

<sup>211</sup> 418 U.S. 298 (1974).

<sup>212</sup> 418 U.S. at 303, 304.

<sup>213</sup> For example, Professor William Lee wrote:

The ban appeared to be facially neutral because it was directed at all candidates rather than those of one party. Yet the transit system advertisements were not of equal value to all candidates. Testimony in *Lehman* revealed that most of the transit system’s riders were residents of the state assembly district *Lehman* sought to represent.... Thus, the ban’s effects on *Lehman* were different than the effect on a candidate who needed to reach residents of a large area or who had greater financial resources. The plurality, however, failed to consider the possibility of the ban’s disparate effects.

William Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757, 775 (1986) [citations omitted]. See also Sidney Buchanan, *The Case of the Vanishing Public Forum*, 1991 U. ILL. L. REV. 949 (1991), and Matthew McGill, *Unleashing the Limited Public Forum: A Modest Revision to a Dysfunctional Doctrine*, 52 STAN. L. REV. 929 (2000).

The candidate argued that the transit cars were public forums and that the city policy impermissibly discriminated on the basis of message content. A plurality of the Court, however, upheld the policy despite its subject matter categorization. Instead of applying either the stringent scrutiny applicable to content-based restrictions in public forums, or the intermediate scrutiny applicable to content-neutral, public forum time, place, and manner restrictions, the plurality simply determined that the transit cars were not public forums and then asked whether the challenged policy was “arbitrary, capricious, or invidious.”

Barbara Gaal, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 STAN. L. REV. 121, 128–29 (1982) [citations omitted]. For an argument that these restrictions are Constitutionally impermissible, see Michael

<sup>201</sup> *International Soc’y of Krishna Consciousness v. Lee*, 505 U.S. 672 (1992). The Supreme Court has also noted that littering is the fault of the litterbug, not the fault of the leafleter. *Schneider v. State*, 308 U.S. 147, 162 (1939).

<sup>202</sup> 984 F.2d 1319, 1325 (1st Cir. 1993).

<sup>203</sup> *Meyer v. Grant*, 486 U.S. 414, 421 (1988).

<sup>204</sup> 984 F.2d 1319, 1326 (1st Cir. 1993).

<sup>205</sup> *Stori v. Southeastern Transp. Auth.*, 1999 U.S. Dist. Lexis 14515 (E.D. Pa. 1999).

<sup>206</sup> 558 F.2d 67 (2d Cir. 1977).

<sup>207</sup> 558 F.2d 67, 68 (2d Cir. 1977).

<sup>208</sup> 903 F.2d 146 (2d Cir. 1990).

<sup>209</sup> 903 F.2d at 153.

In *Children of the Rosary v. City of Phoenix*,<sup>214</sup> a case closely following the *Lehman* analysis, the U.S. Court of Appeals for the Ninth Circuit upheld a city's ban on bus noncommercial advertising. A religious group was denied the opportunity to advertise the sale of its anti-abortion bumper stickers. The court held that advertising panels on a bus are nonpublic fora, for which the city was proprietor, and as such, could regulate the types of advertising sold if advertising standards were reasonable and nondiscriminatory. The regulations were deemed a reasonable effort to advance the city's interest in protecting revenue and maintaining neutrality on political and religious issues.

## E. EMPLOYMENT DISCRIMINATION

### 1. Types of Unlawful Employment Practices

As enumerated in Section 10.B above, several federal statutes declare it unlawful to discriminate in any area of employment, including:

- Hiring and firing;
- Compensation, assignment, or classification of employees;
- Transfer, promotion, layoff, or recall;
- Job advertisements;
- Recruitment;
- Testing;
- Use of company facilities;
- Training and apprenticeship programs;
- Fringe benefits;
- Pay, retirement plans, and disability leave; or
- Other terms and conditions of employment.<sup>215</sup>

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Garvey, *Next Stop Censorship: A Facial Challenge to the Metropolitan Transportation Authority's Newly Adopted Advertising Standards*, 72 ST. JOHN'S L. REV. 485 (1998).

<sup>214</sup> 154 F.3d 972 (9th Cir. 1998), *cert. denied*, 526 U.S. 1131 (1999).

<sup>215</sup> U.S. Equal Employment Opportunity Commission, *Federal Laws Prohibiting Job Discrimination, Questions and Answers* (last modified June 27, 2001), <http://www.eeoc.gov/facts/qanda.html>.

Applicants for FTA funding must certify that they will comply with all statutes relating to nondiscrimination, including:

- Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, prohibits discrimination on the basis of race, color, or national origin;
- Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681, 1683, and 1685 through 1687, prohibits discrimination on the basis of sex;
- Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, prohibits discrimination on the basis of handicaps;
- The Age Discrimination Act of 1975, 42 U.S.C. §§ 6101 through 6107, prohibits discrimination on the basis of age;
- The Drug Abuse Office and Treatment Act of 1972, Pub. L. 92-255, Mar. 21, 1972, provides for nondiscrimination on the basis of drug abuse;
- The Comprehensive Alcohol Abuse and Alcoholism Prevention Treatment & Rehabilitation Act of 1970, Pub. L. 91-616, Dec. 31, 1970, provides for nondiscrimination on the basis of alcohol abuse or alcoholism;

In order to enforce these federal statutes, an aggrieved person must follow the procedures discussed below.

### 2. Exhaustion of Administrative Remedies

To preserve the right to bring a lawsuit for discrimination on the basis of race, color, sex, religion, national origin, age, or disability under Title VII, a plaintiff must first file an administrative complaint with the Equal Employment Opportunity Commission (EEOC) within 180 days, or the corresponding state agency (also known as "Fair Employment Practices Agencies") within 300 days, of the alleged discriminatory action,<sup>216</sup> and obtain a right-to-sue letter.<sup>217</sup> If there is a corresponding state agency in the jurisdiction, transit counsel should obtain and review a copy of the work-sharing agreement between the EEOC and the state agency.<sup>218</sup>

A complaining party must file a written charge of discrimination. Once a charge of discrimination has been filed it may be assigned for priority investigation if the facts suggest a violation of law. If the evidence is not so compelling, it may be assigned for a follow up investigation to determine whether a violation has occurred. If the EEOC deems the claim meritorious, it sends a copy

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• The Public Health Service Act of 1912, 42 U.S.C. §§ 290dd-3 and 290ee-3, provides for confidentiality of alcohol and drug abuse patient records;

• Title VIII of the Civil Rights Act, 42 U.S.C. § 3601 *et seq.*, provides for nondiscrimination in the sale, rental, or financing of housing; and

• Section 1101(b) of the Transportation Equity Act for the 21st Century, 23 U.S.C. § 101 note, provides for participation of disadvantaged business enterprises in FTA programs.

<sup>216</sup> *Miles v. N.Y. City Transit Auth.*, 1999 U.S. App. Lexis 13970 (2d Cir. 1999).

<sup>217</sup> 42 U.S.C. § 2000e-5(e) (2000). The same deadlines apply to complaints filed under the Americans with Disabilities Act and the Age Discrimination in Employment Act.

<sup>218</sup> The EEOC enforces the following laws: (1) Title VII of the Civil Rights Act, 42 U.S.C. § 2000 (1964). Title VII of the Civil Rights Act of 1964, as amended, prohibits employment discrimination; (2) the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1963). The Equal Pay Act of 1963 prohibits discrimination on the basis of gender in compensation for substantially similar work under similar conditions; (3) the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1967). The Age Discrimination in Employment Act of 1967 prohibits employment discrimination against individuals 40 years of age and older; (4) the Rehabilitation Act of 1973, §§ 501 & 505, 29 U.S.C. § 701 (1973). Section 501 of the Rehabilitation Act of 1973 prohibits employment discrimination against federal employees with disabilities; (5) the Americans with Disabilities Act of 1990, tits. I and V, 42 U.S.C.S. § 12101 (1990). Title I of the Americans with Disabilities Act of 1990 prohibits employment discrimination on the basis of disability in both the public and private sector, excluding the federal government; and (6) the Civil Rights Act of 1991, 42 U.S.C. 2000e-2(m) (1991). The Civil Rights Act of 1991 includes provisions for monetary damages in cases of intentional discrimination and clarifies provisions regarding disparate impact actions.

of the Charge to the respondent. At this point, the transit agency should prepare a detailed position statement, with the assistance of experienced civil rights/labor defense counsel. The EEOC will submit a request for information to which the transit agency and its attorney should prepare a detailed response. Upon completion of the investigation, EEOC will discuss the evidence with the charging party or the employer. If both the charging party and the employer agree, the dispute may be set for confidential mediation. EEOC can also seek to settle a charge at any time during the investigation. If the EEOC concludes there is no violation of law, the charge may be dismissed. Upon dismissal, the charging party is given notice, and 90 days to file suit.

If the EEOC determines that unlawful discrimination has occurred, and is unable to successfully conciliate or mediate the case, it decides whether to bring suit in federal court. If it declines to file suit, it will issue a notice closing the case, giving the charging party 90 days to file suit in his or her own behalf.<sup>219</sup> The charging party may also request the EEOC to issue a right-to-sue letter at any time. Due to the heavy backlog of charges to investigate, the EEOC in most instances issues the right-to-sue letter and administratively closes its file. However, the issuance of a right-to-sue letter to a requesting charging party does not preclude the EEOC from initiating litigation in its own name (if timely initiated) or participating in litigation initiated by the charging party.

The exhaustion of administrative remedies and adequate notice to the employer are essential elements of Title VII's remedial scheme. Failure to file a charge of discrimination with the EEOC deprives the courts of subject matter jurisdiction over the claim.<sup>220</sup> The purpose of the notice provision is to encourage voluntary settlement of discrimination claims through conciliation and compliance.<sup>221</sup> Likewise, the charge must be timely filed. The purpose of this requirement is to prevent the filing of stale claims and to afford the employer and the Commission the opportunity to investigate charges while witnesses' recollections are fresh and documentary evidence is available.

A plaintiff is barred from raising claims in a lawsuit that were not included in, or reasonably related to,<sup>222</sup> its

charge before the administrative agency.<sup>223</sup> Hence, the scope of judicial review is limited to the scope of the EEOC investigation that can reasonably be expected to grow out of the discrimination allegation.<sup>224</sup> Thus, where a transit employee has brought only a sex discrimination claim before the EEOC, she may not subsequently pursue race discrimination and retaliation claims before a federal court.<sup>225</sup>

### 3. Three-Part Discrimination Analysis

The purpose of Title VII is to eliminate discrimination on the basis of race, color, religion, sex, or national origin.<sup>226</sup> Employment discrimination cases brought under Title VII fall in one of two categories—"mixed-motive" cases (or direct method), or "pretext" cases (or indirect method).

In mixed-motive cases, the plaintiff must prove by direct or strong circumstantial evidence of discriminatory intent the existence of a prohibited discriminatory factor that played a "motivating part" in an adverse employment action. As an example, plaintiff might prove that a decision-maker uttered discriminatory remarks evidencing hostility to a protected group,<sup>227</sup> or that such remarks were issued by one who tainted the decision-maker's judgment, if related to the decisional process on the adverse employment action.<sup>228</sup> But if the discriminatory remarks are unrelated to the employment decision and amount to no more than "stray remarks," discriminatory intent may not be proven.<sup>229</sup> If plaintiff proves discriminatory intent, the burden shifts to the defendant to prove that it would have made the same decision anyway.<sup>230</sup> Usually, discriminatory motivation is

<sup>223</sup> *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Allen v. Chicago Transit Auth.*, 2000 U.S. Dist. Lexis 937 (N.D. Ill. 2000).

<sup>224</sup> *Sanchez v. Standard Brands*, 431 F.2d 455 (5th Cir. 1970).

<sup>225</sup> *Fowler v. N.Y. Transit Auth.*, 2001 U.S. Dist. Lexis 762 (S.D. N.Y. 2001).

<sup>226</sup> *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977); *King v. Wilmington Transit Co.*, 976 F. Supp. 356 (E.D. N.C. 1997).

<sup>227</sup> *Castleman v. Acme Boot Co.*, 959 F.2d 1417, 1420 (7th Cir. 1992) (but such remarks are "rarely found").

<sup>228</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989).

<sup>229</sup> *Robinson v. Chicago Transit Auth.*, 1999 U.S. Dist. Lexis 8994 (N.D. Ill. 1999). In *Robinson*, the alleged 'stray remarks' deemed unrelated to the employment decision included: (1) a statement by the foreman that "You black people are all the same. You take all day to do something."; (2) a statement by the line leader that he did not "care for blacks."; (3) a statement by the manager, "I don't care for black people in particular.... I appreciate your black ass staying out of my office."; (4) a statement by the manager, "I don't like you as a black person."; and (5) a statement by the general manager that blacks were "hard headed" and "harder to teach." The court held, "Collectively, these remarks do not paint a convincing mosaic of intentional discrimination." *Id.* at 12.

<sup>230</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>219</sup> U.S. Equal Employment Opportunity Commission, *Federal Laws Prohibiting Job Discrimination, Questions and Answers* (last modified June 27, 2001), <http://www.eeoc.gov/facts/qanda.html>.

<sup>220</sup> *Sotolongo v. N.Y. City Transit Auth.*, 63 F. Supp. 2d 353, 360 (S.D. N.Y. 1999).

<sup>221</sup> *Adams v. N.J. Transit Rail Operations*, 2000 U.S. Dist. Lexis 2154 (S.D. N.Y. 2000).

<sup>222</sup> A claim is deemed reasonably related to the original charge where "the conduct complained of would fall within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Butts v. City of N.Y. Dep't of Housing Preservation and Dev.*, 900 F.2d 1397, 1401 (2d Cir. 1993); *Sotolongo v. N.Y. City Transit Auth.*, 63 F. Supp. 2d 353, 360 (S.D. N.Y. 1999).

proven by adducing policy documents, statements, or actions that exhibit a discriminatory attitude.<sup>231</sup>

More common are pretext cases. In pretext cases, courts use the burden-shifting framework for employment discrimination first articulated by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*.<sup>232</sup> The framework for judicial assessment of a Title VII claim of discrimination under *McDonnell Douglas* involves a three-step process. First, the plaintiff must establish a *prima facie* case of discrimination. If he succeeds, the burden shifts to the defendant to show a legitimate, nondiscriminatory justification for the employment action. If the defendant does so, the burden shifts again to the plaintiff to prove that the reasons advanced by the defendant were specious, and that its true motivation was discrimination. The ultimate burden of proof, however, resides with the plaintiff. This allocation of the burden of production is explained in greater detail as follows:

#### a. Plaintiff's Prima Facie Case

First, the plaintiff has the burden of proving, by a preponderance of the evidence, a *prima facie* case of discrimination. To prove a *prima facie* case of employment discrimination, a plaintiff must prove that (1) he or she is a member of a protected class, (2) who was qualified for the position, or was performing satisfactorily in it, (3) who suffered an adverse employment action (e.g., was not hired for, or was fired from the position), (4) under circumstances to give rise to an inference of discrimination based on his or her membership in the protected class.<sup>233</sup> A plaintiff may satisfy this either by offering direct proof of discriminatory intent, or proving disparate treatment.<sup>234</sup> Direct proof of discriminatory intent can be difficult for plaintiffs to establish. Employers rarely include a notation in the employee's personnel file that their actions are motivated by illegal factors.<sup>235</sup> Because the employer rarely leaves

a "smoking gun" of illegitimate intent, a plaintiff is rarely able to prove discrimination by direct evidence and must instead rely on circumstantial evidence.<sup>236</sup>

In the seminal case of *Griggs v. Duke Power Co.*,<sup>237</sup> the U.S. Supreme Court created the disparate impact theory of discrimination, recognizing that Title VII was designed not only to prescribe overt discrimination, but also to prohibit "practices that are fair in form, but discriminatory in operation."<sup>238</sup> According to the Court, what is required by Title VII is "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial and other impermissible classification."<sup>239</sup> In order to establish a *prima facie* case of disparate impact, plaintiff must establish that application of a facially neutral standard has resulted in a significantly discriminatory hiring pattern,<sup>240</sup> or that a facially neutral employment practice falls more harshly on a protected group.<sup>241</sup> Such circumstantial evidence may consist, for example, in proof that the employer continued to seek applications from persons of plaintiff's qualifications after it dismissed him, invidious comments about others in the employee's protected group, more favorable treatment of employees not in the protected group, the sequence of events before plaintiff's discharge, or the timing of the discharge.<sup>242</sup>

A plaintiff pursuing a Title VII claim may rely either on disparate impact or disparate treatment.<sup>243</sup> Under the disparate treatment theory, a plaintiff must establish that the employer intentionally discriminated against a member of the protected class.<sup>244</sup>

#### b. Defendant's Burden

Under the second stage of the *McDonnell Douglas* analysis, if plaintiff has established a *prima facie* case

<sup>231</sup> *Ralkin v. N.Y. City Transit Auth.*, 62 F. Supp. 2d 989, 998 (E.D. N.Y. 1999)

(While a plaintiff's burden of establishing a *prima facie* case of discrimination is de minimus, she cannot meet this burden through conclusory or unsupported assertions. In this case, plaintiff has submitted no evidence, not even her own sworn affidavit, in support of her conclusory assertion that she performed her work satisfactorily. Rather, the record in this case shows that plaintiff received numerous unsatisfactory evaluations of her work performance from at least four different NYCTA employees and supervisors)

[citations omitted].

<sup>232</sup> 411 U.S. 792 (1973).

<sup>233</sup> *Shumway v. United Parcel Service*, 118 F.3d 60, 63 (2d Cir. 1997); *Chambers v. TRM Copy Centers*, 43 F.3d 29, 37 (2d Cir. 1994).

<sup>234</sup> *Stockett v. Muncie Ind. Transit System*, 221 F.3d 997 (7th Cir. 2000) (plaintiff failed to offer satisfactory proof that he was treated differently than non-black employee when drug tested).

<sup>235</sup> *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994).

<sup>236</sup> *Id.* at 37.

<sup>237</sup> 401 U.S. 424 (1971).

<sup>238</sup> 401 U.S. at 431.

<sup>239</sup> *Id.*

<sup>240</sup> *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

<sup>241</sup> Proof of disparity can be demonstrated through a statistical analysis that compares the impact of an employment practice on a protected class vis-à-vis the labor pool. *Duncan v. N.Y. City Transit Auth.*, 127 F. Supp. 2d 354, 2001 U.S. Dist. Lexis 711 (E.D. N.Y. 2001). The EEOC employs a four-fifths rule, whereby a selection rate for any protected class that is less than four-fifths (80 percent) of the rate for the group with the highest rate is generally regarded as evidence of adverse impact, whereas a greater than four-fifths rate is not generally considered evidence of adverse impact. 29 C.F.R. § 1607.4D (1999).

<sup>242</sup> See *Ralkin v. N.Y. City Transit Auth.*, 62 F. Supp. 2d 989, 995 (E.D. N.Y. 1999), discussed above, and cases cited therein.

<sup>243</sup> *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 986-87 (1988), Citing *Griggs v. Duke Power Co.*, *supra*.

<sup>244</sup> *Dist. Council 37, American Fed. of State, County & Mun. Employees, AFL-CIO v. N.Y. City Dep't of Parks and Recreation*, 113 F.3d 347, 351 (2d Cir. 1997).

of discrimination, the burden shifts to the defendant to “articulate some legitimate, non-discriminatory reason” for the employment action.<sup>245</sup> The employer must show that the employment practice is “job related for the position in question and consistent with business necessity....”<sup>246</sup> The second prong of the three-step process—whether the employer has a legitimate nondiscriminatory business justification for its action—was elucidated in *Lanning v. Southeastern Pennsylvania Transportation Authority*,<sup>247</sup> a case that evaluated whether a physical fitness test (which included a requirement that applicants complete a 1.5 mile run within 12 minutes) measures the minimum aerobic capacity necessary to perform the job of a SEPTA transit officer, and therefore constituted a “business necessity.”<sup>248</sup> According to the Third Circuit U.S. Court of Appeals, to survive a disparate impact challenge, a discriminatory cutoff score must be proven to measure the minimum qualifications necessary for successful performance of the job in question.<sup>249</sup> Other cases have found pursuing a reduction-in-force and reorganization of staff arising from budgetary constraints to be a legitimate business reason.<sup>250</sup> But even during such legitimate workforce reductions, an employer may not dismiss employees for illegitimate discriminatory reasons.<sup>251</sup> Other courts have found that “poor work performance, abuse of company time, and other rule violations” constitute a legitimate reason for dismissal.<sup>252</sup>

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<sup>245</sup> The defendant need not “persuade the court that it was actually motivated by the proffered reasons.” *Tex. Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, at 245 (1981). Instead, the “employer’s burden here is one of production of evidence rather than one of persuasion.” *Id.* Once a defendant offers a nondiscriminatory reason for its actions, the presumption established by plaintiff’s *prima facie* case “drops out of the picture.” *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502 at 511 (1993).

<sup>246</sup> 42 U.S.C. § 2000e-k (2000).

<sup>247</sup> 181 F.3d 478 (3d Cir. 1999).

<sup>248</sup> This standard was evaluated in detail in *Lanning v. Southeastern Pa. Transp. Auth.*, 181 F.3d 478 (3d Cir. 1999). The trial court’s decision that testing a transit police candidate’s aerobic ability was job related and consistent with business necessity, and did not constitute a violation of the Civil Rights Act of 1991, was reversed by the Court of Appeals. Pass rates were significantly lower for women than men; thus, a facially neutral standard had resulted in a discriminatory hiring pattern. The Court of Appeals held that the test failed the business necessity doctrine.

<sup>249</sup> 181 F.3d at 494.

<sup>250</sup> *Duncan v. N.Y. City Transit Auth.*, 2001 U.S. Dist. Lexis 711 (E.D. N.Y. 2001) (Plaintiff’s performance was sub-par, the RIF was performed objectively, and the job termination was not age based, as alleged).

<sup>251</sup> *Maresco v. Evans Chemetics*, 964 F.2d 106, 111 (2d Cir. 1992).

<sup>252</sup> *Robinson v. Chicago Transit Auth.*, 1999 U.S. Dist. Lexis 8994 (N.D. Ill. 1999) (Plaintiff exhibited

a pattern of poor work performance, abuse of company time, insubordination, and other rule violations. He was formally disciplined about nine different times, received numerous verbal and

### c. Plaintiff’s Rebuttal

Under the third and final step of *McDonnell Douglas* analysis, if the defendant provides a nondiscriminatory reason for the employment action, the presumption of discrimination “simply drops out of the picture,”<sup>253</sup> and the governing standard is whether the evidence, taken as a whole, reasonably supports an inference of intentional discrimination.<sup>254</sup> The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated remains at all times with the plaintiff.<sup>255</sup>

Specifically, the plaintiff must prove that the legitimate reasons offered by the defendant were not its true reasons, but were instead a pretext<sup>256</sup> for discrimination.<sup>257</sup> To prove pretext, plaintiff may show that the proffered reason either (1) has no basis in fact, (2) did not actually motivate the adverse employment action taken, or (3) was insufficient to motivate the adverse action taken.<sup>258</sup> Plaintiff must prove through either di-

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written warnings and suspensions, and attended several corrective interviews. Plaintiff’s work performance issues included excessive use of the telephone, leaving his assigned work location early, arriving at work late, sleeping at his work location, failing to properly clean engine parts, beginning his lunch break early and returning from lunch late, taking too long to perform tasks within proscribed time periods, failing to perform observable work for a significant period of time, leaving the building without permission, leaving his assigned work location, and refusing directions to return to work.),

*Id.* at 4.

<sup>253</sup> *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 at 511 (1993).

<sup>254</sup> *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000).

<sup>255</sup> *Stockett v. Muncie Ind. Transit System*, 221 F.3d 997, 1000 (7th Cir. 2000).

<sup>256</sup> “Pretext means more than a mistake on the part of the employer; pretext ‘means a lie, specifically a phony reason for some action.’” *Wolf v. Buss (America) Inc.*, 77 F.3d 914, 919 (7th Cir. 1996) (quoting *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir. 1995)).

<sup>257</sup> *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In other words, plaintiff must prove (1) that there is a material issue of fact as to the truthfulness of the employer’s alleged reason for the adverse employment, and (2) by a preponderance of the evidence, that discriminatory animus was the real reason. *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 515 (1993). The plaintiff fails where he or she introduces “no evidence that the true motivation for the defendant’s actions was illegal discrimination.” *Clark v. N.Y. City Transit Auth.*, 1999 U.S. App. Lexis 32729 (2d Cir. 1999). An individual who is transferred in an effort to induce resignation or to harass may sustain an action under Title VII. In the instant case, when the *prima facie* case was spelled out and the burden shifted to the employer, the plaintiff failed to rebut defendant evidence of nondiscriminatory reasons for transfer.

