

SECTION 10



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 legal claim against 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 programs¹ created to prohibit various forms of discrimination. These include:

- Title VI of the Civil Rights Act of 1964² prohibits discrimination on the basis of race, color, or national origin;³ Title VII prohibits such discrimination in the context of employment;⁴ Title VIII requires nondiscrimination in the sale, rental, or financing of housing;
- The Federal Transit Act⁵ (FTA) also prohibits discrimination on the basis of race, color, religion, national origin, sex, disability, or age, and prohibits discrimination in employment or business opportunity;⁶

- Title IX of the Education Amendments of 1972⁷ prohibits discrimination on the basis of sex;⁸
- The Age Discrimination Act of 1975⁹ prohibits age discrimination;¹⁰
- Section 504 of the Rehabilitation Act of 1973¹¹ and the ADA of 1990¹² prohibit discrimination on the basis of handicaps;¹³
- Title IX of the Education Amendments of 1972¹⁴ and the Drug Abuse Office and Treatment Act of 1972¹⁵ prohibit discrimination on the basis of drug abuse;
- The Comprehensive Alcohol Abuse and Alcoholism Prevention Act of 1970¹⁶ prohibits discrimination on the basis of alcohol abuse or alcoholism;¹⁷
- The Public Health Service Act¹⁸ requires confidentiality of alcohol and drug abuse patient records;¹⁹

⁷ 20 U.S.C. §§ 1681, 1683, and 1685 through 1687.

⁸ See Section 10.E.10, below.

⁹ 42 U.S.C. §§ 6101 *et seq.*

¹⁰ See Section 10.E.12, below.

¹¹ 29 U.S.C. § 794. 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 (2012), implementing 29 U.S.C. § 794 (2006) and 49 U.S.C. § 5310(a) & (f).

¹² 42 U.S.C. §§ 12101 *et seq.* (2008); U.S. DOT regulations, “Transportation Services for Individuals with Disabilities (ADA),” 49 C.F.R. pt. 37; 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; 29 C.F.R. pt. 1630—Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended; Final Rule, 76 Fed. Reg. 16,978 (Mar. 25, 2011); 28 C.F.R. pts. 35 and 36—Nondiscrimination on the Basis of Disability in State and Local Government Services; Final Rules, 75 Fed. Reg. 56,164 (Sept. 15, 2010); 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; 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; U.S. GSA regulations, “Accommodations for the Physically Handicapped,” 41 C.F.R. subpt. 101–8; 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 (2006) and 49 U.S.C. §§ 5307(d) and 5308(b) (2011).

¹³ See Sections 10.E.14 and 10.F.2, below.

¹⁴ 20 U.S.C. §§ 1681, 1683, 1685–87.

¹⁵ Pub. L. No. 92-255, Mar. 21, 1972, 86 Stat. 65 (as amended).

¹⁶ Pub. L. No. 91-616, Dec. 31, 1970, 84 Stat. 1848 (as amended).

¹⁷ See Section 10.E.13, below.

¹ 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.

² 42 U.S.C. § 2000d. 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 (2012).

³ 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, 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 (2012). Title VI requirements for transit recipients are elaborated in FTA Circular 4702.1B (Oct. 1, 2012); Title VI Final Circular 77 Fed. Reg. 52,116 (Aug. 28, 2012). See Sections 10.E.6 through 10.E.8, below.

⁴ 42 U.S.C. § 2000e. See Section 10.E, below.

⁵ 49 U.S.C. § 5332.

⁶ *Id.* See U.S. DOT Regulations, “Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs,” 49 C.F.R. pt. 26. See Section 10.E, below.

- Section 1101(b) of TEA-21²⁰ provides for participation of disadvantaged business enterprises in FTA programs.²¹ DOT's implementing regulations (49 C.F.R. Part 26) are among the most problematic issues for grantees;

- The Equal Pay Act of 1963²² protects individuals who perform substantially equal work in the same company from sex-based wage discrimination;²³ and

- The Civil Rights Act of 1991²⁴ provides compensatory and punitive damages and attorneys' fees in cases of intentional employment discrimination.²⁵

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;²⁶

- 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.²⁷

The FTA's enabling legislation requires the nondiscriminatory use of federal funds by grant recipients, including their subrecipients and contractors. Compliance reviews and assessments are conducted to assess the grantee's performance under Title VI of the Civil Rights Act of 1964, (including aspects of Environmental Justice), EEO, DBE programs, and ADA requirements.

¹⁸ See 42 U.S.C. 290 dd-2.

¹⁹ See Section 10.E.13, below.

²⁰ 23 U.S.C. § 101 note (Pub. L. No. 105-178, tit. I § 1101(b), 112 Stat. 107 (2008)).

²¹ See Section 10.C.3, below.

²² Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56, (2007), codified at 29 U.S.C. § 206(d).

²³ See Section 10.E.11, below.

²⁴ Pub. L. No. 102-166, 105 Stat 1071; 42 U.S.C. § 1981.

²⁵ See Section 10.E, below.

²⁶ See Section 10.E.4, below.

²⁷ U.S. Equal Employment Opportunity Commission, *Federal Laws Prohibiting Job Discrimination, Questions and Answers*, <http://www.eeoc.gov/facts/qanda.html> (last visited July 2014).

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 EEO program.²⁸ 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 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 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.²⁹ The grantee may require any document-

²⁸ UMTA Circular 4704.1, "Equal Employment Opportunity Program Guidelines for Grant [FTA] Recipients" (July 26, 1988).

²⁹ 49 U.S.C. § 5332 (which prohibits discrimination on the basis of race, color, religion, national origin, sex, disability 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, and U.S. DOT regulations, "Non-discrimination in Federally-Assisted Programs of the Department of Transportation—Effectuation of Title VI of the Civil Rights Act," 49 C.F.R. pt. 21. An applicant for FTA funding must assure that it will comply with all requirements of 49 C.F.R. pt. 21, FTA Circular 4702.1B, "Title VI Program Guidelines for Federal Transit Administration Recipients" (Oct. 1, 2012). Discrimination on the basis of race, color, religion, national origin, sex, disability, or age in employment or business opportunity is prohibited. 49 U.S.C. § 5332. Title VII of the Civil Rights Act of 1964; 42 U.S.C. § 2000e, and 49 U.S.C. § 5332 (2012). 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.* (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. FTA's MA also bars discrimination in federal transit programs. See U.S. Department of Transportation, Federal Transit Administration, *Master Agreement* (last modified Oct. 1, 2011), <http://www.fta.dot.gov/documents/18-Master.pdf>.

tation it may deem necessary to ensure that subrecipients do not discriminate. FTA reviews subrecipient compliance when performing a state management or other state review.³⁰ 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, religion, national origin, sex, disability, or age.³¹ 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."³² 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).³³ 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 challenging 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).³⁴

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."³⁵ 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. 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.³⁶ 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 FTA, (which prohibits discrimination on the basis of race, color, religion, national origin, sex, disability, or age, and prohibits discrimination in employment or business opportunity); Title VI of the Civil Rights Act of 1964;³⁷ USDOT regulations;³⁸ and all other statutes relating to discrimination.³⁹ An applicant

³⁶ 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 4702.1B, "Title VI Program Guidelines for Urban Mass Transportation Recipient" (Oct. 1, 2012).