<sup>258</sup> *O’Connor v. DePaul Univ.*, 123 F.3d 665 (7th Cir. 1997); *Schrean v. Chicago Transit Auth.*, 1999 U.S. Dist. Lexis 16614 (E.D. Ill. 1999) (indirect evidence of sexual discrimination failed to prove that 1-day suspension for tardiness established a discriminatory pretext); *Jones v. Wash. Metro. Area Transit*

rect, statistical, or circumstantial evidence that the employer's reason is false, and that it is more likely than not that a discriminatory reason motivated the adverse employment action.<sup>259</sup> The plaintiff may also prevail if he or she can prove that an alternative employment practice with a less disparate impact would also serve the employer's legitimate business interest.<sup>260</sup>

#### 4. Retaliation Claims

Retaliation claims may arise under (1) the First Amendment to the United States Constitution; (2) similar provisions of the state constitution; (3) the retaliation provisions of Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the ADA, and similar statutes; and (4) similar state civil rights statutes.

The First Amendment of the U.S. Constitution prohibits the discharge of a public employee for the exercise of Constitutionally protected speech.<sup>261</sup> An employer may not lawfully retaliate against an employee for the exercise of his or her free speech rights.<sup>262</sup> Such a claim against a public transit operator can be brought under Section 1983, as discussed above.

Claims brought under either the First Amendment's Right to Petition Clause or the Free Speech Clause are governed by the interest balancing test, balancing the interests of the employee, as a citizen (in commenting on matters of public concern), against the interests of the government, as an employer (in promoting the efficiency of the workplace and its services). Under either clause, plaintiff must prove (1) he or she spoke out on a matter of public concern, and (2) he or she was retali-

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Auth., 205 F.3d 428 (D.C. Cir. 2000) (retaliation by termination as a result of the filing of a sexual harassment complaint will sustain plaintiff's claim of discriminatory pretext:

Of the three reasons Miller offered in his October 30, 1987 letter for not promoting Jones, the district court reasonably rejected as pretextual two: Jones's "marginal" test score, because it was higher than the score of another employee who *was* promoted, and the instance when she gave a cash refund to a customer, because the court found her action consistent both with the Metro-rail Handbook and with a Department directive. In contrast, the court accepted Miller's third reason, that Jones had "transmitted [her] personal views to [her] subordinates," as "more plausible—but violative of Title VII" because it reflected retaliation for protected activity, namely, the 1985 letter to Bassily complaining of Department discrimination. Because the court's findings of pretext and of retaliation as to the promotion claim are supported by the evidence, they are not clearly erroneous.)

[citations omitted]. *Id.* at 433.

<sup>259</sup> Gallo v. Prudential Residential Services, 22 F.3d 1219, 1255 (2d Cir. 1994). St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993).

<sup>260</sup> Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

<sup>261</sup> Rankin v. McPherson, 483 U.S. 378, 383 (1987); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 282–84 (1977).

<sup>262</sup> Connick v. Myers, 461 U.S. 138, 140 (1983) ("A public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment.").

ated against because of such speech.<sup>263</sup> The fundamental question is whether the speech in question may be "fairly characterized as constituting speech on a matter of public concern."<sup>264</sup> Whether particular speech addresses a matter of public concern must be determined by the content, form, and context of the statement.<sup>265</sup> The court focuses on the motive of the speaker to determine whether the speech was calculated to redress personal grievances (such as his or her personal dissatisfaction with the conditions of employment) or whether the speech has a broader public purpose.<sup>266</sup>

Title VII also prohibits retaliation against employees who have opposed allegedly illegitimate employment practices: "It shall be an unlawful employment practice for an employer to discriminate against an employee...because he has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this subchapter."<sup>267</sup> To establish a *prima facie* case of retaliation, a plaintiff must prove: (1) participation in a protected activity under Title VII (such as filing an EEOC complaint);<sup>268</sup> (2) such participation is known to the retaliator;<sup>269</sup> (3) an

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<sup>263</sup> White Plains Towing Corp. v. Patterson, 991 F.2d 1049, 1058 (2d Cir. 1993).

<sup>264</sup> Connick v. Myers, 461 U.S. 138, 146 (1983).

<sup>265</sup> *Id.* at 147–8 (1983).

<sup>266</sup> Schlesinger v. N.Y. City Transit Auth., 2001 U.S. Dist. Lexis 632 (S.D. N.Y. 2001) at 17, 18 (The speech in question contained plaintiff's complaints about, among other things, inadequate job description, salary, and improper classification as an employee. The court found that the statements were general in nature and related to his own personal situation, and thus did not give rise to a claim under U.S. Const. Amend. I.):

Plaintiff's claim of retaliation is based on the following events: (1) plaintiff's October 25, 1999 memorandum to Gorman complaining of his inadequate job description and inadequate salary; (2) plaintiff's January 5, 2000 meeting with the IG, during which he complained of "fraud"; and (3) plaintiff's February 4, 2000 letter to Gorman complaining of his and his co-workers' workload and of his erroneous classification and Hay Point rating.... None of these statements addressed a matter of public concern. All of plaintiff's comments "were personal in nature and generally related to [his] own situation." Plaintiff was not speaking as a citizen, but rather as an employee complaining of his own labor dispute. Even though plaintiff's complaints of his heavy workload also addressed the workload of his co-workers, such speech does not constitute a matter of public concern because it related primarily "to plaintiff's personal circumstance and was motivated purely by self-interest.)

[citations omitted].

<sup>267</sup> 42 U.S.C. § 20003-3(a).

<sup>268</sup> Plaintiff need only prove a good faith belief that the activity was of a kind protected under Title VII. Fowler v. N.Y. Transit Auth., 2001 U.S. Dist. Lexis 762 (S.D. N.Y. 2001). Filing of an EEOC complaint is a protected activity. Dimino v. N.Y. City Transit Auth., 64 F. Supp. 2d 136, 155 (E.D. N.Y. 1999).

<sup>269</sup> Plaintiff need not show that individual decision-makers within the transit agency knew that he or she had made a complaint; there need only be general corporate knowledge that the plaintiff engaged in the protected activity. Fowler v. N.Y. Transit Auth., 2001 U.S. Dist. Lexis 762 (S.D. N.Y. 2001).

adverse employment action based on the employee's activity,<sup>270</sup> and (4) a causal connection between the protected activity and the employment action.<sup>271</sup> If plaintiff proves a *prima facie* case of retaliation, the burden shifts in the *McDonnell Douglas* manner described above to the defendant to demonstrate a legitimate, nondiscriminatory reason for the adverse employment action.<sup>272</sup> If the defendant does so, the plaintiff must prove that the defendant's proffered reason was merely a pretext for retaliation.<sup>273</sup>

<sup>270</sup> An "adverse employment action" is a material adverse change in the terms and conditions of employment. It must be more than a mere inconvenience or alteration in job conditions and responsibilities. It might be indicated, for example, by an employment termination, demotion, a less distinguished title, material loss of benefits, or significantly diminished responsibilities. *Galabya v. N.Y. City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000). A Lilliputian accumulation of numerous small employment actions may in the aggregate constitute an adverse employment action. As noted in one transit case:

The actions could be viewed as a series of incidents which diminished the responsibilities the plaintiff had been exercising, humiliated the plaintiff, and substantially changed the conditions under which the plaintiff had been performing her job. The evidence at trial also indicated that the first of the series of actions that the plaintiff complained of as being retaliatory...occurred the day after she complained of discrimination and that other incidents occurred in sufficiently close proximity to protected activity to raise a strong inference of retaliation.

*Fowler v. N.Y. Transit Auth.*, 2001 U.S. Dist. Lexis 762 (S.D. N.Y. 2001) at 22.

<sup>271</sup> *DeCintio v. Westchester County Medical Center*, 821 F.2d 111, 115 (2d Cir.), *cert. denied*, 434 U.S. 965 (1987). The causal connection may be proven indirectly by showing that the protected activity was proximate in time to the adverse employment action. *Fowler v. N.Y. Transit Auth.*, 2001 U.S. Dist. Lexis 762 (S.D. N.Y. 2001). It may also be proven by showing that similarly situated individuals were treated differently. *Malarkey v. Texaco, Inc.*, 983 F.2d 1204, 1213 (2d Cir. 1993).

<sup>272</sup> The plaintiff needs merely to establish facts sufficient to permit an inference of retaliatory motive to shift the burden to the defendant to adduce nondiscriminatory reasons for the adverse employment action. *Ostrowski v. Atlantic Mut. Ins. Co.*, 968 F.2d 171, 182 (2d Cir. 1992).

<sup>273</sup> *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 768 (2d Cir. 1998); *Sotolongo v. N.Y. City Transit Auth.*, 63 F. Supp. 2d 353, 360 (S.D. N.Y. 1999) (NYCTA prevailed on motion to dismiss by submitting evidence of defendant's well-documented psychological problems, threats of violence, and history of insubordination. Such evidence was enough to disprove a discriminatory pretext for retaliation.) *Sotolongo v. N.Y. City Transit Auth.*, 2000 U.S. App. Lexis 14161 (2d Cir. 2000)

(Assuming for the purposes of this appeal that Sotolongo has articulated a *prima facie* case of discrimination, it is clear that the TA has articulated a legitimate, non-discriminatory reason for his four-month suspension without pay. Although Sotolongo contests the district court's finding that he had a "history of insubordination," it is common cause that he had repeatedly been diagnosed with psychological problems and that psychologists had questioned his ability to work. Moreover, he does not contest that during the incident on February 14, 1995 he refused work instructions and issued threats of violence. Under these circumstances, the TA's concerns over Sotolongo's psychological stability and the safety of those around him suffice to articulate a reason for suspension that is independent of age or national ori-

gin. For example, in *Adams v. New Jersey Transit Rail Operations*,<sup>274</sup> a federal district court concluded that a rail transit car cleaning employee made out a *prima facie* case of retaliation by proving her employer was aware she had filed a sex discrimination grievance with her union, and that the employer denied her the higher rate of pay associated with the tasks she was performing in close temporal proximity to the filing of her complaint.<sup>275</sup>

## 5. Hostile Work Environment

Title VII guarantees employees within Title VII's coverage the right to a workplace free from discriminatory intimidation, ridicule, and insult.<sup>276</sup> In order to establish a *prima facie* case of a hostile work environment, a plaintiff must prove that the workplace is permeated with discriminatory intimidation, ridicule, and insult.<sup>277</sup> To violate Title VII, the harassing conduct must be so offensive or pervasive that a reasonable person would conclude that it is hostile or abusive.<sup>278</sup> To determine whether the environment is hostile, the conduct must be examined in the totality of the circumstances.<sup>279</sup> In assessing whether a hostile environment exists, one must consider the "quantity, frequency, and severity of the racial, ethnic, or sexist slurs,"<sup>280</sup> and whether it interferes unreasonably with an employee's work performance.<sup>281</sup>

Isolated or sporadic incidents of discrimination do not usually create an unlawful sexually or racially hostile environment in violation of Title VII.<sup>282</sup> For example, isolated verbal abuse, intimidation, and racial epithets without more may not give rise to a Title VII claim.<sup>283</sup>

gin. Moreover, Sotolongo has produced no evidence that these reasons were pretextual. There is no evidence that Sotolongo's superiors were even aware of his national origin. The alleged comment by his arresting officer is irrelevant to his employment. And Sotolongo has produced no evidence that his supervisors took his age into account when they suspended him after the February 14, 1995 incident.)

*Id.* at 7, 8.

<sup>274</sup> 2000 U.S. Dist. Lexis 2154 (S.D. N.Y. 2000).

<sup>275</sup> *Id.* at 47.

<sup>276</sup> *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986).

<sup>277</sup> *Harris v. Forklift System, Inc.*, 510 U.S. 17 (1993).

<sup>278</sup> *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

<sup>279</sup> *Kotcher v. Rosa and Sullivan Appliance Ctr.*, 957 F.2d 59, 63 (2d Cir. 1992).

<sup>280</sup> *Vore v. Ind. Bell Tel. Co.*, 32 F.3d 1161, 1164 (7th Cir. 1994).

<sup>281</sup> *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).

<sup>282</sup> *Baskerville v. Culligan Intern. Co.*, 50 F.3d 428, 430-31 (7th Cir. 1995).

<sup>283</sup> *Adams v. N.J. Transit Rail Operations*, 2000 U.S. Dist. Lexis 2154 (S.D. N.Y. 2000) (Female African-American and Hispanic

Plaintiffs broadly allege they were subject to verbal intimidation and threats (e.g., "It was not uncommon on any given day to have a General Foreman, Assistant Manager or a foreman yelling and screaming at me") and Richardson asserts that at some unspecified time someone stated to her "Oh so you want to be a

The U.S. Supreme Court has held that “a mere utterance of an epithet which engenders offensive feelings in an employee,’ does not sufficiently affect the conditions to implicate Title VII.”<sup>284</sup> The harassment must be “extreme.”<sup>285</sup> But where a plaintiff has established evidence of sexually or racially vicious epithets, physically intimidating or humiliating action, or a pattern of such behavior over an extended period of time, a claim for a hostile work environment has prevailed.<sup>286</sup>

In addition to demonstrating a hostile environment, plaintiffs must impute such harassment to the employer. An employer is liable for a supervisor’s harassment if his or her acts fell within the scope of his authority or were foreseeable, and the employer failed to take remedial action.<sup>287</sup> An employer is only liable for the acts of its employees in creating a hostile work environment where it knew or should have known of the employees’ actions and failed to take appropriate remedial action.<sup>288</sup> Appropriate action must be prompt, and likely to prevent future harassment.<sup>289</sup> As the U.S. Supreme Court held in *Faragher v. City of Boca Raton*,<sup>290</sup>

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence....

“The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent

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man.” Broad allegations of verbal abuse and intimidation, coupled with an isolated, gender-based epithet, without more, cannot create a hostile work environment. Because no reasonable jury could find that plaintiffs’ assertions rise to the level required to sustain a Title VII claim for a hostile work environment, those claims must be dismissed.)

[citations omitted]; (transit operator succeeding in proving legitimate nondiscriminatory reason in hostile work environment/disparate working conditions claim by showing that work assignments were conducted in concert with plaintiffs’ job descriptions); *Schrean v. Chicago Transit Auth.*, 1999 U.S. Dist. Lexis 16614 (E.D. Ill. 1999) (employer responded to initial complaint with sufficient disciplinary action—no other formal complaint was filed with employer—initial complaint, therefore, was insufficient to establish a hostile work environment; suspension for tardiness not pretextual: “Merely because Schrean’s co-workers and supervisor failed to treat her with sensitivity or tact, and used coarse language on one occasion and Schrean found this environment to be unpleasant, it is not discriminatory or hostile under the statute.”).

<sup>284</sup> *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986)).

<sup>285</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

<sup>286</sup> *Castro v. Local 1199*, 964 F. Supp. 719 (S.D. N.Y. 1997).

<sup>287</sup> *Williams v. Banning*, 72 F.3d 552, 555 (7th Cir. 1995). *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998). *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463 (7th Cir. 1990).

<sup>288</sup> *Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742 (1998).

<sup>289</sup> *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990).

<sup>290</sup> 524 U.S. 775 (1998).

and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>291</sup> The failure of the employee to report a racial epithet to the employer may thwart the imputation of liability.<sup>292</sup>

Where an employer takes action to prevent and promptly correct any harassing behavior, and the employee fails to take advantage of such corrective or preventive procedures, the employee may not prevail on a Title VII claim.<sup>293</sup> An employer can raise a successful affirmative defense if the “defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>294</sup>

## 6. Racial Discrimination

In order to prove a *prima facie* case of racial discrimination, a plaintiff must prove that: (1) he or she was treated differently, (2) from a person of another race or color, (3) where the defendant intended to discriminate, and (4) where the defendant’s intent to discriminate caused the difference in the plaintiff’s treatment.<sup>295</sup> The following cases illustrate how these issues have been dealt with in the context of alleged racial discrimination by transit providers.

*Brinson v. New York City Transit Authority*<sup>296</sup> involved a claim of racial discrimination by an African-

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<sup>291</sup> 524 U.S. at 807.

<sup>292</sup> *Robinson v. Chicago Transit Auth.*, 1999 U.S. Dist. Lexis 8994 (1999) (plaintiff failed to apprise CTA of harassment in order to give CTA an opportunity to take corrective action). *Schrean v. Chicago Transit Auth.*, 1999 U.S. Dist. Lexis 16614 (E.D. Ill. 1999). (Transit employer had official sexual harassment policy whereby all complaints were to be filed in writing with transit affirmative action office. Plaintiff only filed initial claim to affirmative action office, which was substantiated by an investigation and resulted in disciplinary action against harasser. Harassment then continued, but plaintiff never filed another complaint with the affirmative action office.)

<sup>293</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 749 (1998).

<sup>294</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (holding the city vicariously liable for harassment and discrimination by the plaintiff’s supervisors and any affirmative defense would fail because the city failed to clarify or discuss its policy on harassment with its employees).

<sup>295</sup> *Alston v. N.Y. City Transit Auth.*, No. 97 CIV. 1080 (RWS), 1998 WL 437154 (S.D. N.Y. 1998) (bus driver dismissed on grounds of insubordination and assault failed to establish *prima facie* case of discrimination). The use of disparate impact data to prove racial discrimination was upheld in *Carey v. Greyhound Lines*, 380 F. Supp. 467 (E.D. La. 1973). Statistical evidence may be accorded great weight in proving a practice or pattern of discrimination. *Ochoa v. Monsanto Co.*, 473 F.2d 318 (5th Cir. 1973).

<sup>296</sup> 60 F. Supp. 2d 23 (E.D. N.Y. 1999).



American bus driver who claimed racial discrimination in her dismissal after 11 years of employment during which she “received six warnings, four reprimands, and fifteen suspensions ranging from one to thirty days each....[accumulating] twenty-six citations in total for occurrences ranging from arriving at bus stops ahead of or behind schedule, failure to wear a tie, by-passing passengers waiting on the street, being ‘AWOL,’ and being ‘reckless’ and ‘insubordinate.’” Ultimately she was dismissed after she was “insubordinate, obscene, and extremely threatening” toward a supervisor.<sup>297</sup> In granting the transit authority’s motion for summary judgment, the court concluded, “plaintiff makes no showing that she was treated differently from other, white employees who accumulated the kind of disciplinary record she accumulated....[P]laintiff’s extensive and progressive disciplinary record serves as a legitimate, non-discriminatory basis for her termination....”<sup>298</sup>

In *de Silva v. New York City Transit Agency*,<sup>299</sup> an Asian American and African American alleged discrimination against a transit authority on grounds they were not promoted to a desirable position, and were subject to undesirable transfers. To prove racial motivation, plaintiffs adduced a 7-year old survey of transit employees showing that 75 percent of African American and 45 percent of Asian American employees believed that system-wide racial discrimination is a problem at the transit authority. Because the survey was distributed to such a small and unidentified sample of employees, the court ruled it inadmissible.<sup>300</sup> The court concluded that there was no evidence that defendants acted with discriminatory intent or that they were in any way influenced by plaintiffs’ race in making their promotional decisions.<sup>301</sup>

In a case alleging racial discrimination against a transit company for imposing a requirement that bus drivers be clean shaven (except for a neat and trimmed moustache), a court held “The wearing of a uniform, the

type of uniform, the requirement of hirsute conformity applicable to whites and blacks alike, are simply non-discriminatory conditions of employment falling within the ambit of managerial decision to promote the best interests of its business.”<sup>302</sup>

In *Stockett v. Muncie Indiana Transit System*,<sup>303</sup> an African-American bus driver complained of racial discrimination for being fired after testing positive in a drug test. The Seventh Circuit found that the plaintiff failed to show that being submitted to a drug test was the type of harassing act that constitutes an adverse employment action. The transit system conducted the test only after receiving a report that the employee had been smoking crack cocaine, and after a trained observer determined that he exhibited the signs of one under the influence of a controlled substance, establishing probable cause that he was under the influence of drugs. The court found that the drug policy was not the type of adverse employment action that Title VII was designed to prevent. Nor did the employee prove that non-black employees were treated more favorably.<sup>304</sup>

Sometimes transportation unions find themselves sued for discrimination.<sup>305</sup> A union’s breach of its duty of fair representation can subject it to liability under Title VII if the breach can be proven to be motivated by plaintiff’s race. A union’s duty of fair representation includes the responsibility to act “without hostility or discrimination...in complete good faith and honesty... to avoid arbitrary conduct.”<sup>306</sup> To establish a race-based Title VII claim against a union, the plaintiff must prove: (1) the employer violated the collective bargaining agreement with respect to the plaintiff; (2) the union allowed the breach to go unrepaired, breaching the duty of fair representation it owed to the employee; and (3) there was some indication that the union’s failure was motivated by racial animus.<sup>307</sup> The second prong is satisfied whenever the union’s conduct toward a member of its collective bargaining unit is arbitrary, discriminatory or in bad faith.<sup>308</sup>

<sup>297</sup> 60 F. Supp. 2d at 25.

<sup>298</sup> 60 F. Supp. 2d at 30. A similar case was *Sweet v. Topeka Metro. Transit Auth.*, 1990 U.S. Dist. Lexis 13809 (D. Kan. 1990), which upheld a dismissal of a bus driver against a claim of racial motivation. In *Sweet*, after a passenger boarded a bus that was running behind schedule, the driver made two personal stops—one to buy orange juice, and another to cash a personal check—the passenger complained to the driver about the delays, to which the driver responded, in contravention of the company’s policies, “If you don’t like how I drive this bus I’ll bash your #%@!\* face in and kick your ass off the bus.” The court held plaintiff failed to produce evidence proving defendant’s reasons for dismissal were pretextual, *Id.* at 7.

<sup>299</sup> 1999 U.S. Dist. Lexis 19998 (E.D. N.Y. 1999).

<sup>300</sup> *Id.* at 32. The U.S. Supreme Court has held that a small statistical sample or an incomplete data set can undercut a plaintiff’s ability to prove disparate impact of a facially neutral employment action. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 996–97 (1988). *Dimino v. N.Y. City Transit Auth.*, 64 F. Supp. 2d 136, 157 (E.D. N.Y. 1999).

<sup>301</sup> 1999 U.S. Dist. Lexis 19998, at 50 (E.D. N.Y. 1999).

<sup>302</sup> *Brown v. D.C. Transit System*, 523 F.2d 725, 728 (D.C. Cir. 1975).

<sup>303</sup> *Stockett v. Muncie Ind. Transit Sys.*, 221 F.3d 997 (7th Cir. 2000).

<sup>304</sup> *Id.* at 997, 1002.

<sup>305</sup> See, e.g., *Brodie v. N.Y. City Transit Auth.*, 2000 U.S. Dist. Lexis 6144 at 7 (S.D. N.Y. 2000) (dismissing a claim that an employee’s union “refused to help him in protecting his job because of his ethnicity and religion, even though they protected the jobs of other individuals of different ethnic backgrounds under similar circumstances” as too broad and conclusory to state a claim upon which relief can be granted).

<sup>306</sup> *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *Parker v. Metropolitan Transp. Auth.*, 97 F. Supp. 2d 437 (S.D. N.Y. 2000).

<sup>307</sup> *Gorham v. Transit Workers Union of America*, 1999 U.S. Dist. Lexis 3573 (S.D. N.Y. 1999).

<sup>308</sup> *Air Line Pilots Ass’n Int’l v. O’Neill*, 499 U.S. 65, 76 (1991).

## 7. Reverse Discrimination

In the employment context, to establish a *prima facie* case of reverse discrimination the plaintiff must prove that: (a) he or she belongs to a class; (b) he or she was qualified for and applied for a job or a promotion; (c) he or she was rejected despite his/her qualifications; and (d) other employees with equal or lesser qualifications who were members of a protected minority were hired or promoted.<sup>309</sup> Typical is the case where a Caucasian employee alleges evidence that African American employees were treated more favorably than Caucasians on the basis of race.<sup>310</sup>

One transit case on point is *Malabed v. North Slope Borough*,<sup>311</sup> a case in which North Slope Transit embraced a hiring preference for Native Americans. Malabed was of Filipino descent and had been hired as a security guard by North Slope, but thereafter dismissed so that the position could be re-noticed with the Native American preference; Malabed, an Asian-American, no longer qualified for the job. Though the EEOC had approved the preference under a federal statutory exemption to racial discrimination that allowed businesses or enterprises located on or near an Indian reservation to give a preference to Indians,<sup>312</sup> the federal district court held that employment preferences affecting fundamental rights or suspect classifications (such as race) could not withstand Constitutional scrutiny without particularized findings logically related to the perceived evil sought to be remedied.<sup>313</sup> In so doing, the court cited *City of Richmond v. J.A. Croson Co.*,<sup>314</sup> in which the U.S. Supreme Court struck down the City of Richmond's ordinance that 30 percent of all construction contracts be given to minority-owned businesses. In *City of Richmond*, the Supreme Court condemned the practice of relying on "a generalized assertion of past discrimination" to correct sweeping efforts to rectify past societal discrimination where no actual discrimination was identified.<sup>315</sup> However, one must recognize that reverse discrimination cases are difficult for plaintiffs to prove.

<sup>309</sup> See *Roberts v. Gadsden Mem'l Hosp.*, 835 F.2d 793, 795 (11th Cir. 1988); *Wilson v. Bailey*, 934 F.2d 301, 304 (11th Cir. 1991); *Young v. City of Houston, Tex.*, 906 F.2d 177, 180 (5th Cir. 1990).

<sup>310</sup> See, e.g., *Schlesinger v. N.Y. City Transit Auth.*, 2001 U.S. Dist. Lexis 632 (S.D. N.Y. 2001).

<sup>311</sup> 42 F. Supp. 2d 927 (D. Alaska 1999).

<sup>312</sup> 42 U.S.C. § 2000e-2(i) (2000).

<sup>313</sup> 41 F. Supp. 2d at 941. The court in *Malabed* also relied on the nonconstitutional theory that the preference, adopted by North Slope Transit as an ordinance, violated a charter provision of North Slope Borough that barred discrimination based on national origin.

<sup>314</sup> 488 U.S. 469 (1989).

<sup>315</sup> 488 U.S. at 498–501.

## 8. National Origin Discrimination

Title VII also prohibits employment discrimination on the basis of the employee's national origin.<sup>316</sup> It is unlawful to discriminate against a person because of their birthplace, ancestry, culture, or linguistic characteristics common to an ethnic group. The EEOC takes the position that requiring that employees speak only the English language on the job may violate Title VII unless the employer can prove that such a requirement is necessary, and the employees are informed of the rule and the consequences for its violation.<sup>317</sup> Reliance on English as the state's "official language" may not insulate the employer from a violation of Title VII national origin discrimination. However, EEOC guidelines on National Origin Harassment were struck down by the U.S. Supreme Court,<sup>318</sup> and have been repealed.<sup>319</sup>

In *Sotolongo v. New York City Transit Authority*,<sup>320</sup> a Cuban-American complained that his suspension, *inter alia*, was based on his national origin. The employer insisted that his suspension was based on his psychological problems, threats of violence (he said he would "cut" someone), and history of insubordination. The court in ruling in favor of the employer noted there was "no evidence even that plaintiff's supervisors were even aware of plaintiff's national origin."<sup>321</sup>

## 9. Religious Discrimination

Relatively few reported cases have been brought against transit providers in the employment context for alleged religious discrimination. Employers are required to reasonably accommodate the religious beliefs of existing or prospective employees unless such accommodation would impose an undue hardship.<sup>322</sup>

In *Mateen v. Connecticut Transit*,<sup>323</sup> a transit bus driver alleged he was discriminated against on racial and religious grounds (he was an African-American and Black Muslim). Shamsiddin Mateen was fired after causing an accident that damaged his bus, and after numerous negative reports from both white and black supervisors as to his abrasive and belligerent manner and outbursts of temper. Proof of a religious motive for

<sup>316</sup> See Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (2000); 29 C.F.R. pt. 1606 (2002).

<sup>317</sup> U.S. Equal Employment Opportunity Commission, *Federal Laws Prohibiting Job Discrimination, Questions and Answers* (last modified June 27, 2001), <http://www.eeoc.gov/facts/qanda.html>; 29 C.F.R. § 1606.7 (2002).

<sup>318</sup> *Burlington Indus. Inc. v. Ellerth*, 534 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

<sup>319</sup> 64 Fed. Reg. 58,333 (Oct. 29, 1999).

<sup>320</sup> *Sotolongo v. N.Y. City Transit Auth.*, 63 F. Supp. 2d 353 (S.D. N.Y. 1999); U.S. Equal Employment Opportunity Commission, *supra* note 317.

<sup>321</sup> *Sotolongo v. N.Y. City Transit Auth.*, 63 F. Supp. 2d 353, 360 (S.D. N.Y. 1999).

<sup>322</sup> U.S. Equal Employment Opportunity Commission, *supra* note 317; 29 C.F.R. pt. 1605 (2002).

<sup>323</sup> 550 F. Supp. at 52 (D. Conn. 1982).

his dismissal was slim. According to the court, “A keen mind and manual dexterity are not the only criteria that management may utilize in determining a person’s qualifications for employment. An ability to work well with others, patience, pleasantness, and self-control are permissible factors to be placed on the scale. In view of a bus operator’s daily and extensive contact with the public, these personal characteristics are components for the successful performance of the job.”<sup>324</sup>

In a state case, the New York City Transit Authority dismissed a bus driver for failing to show up for work on Fridays and Saturdays. As a Seventh Day Adventist, she claimed she was prohibited from working on the Sabbath—from sundown on Friday to sundown on Saturday. The union objected to any accommodation of her on grounds it would violate the seniority provisions in its CBA with the Transit Authority. In the interest of maintaining harmony in the workplace, the Authority declined to contest the issue with the union. The court held that an employer need not make such accommodations when it would be prohibited by the nondiscriminatory provisions of its CBA.<sup>325</sup>

There have been a number of recent claims of discrimination based on religion arising out of an employee’s desire to wear attire required by his or her religion. In *Goldman v. Weinberger*, the U.S. Supreme Court addressed the issue of whether the U.S. Air Force could prohibit an Orthodox Jew from wearing a yarmulke, and concluded that the government’s interest in uniformity and discipline legitimately justified a dress code, and that such code did not infringe on his First Amendment free exercise rights.<sup>326</sup> One transit case on point is *Kalsi v. New York City Transit Authority*.<sup>327</sup> New York subway inspectors were required to wear hard hats to avoid the risk of head injury while working under the cars. Charan Singh Kalsi was a Sikh, whose religious beliefs required him to wear a turban at all times. Kalsi refused to wear the hard hat over his turban, and was dismissed. The court found that the hard hat requirement was not pretextual, was grounded on legitimate safety concerns, and that Mr. Kalsi’s dismissal was not religiously motivated.

## 10. Sexual Discrimination

Title VII of the Civil Rights Act of 1964<sup>328</sup> prohibits discrimination on the basis of sex.<sup>329</sup> To establish a *prima facie* case of gender discrimination in failing to be hired or promoted to a position, the plaintiff must show: (a) she is a member of a protected group; (b) she applied for a position; (c) she was qualified for that posi-

tion when she applied; (d) she was not selected for that position; and (e) after the defendant declined to hire her the position either remained open, or a male was selected to fill it.<sup>330</sup> Employers also may not discriminate against employees on the basis of pregnancy, childbirth, and related medical conditions.<sup>331</sup> Neither may employers discriminate on the basis of sex in the payment of wages or benefits, under circumstances where men and women perform work of similar effort, skill, and responsibility.<sup>332</sup>

Evidence of a supervisor’s sporadic or occasional derogatory utterances about an employee’s sex generally is insufficient, without more, to establish a case of sexual discrimination.<sup>333</sup> However, such comments, if made contemporaneously with the employment decision in question, may constitute sexual discrimination.<sup>334</sup> But without evidence of pretext or discriminatory impact, the decision of an employer to suspend an employee because of excessive tardiness is not a violation of Title VII.<sup>335</sup>

The Pregnancy Discrimination Act (PDA) declares that discrimination against a woman because of her pregnancy is sex discrimination.<sup>336</sup> It prohibits policies that discriminate against fertile women, but not fertile

<sup>330</sup> *Davis v. Chevron USA, Inc.*, 14 F.3d 1082, 1087 (5th Cir. 1994).

<sup>331</sup> See the Family and Medical Leave Act, 29 U.S.C. § 2611 (2000). See also *Rowe v. Laidlaw Transit, Inc.*, 244 F.3d 1115, 2001 U.S. App. Lexis 5533 (9th Cir. 2001). See generally the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2000), discussed below.

<sup>332</sup> See the Equal Pay Act of 1963, Pub. L. No. 88-38, 29 U.S.C. § 206(d) (2000). *Garcia v. Chicago Transit Auth.*, 244 F.3d 1115 1987 U.S. Dist. Lexis 554 (N.D. Ill. 1987)

(In order to make out a case under the Equal Pay Act, the plaintiff must show that an employer pays different wages to employees of opposite sexes for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions. Although the complaint alleges that other CTA employees had a higher salary than the plaintiff, the complaint does not allege that the jobs those other CTA employees performed required equal skill, effort and responsibility and were done under similar working conditions as the plaintiff’s job. Consequently, the court dismisses the equal pay claim.)

[citations omitted]. See *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974) for a good example of a wage act case. Men were collecting greater salaries for equal work on a nightshift.

<sup>333</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

<sup>334</sup> *Schrean v. Chicago Transit Auth.*, 1999 U.S. Dist. Lexis 16614, at 19 (E.D. Ill. 1999) (suspension for tardiness not pretextual. “Merely because Schrean’s co-workers and supervisor failed to treat her with sensitivity or tact, and used coarse language on one occasion and Schrean found this environment to be unpleasant, it is not discriminatory or hostile under the statute.”), at 17.

<sup>335</sup> *Schrean v. Chicago Transit Auth.*, 1999 U.S. Dist. Lexis 16614 (E.D. Ill. 1999).

<sup>336</sup> 42 U.S.C. § 2000e(k) (2000). See, e.g., *Legrand v. N.Y. Transit Auth.*, 2000 U.S. App. Lexis 894 (2d Cir. 2000).

<sup>324</sup> 550 F. Supp. at 55 (D. Conn. 1982).

<sup>325</sup> In the Matter of N.Y. City Transit Auth. v. State of N.Y. Executive Dep’t, 627 N.Y.S.2d 360 (N.Y.S. Ct. 1995).

<sup>326</sup> *Goldman v. Weinberger*, 475 U.S. 503 (1986).

<sup>327</sup> 62 F. Supp. 2d 745 (E.D. N.Y. 1998).

<sup>328</sup> 42 U.S.C. 2000 *et seq.*

<sup>329</sup> See generally Maxine Eichner, *Getting Women’s Work That Isn’t Women’s Work: Challenging Gender Biases in the Workplace Under Title VII*, 97 YALE L.J. 1397 (1988).

men.<sup>337</sup> Unless pregnant women differ from other employees in their ability or inability to work, they must be treated the same as all other employees.<sup>338</sup> The PDA neither requires the creation of special programs for pregnant women, nor mandates special treatment for them.<sup>339</sup> Health and welfare plans must treat pregnancy as any other health condition.

With respect to an employer's fear of tort liability arising from injury to mothers or would-be mothers, the U.S. Supreme Court has held that it is the mother who must make the decision as to potential risks to the fetus, rather than the employer. Hence, fear of potential tort liability does not justify a fetal protection policy.<sup>340</sup>

## 11. Sexual Harassment

Title VII of the Civil Rights Act prohibits sexual harassment, which includes such practices as a supervisor seeking sexual favors from a subordinate employee, or creating a hostile workplace environment for persons of either gender.<sup>341</sup> An employer can be subjected to vicarious liability to a victimized employee for creation of a hostile environment by a supervisor with authority over an employee. When no tangible employment action has been taken, the employer may raise an affirmative defense to liability by proving that: (1) the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of available preventive or correcting opportunities made available by the employer, or otherwise failed to avoid harm.<sup>342</sup>

<sup>337</sup> *Dimino v. N.Y. City Transit Auth.*, 64 F. Supp. 2d 136 (E.D. N.Y. 1999).

<sup>338</sup> *International Union UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991). For example, to force a woman to take unpaid medical leave during the full term of her pregnancy would violate Title VII. *Dimino v. N.Y. City Transit Auth.*, 64 F. Supp. 2d 136 (E.D. N.Y. 1999).

<sup>339</sup> *Urbano v. Continental Airlines*, 138 F.3d 204, 206 (5th Cir. 1998). In passing the Pregnancy Discrimination Act, § 701(k) of Title VII, Congress made it clear that an employer must treat pregnant employees the same as non-pregnant employees. The passage of the PDA was meant to overrule the Supreme Court decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) (General Electric's disability plan, which excluded pregnancy, does not violate Title VII). See also *Lang v. Star Herald*, 107 F.3d 1308, 1313 (8th Cir. 1997); *Dimino v. N.Y. City Transit Auth.*, 64 F. Supp. 2d 136 (E.D. N.Y. 1999); *LeGrand v. N.Y. City Transit Auth.*, 1999 U.S. Dist. Lexis 8020 (E.D. N.Y. 1999).

<sup>340</sup> *Dimino v. N.Y. City Transit Auth.*, 64 F. Supp. 2d 136, 147 (E.D. N.Y. 1999). *International Union UAW v. Johnson Controls*, 499 U.S. 187 (1991) (policy that forbade women from lead exposure, but not men, violated Title VII. Transit Police Officer requested reassignment. Fear of liability did not in itself prevent a finding of a violation of Title VII by placing the officer on medical leave after she modified and refused an order reassigning her.)

<sup>341</sup> U.S. Equal Employment Opportunity Commission, *supra* note 219.

<sup>342</sup> *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742 (1998).

The existence of an anti-harassment policy with complaint procedures is an important, though not essential, consideration in determining whether the employer has met the first prong of its defense.<sup>343</sup> To provide a defense, the anti-harassment policy (i) must be written, (ii) must be widely disseminated, (iii) must be uniformly enforced regardless of the position of the complainant and the respondent within the organization, and (iv) must provide a meaningful complaint procedure that includes alternative mechanisms in the event the respondent is the top person in the organization or the complainant's immediate supervisor. In *Caridad v. Metro-North Commuter Railroad*,<sup>344</sup> the Second Circuit considered a sexual harassment complaint by a transit employee who allegedly suffered several episodes of unwelcome sexual touching by her supervisor. The court held that failure of an employee to use the established complaint procedures provided by the employer will normally satisfy the second prong of the defense.<sup>345</sup>

## 12. Age Discrimination

The Age Discrimination in Employment Act of 1967 (ADEA),<sup>346</sup> and the Age Discrimination Act of 1975<sup>347</sup> prohibit discrimination on the basis of age. Such discrimination might include:

- Specifications in job notices of age preference. An age limitation may only be specified if age has been proved to be a *bona fide* occupational qualification (BFOQ);
- Discrimination on the basis of age by apprenticeship program; and
- Denial of benefits to older employees.<sup>348</sup>

The ADEA<sup>349</sup> protects employees who are at least 40 years old from discrimination on the basis of their age. The ADEA provides that it is unlawful "to discharge or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."<sup>350</sup>

The purpose of the statute is to promote older employees on the basis of their abilities, rather than their age. To establish a *prima facie* case, a plaintiff must prove: (1) he or she is a member of a protected class (between 40 and 70 years of age); (2) he or she was qualified for the position in question or performed at or near the employer's legitimate expectations; (3) he or she was not hired for, not promoted to, or was dismissed from, the position; and (4) the position was filled by a

<sup>343</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

<sup>344</sup> 191 F.3d 283 (2d Cir. 1999).

<sup>345</sup> 191 F.3d at 295.

<sup>346</sup> 29 U.S.C. § 621 *et seq.*

<sup>347</sup> 42 U.S.C. §§ 6101 *et seq.* (2000).

<sup>348</sup> U.S. Equal Employment Opportunity Commission, *supra* note 219.

<sup>349</sup> 29 U.S.C. § 621-34 (2000).

<sup>350</sup> 29 U.S.C. § 623(a) (2000).

younger person, or the position remains open.<sup>351</sup> If the plaintiff proves these elements, the burden of proof shifts to the employer to prove the plaintiff's discharge was the result of "some legitimate, nondiscriminatory reason." If the defendant proves this, the burden shifts again to the plaintiff to prove that the reasons proffered by the defendant for discharge were merely a pretext for discrimination.<sup>352</sup>

For example, in *Ralkin v. New York City Transit Authority*,<sup>353</sup> plaintiff alleged that the New York City Transit Authority maintained a "glass ceiling" for Caucasian, Jewish employees in their 40s and 50s. But the employer continued to employ a significant number of individuals roughly the same age and racial and religious affiliation after termination of the plaintiff; the court found this fact undercut any inference that the employer's actions were discriminatory. Moreover, the same person who hired the plaintiff was the same person who terminated her for unsatisfactory performance during her probationary period, and that supervisory employee was a woman in her 60s.<sup>354</sup> These circumstances led the court to dismiss the complaint on grounds that "no reasonable jury could find that defendant's decision to terminate plaintiff was motivated by racial, religious, or age bias...."<sup>355</sup> In another case, a transit worker was held not to have stated a claim upon which relief could be granted based on his dismissal where he was replaced by an individual 61 years of age.<sup>356</sup>

But the plaintiff fared better in *Epter v. New York City Transit Authority*,<sup>357</sup> where he was denied a promotion after refusal to take an electrocardiogram (EKG) test administered only to candidates over the age of 40. The court noted that where the employer relied on a facially discriminatory policy imposing adverse treatment on a protected class, the court need not proceed through the *McDonnell Douglas* burden-shifting formula, described above. The court also observed that an employer can maintain an age-specific policy only if it can prove that age is being employed as a "bona fide

occupational qualification" (BFOQ).<sup>358</sup> Because the employer imposed a facially discriminatory age classification to administer EKGs only on employees over the age of 40, and because it could not prove the testing was a BFOQ, the employer was held to have violated the ADEA.<sup>359</sup>

However, the U.S. Supreme Court held that although the ADEA reflects a clear intent to abrogate a state's sovereign immunity, the abrogation exceeded Congress's authority under the 11th Amendment of the U.S. Constitution.<sup>360</sup> In *Kimel v. Florida Board of Regents*,<sup>361</sup> the U.S. Supreme Court held that though the ADEA reflects a clear Congressional intent to abrogate state sovereign immunity, the abrogation exceeded its authority under the 11th Amendment to the U.S. Constitution, which shields consenting states from suit in federal court.<sup>362</sup> Neither the 14th Amendment nor the Commerce Clause conferred on Congress the authority to arrest age discrimination. Thus, a public transit operator that enjoys sovereign immunity may be shielded from suit under the ADEA.<sup>363</sup> Decisions concerning the hiring, firing, and disciplining of employees are discretionary (as opposed to ministerial) in nature, and therefore enjoy immunity from judicial review.<sup>364</sup> However,

<sup>358</sup> An age classification is permissible only "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1) (2000).

<sup>359</sup> 2001 U.S. Dist. Lexis 753, at 22 (E.D. N.Y. 2001).

<sup>360</sup> *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

<sup>361</sup> 528 U.S. 62 (2000).

<sup>362</sup> *See also* *Federal Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 122 S. Ct. 1864 (2002), which held that, absent its consent, a state could not be subject to a private cause of action brought in a quasi-judicial proceeding before a federal administrative agency.

<sup>363</sup> *Jones v. WMATA*, 205 F.3d 428 (D.C. Cir. 2000); *Taylor v. Wash. Metro. Area Transit Auth.*, 109 F. Supp. 2d 11 (D. D.C. 2000).

<sup>364</sup> *Burkhart v. WMATA*, 112 F.3d 1207 (D.C. Cir. 1997) (hiring and supervision of a bus driver is discretionary in nature; court denies claim of negligent hiring, training, and supervision in a case of a physical altercation between a deaf passenger and a bus driver and thus fails to hold WMATA liable on the claim of negligent hiring, training, and supervision). The hiring, training, and supervising of employees is a discretionary function subject to immunity. *Beebe v. WMATA*, 129 F.3d 1283 (D.C. Cir. 1997). *Taylor v. WMATA*, 109 F. Supp. 2d 11 (D. D.C. 2000),

(An activity that amounts to a "quintessential" governmental function, such as law enforcement, is clearly "governmental" and falls within the scope of sovereign immunity. For activities that are not quintessential governmental functions, the Court must consider whether the activity is "discretionary" or "ministerial." *Id.* Only if the activity is "discretionary" will it be considered "governmental" and therefore protected by sovereign immunity. An activity that is found to be "ministerial" is not protected by sovereign immunity.)

[citations omitted]. *Beebe v. WMATA*, 129 F.3d 1283 (D.C. Cir. 1997)

(To determine whether an activity is discretionary, and thus shielded by sovereign immunity, we ask whether any statute,

<sup>351</sup> *Julian v. N.Y. City Transit Auth.*, 857 F. Supp. 242 (E.D. N.Y. 1994). *See also* *Dove v. Wash. Metro. Area Transit Auth.*, 1999 U.S. Dist. Lexis 12443 (D. D.C. 1999) (plaintiff was dismissed, not on the basis of age discrimination, but because of "20 instances of complaints of rude and unprofessional conduct during his tenure as a station manager, as well as four prior suspensions.") *Id.* at 4.

<sup>352</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Metz v. Transit Mix, Inc.*, 828 F.2d 1202 (7th Cir. 1987).

<sup>353</sup> *Ralkin v. N.Y. City Transit Auth.*, 62 F. Supp. 2d 989 (E.D. N.Y. 1999)

<sup>354</sup> *See Sotolongo v. N.Y. City Transit Auth.*, 63 F. Supp. 2d 353 (S.D. N.Y. 1999), where the court noted that both supervisory employees who terminated plaintiff were over the age of 50. *Id.* at 360.

<sup>355</sup> *Ralkin v. N.Y. City Transit Auth.*, 62 F. Supp. 2d 989, 1002 (E.D. N.Y. 1999).

<sup>356</sup> *Heuser v. Metropolitan Transit Auth.*, 1999 U.S. App. Lexis 7655 (2d Cir. 1999).

<sup>357</sup> 2001 U.S. Dist. Lexis 753 (E.D. N.Y. 2001).

where the public transit operator is not considered an arm of the state for 11th Amendment purposes, it enjoys no such immunity.<sup>365</sup>

### 13. Alcohol and Drug Use Discrimination

Discrimination on the basis of drug or alcohol abuse is prohibited by the Drug Abuse Office and Treatment Act of 1972<sup>366</sup> and the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970.<sup>367</sup> Where a drug test is not performed in a routine fashion under the regular or legitimate practices of the employer, but is instead conducted in a manner that harasses or humiliates employees, requiring that an employee submit to a drug test may be an adverse employment action in violation of Title VII.<sup>368</sup> Although discriminatory drug testing is prohibited by federal statute, nondiscriminatory drug testing is required of certain “safety sensitive” transportation employees.<sup>369</sup> These requirements are discussed in detail above in Section 7—Safety.

In 1991, Congress passed the Omnibus Transportation Employee Testing Act.<sup>370</sup> In response DOT issued regulations for the “safety-sensitive”<sup>371</sup> workers of

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regulation, or policy specifically prescribes a course of action for an employee to follow. If no course of action is prescribed, we then determine whether the exercise of discretion is grounded in social, economic, or political goals. If so grounded, the activity is “governmental,” thus falling within section 80’s retention of sovereign immunity.)

See also *Taylor v. Washington Metro. Area Transit Auth.*, 109 F. Supp. 2d 11 (D. D.C. 2000).

<sup>365</sup> *Williams v. Dallas Area Rapid Transit*, 242 F.3d 215, 2001 U.S. App. Lexis 2558 (5th Cir. 2001). The Fifth Circuit uses a six factor test to determine whether an agency is an arm of the state: (1) whether the state statutes and case law characterize the agency as an arm of the state; (2) the source of funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property. *Clark v. Tarrant County*, 798 F.2d 736 (5th Cir. 1986).

<sup>366</sup> Pub. L. 92-255 (Mar. 21, 1972). 42 U.S.C. § 290ee-3 (2000). It was recodified with modifications in the Alcohol, Drug Abuse and Mental Health Administration Reorganization Act of 1992, Pub. L. No. 102-321.

<sup>367</sup> Pub. L. 91-616, Dec. 31, 1970; Public Health Service Act of 1912, 42 U.S.C. §§ 290dd-3 and 290ee-3 (2000), also recodified.

<sup>368</sup> *Landon v. Northwest Airlines*, 72 F.3d 620, 624–25 (8th Cir. 1995).

<sup>369</sup> Joe Maassen, *Drug Testing for Professional Drivers: It’s the Law*, 13 No. 1 COMPLETE L., S1 (1996).

<sup>370</sup> 49 U.S.C. App. § 2717.