³⁷ 42 U.S.C. § 2000d.

³⁸ "Nondiscrimination in Federally-Assisted Programs of the Department of Transportation—Effectuation of Title VI of the Civil Rights Act of 1964," 49 C.F.R. pt. 21, at 21.7. Every application for financial assistance from FTA must be accompanied by an assurance that the applicant will carry out the program in compliance with DOT's Title VI regulations. 49 C.F.R. § 21.7(a).

³⁹ 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, which 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 (2006) 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. No. 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. No. 91-616, Dec. 31, 1970, 84 Stat. 1848, as amended, 42 U.S.C. 4541 *et seq.* (2008), 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 (2008) provides for participation of disadvantaged business enterprises in FTA programs.

³⁰ FTA Circular 9040.1F, ch. 7.

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

³² See FTA Circular 4702.1B (Oct. 1, 2012); Title VI, Final Chapter, 77 Fed. Reg. 52,116 (Aug. 28, 2012).

³³ Policy Guidelines Concerning Application of Title VI of the Civil Rights Act of 1964 to Metropolitan and Statewide Planning, 65 Fed. Reg. 31,803 (May 19, 2000).

³⁴ *Labor/Community Strategy Center v. L.A. County Metro. Transp. Auth.*, 263 F.3d 1041 (9th Cir. 2001).

³⁵ Exec. Order No. 12,898 (Feb. 11, 1994); Michele Knorr, *Environmental Injustice: Inequities Between Empirical Data and Federal, State Legislative and Judicial Responses*, 6 U. BALT. J. ENVTL. L. 71 (1997).

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.⁴⁰

Compliance with these regulations is a condition of receiving federal financial assistance from DOT.⁴¹ The FTA Master Agreement (MA) contains these requirements, and the grantee attorney is required to sign a certification that incorporates these and other FTA requirements.⁴² 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.”⁴³ FTA may withhold funds to the state or instruct the 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.⁴⁴

The U.S. Department of Transportation (DOT) has issued a policy statement requiring transit operators, Metropolitan Planning Organizations (MPOs), and state DOTs to develop a transportation planning public involvement process to engage minority and low-income populations in the decision-making function.⁴⁵ 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 Unified Planning Work Programs (UPWPs), the policy statement provides that the Federal Highway Administration (FHWA) and FTA should, at minimum, review how Title VI is addressed in their public involvement and plan development process.⁴⁶

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 (Transportation Improvement Program (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.⁴⁷

3. Disadvantaged Business Enterprises

a. Federal Legislation

Congressional authorization for the current disadvantaged business enterprise (DBE) requirements is located in numerous legislative sources.⁴⁸ Congress enacted the Small Business Act (SBA) of 1958,⁴⁹ the Surface Transportation Assistance Act (STAA),⁵⁰ and the Surface Transportation and Uniform Relocation Assistance Act (STURAA) of 1987⁵¹ to achieve minority business participation goals.⁵² 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.”⁵³ 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.”⁵⁴

Replacing regulations that had resulted in significant judicial setbacks,⁵⁵ in 1999, DOT promulgated new

⁴⁷ Id.; 49 C.F.R. pts. 619 & 622 (2002).

⁴⁸ 23 U.S.C. § 324; 42 U.S.C. § 2000d, *et seq.*; 49 U.S.C. §§ 1615, 47107, 47113, 17123; § 1101(b), Pub. L. No. 105-178, 112 Stat. 107, 113.

⁴⁹ Pub. L. No. 85-536, 72 Stat. 384.

⁵⁰ Pub. L. No. 97-424, 96 Stat. 2097 (1983).

⁵¹ Pub. L. No. 100-17, 101 Stat. 132.

⁵² *Harrison & Burrowes Bridge Constructors v. Cuomo*, 981 F.2d 50, 53 (2d Cir. 1992).

⁵³ 15 U.S.C. § 637(d)(1) (2000).

⁵⁴ 15 U.S.C. § 637(a)(6)(A) (2000).

⁵⁵ 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

See FTA Circular 4702.1B (Oct. 1, 2012); 77 Fed. Reg. 52,116 (Aug. 28, 2012).

⁴⁰ Rehabilitation Act of 1973, 29 U.S.C. 794, Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* (2009); 49 C.F.R. pts. 27, 37, and 38.

⁴¹ 49 U.S.C. § 5332(g)(2); 49 C.F.R. § 27.19.

⁴² U.S. Dep’t of Transp., Federal Transit Admin., *Master Agreement* (last modified Oct. 1, 2011), <http://www.fta.dot.gov/documents/18-Master.pdf>.

⁴³ 55 Fed. Reg. 40766 (Oct. 4, 1990).

⁴⁴ FTA Circular 9040.1E, ch. 9.

⁴⁵ 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 consists 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.

⁴⁶ Policy Guidance Concerning Application of Title VI of the Civil Rights Act of 1964 to Metropolitan and Statewide Planning, 65 Fed. Reg. 31,803 (May 19, 2000).

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 rather relied on certification from the Small Business Administration and state Departments of Transportation instead. 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 so demonstrate. 13 C.F.R. 124.1-1 (2000). These included individuals 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* (Transit Cooperative Research Program, Legal Research Digest No. 7, Transportation Research Board, 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 to participate, and was required to 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. 1992), *cert. denied sub nom*; *Ellis v.*

regulations at 49 C.F.R. Part 26 [Part 26].⁵⁶ 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.⁵⁷ 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.⁵⁸ In order to survive strict scrutiny analysis, DOT revised its DBE rules in February of 1999.⁵⁹ 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 playing field” for small economically and socially disadvantaged businesses.⁶⁰

b. DBE Certification

Eligibility to participate in the DBE program as a DBE is based on economic and social factors.⁶¹ Applicants have the burden of proof to show that they meet the size, ownership and control standards, and group membership for DBE participation.⁶² Pursuant to Part 26,⁶³ a DBE is defined as a for-profit small business:

Card, 506 U.S. 939 (1992). *See also* 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).

⁵⁶ “Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs,” 49 C.F.R. pt. 26 (1999).

⁵⁷ “Participation by Disadvantaged Business Enterprises in Department of Transportation Programs,” 57 Fed. Reg. 58,288 (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).

⁵⁸ VAN DE WALLE, *supra* note 55, at 7.

⁵⁹ “Participation by Disadvantaged Business Enterprises in Department of Transportation Programs,” 64 Fed. Reg. 5096 (Feb. 2, 1999).

⁶⁰ “Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs,” 66 Fed. Reg. 23208 (May 8, 2001).

⁶¹ 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—Meeting the Adarand Test*, <http://www.dot.gov/osdbu/disadvantaged-business-enterprise/the-new-dot-dbe-rule-is-narrowly-tailored-meeting-the-adarand-test> (last visited July 2014).