<sup>371</sup> The definition of “safety-sensitive” varies among the regulations for the different transportation agencies. See Department of Transportation, *Factsheet: Department of Transportation (DOT) Drug and Alcohol Testing Regulations* (visited Nov. 24, 2001), <http://afscme.org/wrkplace/dfa-dot.htm>. For example, the FHWA defines “safety-sensitive” employees as

FHWA, FTA, FAA, FRA, FMCSA, and the RSPA.<sup>372</sup> These regulations specify when employees need to be tested for drugs and alcohol and the proper procedures that agencies must follow. The tests and procedures are designed to protect the workers’ privacy, assure accuracy, and prevent discriminatory testing.<sup>373</sup>

### 14. Disabilities Discrimination

Congress has passed two major statutes addressing disabilities—the Rehabilitation Act of 1973, addressing discrimination by the federal government, and the ADA of 1990, applicable to virtually all other employers and transportation providers.

#### a. *The Rehabilitation Act of 1973*

Section 504 of the Rehabilitation Act of 1973 prohibits the federal government and recipients of federal funds from discriminating against people with disabilities in employment. It provides that, “No otherwise qualified individual...shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>374</sup> A handicapped individual is one who “has [has a record of, or is regarded as having] a physical or mental impairment which substantially limits one or more of such person’s major life activities.” A 1978 amendment made it clear that a handicapped person under the Rehabilitation Act

does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.<sup>375</sup>

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operators of commercial vehicles. *Id.* The FTA, however, defines “safety-sensitive” employees as those employees:

- Operating a revenue service vehicle;
- Operating a nonrevenue service vehicle, when required to be operated by a holder of a Commercial Driver’s License;
- Controlling dispatch or movement of a revenue service vehicle; Maintaining a revenue service vehicle or equipment used in revenue service; or Carrying a firearm for security purposes.

Finally, the RSPA defines “safety sensitive” employees as those “who perform an operation, maintenance, or emergency-response function on a pipeline or at a liquefied natural gas facility.” *Id.*

<sup>372</sup> *Id.* See 49 C.F.R. pt. 40 for a description of the DOT’s regulatory procedures for drug and alcohol testing in the transportation industry. See 14 C.F.R. pts. 61 *et seq.* for the FAA’s drug and alcohol testing rules, See 49 C.F.R. pt. 382 for the Federal Motor Carrier Safety Administration’s (FMCSA) drug and alcohol testing rules. See 49 C.F.R. pt. 219 for the FRA’s drug and alcohol testing rules. See 49 C.F.R. pt. 655 for FTA’s drug and alcohol testing rules. See 49 C.F.R. pt. 199 for the RSPA’s rules for drug and alcohol testing.

<sup>373</sup> *Testing and Documentation Procedures*, EMPLOY. DISCRIM. COORDINATOR, ¶ 26,520 (2001).

<sup>374</sup> 29 U.S.C. § 794(a) (2000).

<sup>375</sup> 29 U.S.C. § 706(7)(B) (2000).

Even before promulgation of this amendment, the U.S. Supreme Court was notably deferential to decisions of transit providers to dismiss or refuse to hire individuals on drugs, concluding that such discrimination violated neither the Civil Rights Act of 1964 nor the Equal Protection Clause of the 14th Amendment.<sup>376</sup>

In *Teahan v. Metro-North Commuter Railroad*,<sup>377</sup> the U.S. Court of Appeals for the Second Circuit applied the Rehabilitation Act to the dismissal of an employee whose alcohol and drug abuse led to his being unexcusedly absent from work 19 times in 1984, 14 times in 1985, 58 times in 1986, and 53 times in 1987. He entered a 30-day rehabilitation program in 1986, then relapsed into further drug and alcohol abuse. His employer sent him a letter in December 1987 informing him that his absenteeism was excessive. The employee entered another rehabilitation program, which this time was successful. The employer dismissed him in April 1988. The court noted that substance abuse was a handicap within the meaning of the Rehabilitation Act, and that an otherwise qualified handicapped individual may not be dismissed from federally-funded employment "solely by reason of his handicap."<sup>378</sup> Metro-North insisted that the reason for the dismissal was excessive absenteeism, not alcoholism, and that the delay between the decision to dismiss and actual dismissal was required in order to comply with the dismissal procedures set forth in its collective bargaining agreement. The court noted that the 1978 amendments, quoted above, eliminated from the definition of handicapped one "whose current use of alcohol or drugs" prevents the employee from performing the duties of the job.<sup>379</sup> The court held:

[I]nsofar as the Rehabilitation Act evinces a general recognition of substance abuse as a disease, discrimination on the basis of such a handicap is antithetical to one of the goals of the Act—to ensure that handicapped persons are not victimized in the employment context by archaic or stereotypical assumptions concerning their handicap. But nothing in the language, history or precedents interpreting Section 504 suggest that this provision is designed to insulate handicapped individuals from the actual impact of their disabilities.... Consequently, we must be wary lest Section 504 be applied as a haven to protect substance abusers who have not in the past sought—nor do they seek in the present—help.... It would defeat the goal of Section 504 to allow an employer to justify discharging an employee based on past substance abuse problems that an employee has presently overcome.... The statute plainly is designed to protect rehabilitated or rehabilitating substance abusers from retroactive punishment by employers.<sup>380</sup>

Regulations promulgated under the Rehabilitation Act require that employers determine the competence of applicants or individuals with disabilities to perform

the essential functions of jobs, with or without reasonable accommodations (i.e., any mechanical, electrical, or human device that compensates for an individual's disability).<sup>381</sup> Employers must make accommodations unless they would impose undue hardship upon employers. Physical job qualifications, which may screen out qualified handicapped individuals, must be "related to the specific jobs for which the individual is being considered and shall be consistent with business necessity and the safe performance of the job."<sup>382</sup>

The 1978 amendments to the Rehabilitation Act also made it clear that the "remedies, procedures, and rights" of an aggrieved individual are set forth in Title VI of the Civil Rights Act of 1964.<sup>383</sup> Once it is established that the plaintiff is handicapped within the meaning of the Rehabilitation Act, he or she may file a complaint of employment discrimination on the basis of denied employment. To prevail, the plaintiff must prove that (1) he or she is not "otherwise qualified" to do the particular job, (2) he or she cannot readily do other jobs for this or other employers because of the handicap, (3) he or she is being excluded from the job solely because of the handicap, (4) he or she is seeking a job from an employer receiving federal financial assistance, and (5) "reasonable accommodation" can be made by the employer for the handicap.<sup>384</sup>

#### b. *The Americans with Disabilities Act*

The ADA<sup>385</sup> extends to private employers the prohibition against employment discrimination of people with disabilities.<sup>386</sup> Title I of the ADA prohibits employment

<sup>381</sup> 45 C.F.R. § 84.12-13 (2002).

<sup>382</sup> 41 C.F.R. § 60-741.6 (2000).

<sup>383</sup> Pub. L. No. 95-602, 92 Stat. 2955 (1978). 29 U.S.C. § 794a (2000). *Jones v. Metropolitan Atlanta Rapid Transit Auth.*, 681 F.2d 1376 (11th Cir. 1982).

<sup>384</sup> Martin Schiff, *The Americans With Disabilities Act, Its Antecedents, and Its Impact*, 58 MO. L. REV. 869 (1993). The Reasonable Accommodation under the Rehabilitation Act requires the employer to assess the potential employee's ability to perform essential job functions and then make accommodations, which may include a mechanical, electrical, or human device that compensates for an individual's disability, unless such accommodation would impose undue hardship on the employer. "Reasonable accommodation" under the Americans with Disabilities Act is similar: the definition of disability is borrowed from the Rehabilitation Act, demands accommodation such as modifying facilities and equipment, and does not require accommodation when accommodation would impose undue hardship on the operation of the business (see notes 384-86).

<sup>385</sup> 42 U.S.C. § 12101 *et seq.*, Pub. L. No. 101-336, 104 Stat. 328 (2000).

<sup>386</sup> Elizabeth Morin, *Americans With Disabilities Act of 1990: Integration Through Employment*, 40 CATH. U. L. REV. 189 (1990). The U.S. Supreme Court has had occasion to interpret the ADA in recent years, concluding:

• Punitive damages are not available under § 202 of the ADA. *Barnes v. Gorman*, 122 S. Ct. 2097 (2002); however, employers who act with malice or reckless indifference to employee's Title VII rights may be subject to punitive damages under the Civil

<sup>376</sup> *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568 (1979).

<sup>377</sup> 951 F.2d 511 (2d Cir. 1991).

<sup>378</sup> 951 F.2d at 515.

<sup>379</sup> 951 F.2d at 517.

<sup>380</sup> 951 F.2d at 518 [citations omitted].

discrimination against disabled individuals who can do a particular job with or without reasonable accommodation. "Disability" is defined as it was in the Rehabilitation Act of 1973, as "a physical or mental impairment that substantially limits one or more of the major life activities of an individual."<sup>387</sup> A "major life activity" is one that an average person can perform relatively effortlessly, such as walking, breathing, seeing, speaking, hearing, learning, and working.

A "qualified employee with a disability" is one who satisfies the skill, experience, and other job-related qualifications of a position, and who can perform the essential functions of the position, with or without reasonable accommodation.<sup>388</sup> A "reasonable accommodation" may include such things as making existing facilities accessible to and usable by persons with disabilities, modification of work schedules, acquiring or modifying equipment, and providing qualified readers or interpreters. But it does not include removing the essential functions of the job.<sup>389</sup> An employer is required

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Rights Act of 1991. *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999);

- Employment may be denied to one whose exposure to working conditions would pose a direct threat to the employee's own health. *Chevron USA, Inc v. Echanzabal*, 122 S. Ct. 2045 (2002);
- Reasonable accommodation under the ADA does not require an employer to violate established seniority rules. *U.S. Airways v. Barnett*, 122 S. Ct. 1516 (2002);
- Once a charge has been filed, the EEOC enjoys exclusive authority over the choice of forum and prayer for relief. *EEOC v. Waffel House*, 534 U.S. 279 (2002);
- To be substantially impaired in performing manual tasks, the individual must have an impairment that prevents or severely restricts his ability from performing tasks essential to most people's daily lives. *Toyota Motor MFG., KY, Inc v. Williams*, 534 U.S. 184 (2002);
- Attorneys' fees are not recoverable unless the moving party is the recovering party, even though the lawsuit brought about the desired change by the employer. *Buckhannon Board & Care Home v. W. Va. Dep't of Health*, 532 U.S. 598 (2001);
- States need not make special accommodations for the disabled so long as their actions toward them have a rational basis. *Board of Trustees v. Garrett*, 531 U.S. 356 (2001).

<sup>387</sup> 42 U.S.C. § 12102 (2000). A physical or mental impairment is defined as

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h) (2000).

<sup>388</sup> *Nash v. Chicago Transit Auth.*, 1998 U.S. Dist. Lexis 12668 (N.D. Ill. 1998).

<sup>389</sup> *Irby v. N.Y. City Transit Auth.*, 2000 U.S. Dist. Lexis 15822 (D. N.Y. 2000). In this case, the essential functions of the job in question are the essential functions of a bus driver. The court dismissed the claim of accommodation, suggesting

to make reasonable accommodations for its handicapped employees unless doing so would impose an undue hardship on the operation of the business. An "undue hardship" is an action that is significantly difficult or expensive given the business's size, financial resources, and the nature and structure of its operations.<sup>390</sup>

The duty to provide a reasonable accommodation does not require the employer to displace incumbent employees to make room for a disabled employee, where it would violate the other employees' seniority rights under a CBA.<sup>391</sup> Generally speaking, reasonable accommodation also does not require an employer to provide a disabled employee with an alternative job when he or she is unable to meet the demands of the present position.<sup>392</sup> It need merely reasonably accommodate an employee's handicap so as to enable him or her to perform the positions he or she is currently holding. If the employee is unable to satisfy federal safety regulations for a bus driver, because of deteriorating eye sight for example, the employer may be unable to reasonably accommodate him or her in that position.<sup>393</sup>

The ADA protects employees against discrimination because of the disability, but not discrimination on other bases, such as the refusal of a transit employee to provide a urine sample for purposes of drug testing.<sup>394</sup> Moreover, the ADA explicitly excludes from the definition of "disability" those employees or applicants cur-

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that accommodation does not include elimination of any of the essential functions of the job. The plaintiff had requested reassignment as a result of polycystic kidney and polycystic liver disease, which caused absences.

<sup>390</sup> U.S. Equal Employment Opportunity Commission, *supra* note 219. The EEOC suggests that a finding of undue hardship is supported by an individualized assessment of current circumstances that show that a specific reasonable accommodation will cause significant difficulty or expense. For a list of factors considered, see U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (last modified June 27, 2001), <http://www.eeoc.gov/docs/accommodation.html#contents13>.

<sup>391</sup> *Eckles v. Consolidated Rail*, 94 F.3d 1041 (7th Cir. 1996). *AMERICAN BAR ASS'N, THE RAILWAY LABOR ACT 241* (BNA Supp. 2000).

<sup>392</sup> *Bates v. Long Island R.R. Co.*, 997 F.2d 1028, 1035 (2d Cir. 1993).

<sup>393</sup> *Christopher v. Laidlaw Transit*, 899 F. Supp. 1224 (S.D. N.Y. 1995). The legislative history of the ADA shows that epilepsy and other conditions are considered disabilities under the ADA. See H. R. Rep. No. 101-485, pt. III, at 51. See *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208 (2d Cir. 2001) (epilepsy, which prevented employee from obtaining a driver's license, was not enough to sustain summary judgment on the question of reasonable accommodation). See *Spradley v. Custom Campers, Inc.*, 68 F. Supp. 2d 1225 (KS 2001) (plaintiff failed to establish a prima facie case under the ADA where he could not show that he could perform the essential functions of the job without endangering himself or others).

<sup>394</sup> *Beharry v. M.T.A. N.Y. City Transit Auth.*, 1999 U.S. Dist. Lexis 3157 (E.D. N.Y. 1999).



rently engaged in the illegal use of drugs.<sup>395</sup> Federal regulations describe certain critical functions, such as driving a bus, as a safety-sensitive duty, and provide that once one tests positive for certain drugs, one must cease performing such safety-sensitive functions.<sup>396</sup> Thus, a transit bus driver who tests positive for cocaine has no cognizable ADA claim for being removed from performing the safety-sensitive function of bus driving.<sup>397</sup>

An employer of 15 or more individuals may not discriminate against any "otherwise qualified" individual on the basis of mental or physical disability. A qualified individual is one "with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position...and who, with or without reasonable accommodation, can perform the essential functions."<sup>398</sup> The "otherwise qualified" standard assumes that job qualifications are readily ascertainable and measurable as "job related" and "consistent with business necessity."<sup>399</sup> Such qualifications should be measured by criteria necessary for and substantially related to an employee's ability to perform essential job functions.<sup>400</sup> Hence, it is critically important for the employer to have a written job description for every position within the organization. The job description should be reviewed by counsel experienced with the ADA, and should reflect review of the EEOC guidance<sup>401</sup> as to what job descriptions should/should not contain. The ADA provides that "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."<sup>402</sup> Thus, a qualification that a bus driver or airline pilot have 20/20 correctable vision would be deemed "job related" and "consistent with

business necessity," not subjecting an employer to a discrimination claim under the ADA.<sup>403</sup>

The employment provisions of the ADA are enforced by the EEOC; it has authority to use the remedies available under Title VII of the Civil Rights Act of 1964 to compel compliance, including the ability to initiate suits on behalf of employees against employers.<sup>404</sup> Under the ADA, the claimant must file a charge of discrimination with the EEOC within 180 days of the alleged unlawful action; if the claimant has already filed a complaint with the state or local equal employment agency, he or she has 300 days from the alleged discriminatory action to file a claim with the EEOC.<sup>405</sup> To make out a *prima facie* case of employment discrimination under the ADA, the plaintiff must show that he or she (1) is a disabled person within the meaning of the ADA, (2) is a qualified individual with a disability (i.e., that with or without reasonable accommodation he or she is able to perform the essential functions of the job), and (3) suffered an adverse employment decision because of the disability.<sup>406</sup> But empirical research reveals that plaintiffs lost 92 percent of all ADA discrimination claims

<sup>403</sup> See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 493-94 (1999) (holding that the plaintiffs did not allege their severe myopia was a disability and did not demonstrate that the defendant's vision requirement substantially limited them in working as a major life activity).

<sup>404</sup> Elizabeth Morin, *Americans With Disabilities Act of 1990: Social Integration Through Employment*, 40 CATH. U.L. REV. 189, 200 (1990). However, the ability to use Title VI to support a private right of action was effectively eliminated in *Alexander v. Sandoval*, 532 U.S. 275 (2001).

<sup>405</sup> 42 U.S.C. §§ 2000e-5(e)(1), 12117(a) (2000).

<sup>406</sup> 42 U.S.C. §§ 12101(2)(A) - (C), 12111(8), 12112(a) (2000). *White v. York Int'l Co.*, 45 F.3d 357, 360-61 (10th Cir. 1995); *Christopher v. Laidlaw Transit*, 899 F. Supp. 1224 (S.D. N.Y. 1995). In *Laidlaw, Christopher* failed to establish that he was a qualified individual with a disability because Department of Transportation regulations prevented him from operating a school bus because of his disability. The Court found that reasonable accommodation does not require reassignment to another position. However, "Once the plaintiff produces evidence sufficient to make a facial showing that accommodation is possible, the burden of production shifts to the employer to present evidence of its inability to accommodate." *White v. York Int'l Co.*, 45 F.3d 357, 361 (10th Cir. 1995).

Once plaintiff establishes his *prima facie* case, defendants have the burden of going forward and proving that plaintiff was not an otherwise qualified handicapped person, that is one who is able to meet all of the program's requirements in spite of his handicap, or that his rejection from the program was for reasons other than his handicap.

*Pushkin v. Regents of University of Colo.*, 658 F.2d 1372, 1387 (10th Cir. 1981) (summarizing *Southeastern Community College v. Davis*, 442 U.S. 397 (1979)). The next step: "The plaintiff then has the burden of going forward with rebuttal evidence showing that the defendants' reasons for rejecting the plaintiff are based on misconceptions or unfounded factual conclusions, and that reasons articulated for the rejection other than the handicap encompass unjustified consideration of the handicap itself."

<sup>395</sup> 42 U.S.C. § 12114 (2000).

<sup>396</sup> 49 C.F.R. pt. 655 (1999). See § 10.413 for various transportation agencies' definitions of "safety-sensitive."

<sup>397</sup> *Redding v. Chicago Transit Auth.*, 2000 U.S. Dist. Lexis 14557 (E.D. Ill. 2000).

<sup>398</sup> 29 C.F.R. § 1630.2(m) (2000).

<sup>399</sup> Wendy Wilkinson, *Judicially Crafted Barriers to Bringing Suit Under the Americans With Disabilities Act*, 38 S. TEX. L. REV. 907 (1997).

<sup>400</sup> Schiff, *supra* note 384.

<sup>401</sup> See <http://www.eeoc.gov/qs-employers.html> (visited Jan. 8, 2002) for a comprehensive list of issues for which EEOC offers advice.

<sup>402</sup> 42 U.S.C. § 12111 (2000); *Carr v. Reno*, 23 F.3d 525, 529 (D.C. Cir. 1994) (upholding summary judgment for defendant on ground that predictable attendance was an essential function of the job for which accommodation was impossible); *Swanks v. Wash. Metro. Area Transit Auth.*, 179 F.3d 929, 934 (D.C. Cir. 1999) (employer's official policy of requiring the ability to obtain a special police commission was used as the measure of the essential function of the job and the employer was not permitted to contradict its official policy by terminating the employee).

taken to court, and 86 percent of all claims handled by the EEOC.<sup>407</sup>

## F. TRANSPORTATION DISCRIMINATION

### 1. Racial Discrimination

Federal efforts to arrest discrimination in the provision of transportation services began in the 19th century. As early as 1887, the ICC found that racial discrimination by railroads violated the antidiscrimination provisions of the Interstate Commerce Act.<sup>408</sup> The ICC attempted to devise a policy requiring all passengers to be treated equally, though served separately. Thus was born the concept of “separate but equal” endorsed by the U.S. Supreme Court in 1896 in *Plessy v. Ferguson*.<sup>409</sup> When blatant acts of discrimination and inequality arose, the ICC took action to assure substantial equality in treatment of passengers.<sup>410</sup> As the motorbus industry grew, it followed a similar pattern.<sup>411</sup> Many states passed “Jim Crow” laws mandating racially separate but equal facilities.<sup>412</sup> Yet it became increasingly apparent that separate transportation accommodations inherently could not be equal.

In 1955, Rosa Parks took a seat in the “colored” section of a Montgomery City Lines bus in Montgomery, Alabama. The bus driver subsequently demanded that Ms. Parks and several other Negro patrons on the row surrender their seats to a recently boarded white patron. Ms. Parks refused, and was arrested. The arrest and trial of Rosa Parks led the African-American community of Montgomery to stage a 382-day boycott of the bus company beginning December 5, 1955. The boycott was led by Dr. Martin Luther King, Jr. Since 70 percent of the bus patrons were black, and most of those honored the boycott, the impact was profound. To deal with the losses, the bus company cut service, then distanced itself from its earlier embrace of segregation. In April 1956, the bus company president declared, “We would be tickled if the [Alabama and Montgomery Jim Crow discrimination laws] were changed. We are simply trying to do a transportation job, no matter what the color of the rider.” The bus company then directed its drivers to discontinue enforcing segregation, a move met by fierce opposition by the Montgomery city and Alabama

state governments. Ultimately, the federal courts invalidated the city ordinance and state statute compelling segregation of intrastate passenger transportation.<sup>413</sup>

Relying on the U.S. Supreme Court decision in *Brown v. Board of Education*<sup>414</sup> (which struck down the “separate but equal” doctrine in public education), the ICC held that providing separate but equal transportation facilities could be countenanced no longer.<sup>415</sup> In 1961, the ICC promulgated regulations prohibiting carriers under its jurisdiction from separating their facilities so as to segregate patrons on the basis of race or color.<sup>416</sup>

The U.S. Supreme Court affirmed and expanded these actions, concluding that it was an “undue or unreasonable prejudice” under the Interstate Commerce Act for a railroad to divide its dining car by curtains, partitions, and signs in order to segregate passengers according to race.<sup>417</sup> Further, the Court extended the Act’s discriminatory prohibition not only to interstate bus common carriers, but to unaffiliated restaurants at which bus companies stopped.<sup>418</sup> The “separate but equal” doctrine came crashing down in public and private transportation venues.<sup>419</sup> State and local laws mandating segregation in transportation facilities were struck down, and injunctions were issued prohibiting their enforcement.<sup>420</sup> Transit and municipal and inter-

<sup>413</sup> Randall Kennedy, *Martin Luther King’s Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999 (1989); CATHERINE BARNES, *JOURNEY FROM JIM CROW: THE DESEGREGATION OF SOUTHERN TRANSIT* (1983). See also Michael Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994); Richard Epstein, *The Status-Production Sideshow: Why the Antidiscrimination Laws Are Still a Mistake*, 108 HARV. L. REV. 1085 (1995); Michael Klarman, *Brown v. Board of Education: Facts and Political Correctness*, 80 VA. L. REV. 185 (1994).

<sup>414</sup> 347 U.S. 483 (1954).

<sup>415</sup> *National Assoc. for A.O.C.P. v. St. Louis-S.F. Ry. Co.*, 297 I.C.C. 335 (1955). Examining this history, the Commission concluded:

[I]n the early days of regulation this Commission went to great lengths in attempting, within the confines of the prevailing social and legal philosophy, to end racial discrimination in services, and facilities in the transportation industry. We are proud of the fact that our policy, once plainly enunciated and firmly established, has resulted in prompt and effective compliance by all phases of the industry. Subsequently, over the years complaints alleging racial discrimination in services and facilities have been virtually nonexistent.

*Equal Opportunity in Surface Transportation*, 353 I.C.C. 425 at 940, 441 (1977).

<sup>416</sup> *United States v. City of Shreveport*, 210 F. Supp. 708 (D. La. 1962).

<sup>417</sup> *Henderson v. United States*, 339 U.S. 816 (1950).

<sup>418</sup> *Boynton v. Va.*, 354 U.S. 454 (1960).

<sup>419</sup> *Morgan v. Va.*, 323 U.S. 373 (1946); *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956), *aff’d*, *Gayle v. Browder*, 352 U.S. 903 (1956). The “Separate but Equal” doctrine was rejected in *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

<sup>420</sup> See, e.g., *United States v. City of Shreveport*, 210 F. Supp. 708 (W.D. La. 1962).

<sup>407</sup> Jessica Barth, *Disability Benefits and the ADA After Cleveland v. Policy Management Systems*, 75 IND. L.J. 1317, at 1338 (2000). See generally Luther Sutter, *The Americans With Disabilities Act: A Road Too Narrow*, 22 U. ARK. LITTLE ROCK L. REV. 161 (2000).

<sup>408</sup> *Councill v. Western & Atlantic R.R. Co.*, 1 I.C.C. 339 (1887); *Heard v. Georgia R.R. Co.*, 1 I.C.C. 428 (1888).

<sup>409</sup> 163 U.S. 537 (1896).

<sup>410</sup> See *Mitchell v. United States*, 313 U.S. 80 (1941).

<sup>411</sup> *Day v. Atlantic Greyhound Corp.*, 171 F.2d 59 (4th Cir. 1948).

<sup>412</sup> See, e.g., *Corporation Comm’n v. Transportation Comm. of the N.C. Comm’n on Interracial Cooperation*, 198 N.C. 317, 151 S.E. 648 (1930).

city companies were ordered to desegregate on Constitutional equal protection and commerce clause grounds.<sup>421</sup> Both public and private facilities were desegregated under the Civil Rights Act of 1964.

As noted above, Title VI of the Civil Rights Act of 1964 became the legislative authority for DOT regulations prohibiting discrimination. DOT regulations provide that,

No person or group of persons shall be discriminated against with regard to the routing, scheduling or quality of service...on grounds of race, color, or national origin. Frequency of service, age and quality of vehicles assigned to routes, quality of stations serving different routes, and location of routes may not be determined on the basis of race, color or national origin.<sup>422</sup> Affirmative action and elimination of disparate impact discrimination are also required by the regulations. One source notes that, "DOT has the authority to enact regulations requiring transit grantees to take affirmative action to ensure that the grantees' activities do not have an unjustified disparate impact on minorities, thereby excluding them from the benefits of federally assisted programs without an appropriate justification."<sup>423</sup>

In this context, one must understand the grantee's civil rights program and the role of the FTA Office of Civil Rights. The civil rights program is a vital part of the grantee's operation. The grantee's civil rights program includes both obligations to its employees and compliance with the grantee's civil rights obligations to the public, including those under Title VI, EEO, DBE, and ADA. Grantees must submit programs or plans for approval as a prerequisite to FTA's award of grant funds. Historically, a regional Civil Rights officer has worked in a give-and-take relationship with transit recipients to facilitate compliance, with back-up from FTA in Washington. Much of FTA's work in this area is in the form of guidance and technical assistance rendered to grantees.

Transit grantees are required to maintain records proving compliance with their nondiscrimination obligations. DOT reviews the practices of grantees to determine their compliance. Moreover, procedures exist for the filing of complaints against a transit grantee by anyone who believes they have been subjected to discrimination by the grantee. Notice of the charge to the grantee and a written response by the grantee typically follow the filing of a complaint. If a DOT investigator concludes that the grantee is in noncompliance, it will be so notified, and efforts will be made to resolve the matter informally. If informal means of dispute resolution are unsuccessful, the grantee's federal funds may, after hearing, be suspended or terminated. The grantee may appeal an adverse decision to the Secretary of Transportation, who must report to Congress 30 days

before such suspension or termination of federal grant funds.<sup>424</sup>

Complaints based on Title VI of the Civil Rights Act were filed against state and local transportation agencies in Macon, Georgia, on grounds that, for example, they have over-funded the road network (used primarily by nonminorities) while under-funding the bus system (used primarily by minorities). Allegations of discrimination have been levied against the disproportionate funds spent on commuter rail projects (primarily frequented by nonminorities) in Los Angeles, while less money has been spent on buses (primarily used by minorities). It was also alleged in New York and Philadelphia that it is discriminatory to force minority passengers to pay, in higher fares, a relatively higher percentage of the costs of the transit system, while nonminority and more affluent passengers pay a lower percentage of the costs of the heavy rail system.

Though the complaining parties were able to show a disparate impact, in every case the transportation agency showed a legitimate (nondiscriminatory) business justification. Nevertheless, it has been observed, "Transit agencies should be aware that there is an increasing likelihood that proposed increases or changes in their fare structures or in their routes will subject them to litigation if such changes are perceived to have an unjustified adverse impact on minorities."<sup>425</sup> The recipient is required to conduct a meaningful public participation process, which includes legal notice published in newspaper of general circulation and newspapers serving or directed to minority populations; notice mailed to social service agencies that serve minority populations; a meaningful public hearing; and the opportunity to submit written comments that will be considered on the same basis as comments at the public hearing. The agency must explain its decision as to meaningful comments and suggestions submitted during the public participation process.

Transportation equity requires equality of service to minority and nonminority passengers. Minority passengers are primarily serviced by inner-city transportation systems and nonminority passengers are primarily serviced by suburban transportation systems.<sup>426</sup> Minority groups have alleged discrimination in service based on fare increases, inequitable transportation improvements, and inequitable transportation funding.<sup>427</sup>

<sup>424</sup> Van de Walle, *supra* note 54, at 16.

<sup>425</sup> *Id.* at 21.

<sup>426</sup> Kevin J. Klesh, *Urban Sprawl: Can the "Transportation Equity" Movement and Federal Transportation Policy Help Break Down Barriers To Regional Solutions?*, 7 ENVTL. L. 649, 671 (2001).

<sup>427</sup> *Labor/Community Strategy Center v. L.A. County Metro. Transp. Auth.*, 263 F.3d 1041 (9th Cir. 2001) (holding that the transportation authority was obligated to comply with the consent decree to remedy discrimination and not just use its best efforts); *N.Y. Urban League, Inc. v. N.Y.*, 71 F.3d 1031 (2d Cir. 1995) (holding that an injunction was an improper remedy to prevent a fare increase); *Committee for a Better North Phila. v. Southeastern Pa. Transp. Auth.*, Civ. A. No. 88-1275, 1990 WL

<sup>421</sup> See, e.g., *Boman v. Birmingham Transit Co.*, 280 F.2d 531 (5th Cir. 1960); *Morgan v. Va.*, 328 U.S. 373 (1946); *Lewis v. Greyhound Corp.*, 199 F. Supp. 210 (N.D. Ala. 1961).

<sup>422</sup> 49 C.F.R. pt. 21, App. C(a)(3)(iii).

<sup>423</sup> Van de Walle, *supra* note 54, at 16.

In 1994, President Clinton signed an Executive Order to ensure that federal agencies address the disproportionate environmental effects on minority and low-income populations.<sup>428</sup> In 1997, DOT issued its own order with guidelines for incorporating the Executive Order into transportation planning.<sup>429</sup> The DOT order seeks to achieve environmental justice by integrating NEPA and Title VI in the planning of all transportation projects.<sup>430</sup> The DOT order specifically requires that transportation agencies address “adverse effects” on minority and low-income populations.<sup>431</sup> Adverse effects include the following:

- Bodily impairment, infirmity, illness, or death.
- Air, noise, and water pollution and soil contamination.
- Destruction or disruption of man-made or natural resources.
- Destruction or diminution of aesthetic values.
- Destruction or disruption of community cohesion or a community’s economic vitality.
- Destruction or disruption of the availability of public and private facilities and services.
- Vibration.
- Adverse employment effects.
- Displacement of persons, businesses, farms, or non-profit organizations.
- Increased traffic congestion, isolation, exclusion, or separation of minority or low-income individuals within a given community or from the broader community.
- The denial of, reduction in, or significant delay in the receipt of, benefits of DOT programs, policies, or activities.<sup>432</sup>

DOT and other transit authorities must address environmental justice and equity under the Executive Order, DOT order, and DOT regulations. However, transportation agencies do not consistently achieve the aspirational requirements of environmental justice and transportation equity.

In 1994, minority bus riders of the Los Angeles County MTA filed a class action lawsuit under Title VI and the 14th Amendment.<sup>433</sup> The plaintiffs alleged that

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121177 (E.D. Pa. 1990), affirmed without opinion 935 F.2d 1280 (staying a motion for summary judgment pending settlement negotiations regarding the use of federal subsidies in transportation planning).

<sup>428</sup> *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, Exec. Order No. 12898, 59 Fed. Reg. 7629 (1994).

<sup>429</sup> *DOT Order on Environmental Justice to Address Environmental Justice in Minority Populations and Low-Income Populations*, DOT Order No. 5610.2 (1997).

<sup>430</sup> U.S. Dep’t of Transp., *Environmental Justice—Facts* (visited Nov. 18, 2001), <http://www.fhwa.dot.gov/environment/ejustice/facts/index.htm>.

<sup>431</sup> *Id.*

<sup>432</sup> *Id.* *DOT Order on Environmental Justice to Address Environmental Justice in Minority Populations and Low-Income Populations*, DOT Order No. 5610.2 (1997).

<sup>433</sup> *Labor/Community Strategy Center v. L.A. County Metro. Transp. Auth.*, 263 F.3d 1041, 1043 (9th Cir. 2001).

the MTA spent a disproportionate amount of its budget on suburban rail lines and buses and neglected inner city buses while increasing bus fares.<sup>434</sup> The catalyst for the lawsuit was the MTA’s intention to increase bus fares by 23 percent from \$1.10 to \$1.35 per trip, and the elimination of the low cost monthly bus pass.<sup>435</sup> The plaintiffs presented evidence that approximately 94 percent of the MTA’s clients were bus riders and 80 percent of those riders were persons of color.<sup>436</sup> In addition, only 30 percent of the MTA’s resources were spent on buses and the remaining 70 percent were spent on the rails, which serviced only 6 percent of the total riders.<sup>437</sup> The plaintiffs also presented MTA documents that acknowledged severe overcrowding on buses up to 140 percent above allowable capacity.<sup>438</sup> The plaintiffs documented a “history of discrimination” in the MTA dating back to the 1964 race riots and spurred in part by transportation and social inequities.<sup>439</sup>

Eventually, in 1996, the parties signed a consent decree to settle the lawsuit.<sup>440</sup> The consent decree required that the MTA purchase 248 additional buses to prevent overcrowding and continue the low monthly and daily fares.<sup>441</sup> However, 14 months after signing the consent decree the MTA failed to meet its requirements.<sup>442</sup> Specifically, the MTA had not acted to reduce the overcrowding problems on the buses.<sup>443</sup> The MTA argued that it had insufficient funds to purchase new buses and therefore could not meet its targeted goal.<sup>444</sup> In 2001, the Ninth Circuit affirmed an earlier district court decision and ordered the MTA to comply with the consent decree.<sup>445</sup> Therefore, in this case, minority passengers were successful under Title VI and achieved a degree of transportation equality.

In *New York Urban League, Inc. v. New York*, the Second Circuit Court of Appeals frustrated minority passengers’ attempt to enjoin subway and bus fare in-

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<sup>434</sup> *Id.*

<sup>435</sup> *Environmental Defense, Fighting for Equality in Public Transit: Labor Community Strategy Center v. MTA* (visited Nov. 24, 2001), [http://environmentaldefense.org/programs/Transportation/Equity/e\\_case.html](http://environmentaldefense.org/programs/Transportation/Equity/e_case.html).

<sup>436</sup> *Id.*

<sup>437</sup> *Id.*

<sup>438</sup> *Id.*

<sup>439</sup> *Id.* Among the documented inequities in services provided by the MTA were bus fare increases; development of rail lines in nonminority areas, which benefited only a small percentage of the MTA ridership; no new rail lines to service predominantly minority areas; and the absence of rail stops in minority areas.

<sup>440</sup> *Labor/Community Strategy Center v. L.A. County Metro. Transp. Auth.*, 263 F.3d at 1044–45.

<sup>441</sup> *Id.*

<sup>442</sup> *Id.* at 1045.

<sup>443</sup> *Id.*

<sup>444</sup> *Id.* at 1049.

<sup>445</sup> *Id.* at 1051.

creases.<sup>446</sup> Plaintiffs challenged the state and metropolitan transit authority's 20 percent increase in fares on subways and buses at a time when it imposed only an 8.5 percent increase on the suburban commuter lines.<sup>447</sup> In addition, the plaintiffs challenged the allotment of transportation funds between buses and the commuter lines as disparities in subsidies and a violation of DOT regulations implementing Title VI.<sup>448</sup> The subways and buses served the predominantly minority, inner-city population and the commuter lines served a primarily suburban, white population.<sup>449</sup> The district court found a disparate impact on the protected minority plaintiffs and entered a preliminary injunction to enjoin the fare increases.<sup>450</sup> However, on appeal the Second Circuit reversed the district court's decision and held the plaintiffs were not likely to succeed on the merits of the case.<sup>451</sup>

The Second Circuit looked beyond the fare increases and examined the larger administrative and financial situation of the transportation authorities.<sup>452</sup> The court held that there were insufficient findings of a disparate impact on minority passengers and that enjoining the fare increase was an inappropriate remedy as the ultimate issue was the disparities in subsidies.<sup>453</sup> The court found "substantial legitimate justification" for the fare increases based on financial analysis, including encouraging suburban commuters to use public transportation, which would increase use of the buses and subways and benefit minority riders through indirect subsidies.<sup>454</sup> This decision continued what some experts find to be a "legacy of inequity" in the New York transportation system.<sup>455</sup>

As a result of the litigation in New York, Los Angeles, and other cities like Philadelphia and Atlanta, "[t]ransit agencies should be aware that there is an increasing likelihood that proposed increases or changes in their fare structures or in their routes will subject them to litigation if such changes are perceived to have an unjustified adverse impact on minorities."<sup>456</sup> Although the

existing transportation equity litigation was generally brought under Title VI, regulations promulgated pursuant to President Clinton's Executive Order promoting environmental justice may provide minorities with additional avenues of access to the courthouse in the future. The Executive Order requires that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations...."<sup>457</sup> Federal agencies such as DOT have adopted environmental justice strategies and promulgated regulations to accomplish the goals of the Executive Order.<sup>458</sup> Transportation equity litigants have yet to focus upon DOT regulations for environmental justice, but the regulations are a valuable tool to be used in conjunction with Title VI to promote transportation equality.

## 2. Disabilities Discrimination

### *a. Development of the Law of the Handicapped in Transportation: The Long and Winding Road*

This section provides a historical overview of the law and regulation addressing the transportation of disabled patrons, leading up to promulgation of the ADA of 1990.

The Urban Mass Transportation Assistance Act of 1970 declared it national policy that elderly and handicapped people have the same right as other people to use mass transportation facilities and services, and that special efforts should be made in the planning and design of mass transit facilities and services so that their availability to the elderly and handicapped will be assured.<sup>459</sup> The National Mass Transportation Assistance Act of 1974 enacted the current requirement that fares for elderly and handicapped persons not exceed half the general rate during peak hours.<sup>460</sup>

Section 504 of the Rehabilitation Act of 1973—commonly known as "the civil rights bill of the disabled"—provides: "No otherwise qualified individual with handi-

<sup>457</sup> *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, Exec. Order No. 12898, 59 Fed. Reg. 7629 (1994).

<sup>458</sup> See Environmental Justice Section 3.150 for a discussion of the regulations promulgated by the DOT to comply with the Executive Order.

<sup>459</sup> 49 U.S.C. § 1612(a) (1982).

<sup>460</sup> *Id.* at 327. The Half-Fare Program benefits are available only to persons who meet the statutory definition of an "individual with handicaps." *Colautti v. Franklin*, 439 U.S. 379 (1979); *Marsh v. Skinner*, 922 F.2d 112 (2d Cir. 1990) (plaintiff who suffered from unspecified mental illness held ineligible because the disability required no special planning, facilities, or design). Blindness is considered a handicap under this Program; deafness is not, and mental illness is generally not. Temporary handicaps (of less than 90-days in duration) also are not. The Program is also available to elderly persons, which include at least persons 65 years of age or older. 49 C.F.R. § 609.23 (1999).

<sup>446</sup> *N.Y. Urban League, Inc. v. N.Y.*, 71 F.3d 1031 (2d Cir. 1995).

<sup>447</sup> *Id.* at 1035.

<sup>448</sup> *Id.*

<sup>449</sup> *Id.*

<sup>450</sup> *Id.* at 1035, 1037.

<sup>451</sup> *Id.* at 1036.

<sup>452</sup> *Id.* at 1037.

<sup>453</sup> *Id.* at 1040.

<sup>454</sup> *Id.* at 1039.

<sup>455</sup> *Klesh*, *supra* note 426, at 649, 677.

<sup>456</sup> See *Van de Walle*, *supra* note 54, at 456; see also *Committee for a Better North Phila. v. Southeastern Pa. Transp. Auth.*, Civ. A. No. 88-1275, 1990 WL 121177 (E.D. Pa. 1990) (challenging the use of federal subsidies in transportation planning); *Klesh*, *supra* note 426, at 649, 678–80 (discussing the DOT administrative complaint brought by the Metropolitan Atlanta Transportation Equity Coalition alleging Atlanta's transportation authority's violations of Title VI of the Civil Rights Act of 1964 and the ADA).

rovides: "No otherwise qualified individual with handicaps in the United States...shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under program or activity receiving Federal financial assistance."<sup>461</sup>

But in the ensuing years, disabled plaintiffs were unsuccessful arguing that they had a fundamental right to public transportation that requires transit authorities to purchase buses accessible to wheelchairs.<sup>462</sup> In 1976, Section 165 was added to the Federal-Aid Highway Act of 1973 authorizing the Secretary of Transportation to require that a mass transit system aided by grants from highway funds "be planned designed, constructed, and operated to allow effective utilization by elderly or handicapped persons."<sup>463</sup>

Today, to establish a *prima facie* case of discrimination under the Rehabilitation Act, a plaintiff must prove: (1) defendant received federal financial assistance; (2) plaintiff suffers from a disability as defined under the Act; (3) plaintiff is "otherwise qualified" for the program; and (4) the plaintiff is exposed to discrimination solely because of his or her disability.<sup>464</sup> As we shall see, Title II of the ADA explicitly was modeled after Section 504 of the Rehabilitation Act; thus requirements for claims under the ADA are virtually identical for those under the Rehabilitation Act.<sup>465</sup> Often, public transit claims are brought under both statutes.<sup>466</sup>

Acting under the Rehabilitation Act and Section 16 of the Urban Mass Transportation Act, UMTA adopted regulations in 1976 that required local transit agencies receiving federal funds to make "special efforts" to accommodate the transportation needs of the disabled, but largely left to the local agencies the responsibility to

determine how to implement these requirements.<sup>467</sup> Many devoted resources to purchasing new buses with wheelchair lifts. Others found that alternative too costly due in large part to the cost of wheelchair lifts and high maintenance costs arising from the breakdown of early generation lifts, and decided to provide paratransit or "dial-a-ride" services, whereby a van would be dispatched to pick up disabled persons and take them to their destinations (door-to-door or curb-to-curb service).

In 1978, the U.S. Department of Health, Education, and Welfare issued guidelines requiring that federally-funded programs be accessible, as a whole, to disabled persons, essentially requiring federally-funded programs to "mainstream" disabled persons.<sup>468</sup> The guidelines specifically required retrofitting of subways and buses to make them fully accessible to the handicapped.<sup>469</sup> But HEW acknowledged that its guidelines did not "preclude in all circumstances the provision of specialized services as a substitute for, or supplement to, totally accessible services."<sup>470</sup>

In response, UMTA promulgated new rules in 1979 mandating equal access, embracing the assumption that mass transit should be available both to people with disabilities and those free from them.<sup>471</sup> This required that all new fixed route buses be made accessible to the disabled (including those confined to wheelchairs), and that rail transit facilities be retrofitted for accessibility.<sup>472</sup> One half of peak-hour buses were required to be accessible within 3 years (10 years for

<sup>461</sup> 29 U.S.C. § 794(a) (1973).

<sup>462</sup> PAUL DEMPSEY & WILLIAM THOMS, LAW & ECONOMIC POLICY IN REGULATION 328 (1986).

<sup>463</sup> 23 U.S.C. § 142 (1982). PAUL DEMPSEY & WILLIAM THOMS, LAW & ECONOMIC REGULATION IN TRANSPORTATION 329 (Quorum 1986). This requirement was reaffirmed in more recent legislation. Special efforts must be made in the planning and design of transit facilities and services so these are available to and can be effectively utilized by elderly persons and persons with disabilities. 49 U.S.C. § 5310 (2000), (formerly § 16(a) of the FT Act), (tit. III of Pub. L. 102-240, ISTEA).

<sup>464</sup> Knapp v. Northwestern Univ., 101 F.3d 473, 478, *cert. denied*, 520 U.S. 1274, 117 S. Ct. 2454 (1997).

<sup>465</sup> Hamlyn v. Rock Island County Metro. Mass Transit Dist., 986 F. Supp. 1126 (C.D. Ill. 1997) (transit authority's reduced fare program violates the Rehabilitation Act because it discriminates against passengers with AIDs).

<sup>466</sup> See, e.g., James v. Peter Pan Transit Management, Inc., 1999 U.S. Dist. Lexis 2565 (E.D. N.C. 1999). The Court found that Peter Pan Transit failed to: adequately maintain wheelchair lifts, prevent a pattern of lift breakdowns, ensure that all equipment contained the necessary parts to operate in its intended fashion, repair broken lifts promptly, or train its employees how to proficiently operate the wheelchair lifts.

<sup>467</sup> Martha McCluskey, *Rethinking Equality and Difference*, 97 YALE L.J. 863, 873 (1988); 55 Fed. Reg. 40, 762 (1990); DEMPSEY & THOMS, *supra* note 463, at 329-30. Three examples of satisfactory "special efforts" with respect to people using wheelchairs are: (1) spending a minimum proportion of federal aid on wheelchair accessible service; (2) buying only wheelchair accessible buses until one-half of the vehicles in system were accessible, or providing a comparable substitute service for wheelchair users; (3) establishing a system of individual subsidies so that every wheelchair user could purchase round trips per week from any accessible service at prices equal to "regular fares." 97 YALE L. J. at 873.

<sup>468</sup> 45 C.F.R. §§ 85.57(a), 85.58(a) (1978). DEMPSEY & THOMS, *supra* note 463, at 330.

<sup>469</sup> 45 C.F.R. §§ 85.57(b), 85.58 (1978).

<sup>470</sup> 43 Fed. Reg. 2,134 (1978).

<sup>471</sup> McCluskey, *supra* note 467. The DOT made this change in adopting an equal access approach in the new rules in response to rules issued in 1978 by the Department of Health, Education, and Welfare (HEW), which had authority to coordinate other agencies' implementation of Section 504. The HEW guidelines required federally-funded programs to be accessible as a whole, to people with disabilities. Following HEW's guidelines, DOT's 1979 rules required all new fixed route buses to be accessible to people with disabilities, including those using wheelchairs. Within 3 years, or 10 years for modifying existing vehicles or facilities or making expensive structural changes, transit systems had to make at least one half of peak-hour bus service accessible.

<sup>472</sup> 55 Fed. Reg. 40, 778 (Oct. 4, 1990); DEMPSEY & THOMS, *supra* note 463, at 330.

modification of existing vehicles or facilities requiring extensive structural changes).<sup>473</sup>

These rules were struck down in 1981 as beyond the scope of DOT's authority because of their requirement of extensive structural changes that imposed undue financial burdens on transit authorities.<sup>474</sup> In response, DOT withdrew the challenged regulations, and substituted interim rules similar to the "special efforts" regulations it had adopted in 1977.<sup>475</sup>

Congress responded by promulgating the STAA of 1982<sup>476</sup> that required that DOT issue a new rule identifying minimum service criteria for the disabled. The legislation did not, however, require equal access or comparable service for disabled persons.<sup>477</sup>

DOT issued final rules to implement Section 504 in 1986 that gave local transit agencies the option of (1) requiring installation of wheelchair lifts in buses, (2) establishing a "special service" or paratransit system, or (3) establishing a mixed system of accessible buses and paratransit as an option for making public transporta-

tion available to the disabled.<sup>478</sup> The rule also contained six service criteria: (1) nondiscriminatory eligibility; (2) maximum response time; (3) no restrictions or priorities based on trip purpose; (4) comparable fares to those for the general public; (5) comparable hours and days of service; and (6) comparable service area.<sup>479</sup>

Although it could be segregated, service for disabled persons would have to be "comparable." In order to avoid the "undue burdens" problems that had scuttled the 1977 rules, the 1986 rules also allowed a local transit agency to limit its expenditure on transportation for the handicapped to 3 percent of its annual operating budget, even if it failed to meet the rule's service criteria.<sup>480</sup> Although holding that DOT could take costs into account in formulating a rule, a federal court deemed this 3 percent "cost cap" arbitrary and capricious in 1988.<sup>481</sup> DOT subsequently deleted the 3 percent "cost cap" expenditure on handicapped facilities.<sup>482</sup>

Nevertheless, DOT's decision not to implement mainstreaming, but to allow local transit authorities to use accessible buses, paratransit, or mixed systems, was upheld as reasonable.<sup>483</sup> Mainstreaming was not required under the legislation that then existed, for there was no right, legislative or constitutional, of equal access.<sup>484</sup>

With two steps forward and one step back, progress was made, albeit gradually. The percentage of new bus purchases accessible to those in wheelchairs grew to more than 50 percent annually. By 1990, 35 percent of the nation's public transit buses were accessible to disabled persons.<sup>485</sup>

<sup>473</sup> McCluskey, *supra* note 467 at 863, 874.