⁶² U.S. Dep’t of Transp., Office of Small and Disadvantaged Business Utilization, *What’s New in the New DOT DBE Rule?* <http://www.dot.gov/osdbu/disadvantaged-business-enterprise/whats-new-new-dot-dbe-rule> (last visited

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.⁶⁴

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....”⁶⁵ Individuals not presumed to be 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.⁶⁶ The new rules impose a personal net worth eligibility cap of \$750,000 irrespective of race, gender, or size of the business.⁶⁷

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.⁶⁸ 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.⁶⁹ A white male can also make an individual showing of social and

economic disadvantage to seek to achieve eligibility under the program.⁷⁰

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 that 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.”⁷¹ 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.⁷² Recipients set their own goals based on local market conditions.⁷³ Goals are to be established based on the number of “ready, willing, and able DBEs” in the local market.⁷⁴ Recipients must meet the maximum feasible portion of their overall goals via race-neutral means, such as outreach and technical assistance.⁷⁵ 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.⁷⁶ 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.⁷⁷

Congress also enacted the SBA⁷⁸ to assist businesses owned and controlled by the socially and economically disadvantaged. Both the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA)⁷⁹ and the Transportation Equity Act for the 21st Century (TEA-21)⁸⁰ set an aspirational goal of 10 percent of transportation contracting funds to projects employing DBEs.⁸¹ This 10

July 2014).

⁶³ 49 C.F.R. pt. 26. See Docket No. OST–2010–0118, RIN 2105–AD75 Disadvantaged Business Program Improvements—76 Fed. Reg. 5083 (Jan. 28, 2011). Rules and Regulations 5083, available at http://www.apta.com/gap/fedreg/Documents/DOT_OTS_%202010_0118_DBE_Program_Improvements.pdf.

⁶⁴ 49 C.F.R. § 26.5. 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. 23,208, 23,219 (May 8, 2001).

⁶⁵ 49 C.F.R. § 26.67.

⁶⁶ *Id.*, 49 C.F.R. § 26.69. 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 at http://www.adversity.net/special/usdot_clinton.htm. 13 C.F.R. pt. 121 (2001) (defining small business standards under the SBA).

⁶⁷ 49 C.F.R. § 26.67.

⁶⁸ Participation by Disadvantaged Business enterprises in Department of Transportation Programs, 64 Fed. Reg. 5096, 5099 (Feb. 2, 1999).

⁶⁹ *Id.*

⁷⁰ *Id.*, 49 C.F.R. § 26.67.

⁷¹ 64 Fed. Reg. 5096, 5097 (Feb. 2, 1999).

⁷² 49 C.F.R. § 26.41.

⁷³ 49 C.F.R. § 26.45. The overall goals must be based on evidence of the relative availability of ready, willing, and able DBEs in the area. *Id.*

⁷⁴ U.S. GENERAL ACCOUNTING OFFICE, GAO-01-586, *DISADVANTAGED BUSINESS ENTERPRISES: CRITICAL INFORMATION IS NEEDED TO UNDERSTAND PROGRAM IMPACT* (June 2001).

⁷⁵ 49 C.F.R. § 26.51.

⁷⁶ 49 C.F.R. § 26.43.

⁷⁷ 49 C.F.R. § 26.53.

⁷⁸ Pub. L. No. 87-305, 75 Stat. 667 (Sept. 26, 1961), 15 U.S.C. § 637(d)(1) (2010).

⁷⁹ Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1919 (Dec. 18, 1991).

⁸⁰ Pub. L. No. 105-178, 112 Stat. 113 (June 9, 1998).

⁸¹ FTA Circular 4716.1A, “*Disadvantaged Business Enterprise Requirements for Recipients and Transit Vehicle Manufacturers*” (July 26, 1988), *superseded by* 49 C.F.R. pt. 26.

percent target is considered by DOT to be a flexible goal.⁸²

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,⁸³ a state or local government has only “the authority to eradicate the effects of discrimination within its own legislative jurisdiction.”⁸⁴ 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.⁸⁵ A minority business enterprise provision could pass constitutional muster if the following two conditions were 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.⁸⁶

d. Recipient Eligibility

FTA recipients who receive more than \$250,000 in FTA assistance during a fiscal year must establish a DBE program.⁸⁷ FTA must approve a transit agency’s DBE program as a condition of receipt of FTA financial assistance.⁸⁸ The DBE program is both a requirement for eligibility as a recipient and a condition of the continued receipt of FTA funds.⁸⁹ 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.⁹⁰

Once certified to participate in the DBE program, recipients must set annual overall goals.⁹¹ Goals must be based on evidence of DBE availability, readiness, and

willingness to participate.⁹² 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.⁹³ 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.⁹⁴ Recipients must also establish a monitoring and enforcement mechanism to ensure work committed to DBEs is actually performed by them.⁹⁵

Though DOT could withhold funding to a recipient that failed to meet its goals, DOT insisted it had never imposed such sanctions.⁹⁶ 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.⁹⁷ DOT will only penalize recipients if the noncompliance and inappropriate administration was in bad faith.⁹⁸ 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.”⁹⁹

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

⁹² *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://www.osdbu.dot.gov/dbeprogram/tips.cfm> (last visited July 2014).

⁹³ 49 C.F.R. § 26.45. Tips for setting goals may be found at <http://www.osdbu.dot.gov/dbeprogram/tips.cfm> (last visited July 2014). 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.

⁹⁴ 49 C.F.R. §§ 26.51 and 26.43.

⁹⁵ 49 C.F.R. § 26.37.

⁹⁶ 64 Fed. Reg. 5096, 5098.

⁹⁷ 49 C.F.R. § 26.47.

⁹⁸ *Id.*

⁹⁹ 49 C.F.R. § 26.101(a).

⁸² VAN DE WALLE, *supra* note 55, at 12.

⁸³ See *City of Richmond v. Croson*, 488 U.S. 469, 504, 109 S. Ct. 706, 727, 102 L. Ed. 2d 854, 889 (1989).

⁸⁴ *Id.* at 491–92.

⁸⁵ *Houston Contractors Ass’n. v. Metro. Transit Auth. of Harris County*, 189 F. 3d 467 (1999).

⁸⁶ See *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978); see also *Fullilove v. Klutznick*, 448 U.S. 448, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980).

⁸⁷ 49 C.F.R. § 26.21.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ 49 C.F.R. § 26.21. 49 C.F.R. § 26.5 (defining operating administration as the following parts of the DOT: FAA; FHWA; and FTA).

⁹¹ 49 C.F.R. § 26.45. Goals must be set on August 1 of each year.

submitted a lower bid. Prime contractors, however, must make good faith efforts to achieve DBE-contract goals.¹⁰⁰ Prime contractors are also free to accept whatever sub-contractor bid they wish.¹⁰¹

Coordinating its program with the SBA,¹⁰² DOT has developed a standard certification form for DBE eligibility,¹⁰³ and a uniform reporting form for all its agencies, including FTA.¹⁰⁴ DOT has also established a model DBE program that recipients may adopt to help them comply with Part 26.¹⁰⁵

e. Adarand

The most significant case assessing the Constitutionality of DOT race-based preferences was *Adarand Constructors v. Peña*.¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸

Overruling prior decisions, which had used intermediate scrutiny to assess federal “benign” race preferences,¹⁰⁹ the Supreme Court subjected DOT’s use of race-based measures in its regulations to strict scrutiny analysis.¹¹⁰ 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.¹¹¹ 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.”¹¹² Thus, affirmative action programs—whether federal, state, or local—are now subjected to “strict scrutiny.”¹¹³ They will pass constitutional muster only if they are narrowly tailored to serve a compelling government interest.¹¹⁴ 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*,¹¹⁵ and 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?