<sup>474</sup> American Public Transit Ass'n v. Lewis, 655 F.2d 1272 (D.C. Cir. 1981); DEMPSEY & THOMS, *supra* note 463, at 331. American Public Transit Ass'n v. Lewis held that a section of the rules governing specific requirements for mass transit was beyond the scope of DOT's authority under Section 504 because it mandated expensive structural change. The D.C. Circuit based its decision in this case on Southeastern Community College v. Davis, 442 U.S. 397 (1979), the U.S. Supreme Court's first decision interpreting Section 504's substantive requirements. Davis upheld a nursing program's rejection of an applicant with impaired hearing, holding that Section 504 does not require substantial modifications of programs to accommodate people with disabilities. The Court did not define "substantial modification," but held that section does not require a fundamental alteration in the nature of a program, such as eliminating clinical courses for a nursing student. 442 U.S. 409-414.

<sup>475</sup> McCluskey, *supra* note 467, at 863, 875. Believing that these rules would not result in sufficient access, Congress promulgated a statute requiring DOT promptly to issue final rules that would establish clear minimum standards for accessible transportation service. Before DOT issued those final rules, the U.S. Supreme Court again considered the extent of accommodations required by Section 504. In Alexander v. Choate, 469 U.S. 287 (1985), the Court refused to limit Section 504 to simple equal treatment, but left unanswered questions about when Section 504 would forbid unequal results. The Court assumed that Section 504 in some situations required accommodations to eliminate disparate impacts. The Court concluded that policies with harmful effects on people with disabilities may be lawful if "meaningful and equal access" still exists. The Court feared that "because the handicapped typically are not similarly situated to the nonhandicapped," "the disparate impact approach in some situations could lead to a wholly unwieldy administrative and adjudicative burden." McCluskey, at 875.

<sup>476</sup> 49 U.S.C. §§ 1601, 1612(d). The statute added Section 1612(d) to the Urban Mass Transit Act.

<sup>477</sup> 55 Fed. Reg. 40,762 (2002). The new section required the Department to issue a new rule containing minimum service criteria for service to disabled passengers.

<sup>478</sup> 51 Fed. Reg. 18,994 (1986). 49 C.F.R. § 27.95 (1987). McCluskey, *supra* note 467, at 86, 876. The transit agencies were required to meet these minimum service requirements as soon as reasonably feasible, as determined by UMTA, but in any case within 6 years of the initial determination by UMTA concerning the approval of its program. The rules established minimum service requirements governing fares, area and time of service, restrictions on eligibility and trip purpose, and waiting periods. Under these rules, service for people with disabilities was required generally to be "comparable" to service for nondisabled people, but could still be somewhat inferior.

<sup>479</sup> 49 C.F.R. § 27.95 (1987).

<sup>480</sup> McCluskey, *supra* note 467, at 863, 877 (1988). The DOT claimed that this cost limit on required accommodations would prevent undue burdens that were beyond its authority to impose under Section 504, particularly in light of APTA, while still requiring improved service for people with disabilities.

<sup>481</sup> ADAPT v. Dole, 676 F. Supp. 635 (E.D. Pa. 1988). The decision was affirmed by the Third Circuit in ADAPT v. Skinner, 881 F.2d 1184 (3d Cir. 1989) (en banc).

<sup>482</sup> 55 Fed. Reg. 40,762 (2002). This rule deletes the 3 percent "cost cap," the provision of the rule which the courts invalidated. The effect of this amendment will be to require any FTA recipient electing to meet its Part 27 obligations through a special service system to meet all service criteria.

<sup>483</sup> ADAPT v. Skinner, 881 F.2d 1184, 1198 (3d Cir. 1989) (en banc).

<sup>484</sup> *Id.*

<sup>485</sup> 136 CONG. REC. H2421, H2435 (daily ed. May 17, 1990) (statement of Rep. Anderson).

### *b. Purposes of the Americans with Disabilities Act*

Described as the most sweeping civil rights legislation in a quarter century, the ADA seeks to eliminate bias by private and public enterprises in areas of employment, public accommodations, transportation, and telecommunications.<sup>486</sup> The legislation created federally mandated rights and responsibilities for a class of beneficiaries unparalleled since the 1960s.

The ADA mandates accessibility and nondiscriminatory service.<sup>487</sup> It provides that “no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations....”<sup>488</sup>

The transportation provisions of the ADA were among the most hotly contested, primarily because of the cost of compliance.<sup>489</sup> In a nutshell, the ADA requires that all new vehicles purchased by public and private transportation firms be equipped with lifts and

<sup>486</sup> *Will Disabilities Law Produce Litigation*, NAT’L L.J., Aug. 13, 1990, at 3. The bill was signed into law by President George Bush on July 26, 1990. See generally PERRETT, AMERICANS WITH DISABILITIES ACT HANDBOOK (1990) [hereinafter ADA Handbook].

<sup>487</sup> The ADA provides that discrimination includes “a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities. 42 U.S.C. § 12182(b)(2)(A)(ii) (2000). Discrimination also includes “failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services.” *Id.* § 12182(b)(2)(A)(iii).

<sup>488</sup> 42 U.S.C. § 12182(a) (2000).

<sup>489</sup> Bonnie P. Tucker, *The Americans with Disabilities Act: An Overview*, 1989 U. ILL. L. REV. No. 4, 923, 933 (1989) [hereinafter *Overview*]. For example, Greyhound Corporation argued that compliance with the ADA would cost \$40 million a year, “a sum that dwarfs its expected 1989 profit of \$8.5 million.” Disabled rights advocates, however, contended that the cost estimates cited by the transportation companies are unrealistic. For example, during Congressional hearings on the ADA, Greyhound alleged that it costs \$35,000 to purchase one lift for an over-the-road bus, while others indicated that lifts could be purchased for less than \$8,000. Transit systems opposed the proposed ADA regulations on the basis of the cost of lifts and the maintenance cost of lifts. Transit systems were being required to make the system accessible with no new funds being provided by FTA. It was an unfunded mandate. Transit agencies argued that they should have the choice at the local level of lift-equipping fixed route buses, operating door-to-door paratransit service, operating curb-to-curb paratransit service, or a mixed system. Wheelchair lifts at that time were unreliable and often broke down, leaving a bus inoperative. Maintenance costs for fixed route lifts were high, and smaller lift-equipped paratransit vehicles were considered by a significant number of transit systems to be more reliable. Many specialized transportation advisory committees preferred curb-to-curb paratransit service to lift-equipping the fixed route fleet because paratransit provided a higher quality/direct service.

other facilities to accommodate access by disabled passengers.<sup>490</sup> This includes the construction of facilities, acquisition of rolling stock or other equipment, undertaking of studies or research, or participation of any program or activity receiving or benefiting from FTA financial assistance.<sup>491</sup>

Although much of the legislation is devoted to issues of employment discrimination, its transportation provisions are also quite important. The fundamental thrust of the ADA is to integrate disabled persons into the mainstream of the nation. The ADA is civil rights legislation. It establishes disability as a civil right. Consequently, Congress provided no funds for compliance. The ADA finds that “individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment and relegated to a position of political powerlessness....”<sup>492</sup> During debate, one Congressman stated the purpose of the ADA’s provisions on transportation as to “open up mainline transportation systems to people with disabilities. It is designed to make the America of the future accessible to all our citizens.”<sup>493</sup>

A poll of disabled persons relied upon during the legislative debate of the ADA found that half viewed employment discrimination as the cause of their unemployment, and 28 percent blamed transportation barriers. More than half of those with severe disabilities identified transportation barriers as limiting their social activity.<sup>494</sup> Transportation access is essential for many of the human activities nondisabled persons take for granted—employment, education, shopping, recreation, and political participation.<sup>495</sup> As will be seen, each of these activities except political participation are defined “major life activities” in the ADA paratransit regulations.

<sup>490</sup> 49 U.S.C. § 5301(d) expresses the Federal policy that the elderly and persons with disabilities have the same right as other persons to use mass transportation service and facilities. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, also prohibits discrimination on the basis of handicaps.

<sup>491</sup> 49 C.F.R. pts. 27, 37, and 38 (2002). However, an individual or firm can use its own funds to purchase a bus and not make it accessible, so long as the vehicle is not used for public transportation service.

<sup>492</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-596, § 2(a)(7), 104 Stat. 3000 (1990) [hereinafter ADA].

<sup>493</sup> 136 CONG. REC. H2599, H2608 (daily ed. May 22, 1990) (statement of Rep. Fish.).

<sup>494</sup> 134 CONG. REC. S5106, S5115 (daily ed. April 28, 1988) (statement of Sen. Simon). The 1980 census revealed that 20 percent of our citizens have a disability. Even the number with severe disabilities constitutes a sizable minority. Six million Americans have mobility problems sufficiently severe to require a mobility aid such as a wheelchair, a walker, crutches, or a prosthesis.

<sup>495</sup> McCluskey, *supra* note 467, at 863, 864.



### c. Definition of "Disability"

The ADA begins with a Congressional finding that 43 million Americans "have one or more physical or mental disabilities."<sup>496</sup> Nearly one in five of all Americans, according to Congress, are disabled. The ADA defines a disability as any physical or mental impairment that "substantially limits a major life activity."<sup>497</sup> An individual with a disability is a person who (a) has a physical or mental impairment that substantially limits one or more major life activities; (b) has a record of such an impairment; or (c) is regarded as having such an impairment.<sup>498</sup>

While courts interpreting Section 504 of the Rehabilitation Act of 1973<sup>499</sup> have construed the term "handicapped" as including transsexuals and compulsive gamblers, the ADA specifically excludes them.<sup>500</sup> In fact, the

<sup>496</sup> ADA, *supra* note 493 § 2(a).

<sup>497</sup> *Will Disabilities Law Produce Litigation*, NAT'L L.J., Aug. 13, 1990, at 3.

<sup>498</sup> Interesting issues arise at the intersection of ADA and workers' compensation laws. As one scholar noted:

Workers' compensation laws provide a system of settling employee claims for occupational injury or illness against an employer in a fair and speedy manner. The definitions of disability under these laws emphasize the lost earning capacity of the worker because of compensable injury rather than ability to perform work with or without accommodation. The laws vary from state to state, but they ordinarily classify disabilities based on severity or extent of injury, as well as duration of the disability. The EEOC claims that the main focus of these laws is earning capacity rather than ability to perform essential job functions.

The EEOC's criticisms of workers' compensation laws are not wholly misplaced. However, the differentiated levels of disability suggest that full individualized consideration of the disability is made under this regime. The concern that a workers' compensation claimant can receive disability benefits while working would lead to the conclusion that reasonable accommodations are possible and that some individuals labeled "disabled" under workers' compensation definitions are still covered by the ADA. Therefore, those individuals should not be denied coverage under the ADA based on workers' compensation definitions of "total" disability.

Kimberly Jane Houghton, *Having Total Disability and Claiming It, Too: The EEOC's Position Against the Use of Judicial Estoppel in Americans With Disabilities Act Cases May Hurt More than It Helps*, 49 ALA. L. REV. 645, 629 (1998) [citations omitted]. See also Carla R. Walworth et al., *Walking a Fine Line: Managing the Conflicting Obligations of the Americans with Disabilities Act and Workers' Compensation Laws*, 19 EMPLOYEE REL. L.J. 221, 231-32 (1993), and Joan T.A. Gabel, Nancy R. Mansfield, & Robert W. Klein, *The New Relationship Between Injured Worker And Employer: An Opportunity For Restructuring The System*, 35 AM. BUS. L.J. 403 (1998).

<sup>499</sup> 29 U.S.C. §§ 794 (1982 & Supp. V 1987). See Dempsey, *The Civil Rights of the Handicapped in Transportation: The Americans With Disabilities Act and Related Legislation*, 19 TRANSP. L.J. 309, 321 (1991).

<sup>500</sup> Gary Lawson, *Aids, Astrology, and Airline: Towards a Casual Interpretation of Section 504*, 17 HOFSTRA L. REV. 237 (1989); Leonard, *AIDS and Employment Law Revisited*, 14 HOFSTRA L. REV. 11 (1985); *Application of Handicap Discrimination Laws to AIDS Patients*, 22 U. SO. FLA. L. REV. 317 (1988). An ongoing illness like tuberculosis is considered a

ADA excludes a number of categories of human condition, including homosexuality, bisexuality, transvestism, transsexualism, other sexual disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substantive use disorders resulting from the consumption of illegal drugs.<sup>501</sup> A current substance abuser is not a "disabled person" within the definition of the ADA. However, alcoholics or former/recovering drug users are persons with a disability. But as noted above in Section 7—Safety, DOT drug and alcohol testing regulations prohibit persons who test positive for certain substances from performing safety sensitive duties. Hence, the ADA allows an employer to prohibit the illegal use of drugs and alcohol in the workplace.

Both the Senate and House of Representatives Committee Reports on the ADA specify that the legislation covers persons with AIDS or HIV.<sup>502</sup> DOT regulations define a disability as a "physical or mental impairment that substantially limits one or more of the major life activities...."<sup>503</sup>

The requirements for establishment of a *prima facie* case of discrimination under the ADA are the same as those described above under the Rehabilitation Act: (1) plaintiff has a disability within the meaning of the ADA; (2) the plaintiff is otherwise qualified for the program; and (3) the plaintiff was subjected to discrimina-

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disability, thus subject to protection against discrimination. *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1986). Since AIDS is also an ongoing illness like tuberculosis, then the Arline should apply to AIDS patients as well.

<sup>501</sup> 29 U.S.C. § 705(E) (2000); 42 U.S.C. § 12211 (2000). Tucker, *supra* note 489, at 923, 925-26.

<sup>502</sup> See Dempsey, *supra* note 499, at 322.

<sup>503</sup> 49 C.F.R. § 37.3 (2002). A physical or mental impairment is defined to include the following:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory including speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin or endocrine;

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities;

(iii) The term "physical or mental impairment" includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments; cerebral palsy; epilepsy; muscular dystrophy; multiple sclerosis; cancer; heart disease; diabetes; mental retardation; emotional illness; specific learning disabilities; HIV disease; tuberculosis; drug addiction; and alcoholism;

(iv) The phrase physical or mental impairment does not include homosexuality or bisexuality.

49 C.F.R. § 37.3(1) (1999). Originally, the regulations provided that drug addiction did not include "the current use of illegal drugs," nor did the definition of physical or mental impairment include alcoholism or HIV disease. "Major life activities" was originally defined to include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working....

tion because of the disability.<sup>504</sup> The major difference is that the Rehabilitation Act is triggered by the receipt of federal financial assistance; the ADA is not.

"The ADA affects public transportation providers both as employers (as are all employers) and as providers of transportation services." Public transportation firms would be well advised to prepare written job descriptions that specify the essential physical characteristics of positions of a physically demanding nature or those that are safety related. In preparing such job descriptions, the employer must keep in mind the reasonable accommodations that could be made to enable a disabled person to perform the essential characteristics of the position.<sup>505</sup> But it is the requirements of public transportation companies as providers of transportation services with which the instant discussion is focused.

The ADA divides transportation firms into two categories: public and private.<sup>506</sup> The rules promulgated by DOT to implement the ADA prohibit discrimination by public and private entities against individuals with disabilities. They forbid denial of the opportunity to use the transportation system if the person is capable of using it. They require that vehicles and equipment be accessible.<sup>507</sup> The individual must be capable of using the grantee's transportation service. For example, neither fixed route buses nor paratransit vehicles are required to carry specialized equipment that would enable a person to ride. If a person can get to the curb or the stop and carries an oxygen bottle, the person must be allowed to ride; the public transportation provider is not required to provide hookups for oxygen. Personnel must be trained and supervised so that they "treat individuals with disabilities who use the service in a courteous and respectful way."<sup>508</sup>

#### *d. Public Transit Providers: Discrimination*

The ADA provides 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>509</sup>

<sup>504</sup> 42 U.S.C. § 12101(2) (2000). *Doe v. University of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1264-65 (4th Cir. 1995).

<sup>505</sup> See Dempsey, *supra* note 486, at 323 and 1990 U.S. C.C.A.N. 267, 339. Initially, the act only applied to firms employing more than 25 employees. That number dropped to 15 employees on July 26, 1994.

<sup>506</sup> William Kenworthy, *Legislative Update* (address before the Transportation Law Institute, Washington, D.C., Nov. 5, 1990), at 10.

<sup>507</sup> 49 C.F.R. § 37.5(b) and (d) (2002).

<sup>508</sup> 49 C.F.R. § 37.7 (1990).

<sup>509</sup> ADA at § 202. The regulations provide that, "No entity shall discriminate against an individual with a disability in connection with the provision of transportation service." 49 C.F.R. § 37.5(a) (2002). Certain specific prohibitions are also enumerated, including denial to any disabled individual "the opportunity to use the entity's transportation service for the general public, if the individual is capable of using that serv-

The ADA also includes a blanket antidiscrimination provision applicable to public and private firms: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation."<sup>510</sup> A "public accommodation" is defined to include "a terminal, depot, or other station used for specified public transportation...."<sup>511</sup> Included among the prescribed conduct is denial of the opportunity "to participate in or benefit from the goods, services, facilities, privileges, or accommodation...."<sup>512</sup> A public entity is defined to include a state or local government or its agencies (meaning essentially public bus and rail transit systems) and Amtrak.<sup>513</sup> Both public school transport and aviation are excluded from the definition of public transportation, in the latter case because the Air Carrier Access Act prohibits discrimination in air travel.<sup>514</sup> Public, private, and religious schools are subject to the same standard—whether, when viewed in their entirety, transportation services are "provided in the most integrated setting appropriate to the needs of the individual and is equivalent to the service provided other individuals."<sup>515</sup>

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ice," imposing special charges on disabled individuals, or those with wheelchairs. 49 C.F.R. § 37.5(b), (d) (1999).

<sup>510</sup> ADA at § 302(a).

<sup>511</sup> *Id.* at § 301(7).

<sup>512</sup> *Id.* at § 302(b). See *Parker v. Universidad de P.R.*, 225 F.3d 1 (1st Cir. 2000). In *Parker*, plaintiff brought suit against defendant University Botanical gardens for failure to accommodate disability under ADA. The First Circuit overturned summary judgment in favor of the University on ground that plaintiff stated a case for discrimination under the ADA. Specifically, in terms of the duty of a public entity, the court held: "Congress emphasized in enacting the ADA that 'the employment, transportation, and public accommodations sections of [the ADA] would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the streets.' H. Rep. No. 101-485 (1990), pt. 2, at 84." The court also ruled that there must exist at least one route for safe travel by wheelchair absent a defense that may excuse such duty. In dicta, the court suggests that the defendant may have prevailed by asserting that other than backpay there are no compensatory damages available under the ADA or Rehabilitation Act. Also in dicta, the court suggests that the defendant may have prevailed by asserting an 11th amendment sovereign immunity defense. See also *Gorman v. Bartch*, 152 F.3d 907 (8th Cir. 1998) (ruling that ADA applies to police departments when transporting paraplegic prisoner).

<sup>513</sup> ADA § 201(1).

<sup>514</sup> *Id.* § 221(2). The term "designated public transportation" means transportation (other than public school transportation) by bus, rail, or any other conveyance (other than transportation by aircraft or intercity or commuter rail transportation (as defined in Section 241)) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

<sup>515</sup> 49 C.F.R. § 37.105 (1999); 61 Fed. Reg. 25416 (May 21, 1996).

In *Burkhart v. Washington Metropolitan Area Transit Authority*,<sup>516</sup> the U.S. Court of Appeals for the D.C. Circuit reversed a jury verdict finding the WMATA directly liable for violations of the ADA and the Rehabilitation Act of 1973. The case involved a deaf patron, Eduardo Burkhart, who boarded a Metrobus in Arlington, Virginia. Upon boarding, Mr. Burkhart placed a 30 cent token in the fare box; the correct fare for a passenger for disabilities was 50 cents. As they pulled away from the curb, the driver called to Burkhart to pay the correct fare. But because he was deaf, he did not understand the driver's request. The dispute escalated into physical violence.

The court noted that both the ADA and the Rehabilitation Act prohibit discrimination "by reason of" a disability.<sup>517</sup> But the court found the evidence that Burkhart was discriminated "by reason of his deafness," thin. In fact, the court concluded that it was the driver's general rudeness that caused Burkhart to suffer humiliation, not discrimination by reason of Burkhart's disability. "Unfortunately for Burkhart," said the court, "general rudeness towards all does not violate either the ADA or the Rehabilitation Act."<sup>518</sup> However, the decision should not be read as permitting a transit system to permit its drivers to be rude. Under the ADA paratransit regulations, drivers of both fixed route and paratransit vehicles (as well as dispatchers, schedulers, supervisors, and other persons who come into contact with disabled riders on a regular basis) must take a specified level of training as to how to deal courteously and efficiently with persons with disabilities. Training is required in part because drivers voice many complaints about persons with disabilities. Grantee managers and supervisors receive large numbers of complaints from disabled persons of driver rudeness, insensitivity, and ADA violations, such as a failure to call out stops. The prudent grantee will recognize the potential exposure under the ADA, and establish protocols to deal effectively and promptly with complaints as to driver rudeness and driver conduct.

### *e. Public Transit Providers: Accessibility Requirements*

Unless FTA issues a waiver,<sup>519</sup> compliance with the following requirements is a condition of receiving federal financial assistance from DOT.<sup>520</sup>

**New Vehicles.** The ADA requires that new vehicles (e.g., buses and light and rapid rail cars) purchased and new facilities constructed by entities that operate fixed route systems must be accessible to disabled persons,

including those who use wheelchairs.<sup>521</sup> New public buses and rail cars must be fitted with lifts or ramps

<sup>521</sup> ADA *supra* §§ 222(a), 226, 242.

Common wheelchairs and mobility aids means belonging to a class of three or four wheeled devices, usable indoors, designed for and used by persons with mobility impairments which do not exceed 30 inches in width and 48 inches in length, measured 2 inches above the ground, and do not weigh more than 600 pounds when occupied.

36 C.F.R. § 1192.3 (2002). 49 C.F.R. § 37.3 (2002) of the DOT's ADA regulation defines a "common wheelchair" as a three wheeled or four wheeled mobility device that does not exceed a maximum dimension of 30 inches x 48 inches, and does not exceed 600 pounds when fully loaded. This broad definition includes the traditional "Ironside" manually-powered four-wheeled chairs, the newer electric wheelchairs, and three-wheeled scooters. Although riders with bicycles, go-karts, and riding lawn mowers that meet the weight and dimensional requirements of the regulation have been denied boarding because they are not viewed as "common wheelchairs" in the common sense meaning of the term, at this writing, none of those riders have filed complaints with FTA.

Transit operators must board and attempt to secure such chairs to the best of their ability. A transit operator cannot deny boarding to a rider based on the operator's concerns that the chair cannot be secured to his satisfaction. Securement requirements are at the discretion of the transit operator. As 49 C.F.R. § 37.165 (2002) states, a transit operator *may* require that all riders secure their wheelchairs. On some systems, such as in Chicago, wheelchair riders have the freedom to ride unsecured. Transit operators are caught in a bind—they want to secure wheelchairs to avoid injuries and to limit claims from riders, yet they don't want to pay for a wheelchair that was damaged by an employee who improperly secured the wheelchair. See <http://www.fta.dot.gov/office/civrights/adainfo.html> for further FTA guidance on this subject.

The accessible vehicle dimensions in 48 C.F.R. pt. 38 (see <http://www.fta.dot.gov/library/legal/fr9691a.htm>) are all based on this 30 inch x 48 inch dimension. However, riders with chairs that are 30 inches wide (particularly those with limited dexterity) may have difficulty maneuvering on a ramp or lift that complies with the 30 inch requirement. To address this situation, Thomas Built Buses has developed a bus with a wider ramp width (see <http://www.thomasbus.com/products/commercial/slf200.asp>), and numerous transit agencies (and the Bryce Canyon National Park) are purchasing them because the wider passageways facilitate wheelchair boarding and disembarking. In addition, a bus with an ADA-compliant 48 inch long securement location may prove difficult for a rider with a chair that is 48 inches long. Also, because the wheel wells of these new low-floor buses protrude into the passenger compartment of the bus, a passenger using a wheelchair will need to make a 90-degree turn to maneuver down a narrow 30 inch wide passageway between the wheel housings. For passengers who have limited dexterity, and especially for passengers who use less-maneuverable electric wheelchairs that cannot perform a 90-degree turn, low-floor buses, while ADA-compliant, pose a logistical nightmare. To address this problem, some transit operators have moved the lift and securement location to the rear of the vehicle, but it makes it difficult for the driver to walk to the rear of the bus to provide assistance with the equipment and to secure the chair, and to collect the fare from the passenger. And thirdly, the ADA allows part of the 30 inch x 48 inch floor space to be beneath the back of the seat ahead of

<sup>516</sup> 112 F.3d 1207 (D.C. Cir. 1997).

<sup>517</sup> 42 U.S.C. § 12132; 29 U.S.C. § 794 (2000).

<sup>518</sup> 112 F.3d at 1215.

<sup>519</sup> For example, the FTA Administrator may waive the paratransit requirements if the cost of providing fully compliant service constitutes an "undue burden." 49 C.F.R. §§ 37.151 – 37.155 (2002). In practice, however, such discretion has only been rarely conferred.

<sup>520</sup> 49 C.F.R. § 27.19 (2002).

and fold-up seats or secured spaces that accommodate wheelchairs.<sup>522</sup> FHWA has also promulgated proposed safety standards addressing requirements for platform lifts, and a vehicle standard for all vehicles equipped with such lifts.<sup>523</sup> Today, all new transit buses must be equipped with lifts.<sup>524</sup>

The regulations defining specifications of accessibility for buses, vans, and systems are meticulously detailed, addressing such minutia as the design load of the lift (600 pounds),<sup>525</sup> the platform barriers, surface, gaps, entrance ramp and deflection, stowage, handrails, priority seating signs, lighting (2-foot candles of illumination), and the location of the fare box.<sup>526</sup> Regulations governing rapid rail,<sup>527</sup> light rail,<sup>528</sup> commuter rail cars,<sup>529</sup> intercity rail cars, and systems<sup>530</sup> are detailed as well, specifying everything from the door width (32 inches when open); to the gap between the door and the platform (no more than 3 inches); the height of the platform vis-à-vis the vehicle floor (plus or minus 5/8 inch); the height and width between characters on priority seating signs (5/8 inch and 1/16 inch, respectively); and the diameter of handrails and space of knuckle clearance to the nearest adjacent surface (1 and ¼ inch and 1 and ½ inch, respectively). Regulations applicable to over-the-road buses,<sup>531</sup> automated guideway transit,<sup>532</sup> high speed rail cars and monorails,<sup>533</sup> and trams and similar systems<sup>534</sup> are far less detailed. Nevertheless, the respective regulations contain technical specifications that the grantee must ensure are incorporated into each purchase of rolling stock.

Some small cities and rural communities provide demand-responsive systems. In general, such transit

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the securement location (see 49 C.F.R. pt. 38, fig. 2). Manual wheelchair users can easily maneuver their footrests into this space, but users of full-frame wheelchairs and electric scooters (due to the forward steering column) need the full vertical clearance over the 48 inches of floor space.

<sup>522</sup> 49 C.F.R. § 37.71 (2002). Tucker, *supra* note 489.

<sup>523</sup> 58 Fed. Reg. 46,228 (July 27, 2000). 65 Fed. Reg. 46228.

<sup>524</sup> 55 Fed. Reg. 40,770 (1990). The definition of "operates" in the ADA makes it clear that a private entity that contracts with a public entity stands in the shoes of the public entity for purposes of determining the application of ADA requirements.

<sup>525</sup> 55 Fed. Reg. 40,767-68 (2002). A number of transit authorities either refuse to carry scooters and other nonstandard devices or carry the devices but require the passenger to transfer out of his or her own device to a vehicle seat. This latter requirement typically is imposed when the transit provider believes it can successfully secure the mobility device but not the passenger while sitting in the device.

<sup>526</sup> 49 C.F.R. §§ 38.1-38.39 (2002).

<sup>527</sup> 49 C.F.R. §§ 38.51-38.63 (2002).

<sup>528</sup> 49 C.F.R. §§ 38.71-38.87 (2002).

<sup>529</sup> 49 C.F.R. §§ 38.91-38.109 (2002).

<sup>530</sup> 49 C.F.R. §§ 38.111-38.127 (2002).

<sup>531</sup> 49 C.F.R. §§ 38.151-38.157 (2002).

<sup>532</sup> 49 C.F.R. § 38.173 (2002).

<sup>533</sup> 49 C.F.R. § 38.175 (2002).

<sup>534</sup> 49 C.F.R. § 38.179 (2002).

authorities must purchase accessible new equipment.<sup>535</sup> But they need not if their systems, when viewed in their entirety, provide equivalent levels of service both to disabled persons and persons without disabilities.<sup>536</sup> Thus, the delays from the moment service is requested to the time it is provided must be equivalent for handicapped and nonhandicapped passengers.<sup>537</sup> Once the rural grantee has a "fully accessible system," as that term is defined in the ADA regulations, the grantee need not purchase 100 percent accessible vehicles so long as the system continues to be "fully accessible."

The rules governing acquisition of new, used, and remanufactured rapid and light rail vehicles parallel those for the purchase of buses and vans, except that remanufacturing triggers an obligation for modification of intercity and commuter rail vehicles that extends the useful life for 10 (as opposed to 5) years.<sup>538</sup>

**Used Vehicles.** In buying or leasing used vehicles, public entities must also make a good faith effort to find used vehicles accessible to disabled persons.<sup>539</sup> Under DOT rules, this requires that the public entity specify accessibility in bid solicitations, conduct a nationwide search, advertise in trade periodicals, and contact trade associations.<sup>540</sup> However, unlike the new vehicle rules, no formal waiver need be requested from DOT.<sup>541</sup>

**Remanufactured Vehicles.** Vehicles remanufactured to extend their useful life for 5 years or more (or 10 years, in the case of rail cars) shall, "to the maximum extent feasible," be made accessible to disabled persons.<sup>542</sup> Exceptions are made for historical vehicles.<sup>543</sup>

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<sup>535</sup> ADA § 224.

<sup>536</sup> *Id.*; 55 Fed. Reg. 40,772 § 37.27.

<sup>537</sup> 55 Fed. Reg. 40,773 (2002). For example, the time delay between a phone call to access the demand responsive system and pick up of the individual is not to be greater because the individual needs a lift or ramp or other accommodation to access the vehicle.

<sup>538</sup> 55 Fed. Reg. 40,774-75 (2002).

<sup>539</sup> *Id.* §§ 222(b), 242(c).

<sup>540</sup> 55 Fed. Reg. 40,771 (2002). The purpose of the waiver provision in the ADA, as the Department construes it, is to address a situation in which, because of a potentially sudden increase in demand for lifts, lift manufacturers are unable to produce enough units to meet the demand in a timely fashion. This is, as the title of the ADA provision involved suggests, a temporary situation calling for "temporary relief." A waiver should allow a transit provider meeting the statutory standards to bring vehicles into service without lifts. But there is not reason related to the purpose of this provision of the ADA why the vehicle should remain inaccessible throughout its life. A lift should be installed as soon as it becomes available.

<sup>541</sup> *Id.*

<sup>542</sup> ADA §§ 222(c) (1), 242(d). 49 C.F.R. § 37.75 (1999).

<sup>543</sup> ADA § 222(c)(2). Memphis built a trolley system from scratch after the ADA became effective, using vintage trolley cars from Melbourne and Portugal. All were required to be ADA accessible. But the exception for historical vehicles is extremely limited. One should not conclude that buying a vintage piece of rolling stock allows the grantee to automatically place it in service without making it ADA compliant. Though

In remanufacturing used vehicles to extend their useful life for 5 years or more, the ADA requires they be made accessible to the handicapped. While they need not be modified in a way that adversely affects their structural integrity, the cost of modification is not a legitimate consideration and will not justify a grantee failing to make a modified vehicle accessible.<sup>544</sup> The House Report states that "remanufactured vehicles need only be modified to make them accessible to the extent that the modifications do not affect the structural integrity of the vehicle in a significant way."<sup>545</sup>

Historical vehicles need not be made accessible if they operate on a fixed route that is on the National Register of Historic Places, and making the vehicle accessible would significantly alter its historic character.<sup>546</sup> Thus, the San Francisco cable cars and the New Orleans streetcar named "Desire" need not be modified for wheelchair access, even if they are rehabilitated to extend their useful life for 5 years.

**Facilities.** New facilities (including those used in intercity and commuter rail transportation) must be made readily accessible to and usable by disabled individuals.<sup>547</sup> In remodeling or altering existing facilities, those areas renovated must be accessible to disabled persons.<sup>548</sup> The path of travel to the altered area and the bathrooms, telephones, and drinking fountains must be readily accessible to disabled individuals, including those using wheelchairs, unless the cost or scope of doing so would be disproportionate (i.e., more than 20 percent of the cost of the alteration).<sup>549</sup> Transit authorities were given 3 years in which to ensure their key rapid and light rail stations<sup>550</sup> are accessible to the

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the San Francisco and New Orleans systems discussed below fall into this exception, they may be the only systems that will ever fall into this exception. Memphis purchased used trolley cars from New Orleans and made them accessible before placing them into service.

<sup>544</sup> 55 Fed. Reg. 40,772 (2002). The legislative history provides that remanufactured vehicles need to be modified to make them accessible only to the extent that the modifications do not significantly effect the vehicle's structural integrity. The final rule provides that it is considered feasible to remanufacture a vehicle to be accessible, unless an engineering analysis indicates that specified accessibility features would have a significant adverse effect on the structural integrity of the vehicle. That it may not be economically advantageous to remanufacture a bus with accessibility modifications does not mean it is unfeasible to do so, in the engineering sense that Congress intended. Accordingly, the rule does not include economic factors among those that may be considered in determining feasibility.

<sup>545</sup> 55 Fed. Reg. 40,772 (2002). 104 ADA *supra* § 223.

<sup>546</sup> 55 Fed. Reg. 40,772 (2002).

<sup>547</sup> 49 C.F.R. § 37.41 (2002)

<sup>548</sup> ADA *supra* § 227(a).

<sup>549</sup> 49 C.F.R. § 37.43 (2002).

<sup>550</sup> 49 C.F.R. § 37.51 (2002) defines a "key station" for commuter rail systems as follows:

(a) The responsible person(s) shall make key stations on its system readily accessible to and usable by individuals with disabili-

handicapped,<sup>551</sup> unless structural changes are extraordinarily expensive, in which case they may receive ex-

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ties, including individuals who use wheelchairs. This requirement is separate from and in addition to requirements set forth in § 37.21 of this part.

(b) Each commuter rail authority shall determine, in consultation with responsible persons involved and with individuals with disabilities and organizations representing them, which stations on its system are key stations, taking into consideration the following criteria:

(1) Stations where passenger boardings exceed average station passenger boardings by at least fifteen percent; (2) Transfer stations on a rail line or between rail lines; (3) Major interchange points with other transportation modes, including stations connecting with major parking facilities, bus terminals, intercity or commuter rail stations, or airports; (4) End stations, unless an end station is close to another accessible station; and (5) Stations serving major activity centers, such as employment or government centers, institutions of higher education, hospitals or other major health care facilities, or other facilities that are major trip generators for individuals with disabilities.

(c)(1) Except as provided in this paragraph, the responsible person(s) shall achieve accessibility of key stations as soon as practicable, but in no case later than July 26, 1993.

(2) The Secretary may grant an extension of this deadline for key station accessibility for a period up to July 26, 2010. Extensions may be granted as provided in paragraph (e) of this section.

(d) The commuter authority and responsible person(s) for stations involved shall develop a plan for compliance for this section. The plan shall be submitted to the Secretary by January 26, 1992.

(1) The commuter authority and responsible person(s) shall consult with individuals with disabilities affected by the plan. The commuter authority and responsible person(s) shall also hold at least one public hearing on the plan and solicit comments on it. The plan submitted to the Secretary shall document this public participation, including summaries of the consultation with individuals with disabilities and the comments received at the hearing and during the comment period. The plan shall also summarize the responsible person(s) responses to the comments and consultation.

(2) The plan shall establish milestones for the achievement of required accessibility of key stations, consistent with the requirements of this section.

(3) The commuter authority and responsible person(s) of each key station identified in the plan shall, by mutual agreement, designate one of the parties involved as project manager for the purpose of undertaking the work of making the key station accessible.

(e) Any commuter authority and/or responsible person(s) wishing to apply for an extension of the July 26, 1993, deadline for key station accessibility shall include a request for an extension with its plan submitted to the Secretary under paragraph (d) of this section. Extensions may be requested only for extraordinarily expensive modifications to stations (e.g., raising the entire passenger platform, installation of an elevator, or a modification of similar magnitude and cost). Requests for extensions shall provide for completion of key station accessibility within the time limits set forth in paragraph (c) of this section. The Secretary may approve, approve with conditions, modify, or disapprove any request for an extension.

Similar requirements are imposed for key stations in light and rapid rail systems. 49 C.F.R. § 37.47 (2002).

<sup>551</sup> 49 C.F.R. § 37.47 (2002).

tensions up to 20 years.<sup>552</sup> The 500 existing intercity rail (Amtrak) stations shall be made accessible to the disabled in not less than 20 years.<sup>553</sup> Failure to make “key stations” in rapid rail systems readily accessible to disabled individuals, including those in wheelchairs, constitutes discrimination under the ADA.<sup>554</sup>

In *Hassan v. Slater*,<sup>555</sup> a disabled person complained that the decision of the LIRR and MTA to close a train station near his home violated the ADA. According to the plaintiff, appearing *pro se*, the defendants have “forced residents to rely on private cars and drive to mega stations...and have abandoned those without cars and physically unable to drive cars or even afford cars. It’s their fascist yuppie mentality to reinvent things in their image.”<sup>556</sup> According to MTA, after extensive hearings, 10 stations were closed on the grounds of low customer volume, their need for substantial capital investment, nearby alternative transportation, and little or no market growth potential.<sup>557</sup> The court held that Hassan’s ADA claim failed as a matter of law. He was not prevented from using any other LIRR station nor any other mode of transportation by reason of his disability. That the next closest station was 4½ miles away, and therefore less convenient than the station that was closed, was held not to state a claim of exclusion or discrimination.

**Paratransit.** Access to available fixed route transit is the primary goal of the transportation provisions of the ADA. The ADA regulations are framed so as to require that able-bodied disabled persons use fixed route service and that paratransit service is made available to disabled persons who are not able to use fixed route accessible service. The ADA recognizes that some disabled persons will be unable to use fixed route services, even if they are fully accessible. It therefore requires complementary paratransit service to provide transportation to those persons who cannot be transported in

the fixed route system.<sup>558</sup> The ADA requires that public entities providing fixed route systems operate nondiscriminatory paratransit services,<sup>559</sup> comparable in both the level of service and response time as are provided individuals without disabilities, unless such services would impose an undue financial burden on the public entity.<sup>560</sup> An applicant for FTA funding must certify that its demand responsive service offered to persons with disabilities, including persons who use wheelchairs, is equivalent to the level and quality of service offered to persons without disabilities.

Public entities must plan for<sup>561</sup> and implement origin-to-destination paratransit service for those unable to use the normal fixed route system.<sup>562</sup> Door-to-door service is not required. When viewed in its entirety, the applicant’s service for persons with disabilities must be provided in the most integrated setting feasible and be equivalent with respect to: (1) response time, (2) fares, (3) geographic service area, (4) hours and days of service, (5) restrictions on trip purpose, (6) availability of information and reservation capability, and (7) constraints on capacity or service availability.<sup>563</sup>

<sup>558</sup> See FEDERAL TRANSIT ADMIN., ADA PARATRANSIT ELIGIBILITY MANUAL 2 (1993); see also R. THATCHER & J. GAFFHEY, ADA PARATRANSIT HANDBOOK: IMPLEMENTING THE COMPLEMENTARY PARATRANSIT SERVICE REQUIREMENTS OF THE AMERICANS WITH DISABILITIES ACT OF 1990 (1991).

<sup>559</sup> ADA § 223.

<sup>560</sup> *Id.* The FTA Administrator may grant a waiver from these provisions if they impose an “undue financial burden.” Procedures for waiver on the basis of undue financial burden are set forth in 49 C.F.R. § 37.151–37.155 (2002). See also Tucker, *supra* note 490, at 932. Undue financial burden requests must be signed by the highest ranking public official in the grantee’s area. FTA will rarely grant undue financial burden waivers, and those waivers granted will be of finite duration.

<sup>561</sup> 49 C.F.R. § 37.137 (2002).

<sup>562</sup> 49 C.F.R. § 37.121 (2002). William Kenworthy, *Legislative Update* (address before the Transportation Law Institute, Washington, D.C., Nov. 5, 1990), at 10.

<sup>563</sup> DOT regulations, “Transportation Services for Individuals with Disabilities (ADA),” at 49 C.F.R. §§ 37.77, 37.105 (2002). One case concluded that “trip denial” exists only when a rider requests service from all the transit authority’s contracted paratransit providers, and is denied by all. *Bacal v. Southeastern Pa. Transp. Auth.*, 1999 U.S. Dist. Lexis 8700 (E.D. Pa. 1998).

FTA and grantees alike deal on a daily basis with the service criteria because disability advocacy groups and citizens raise the issue. A violation of any of the seven ADA paratransit service criteria would constitute non-compliance with the regulation. A sampling of FTA’s letters of finding (LOFs) on these and other compliance issues are posted on the Internet at <http://www.fta.dot.gov/office/civrights/lof/lof.html>. In some instances, FTA has recommended corrective actions to the transit operator. In addition, private litigation brought by the disability community (e.g., in Philadelphia, Harrisburg, NYC, Rochester, and Hampton Roads, VA) has proven effective in forcing transit operators to address their deficiencies and to bring their systems into compliance.

<sup>552</sup> ADA §§ 227(b), 242(e); 49 C.F.R. § 37.47(b)(2) (2002). Transit authorities were to have made key stations accessible within 3 years of the ADA’s passage, unless the accessibility modifications required extraordinarily expensive structural modifications. In such situations, transit operators were given up to 30 years to complete the work, provided that two-thirds of the key stations were made accessible within 20 years. Operators were to submit their key station reports to FTA by July 26, 1992. Based on those reports, FTA provided key station operators with time extensions that transit operators felt were realistic. However, as time progressed, transit operators appeared to have been overly optimistic and received additional time extensions to complete the projects. Yet even those requests turned out to be optimistic, as transit operators proceeded to violate their own set deadlines. Transit operators that have consistently failed to meet their own self-provided deadlines leave themselves vulnerable to litigation by the disabled because of their noncompliance.

<sup>553</sup> See ADA § 242(e).

<sup>554</sup> 49 U.S.C. §§ 12132, 12147(b)(1) (2000).

<sup>555</sup> 41 F. Supp. 2d 343 (E.D. N.Y. 1999).

<sup>556</sup> *Id.*

<sup>557</sup> 41 F. Supp. 2d at 345.

Public entities that operate paratransit services must develop a formal process for certifying ADA paratransit eligible patrons.<sup>564</sup> It is not just the existence of the disability that makes one eligible for paratransit service. Eligibility is directly related to the inability of a disabled person to use the existing fixed route system.<sup>565</sup> In making this assessment, account must be taken of: (1) the applicant's disability; (2) the accessibility of the fixed route transportation system; and (3) architectural barriers or environmental conditions that, when combined with the applicant's disability, prevent use of the fixed route system.<sup>566</sup> There are three categories of eligibility:

- **Category I Eligibility**—These are disabled persons unable to use fully accessible fixed route services. Examples include persons with a mental disability or vision impairment who cannot “navigate the system,” persons who cannot stand on a crowded bus or rail car when seats may not be available, or wheelchair-bound patrons who cannot get on or off the lift or to or from the wheelchair securement area without assistance.<sup>567</sup>

- **Category II Eligibility**—These are persons with ambulatory disabilities (e.g., who need a wheelchair, walker, leg braces, or canes), who therefore need a wheelchair lift to board a bus or rail car. Eligibility depends on the accessibility of the vehicles and stations; they are eligible if the fixed route to their destination is not accessible. A transit provider may accommodate their needs with an on-call bus program, designating an accessible vehicle to their route at a time when they need to travel.<sup>568</sup>

- **Category III Eligibility**—These are disabled patrons with specific impairment-related conditions that prevent them from traveling to a boarding or from a disembarking point on the system.<sup>569</sup> Two points determine eligibility. First, environmental conditions and architectural barriers not in the control of the public entity do not, in themselves, confer eligibility. But if travel to or from the boarding location is prevented when these factors are paired with the person's disability, they are entitled to paratransit service. Second, the impairment-related condition must prevent (as opposed to make more difficult) the person from using the fixed route system.<sup>570</sup> Examples of eligibility include a blind person unable to cross a major highway intersection not equipped with assistive devices; a person with a cardiac condition sensitive to extremely hot weather who can-

not stand outside waiting for a bus; and a person with a manual wheelchair, walker, or braces who cannot negotiate steep terrain if using a fixed route system required traversing a hilly area. Paratransit ineligible individuals would include persons with a disability who prefer not to use a fixed route service because of the possibility of crime, or when it is raining, or a child with a disability who is unable to use the fixed route service because of age, rather than disability.<sup>571</sup>

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<sup>571</sup> *Id.* at 10. Transit providers that wish to implement broader eligibility criteria are free to do so. *Id.* at 23. Because the purpose of the ADA was to integrate Americans with disabilities into the mainstream, the ADA's emphasis is on making the nation's transit systems, vehicles, and facilities accessible to the general public, including individuals with disabilities. That's why every new bus, station, or rail vehicle must have lifts, ramps, elevators, accessible signage, text telephones, and other features to make it accessible to their disabled passengers. But as a safety net, the ADA required paratransit service for those individuals whose disabilities are so severe that he or she cannot use the fixed route system, and as a penalty for those transit systems whose vehicles and facilities were not yet accessible. ADA paratransit was never intended as a transportation option for persons with disabilities. Rather, it was intended to be a safety net.

Some transit operators have been soft-hearted by providing paratransit service to elderly passengers and anyone certifying themselves as “disabled.” However, these ineligible riders consume valuable capacity that need to be made available for those who truly need the service. In *Bacal v. Southeastern Pa. Transp. Auth.*, 1998 U.S. Dist. Lexis 8700 (E.D. Pa. 1998), a federal judge forced SEPTA to ensure that it met its obligations to those who had a right to the service before providing service to non-eligible riders. And given the high cost of paratransit (\$10-\$20 per trip) and the low farebox recovery ratio (fares are capped by 49 C.F.R. § 37.131(c) (1999) at twice the fixed route fare), transit operators have a financial incentive to restrict eligibility, particularly since the regulation prohibits a transit operator from placing a ceiling on the number of trips a rider may make. (To illustrate, in Los Angeles, a delivery service hired an ADA paratransit rider to make their deliveries, figuring that \$2.00 for a paratransit-subsidized delivery was cheaper than using UPS, FedEx, or a local courier service! It was also a testament to the service provider's reliability.) Transit operators that complain about the high cost of ADA paratransit service need to re-examine their eligibility criteria and to re-evaluate their riders, as the regulation permits. (SEPTA has done so, though it experienced much opposition from its existing paratransit riders).

With regard to eligibility determinations, FTA appears to take the position that those decisions are best made by those in the front lines. Transit operators are best equipped to perform in-person functional evaluations, to conduct face-to-face interviews, and to know what local features may prevent an individual with a specific set of disabilities from accessing the fixed route system. One might liken FTA's role to that of a court of appeals—to ensure that an individual's due process rights were protected—does the transit operator's eligibility policy conform with the regulation's minimum criteria? Was the applicant informed that he or she had a right to an appeal? Was the appeal board constituted consistent with the ADA regulation? The transit lawyer may find guidance at the FTA's letter of findings Web site at <http://www.fta.dot.gov/office/civrights/lof/lof.html>.

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<sup>564</sup> Transit operators are obliged to establish a written eligibility policy that should detail how the ADA paratransit eligibility determination process is structured. 49 U.S.C. § 37.125 (2002). There must be an administrative appeal process for applicants deemed ineligible for complementary paratransit service. 49 C.F.R. § 37.125(g) (2002).

<sup>565</sup> FEDERAL TRANSIT ADMIN., *supra* note 558, at 3.

<sup>566</sup> *Id.* at 15.

<sup>567</sup> *Id.* at 4.

<sup>568</sup> *Id.* at 6–7.

<sup>569</sup> 49 C.F.R. 37.123(e)(3) (1999).

<sup>570</sup> FEDERAL TRANSIT ADMIN., *supra* note 558, at 7–8.

**Conditional certifications.** Since paratransit is only required when trips cannot be made on the fixed route system, a paraplegic individual may be able to use accessible fixed route buses most of the year, but be unable when there are significant accumulations of snow.<sup>572</sup> Such a rider would be certified as conditionally eligible for paratransit.