¹⁰⁰ 49 C.F.R. § 26.53.

¹⁰¹ 64 Fed. Reg. 5096, 5099–5100.

¹⁰² 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)); (2) the disadvantaged owner must have a personal net worth of less than \$750,000.00 (13 C.F.R. § 124.1002(c)); (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); and (4) with respect to DBE airport concessionaires, firms must meet the SBA size standard corresponding to their primary Standard Industrial Classification (SIC) code.

¹⁰³ See Notice of Proposed Rulemaking, Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs, 66 Fed. Reg. 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.

¹⁰⁴ 66 Fed. Reg. 23208 (May 8, 2001), Notice of Proposed Rulemaking.

¹⁰⁵ See 49 C.F.R. pt. 26, Sample Disadvantaged Business Enterprise Program, <http://www.dot.gov/osdbu/disadvantaged-business-enterprise/49-cfr-part-26-sample-disadvantaged-business>. DBE’s relationship to the Racketeer Influenced and Corrupt Organization Act (RICO) is addressed in *San Francisco Bay Area Rapid Transit Dist. v. Spencer*, 358 Fed. Appx. 793 (9th Cir. Cal. 2009), 2006 U.S. Dist. Lexis 88022 (N.D. Cal. 2006).

¹⁰⁶ 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995), *remanded* *Adarand Constructors, Inc. v. Peña*, 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*, 532 US 941 (2001), *cert. granted*, *Adarand Constructors, Inc. v. Mineta*, 534 US 103 (2001).

¹⁰⁷ 15 U.S.C. § 637(d) (2010).

¹⁰⁸ U.S. CONST. Amend. V.

¹⁰⁹ *Metro Broadcasting v. FCC*, 497 U.S. 547, 110 S. Ct. 2997, 111 L. Ed. 2d 445 (1990).

¹¹⁰ 515 U.S. at 237–39.

¹¹¹ VAN DE WALLE, *supra* note 55, at 3.

¹¹² *Adarand*, 515 U.S. at 227.

¹¹³ 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. Peña*, 515 U.S. 200, 227 (1995).

¹¹⁴ *Id.* VAN DE WALLE, *supra* note 55.

¹¹⁵ 480 U.S. 149, 107 S. Ct. 1053, 94 L. Ed. 2d 203 (1987).

6. What is the extent of the burden placed on non-beneficiaries of the program?¹¹⁶

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.”¹¹⁷ 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.¹¹⁸

In the transit context, the “narrowly tailored” criterion is satisfied by having transit grantees develop contract goals according to the criteria of Part 26.¹¹⁹ On the 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

¹¹⁶ VAN DE WALLE, *supra* note 55. See *Paradise*, 480 U.S. at 171 (1987).

¹¹⁷ *Adarand*, 515 U.S. at 237.

¹¹⁸ 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).

¹¹⁹ 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 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).

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.¹²⁰

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.¹²¹

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.¹²² In order to survive strict scrutiny analysis, DOT revised its DBE rules in February of 1999.¹²³ 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”¹²⁴ 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 “difficult to envisage a race-based classification” that could ever be found to be narrowly tailored.¹²⁵

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

¹²⁰ VAN DE WALLE, *supra* note 55, at 11.

¹²¹ *Houston Contractors Ass’n v. Metro. Transp. Auth.*, 993 F. Supp. 545 (S.D. Tex. 1997).

¹²² VAN DE WALLE, *supra* note 55, at 13.

¹²³ *Participation by Disadvantaged Business Enterprises in Department of Transportation Programs*, 64 Fed. Reg. 5096 (Feb. 2, 1999).

¹²⁴ DOT insists its new rules are “narrowly tailored,” <http://www.dot.gov/osdbu/disadvantaged-business-enterprise/the-new-dot-dbe-rule-is-narrowly-tailored-meeting-the-adarand-test> (visited July 2014).

¹²⁵ *Adarand Constructors v. Pena*, 965 F. Supp. 1556, 1580 (D. Colo. 1997).

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.”¹²⁶

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.¹²⁷ 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.¹²⁸ The 1996 SCC program also presumed economic disadvantage based on membership in certain racial groups, and was therefore insufficiently narrowly tailored.¹²⁹ 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.”¹³⁰

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 contracts.¹³¹ Adarand’s petition for *certiorari* of the 10th Circuit decision was initially granted,¹³² then subsequently vacated, by the U.S. Supreme Court.¹³³

¹²⁶ *Adarand Constructors v. Slater*, 528 U.S. 216, 224, 120 S. Ct. 722, 726, 145 L. Ed. 2d 650, 658 (2000).

¹²⁷ *Adarand Constructors v. Slater*, 228 F.3d 1147 (10th Cir. 2000).

¹²⁸ *Id.* at 1182.

¹²⁹ *Id.* 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.”

¹³⁰ *Id.* at 1167.

¹³¹ Colorado DOT DBE Definitions and Requirements, 2001 Notice to Consultants, <http://www.coloradodot.info/business/civilrights/dbe-esb-consultant-information/dbe-regulations.html>.

¹³² *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 122 S. Ct. 511, 151 L. Ed. 2d 489 (2001).

¹³³ *Id.* 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

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.¹³⁴

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.¹³⁵ 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.¹³⁶

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.¹³⁷ Section 1983 does not create substantive rights; to prevail under it, the plaintiff must prove violation of an independent constitutional or federal statutory right.¹³⁸ The Civil Rights

standing. For a good discussion of *Adarand* and progeny, see Karen M Winter, *Adarand Constructors, Inc. v. Slater and Concrete Works of Colorado, Inc. v. City of Denver: Breathing Life Into Croson's Passive Participant Model*, 27 U. HAW. L. REV. 469 (2005). For a good example of a case where a state’s DBE program was found to be sufficiently narrowly tailored under the *Adarand* test and was, therefore, held to be lawful pursuant to the 14th Amendment, see *GEOD Corp. v. N.J. Transit Corp.* 746 F. Supp. 2d 642 (2010).

¹³⁴ 42 U.S.C. § 1981; *Allen v. Chicago Transit Auth.*, 2000 U. S. Dist. LEXIS 11445 (N.D. Ill. 2000).

¹³⁵ 28 U.S.C. § 1343(3).

¹³⁶ 42 U.S.C. § 1983; See, e.g., *Monell v. Dep’t of Social Services of the City of N.Y.*, 436 U.S. 658, 691, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611, 636 (1978).

¹³⁷ *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, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961).

¹³⁸ *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)). See

Attorney's Fees Award Act of 1976¹³⁹ allows recovery of reasonable attorney's fees in a successful § 1983 action.¹⁴⁰

Local governments may be held liable under § 1983. However, they may not be held liable under a *respondeat superior* theory.¹⁴¹ Instead, the constitutional deprivation must be the result of an official governmental policy or custom.¹⁴² Thus, when presented with a § 1983 claim, the transit attorney will closely examine 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.¹⁴³ However, absent a constitutional deprivation, ordinary tort actions, though cast as civil rights claims, are not cognizable under § 1983.¹⁴⁴

also *Arrington v. Richardson*, 660 F. Supp. 2d 1024 (2009), in which federal statutory rights to privacy created under the Driver's Privacy Protection Act (DPPA), 18 U.S.C. § 2721, *et seq.*, were held to be enforceable in an action brought against the Iowa Department of Transportation both as an independent statutory claim as well as pursuant to § 1983.

¹³⁹ 42 U.S.C. § 1988.

¹⁴⁰ See *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Resources*, 532 U.S. 598, 124 S. Ct. 1835, 149 L. Ed. 2d 855 (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, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984).

¹⁴¹ *Monell*, 436 U.S. at 691.

¹⁴² *Id.* at 691.

¹⁴³ *Allen v. Chicago Transit Auth.*, 2000 U.S. Dist. LEXIS 11445 (N.D. Ill. 2000).

¹⁴⁴ "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, 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.¹⁴⁵ Section 1983 actions have been brought against transit agencies for a number of alleged constitutional violations, including restrictions against advertising,¹⁴⁶ the imposing of drug testing on employees,¹⁴⁷ racially-motivated employee dismissal,¹⁴⁸ and assault and battery or other abuse of patrons by transit police.¹⁴⁹ However, relatively few plaintiffs have prevailed in such litigation.

Note, however, that private transit operators stand on a different footing in § 1983 claims, for the 14th Amendment applies only to the states and their subdivisions (such as public transit operators). Thus, 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.¹⁵⁰

However, a relevant federal statute promulgated under the Commerce Clause may be invoked against a private transit operator. Thus, for example, private

106 S. Ct. 662, 665, 88 L. Ed. 2d 662, 669 (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, 306, 106 S. Ct. 2537, 2542, 91 L. Ed. 2d 249, 258 (1986).

¹⁴⁵ *Searight v. State of N.J.*, 412 F. Supp. 413 (D. N.J. 1976). 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, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (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 SILICIANA, THE TORTS PROCESS* 803 (Aspen Law & Business, 5th ed. 1999).

¹⁴⁶ 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).

¹⁴⁷ *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. 1989) (§ 1983 claim brought against drug testing); *Dykes v. SEPTA*, 68 F.3d 1564 (3d Cir. 1995) (§ 1983 action brought challenging drug test).

¹⁴⁸ *Morris v. WMATA*, 781 F.2d 218 (D.C. Cir. 1986).

¹⁴⁹ *Ricciuti v. N.Y. City Transit Auth.*, 941 F.2d 119 (2d Cir. 1991) (§ 1983 action brought against assault and battery by transit police); *Fisher v. WMATA*, 690 F.2d 1133 (D.C. Cir. 1982) (§ 1983 action brought for arrest, search and seizure, and stripping of patron).

¹⁵⁰ See, e.g., *Brown v. D.C. Transit System*, 523 F.2d 725 (D.C. Cir. 1975).

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

Though the federal government is not explicitly subject to the provisions of § 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.¹⁵¹ 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.¹⁵² 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.¹⁵³ Thus, *Bivens* and its 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.¹⁵⁴

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

¹⁵¹ *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (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.

Id. at 389.

¹⁵² *Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979).

¹⁵³ *Id.*

¹⁵⁴ See *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (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, 121 S. Ct. 1819, 149 L. Ed. 2d 958 (2001) (plaintiff's claim against a federal corrections officer for mistreatment otherwise stated a claim except that plaintiff failed to exhaust an administrative review process before filing suit); *Hanlon v. Berger*, 526 U.S. 808, 119 S. Ct. 1706, 143 L. Ed. 2d 978 (1999) (plaintiff's claim denied due to qualified immunity of federal game officials because of legal uncertainties regarding media accompaniment of law enforcement officials at time of search).

types of government officials including judges,¹⁵⁵ prosecutors,¹⁵⁶ legislators,¹⁵⁷ and the President.¹⁵⁸ 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 made with the malicious intent of causing a deprivation of a Constitutional right or causing other injury.¹⁵⁹

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.¹⁶⁰ The Supreme Court has held that a suit brought against individual officials for violation of federal law¹⁶¹ is not prohibited by the 11th Amendment prohibition against suits brought against states.¹⁶²

In *Brown v. Eppler*,¹⁶³ a federal district court granted summary judgment against a bus patron who brought § 1983 action against a city transit authority and its employees, alleging due process and equal protection violations.

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

¹⁵⁵ *Stump v. Sparkman*, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978).

¹⁵⁶ *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976) (immunity when acting "within scope of duties.").

¹⁵⁷ *Lake County Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S. Ct. 1171, 59 L. Ed. 2d 401 (1979) (immunization for planning agency officials, created by Nevada and California, when officials acted in a capacity comparable to members of a state legislature).

¹⁵⁸ *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S. Ct. 2690, 73 L. Ed. 2d 349 (1982) (absolute immunity when acts upon which liability is predicated are official acts).

¹⁵⁹ *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); *Scheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974).

¹⁶⁰ Federal Employees Liability Reform and Tort Compensation Act of 1988 (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. 28 U.S.C. § 2680. 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.

¹⁶¹ 28 U.S.C. §§ 1331, 1343.

¹⁶² See *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 2d 714 (1908); see also *Seminole Tribe v. Fla.*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996).

¹⁶³ 794 F. Supp. 2d 1238 (N.D. Okla. 2011).

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.¹⁶⁴ 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.”¹⁶⁵ The concept of property denotes a broad range of interests secured by existing rules or understandings.¹⁶⁶ Property rights are not created by the Constitution, but rather stem from an independent source, such as state law.¹⁶⁷

For example, in *Ward v. Housatonic Area Regional Transit District*,¹⁶⁸ 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.”¹⁶⁹ In *Medellin v. Chicago Transit Authority*,¹⁷⁰ 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.¹⁷¹ Hence, as part of the analysis of whether a property right exists, the transit attorney must check applicable state or local law to verify whether it is a right-to-work state and whether the employee is 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.”¹⁷² In the seminal case of *Cleveland Board of Education v. Loudermill*,¹⁷³ 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.”¹⁷⁴ 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. Questions to consider include whether the opportunity for comment must be conducted pre- or post-deprivation, whether it may be in writing, or whether it must 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 existing procedures and the value of additional safeguards; and (3) the government’s interest.¹⁷⁵

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 discharged¹⁷⁶ or suspended¹⁷⁷ 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, and 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.¹⁷⁸

However, temporary job suspension stands on a different footing. There, the Supreme Court has required only a prompt post-suspension hearing.¹⁷⁹

¹⁷⁴ *Id.*

¹⁷⁵ *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 898, 47 L. Ed. 2d 18 (1976). *See also* *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.