**Temporary certifications.** Those who suffer temporary disabilities and paratransit eligible individuals who travel outside the region where they live are also eligible for complementary transportation.<sup>573</sup>

**Personal care attendants (PCAs).** Each paratransit rider is allowed to be accompanied by one PCA, who may not be charged for transportation.<sup>574</sup> A family member or friend riding with an eligible disabled patron is not considered a PCA unless performing the role of a PCA. A PCA is someone employed or designated to assist the disabled person in meeting his or her personal needs, such as eating, drinking, using the toilet,

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The FTA is not in the business of overruling transit operators' judgment calls, especially if those assessments were performed in good faith. If a paratransit applicant believes that the transit operator's assessment was incorrect, the applicant is free to resubmit an application with any information that was not revealed in the initial application. In a few instances where an applicant believed that the transit operator was in error, he or she was invited to contact their local disability bar. At this writing, no court decision overruling a transit operator's assessment of a rider's functional capabilities has been discovered. Moreover, based on the Supreme Court's decision *Toyota v. Williams*, 534 U.S. 184, 2002 U.S. Lexis 400 (2002) (holding that to be substantially limited in performing manual tasks under the ADA, an individual must have an impairment that prevented or severely restricted him or her from performing activities that were of central importance to most people's daily lives—such as tending to personal hygiene and carrying out personal or household chores—and the impairment's impacts were required to be permanent or long-term), transit operators likely are justified in restricting paratransit to those who truly need it, rather than providing it to anyone meeting the ADA's broad definition of "disabled."

Some state court decisions have upheld the transit provider's paratransit ineligibility determinations. *See, e.g.*, *Bradley v. East Bay Paratransit Consortium*, 2001 Cal. App. Unpub. Lexis 823 (2001); *Sell v. N.J. Transit Corp.*, 689 A.2d 1386 (N.J. 1997); *Pfister v. City of Madison*, 542 N.W.2d 237 (1995). The first and last of these three decisions are unpublished, and therefore of no precedential value.

<sup>572</sup> *Id.* at 15–16.

<sup>573</sup> A person with a temporary disability, such as a broken leg, a temporary cognitive disability, or who has undergone an operation and is unable to use the fixed route system is eligible. *Id.* at 13. Disabled individuals certified by a public entity as eligible for paratransit service who travel outside the region in which they live are eligible for paratransit service by another transit agency for up to 21 days. *Id.* at 11.

<sup>574</sup> One personal care attendant (PCA) traveling with the disabled person is eligible to accompany the disabled patron, provided the eligible individual regularly makes use of a PCA and the companion is actually acting in that capacity. 49 C.F.R. § 37.123(f) (2002).

or communicating.<sup>575</sup> A PCA is not required to have specialized medical training. For example, a parent may serve as the PCA for an adult child with a disability.

Though transit operators are obliged to establish a formal process for establishing (and revoking) paratransit eligibility, they largely are free to develop procedures that suit them. Transit agencies have utilized a variety of methods to determine eligibility. Examples include:

- The Madison (Wisconsin) Metro Transit System relies primarily on a self-certification process;
- Baltimore's MTA, Seattle's METRO, and the Utah Transit Authority obtain information from both the applicant and a professional;
- The Riverside Transit Agency usually requires an in-person assessment;
- The Regional Transportation Authority of Chicago combines self-certification with in-person assessments, as needed; and
- The Oshkosh (Wisconsin) Transit System uses self-certification with personal verification, as needed, but also uses two local human service agencies for verification.<sup>576</sup>

Operators of demand-responsive systems must establish a system of frequent and regular maintenance of wheelchair lifts.<sup>577</sup> A failure to check lifts regularly and frequently, or a pattern of lift breakdowns resulting in stranded passengers or lack of vehicles to pick up scheduled passengers, constitutes a violation of the ADA paratransit regulations.<sup>578</sup> Damaged or inoperable accessibility features, such as lifts or tie-downs, must be repaired promptly, and if not repaired because of the unavailability of parts, the vehicle must be taken out of service altogether after 3 days.<sup>579</sup>

Personnel must be trained to operate the vehicles and equipment safely and properly, and treat disabled patrons in a courteous and respectful way.<sup>580</sup> The problems of lack of driver training and driver rudeness are serious. Grantees receive numerous complaints of driver rudeness. It's a two-way street: drivers communicate many complaints of unruly, angry, impolite passengers. The ADA regulations place the burden on the grantee to operate a paratransit system in a manner that provides courteous and respectful service to patrons. One real problem is driver turnover. The cost of training a paratransit driver is significant. The driver often goes through the grantee's training, obtains his or her CDL, and leaves shortly thereafter for a higher paying commercial driving job.

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<sup>575</sup> 49 C.F.R. § 37.123(f)(1)(ii) (2002); 59 Fed. Reg. 37208 (July 21, 1994).

<sup>576</sup> FEDERAL TRANSIT ADMIN., *supra* note 558, at 40–41 (Sept. 1993). However, one must recognize certification procedure change based on operational considerations, fraud, and abuse.

<sup>577</sup> 49 C.F.R. § 37.163(b) (2002).

<sup>578</sup> *Id.*

<sup>579</sup> 49 C.F.R. §§ 37.161, 37.163 (2000).

<sup>580</sup> 49 C.F.R. § 37.173 (2000).



Other drivers leave because of rude and belligerent passengers. In one case, a disabled plaintiff was able to establish a *prima facie* case of intentional discrimination and reckless indifference to her right to public transportation upon proof that she encountered inoperable lifts on 15 occasions in less than a 2-year period, that the paratransit provider put vehicles with inoperable lifts into service for longer than a week, that it did not regularly inspect the lifts, and that some of its employees could not proficiently operate the lifts.<sup>581</sup> In another, a transit authority successfully suspended disabled patrons from additional service where they had refused to exit a paratransit van on grounds that it failed to provide reasonably prompt service.<sup>582</sup> The regulations also permit suspension (after hearing, and for a reasonable time) of “No Shows”—those persons who establish a “pattern or practice” of missing scheduled rides.<sup>583</sup> The ADA paratransit regulations in essence require zero tolerance provision of accessible service.

ADA paratransit service is much more costly to operate than fixed route service. “No Shows” strain the resources of the grantee; the slot of the No Show could have been used to serve another patron. Often the second patron negotiated a revised pickup and/or return time that would not have been necessary had the No Show had the common courtesy to cancel the trip. No Shows often tell transit agencies that it is so difficult to schedule trips at preferred times that they feel compelled to make multiple reservations and then try to make arrangements with the destination.

**Half fare requirement for elderly and disabled persons.** Applicants for FTA funding must provide assurance that rates charged elderly and handicapped persons during nonpeak hours will not exceed one-half of the rates generally applicable to other persons at peak hours.<sup>584</sup> One who does not fall within the defini-

tion of a disabled or elderly person does not qualify for the half fare program.<sup>585</sup> Many transit agencies face problems of fraud and abuse by persons attempting to obtain the half fare. One attempted control is to require identification with the Medicare card; another is to provide the half fare upon presentation of the agency’s ADA paratransit photo card, which the agency will issue upon presentation of a Medicare card. FTA has taken the position that a transit operator can require an elderly or handicapped person to comply with an eligibility certification procedure. It can require that eligible individuals carry an identification card, and deny half fare treatment to those without it. However, the FTA does not endorse this practice.<sup>586</sup>

A private entity that contracts with public entities for the provision of public transit “stands in the shoes of the public entity for purposes of determining the application of ADA requirements.” In other words, a grantee cannot avoid either its obligations under the ADA or the ADA paratransit regulations by contracting out the work to a third party contractor. *James v. Peter Pan Transit Management* held that a city may not avoid its obligations under Title II of the ADA by contracting with an independent contractor.<sup>587</sup> Title II of the ADA prohibits discrimination by public entities; Title III prohibits discrimination by private entities. When a public entity contracts with a private entity to provide a public service, the public entity must contractually ensure the private entity will provide service in compliance with Title II, and ensure that the private entity complies with the contract.<sup>588</sup>

#### *f. Private Transit Providers: Discrimination*

The ADA provides that discrimination includes the “failure of a private entity...to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities.”<sup>589</sup> The regulations prohibit discrimination by private entities “against any individual on the basis of disability in the full and equal enjoyment of specified

<sup>581</sup> *James v. Peter Pan Transit Management, Inc.*, 1999 U.S. Dist. Lexis 2565 (E.D. N.C. 1999).

<sup>582</sup> *Collins v. Southeastern Pa. Transp. Auth.*, 69 F. Supp. 2d 701 (E.D. Pa. 1999).

<sup>583</sup> 49 C.F.R. § 37.125(h) (2002).

<sup>584</sup> 49 C.F.R. § 609.23 (2002); 41 Fed. Reg. 18239 (Apr. 30, 1976); 49 U.S.C. §§ 5307(d) and 5308(b); 23 U.S.C. §§ 134, 135, and 142; 29 U.S.C. § 794; 49 C.F.R. 1.51 (1999). FTA fund recipients must ensure that elderly or handicapped persons, or any person presenting a Medicare card pursuant to title II or title XVIII of the Social Security Act (42 U.S.C. § 401 *et seq.* or 42 U.S.C. § 1395 *et seq.*), will be charged for transportation during non-peak hours using or involving a facility or equipment of a project financed with federal assistance authorized for 49 U.S.C. § 5307 or for Section 3037 of the Transportation Equity Act for the 21st Century (TEA-21), 49 U.S.C. § 5309 note, not more than 50 percent of the peak hour fare. Special statutory requirements also exist for elderly and persons with disabilities formula projects. These include 49 U.S.C. § 5310(a)(2) (eligible subrecipients); 49 U.S.C. § 5310, FTA Circular 9070.1E (state procedures); 49 U.S.C. § 5310(h) (eligible project activities); and 49 U.S.C. §§ 5334(g), 5311 (transfer of assets).

<sup>585</sup> *Marsh v. Skinner*, 922 F.2d 112 (1990).

<sup>586</sup> 49 C.F.R. pt. 609, App. A, Question 11.

<sup>587</sup> “When a public entity enters into a contract...with a private entity...the public entity shall ensure that the private entity meets the requirements...that would apply to the public entity if the public entity itself provided the service.” 49 C.F.R. § 37.23 (2002). 55 Fed. Reg. 40, 776 (2002). This rule deleted the 3 percent “cost cap,” the provision of the rule, which the courts invalidated. The effect of this amendment required any FTA recipient electing to meet its Part 27 obligations through a special service system to meet all service criteria.

<sup>588</sup> CIVIL RIGHTS DIVISION, U.S. DEPT OF JUSTICE, THE AMERICANS WITH DISABILITIES ACT: TITLE III TECHNICAL ASSISTANCE MANUAL III-1.7000, at 7 (1993). The private entity must also ensure that it complies with Title III. The FTA’s Office of Chief Counsel and Office of Civil Rights provide influential guidance in their letters of interpretation.

<sup>589</sup> 42 U.S.C. § 12182(b)(2)(C)(i) (2000).

transportation services.<sup>590</sup> There is a critical distinction between the two types of private transportation companies: (1) private transportation companies that provide service to the public for a fee, such as Greyhound, taxi companies, and so forth, and (2) private companies that provide transportation service under contract with a grantee. The latter stand in the shoes of the grantee, and are subject to the identical ADA requirements as the grantee.

### *g. Private Transit Providers: Accessibility Requirements*

Changes in physical structure, design layout, and equipment in existing buildings must be made only if they are reasonable accommodations designed to satisfy the needs of disabled job applicants and employees. However, any sections of the business open to customers or the general public must be made accessible if the cost is minor.

The ADA imposes more stringent accessibility requirements when a "commercial facility" is renovated or newly built. These rules apply to all businesses, regardless of size. Major renovations of commercial facilities must, to the maximum extent feasible, be made accessible to the disabled.

The most stringent rules dealing with physical accessibility apply to the construction of new commercial facilities whose first occupancy occurred on or after January 26, 1993.<sup>591</sup>

Further, the ADA prohibits discrimination "on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people...."<sup>592</sup> Such enterprise may not purchase a new vehicle (other than an automobile or van seating fewer than eight passengers) that is not readily accessible to individuals with disabilities, unless it is used in a demand responsive system and such system provides service equivalent to that provided the general public.<sup>593</sup> Thus, taxi cabs are exempt from the vehicular requirements,<sup>594</sup> though they are not exempt from the nondiscrimination requirements in providing service.<sup>595</sup>

<sup>590</sup> 49 C.F.R. § 37.5(f) (1999). However, it is not discrimination to refuse service to a disabled individual because he or she "engages in violent, seriously disruptive, or illegal conduct." But denial of service cannot be predicated solely on the basis that the disability "results in appearance or involuntary behavior that may offend, annoy, or inconvenience employees...." *Id.* at § 37.5(h).

<sup>591</sup> J. Frierson, Major Changes May Be Needed to Conform to the Americans With Disabilities Act 15–16 (1990) (unpublished monograph).

<sup>592</sup> ADA, *supra* note 493 § 304(a).

<sup>593</sup> *Id.* § 304(b)(3).

<sup>594</sup> Paul Dempsey, *Taxi Industry Regulation, Deregulation & Reregulation: The Paradox of Market Failure*, 24 TRANSP. L.J. 73 (1996).

<sup>595</sup> Taxi companies may not discriminate against disabled individuals in such areas as "refusing to provide service to individuals with disabilities who can use taxi service, and

Similar requirements are imposed for the purchase of new rail cars, and the remanufacture of such cars so as to extend their life for 10 or more years.<sup>596</sup> Certain historical or antiquated rail cars more than 30 years old, with a manufacturer that is no longer in the business, are exempt.<sup>597</sup>

Private companies operating "fixed route systems" (operating vehicles along a prescribed route according to a fixed schedule), must purchase or lease new vehicles (seating 16 passengers or more) that are accessible to individuals with disabilities, including those using wheelchairs.<sup>598</sup> If they do purchase a vehicle inaccessible to the handicapped, it shall be considered discrimination for them to fail to operate their systems so, that, when viewed in their entirety, the system provides a level of service to individuals with disabilities that is equivalent to the level of service provided to those without disabilities.<sup>599</sup>

However, retail and service businesses that are not in the principal business of transporting people, but do offer transportation, must also comply with several provisions of the ADA. Examples of such organizations are hotels and motels that offer airport pick-up services.

When purchasing new vehicles seating more than 16 people, private entities not primarily engaged in transportation (e.g., airport shuttles operated by hotels, rent-a-car companies, or ski resorts) must acquire vehicles accessible to disabled persons, including those who use wheelchairs, unless the system, when viewed in its entirety, provides equivalent service to disabled persons and nondisabled persons.<sup>600</sup> Thus, a private firm need not equip all of its vehicles with wheelchair lifts if its system will accommodate wheelchairs adequately as a whole. Private entities not primarily engaged in the transportation of people and operating demand-responsive systems that purchase vehicles with a capacity of 16 or fewer must provide equivalent service to individuals with disabilities.<sup>601</sup>

**Accessibility requirements for over-the-road buses—Background.** The U.S. Office of Technology Assessment was commissioned by the ADA to undertake a 3-year study of the most cost-effective means of achieving access in over-the-road buses (Greyhound-type buses with an elevated passenger deck over a baggage compartment), and to recommend legislation.<sup>602</sup> Within a year after the study was completed, DOT was required to promulgate regulations identify-

charging higher fares or fees for carrying individuals with disabilities and their equipment than are charged to other persons." 49 C.F.R. § 37.29(c) (2002).

<sup>596</sup> ADA § 304(b) (6)-(7).

<sup>597</sup> *Id.* § 304(c).

<sup>598</sup> 42 U.S.C. § 12181(4).

<sup>599</sup> 42 U.S.C. § 12181(b)(2)(B)(i).

<sup>600</sup> ADA § 302(b)(2)(B) & (D); 55 Fed. Reg. 40,774 (2002); 49 C.F.R. § 37.101 (2002).

<sup>601</sup> 61 Fed. Reg. 25409 (May 21, 1996). 49 C.F.R. § 37.101(e) (2002).

<sup>602</sup> ADA § 305.

ing how over-the-road buses shall comply with the ADA.<sup>603</sup> Compliance was targeted for 7 years for small providers and 6 years for others.<sup>604</sup> In the interim, DOT could not require retrofitting-structural changes to existing over-the-road buses in order to obtain access for the disabled.<sup>605</sup> Such regulations also could not require installation of accessible restrooms in the buses if that would result in a loss of seating capacity.<sup>606</sup>

**Accessibility requirements for over-the-road buses—DOT 1999 regulations.** DOT promulgated extensive rules governing the design features of over-the-road buses<sup>607</sup> to be accessible to persons with wheelchairs and other mobility aids.<sup>608</sup> DOT also promulgated an over-the-road accessibility rule<sup>609</sup> that, *inter alia*, imposed the following requirements:

- **Class I Fixed Route<sup>610</sup> Common Carriers** (those with gross operating revenues of \$5.3 million annually or more)—Beginning in 2000, all new buses were required to be accessible, with wheelchair lifts and tie-downs that permit passengers to ride in their own wheelchairs. By 2012, their entire fleets must be wheelchair-accessible.

- **Small Fixed Route Common Carriers** (those with gross operating revenue of less than \$5.3 million annually)—Beginning in October 2001, new buses were required to be wheelchair-accessible, but there is no overall deadline for total fleet accessibility. They may also provide equivalent service in lieu of obtaining accessible buses.

- **Charter and Tour Carriers**—Beginning in 2001, charter and tour companies were required to provide service in a wheelchair-accessible bus on 48 hours notice. Small carriers that provide primarily charter and tour service, and secondarily fixed route service, also must comply under these rules.<sup>611</sup>

<sup>603</sup> *Id.* § 306(a)(2)(B).

<sup>604</sup> H.R. CONF. REP. NO. 596, 101st Cong., 2d Sess. 79 (1990).

<sup>605</sup> *Id.*

<sup>606</sup> ADA § 306(a)(2)(C).

<sup>607</sup> An “over-the-road bus” is one with an elevated passenger deck located over a baggage compartment. 64 Fed. Reg. 6165 (Feb. 8, 1999).

<sup>608</sup> 36 C.F.R. pt. 1192 (1999). TEA-21, § 3038 of 49 U.S.C. § 5310 (2000). U.S. DOT regulations, “Transportation Services for Individuals with Disabilities (ADA),” 49 C.F.R. pt. 37, subpt. H, “Over-the-Road Buses,” joint U.S. Architectural and Transportation Barriers Compliance Board/U.S. DOT regulations, “Americans With Disabilities (ADA) Accessibility Specifications for Transportation Vehicles,” 36 C.F.R. pt. 1192 and 49 C.F.R. pt. 38 (1999).

<sup>609</sup> 49 C.F.R. pt. 37 (2002).

<sup>610</sup> “Fixed route” service is regularly scheduled bus service available to the general public that operates with limited stops connecting two or more urban areas not in close physical proximity, transports passengers and baggage, and has the ability to make meaningful connections to other distant points. 64 Fed. Reg. 6165 (Feb. 8, 1999).

<sup>611</sup> 64 Fed. Reg. 6165 (Feb. 8, 1999).

Attempting to ameliorate the economic burden imposed by DOT rules, Congress included a provision<sup>612</sup> in TEA-21 that made \$24.3 million available to private over-the-road bus operators to finance the incremental capital and training costs of compliance.<sup>613</sup>

The bus industry sought judicial review of DOT’s over-the-road accessibility rules. The U.S. Court of Appeals for the D.C. Circuit<sup>614</sup> upheld all the regulations save one—a requirement that bus operators compensate disabled patrons when required vehicles or service are not provided.<sup>615</sup> DOT later withdrew the requirement.<sup>616</sup>

#### *h. Remedies*

The ADA provides the remedies available under Section 505 of the Rehabilitation Act of 1973 (which incorporates those available under Title VII of the Civil Rights Act, including back pay, damages, attorney’s fees, and injunctions).<sup>617</sup> Courts have held that plaintiffs may recover compensatory damages if they can prove intentional discrimination,<sup>618</sup> and under the Rehabilitation Act, punitive damages if they can prove malice or reckless indifference.<sup>619</sup> Prevailing parties may also recover reasonable attorney’s fees in the discretion of the court.<sup>620</sup>

In the employment context, the ADA also gives disabled persons the remedies and procedures already available under Title VII of the Civil Rights Act of 1964 to those suffering racial discrimination.<sup>621</sup> Title VII outlaws discrimination based on race, color, religion, sex, or national origin. Job applicants or employees can file complaints with the EEOC, which can investigate and file charges. If the EEOC does not file charges, the individual who complained is permitted to file a lawsuit. Back pay, reinstatement, court-ordered accommodations, and attorneys’ fees may be granted. Thus, vio-

<sup>612</sup> TEA-21 § 3038.

<sup>613</sup> 64 Fed. Reg. 18476 (Apr. 11, 1999); 64 Fed. Reg. 23896 (May 4, 1999); 64 Fed. Reg. 46224 (Aug. 24, 1999); 65 Fed. Reg. 2772 (Jan. 18, 2000); 68 Fed. Reg. 8060 (Jan. 26, 2001).

<sup>614</sup> *American Bus Ass’n v. Slater*, 231 F.3d 1 (D.C. Cir. 2000).

<sup>615</sup> 49 C.F.R. 37.199 (1999).

<sup>616</sup> 66 Fed. Reg. 9048 (Feb. 6, 2001). DOT retained all other requirements, but amended the information collecting requirements to provide for a 5-year record retention period. *Id.* 49 C.F.R. § 37.213 (2002).

<sup>617</sup> 29 U.S.C. § 794a (1976).

<sup>618</sup> *W.B. v. Matula*, 67 F.3d 484, 494 (3d Cir. 1995); *Pandazides v. Va. Bd. of Educ.*, 13 F.3d 823, 832 (4th Cir. 1994); *Moreno v. Consolidated Rail Corp.*, 99 F.3d 782, 789 (6th Cir. 1996).

<sup>619</sup> *Pandazides v. Va. Bd. of Educ.*, 13 F.3d 823, 832 (4th Cir. 1994).

<sup>620</sup> 42 U.S.C. § 12205 (2000). *See Collins v. Southeastern Pa. Transp. Auth.*, 69 F. Supp. 2d 701 (E.D. Pa. 1999).

<sup>621</sup> 42 U.S.C. §§ 2000a-3(a), 2000e-4, 2000e-5, 2000e-6, 2000e-8, 2000e-9 (1964); *Rights Law for Disabled*, N.Y.L.J., July 26, 1990, at 5.

lations of the physical accessibility rules may be handled by EEOC complaint, private lawsuit, or action by the U.S. Attorney General.<sup>622</sup>

Transportation complaints may be filed with FTA, which analyzes allegations of ADA deficiencies by the service provider. If deficiencies are found, they are presented to the transit providers with an offer of assistance to correct them. If they are not corrected, FTA may refer the matter to the Justice Department for enforcement.<sup>623</sup>

Injunctive relief is also available.<sup>624</sup> Moreover, the U.S. Attorney General may investigate alleged violations of the ADA.<sup>625</sup> A court may assess civil penalties up to \$50,000 for the first violation, and up to \$100,000 for any subsequent violation, plus damages.<sup>626</sup> However, punitive damages are specifically excluded.<sup>627</sup>

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<sup>622</sup> Frierson, *supra* note 591, at 16.

<sup>623</sup> A complaint form is published at Federal Transit Admin., *Office of Civil Rights Complaint Form* (visited Apr. 13, 2001), <http://www.fta.dot.gov/office/civil/adacf.htm>. Some FTA decisions are published on its Web site. *See, e.g.*, Federal Transit Admin. (last modified Oct. 30, 2000), <http://www.fta.dot.gov/office/civrights/lof/lof103000a.html> (finding the LYNX complimentary paratransit program consistent with ADA requirements), and Federal Transit Admin. (last modified Oct. 30, 2000), <http://www.fta.dot.gov/office/civrights/lof/lof103000c.html> (finding action by the WMATA to fill gaps between WMATA rail cars and platform areas consistent with the ADA).

<sup>624</sup> ADA § 308(a)(2). In the case of violations of § 302(b)(2)(A)(iv) and § 303(a), injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this title. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this title.

<sup>625</sup> *Id.* § 308(b)(i)(A).

<sup>626</sup> *Id.* § 308(b)(2)(B)-(C).

<sup>627</sup> *Id.* § 308(b)(4). The ADA issues in this section are also addressed in Paul Dempsey, *The Civil Rights of the Handicapped in Transportation: The Americans With Disabilities Act and Related Legislation*, 19 TRANSP. L.J. 309 (1991).