¹⁷⁶ *Roth*, 408 U.S. at 578.

¹⁷⁷ *Gilbert v. Homar*, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120 (1997).

¹⁷⁸ *Loudermill*, 470 U.S. at 546.

¹⁷⁹ *Gilbert v. Homar*, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120 (1997), which involved the suspension of a university police officer who was arrested and charged with drug offenses. Additionally, where the justification for suspension is not so clear cut, the courts may reach a different conclusion.

¹⁶⁴ *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2694, 33 L. Ed. 2d 548 (1972).

¹⁶⁵ *Id.* at 577.

¹⁶⁶ *Perry v. Sinderman*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972).

¹⁶⁷ *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

¹⁶⁸ 154 F. Supp. 2d 339 (D. Conn. 2001).

¹⁶⁹ *Ward*, 154 F. Supp. 2d at 347.

¹⁷⁰ 1994 U. S. Dist. LEXIS 10370 (N.D. Ill. 1994).

¹⁷¹ *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950); *Cafeteria Workers v. McElroy*, 367 U.S. 886, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961).

¹⁷² *Roth*, 408 U.S. at 575.

¹⁷³ 470 U.S. 532, 541, 105 S. Ct. 1487, 1493, 84 L. Ed. 2d 494, 503 (1985).

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 to be 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.”¹⁸⁰

Even where a property interest is not implicated, the government may not deny a person a benefit on a basis 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.¹⁸¹ Such unconstitutional means, for example, might include deprivation of a privilege on grounds of racial discrimination,¹⁸² or retaliation for exercise of free speech.¹⁸³ 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.¹⁸⁴

Occasionally, a losing bidder on a transportation contract will allege a violation of due process. In *Winton Transp. v. South*,¹⁸⁵ a contractor alleged a 42 U.S.C. § 1983 procedural due process claim for denial of a bid for a transit contract. To establish a procedural due process violation, a plaintiff must prove: (1) the existence of a protected property interest, (2) a deprivation of that property interest, and (3) that state remedies for

redress of the alleged deprivation were inadequate.¹⁸⁶ Ordinarily, an unsuccessful bidder is not deemed to have a protected property interest. However, under certain limited circumstances he may have a constitutionally protected property interest in the award of the contract, if he proves that (1) he was awarded the contract, but it was subsequently revoked, or (2) the state official abused his discretion as to whom the contract should be awarded and abused that discretion.¹⁸⁷ In *Winton*, the court dismissed the complaint on grounds that another bidder was the lowest bidder, and there was no evidence that the County abused its discretion by basing its decision on any criteria not expressly stated in the RFP.¹⁸⁸

In *233 Easter 69th Street Owners Corp. v. LaHood*,¹⁸⁹ the court granted summary judgment against the owners of a residential complex who alleged FTA’s and MTA’s conclusion that “no further environmental review was necessary” for an ancillary facility at the 72nd Street station of New York City’s Second Avenue Subway was arbitrary and capricious.¹⁹⁰

3. Equal Protection

Another method of protection against discrimination is through 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.”¹⁹¹ The Equal Protection Clause requires that all similarly situated people be treated alike,¹⁹² protects fundamental rights, protects citizens against suspect classifications such as race, and also protects them from arbitrary and irrational state action.¹⁹³ Such a claim is analyzed under the *McDonnell*

See, e.g., *Winegar v. Des Moines Indep. Community Sch. Dist.*, 20 F.3d 895 (8th Cir. 1994).

¹⁸⁰ *Transportation for Individuals with Disabilities*, 56 Fed. Reg. 45584 (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, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970).

¹⁸¹ *Cafeteria Workers v. McElroy*, 367 U.S. 886, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961).

¹⁸² 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. Wash. Metro. Area Transit Comm’n*, 466 F.2d 394 (D.C. Cir. 1972).

¹⁸³ *See Perry v. Sinderman*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). Examples in the general area of transportation include: *International Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (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 First Amendment activity is unconstitutional).

¹⁸⁴ *United Food and Commercial Workers Union v. Southwest Ohio Regional Transit Auth.*, 163 F.3d 341 (6th Cir. 1998).

¹⁸⁵ 2007 U.S. Dist. LEXIS 65947 (S.D. Ohio 2007).

¹⁸⁶ *See Loudermill*, 470 U.S. 532 (1985); *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984).

¹⁸⁷ *See Enertech Electrical, Inc. v. Mahoning County Comm’rs*, 85 F.3d 257, 260 (6th Cir. 1996).

¹⁸⁸ *Winton Transp. v. South*, 2007 U. S. Dist. LEXIS 65947 (S.D. Ohio 2007).

¹⁸⁹ 797 F. Supp. 2d 326 (S.D.N.Y. 2011).

¹⁹⁰ *See generally* Paul Stephen Dempsey, *Transportation and the United States Constitution*, in *SELECTED STUDIES IN TRANSPORTATION LAW*, vol. 8, *TRANSPORTATION LAW AND GOVERNMENT RELATIONS* (National Cooperative Highway Research Program, Transportation Research Board, 2007).

¹⁹¹ *Harris v. McRae*, 448 U.S. 297, 322, 100 S. Ct. 2671, 2691, 65 L. Ed. 2d 784, 808 (1980).

¹⁹² *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313, 319 (1985).

¹⁹³ *Hamlyn v. Rock Island County Metro. Mass Transit District*, 986 F. Supp. 1126 (C.D. Ill. 1997) (transit authority’s reduced fare program violated Equal Protection Clause because it discriminated 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 as eligible persons whose sole disability was AIDS. The court found that AIDS was a qualifying disability under the ADA and Rehabilitation Act, and that discrimination against persons who have AIDS also violates the 14th Amendment.

Douglas burden-shifting framework for Title VII claims, as described below.¹⁹⁴

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;¹⁹⁵ (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.¹⁹⁶ 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.¹⁹⁷ Moreover, 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.¹⁹⁸

In one case, a group of citizens alleged that MTC engaged in intentional discrimination under the Equal Protection Clause in its disproportionate emphasis on rail expansion projects over bus expansion projects in its Regional Transit Expansion Plan and that this illegally discriminated against minorities, who constituted 66.3 percent of San Francisco Bay Area bus riders. They alleged that the plan had a disparate impact on minorities, and that along with evidence of (1) the history of Bay Area rail service as primarily benefiting white riders, (2) MTC's interactions with its advisory committees representing minority groups, and (3) MTC's inconsistent application of selection criteria to bus and rail projects, the evidence demonstrated that MTC's decision resulted from intentional discrimination. The federal district court held that plaintiffs established a *prima facie* case of disparate impact discrimination only as to MTC's conduct in disproportionately selecting and allocating funding to rail projects as opposed to bus projects. Shifting the burden to MTC, the district court held that MTC had shown “substantial legitimate justification” for its conduct. Shifting the burden back to plaintiffs, the court held that they had failed to prove the existence of a less discriminatory, equally effective

alternative.¹⁹⁹ On appeal, the 9th Circuit Court of Appeals agreed that the plaintiffs' disparate impact claim failed, but on different grounds—that the statistical measurement upon which plaintiffs relied was unsound and rested upon a logical fallacy. Although plaintiffs' statistical evidence showed that minorities made up a greater percentage of the regional population of bus riders than rail riders, it did not follow that an expansion plan that emphasized rail over bus projects would harm minorities.²⁰⁰

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.²⁰¹ 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*.²⁰² 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.²⁰³ 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 that the rule was 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

¹⁹⁴ *Schlesinger v. N.Y. City Transit Auth.*, 2001 U.S. Dist. LEXIS 632 (S.D. N.Y. 2001).

¹⁹⁵ *Jones v. Helms*, 452 U.S. 412, 423–24, 101 S. Ct. 2434, 2442, 69 L. Ed. 2d 118, 128 (1981).

¹⁹⁶ *Plyler v. Doe*, 457 U.S. 202, 217–18, 102 S. Ct. 2382, 2395, 72 L. Ed. 2d 786, 800 (1982).

¹⁹⁷ *Cleburne Living Ctr.*, 473 U.S. at 446–47.

¹⁹⁸ *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S. Ct. 397, 401, 88 L. Ed. 497, 502 (1944). A challenge to a DBE program by white males on equal protection grounds failed in *Geod Corp. v. N.J. Transit Corp.*, 746 F. Supp. 2d. 692 (D.N.J. 2010).

¹⁹⁹ *Darensburg v. Metro. Transp. Comm'n*, 611 F. Supp. 2d 994 (N.D. Cal. 2009); *Darensburg v. Metro. Transp. Comm'n*, 2008 U. S. Dist. LEXIS 79003 (N.D. Cal. 2008).

²⁰⁰ *Darensburg v. Martinez*, 636 F.3d. 511 (9th Cir. 2011).

²⁰¹ See generally NORMAN HERRING & LAURA D'AURI, RESTRICTIONS ON SPEEDY AND EXPRESSIVE ACTIVITIES IN TRANSIT TERMINALS AND FACILITIES (Transit Cooperative Research Program, Legal Research Digest No. 10, Transportation Research Board, 1998).

²⁰² 391 U.S. 563, 568, 88 S. Ct. 1731, 1735, 20 L. Ed. 2d 811, 817 (1968).

²⁰³ *NAACP v. Ala.*, 377 U.S. 288, 307–08, 84 S. Ct. 1302, 1314, 2 L. Ed. 2d 325, 338 (1964).

that place them into contact with the public, with proper justification in the record, would pass constitutional muster.²⁰⁴

A content neutral limitation may lawfully restrict speech if it is narrowly tailored to serve a substantial governmental interest; it reasonably regulates the time, manner and place of speech; and it leaves open alternative channels for expression.²⁰⁵ 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.²⁰⁶ The extent to which the government may regulate speech depends on the nature of the location in issue.²⁰⁷ 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 it is necessary to serve a compelling governmental interest, and if it is narrowly tailored to serve that purpose.²⁰⁸ The Supreme Court has observed that airport terminals, like shopping malls, are not public fora.²⁰⁹

In *Jews for Jesus v. Massachusetts Bay Transportation Authority*,²¹⁰ 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. The 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.”²¹¹ 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 had invalidated bans on leafleting, dismissed the danger to traffic congestion, and previously recognized it as a particularly unobtrusive form of expression.²¹²

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,”²¹³ including

²⁰⁴ *Scott v. Myers*, 191 F.3d 82, 86, 87 (2d Cir. 1999).

²⁰⁵ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983); *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989).

²⁰⁶ *Grayned v. City of Rockford*, 408 U.S. 104, 116, 92 S. Ct. 2294, 2303, 33 L. Ed. 2d 222, 232 (1972).

²⁰⁷ *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985).

²⁰⁸ *Perry Local Educators’ Ass’n*, 460 U.S. at 45.

²⁰⁹ *International Soc’y of Krishna Consciousness v. Lee*, 505 U.S. 672, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992).

²¹⁰ 984 F.2d 1319 (1st Cir. 1993).

²¹¹ *Id.* at 1324.

²¹² *Lee*, 505 U.S. 672. 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, 60 S. Ct. 146, 151, 84 L. Ed. 155, 165 (1939).

²¹³ *Jews for Jesus*, 984 F.2d 1319, 1325 (1st Cir. 1993).

business flyers, wandering newspaper hawkers, and the sale of food and beverages in disposable containers. The Supreme Court had also placed a heavier burden of justification for bans against the solicitation of signatures in public places.²¹⁴ 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.²¹⁵

In upholding a restriction on leafleting in order for the Southeastern Pennsylvania Transit Authority (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.”²¹⁶

In *Wright v. Chief of Transit Police*,²¹⁷ the Second 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, to try and engage interested persons in conversations, and 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.²¹⁸

By comparison, in *Young v. New York City Transit Authority*,²¹⁹ 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.”²²⁰ 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.”²²¹ Even if there were some protected speech involved 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.

²¹⁴ *Meyer v. Grant*, 486 U.S. 414, 421, 108 S. Ct. 1886, 1891, 100 L. Ed. 2d 425, 433 (1988).

²¹⁵ 984 F.2d 1319, 1326 (1st Cir. 1993).

²¹⁶ *Storti v. Southeastern Transp. Auth.*, 1999 U.S. Dist. 14515 (E.D. Pa. 1999).

²¹⁷ 558 F.2d 67 (2d Cir. 1977).

²¹⁸ *Id.* at 68 (2d Cir. 1977).

²¹⁹ 903 F.2d 146 (2d Cir. 1990).

²²⁰ *Id.* at 153.

²²¹ *Id.* at 154.

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*,²²² the Court upheld an advertising ban in transit vehicles, observing

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.²²³

Transit systems tend to begin the defense of advertising and other similar restrictions by relying on *Lehman* in general, and *Lehman's* "captive audience" language in particular. However, there has been much academic criticism of *Lehman*, which was a 5-4 decision.²²⁴

²²² 418 U.S. 298, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974).

²²³ *Id.* at 303, 304.

²²⁴ 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 E. 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 D. 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 S. 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 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).

In *Children of the Rosary v. City of Phoenix*,²²⁵ a case which closely followed 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, the city could regulate the types of advertising sold if advertising standards were reasonable and nondiscriminatory. In this case, the regulations were deemed a reasonable effort to advance the city's interest in protecting revenue and maintaining neutrality on political and religious issues.²²⁶

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.²²⁷

²²⁵ 154 F.3d 972 (9th Cir. 1998), *cert. denied*, 526 U.S. 1131 (1999).

²²⁶ See DEMPSEY, *supra* note 190.

²²⁷ U.S. Equal Employment Opportunity Commission, *Federal Laws Prohibiting Job Discrimination, Questions and Answers*, available at <http://www.eeoc.gov/facts/qanda.html> (last visited July 2014). For a recent decision in a transit context, see *Getachew v. Central Ohio Transit Auth.*, 2013 U.S. Dist. LEXIS 110659 (S.D. Ohio 2013).

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. § 2000dn, 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. No. 92-255, Mar. 21, 1972, provides for nondiscrimination on the basis of drug abuse;

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,²²⁸ and obtain a right-to-sue letter.²²⁹ 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.²³⁰

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

• The Comprehensive Alcohol Abuse and Alcoholism Prevention Treatment & Rehabilitation Act of 1970, Pub. L. No. 91-616, Dec. 31, 1970, 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, 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.

²²⁸ *Miles v. N.Y. City Transit Auth.*, 182 F3d 900 (2d Cir. 1999) (Unpublished).

²²⁹ 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.

²³⁰ The EEOC enforces the following laws: (1) Title VII of the Civil Rights Act, 42 U.S.C. § 2000. 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) (2007). 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. 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. 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 (2009). 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). The Civil Rights Act of 1991 includes provisions for monetary damages in cases of intentional discrimination and clarifies provisions regarding disparate impact actions.

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 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, the 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. The 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.²³¹ 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.²³² The purpose of the notice provision is to encourage voluntary settlement of discrimination claims through conciliation and compliance.²³³ 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,²³⁴ its

²³¹ U.S. Equal Employment Opportunity Commission, *Federal Laws Prohibiting Job Discrimination, Questions and Answers* (last modified Nov. 21, 2009), <http://www.eeoc.gov/facts/qanda.html>.

²³² *Sotolongo v. N.Y. City Transit Auth.*, 63 F. Supp. 2d 353, 360 (S.D.N.Y. 1999).

²³³ *Adams v. N.J. Transit Rail Operations*, 2000 U.S. Dist. LEXIS 2154 (S.D.N.Y. 2000).

²³⁴ 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 ex-

charge before the administrative agency.²³⁵ 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.²³⁶ 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.²³⁷

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.²³⁸ 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,²³⁹ 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.²⁴⁰ 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.²⁴¹ If

pected to grow out of the charge of discrimination.” *Butts v. City of N.Y. Dep’t of Housing Preservation and Dev.*, 990 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).

²³⁵ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974); *Allen v. Chicago Transit Auth.*, 2000 U.S. Dist. LEXIS 11445 (N.D. Ill. 2000).

²³⁶ *Sanchez v. Standard Brands*, 431 F.2d 455 (5th Cir. 1970).

²³⁷ *Fowler v. N.Y. Transit Auth.*, 2001 U.S. Dist. LEXIS 762 (S.D. N.Y. 2001).

²³⁸ *Trans World Airlines v. Hardison*, 432 U.S. 63, 97 S. Ct. 2264, 53 L. Ed. 2d 113 (1977); *King v. Wilmington Transit Co.*, 976 F. Supp. 356 (E.D. N.C. 1997).

²³⁹ *Castleman v. Acme Boot Co.*, 959 F.2d 1417, 1420 (7th Cir. 1992) (but such remarks are “rarely found.”).

²⁴⁰ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277, 109 S. Ct. 1775, 1805, 104 L. Ed. 2d 268, 305 (1989).

²⁴¹ *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.

plaintiff proves discriminatory intent, the burden shifts to the defendant to prove that it would have made the same decision anyway.²⁴² Usually, discriminatory motivation is proven by adducing policy documents, statements, or actions that exhibit a discriminatory attitude.²⁴³

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*.²⁴⁴ 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.²⁴⁵ A plaintiff may satisfy this burden either by offering direct proof of discriminatory intent, or proving disparate treatment.²⁴⁶ Direct proof of discriminatory intent can be difficult for plain-

²⁴² *Price Waterhouse*, 490 U.S. 228.

²⁴³ *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 minimis, 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].

²⁴⁴ 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

²⁴⁵ *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).

²⁴⁶ *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).

tiffs to establish. Employers rarely include a notation in the employee's personnel file that their actions are motivated by illegal factors.²⁴⁷ 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.²⁴⁸

In the seminal case of *Griggs v. Duke Power Co.*,²⁴⁹ 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."²⁵⁰ 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."²⁵¹ 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,²⁵² or that a facially neutral employment practice falls more harshly on a protected group.²⁵³ 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.²⁵⁴

A plaintiff pursuing a Title VII claim may rely either on disparate impact or disparate treatment.²⁵⁵ Under the disparate treatment theory, a plaintiff must establish that the employer intentionally discriminated against a member of the protected class.²⁵⁶ To establish

a *prima facie* case of discrimination under Title II of the ADA, a plaintiff must prove that he (1) is a qualified individual under the Act; (2) is being excluded from participation in, or being denied benefits of, services, programs, or activities for which defendant is responsible or otherwise is being discriminated against by the transit provider; and (3) that such exclusion, denial of benefits, or discrimination is by reason of plaintiff's disability.²⁵⁷

b. Defendant's Burden

Under the second stage of the *McDonnell Douglas* analysis, if plaintiff has established a *prima facie* case of discrimination, the burden shifts to the defendant to "articulate some legitimate, non-discriminatory reason" for the employment action.²⁵⁸ The employer must show that the employment practice is "job related for the position in question and consistent with business necessity...."²⁵⁹ 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*,²⁶⁰ a case that evaluated whether a physical fitness test (which included a requirement that applicants complete a 1.5 mile run within 12 minutes) measured the minimum aerobic capacity necessary to perform the job of a SEPTA transit officer, and therefore constituted a "business necessity."²⁶¹ 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.²⁶² Other cases have found pursuing a reduction-in-force and reorganization of staff arising from

²⁴⁷ *Chambers*, 43 F.3d at 37.

²⁴⁸ *Id.* at 37.

²⁴⁹ 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971).

²⁵⁰ *Griggs*, 401 U.S. at 431.

²⁵¹ *Id.*

²⁵² *Dothard v. Rawlinson*, 433 U.S. 321, 99 S. Ct. 2720, 53 L. Ed. 2d 786 (1977).

²⁵³ 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 (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 (2012).

²⁵⁴ 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.

²⁵⁵ *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 986–87, 108 S. Ct. 2777, 2785, 101 L. Ed. 2d 827, 840 (1988) (quoting *Griggs v. Duke Power Co.*).

²⁵⁶ *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).

²⁵⁷ *Lightbourn v. County of El Paso, Texas*, 118 F.3d 421, 428 (5th Cir. 1997). *Melton v. Dallas Area Rapid Transit*, 326 F. Supp. 2d 767 (N.D. Tex. 2003).

²⁵⁸ 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, 254, 101 S. Ct. 1089, 1094 (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, 511, 113 S. Ct. 2742, 125 L. Ed. 2d 407, 418 (1993).

²⁵⁹ 42 U.S.C. § 2000e-k.

²⁶⁰ 181 F.3d 478 (3d Cir. 1999).

²⁶¹ 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.

²⁶² *Lanning*, 181 F.3d at 494.

budgetary constraints to be a legitimate business reason.²⁶³ But even during such legitimate workforce reductions, an employer may not dismiss employees for illegitimate discriminatory reasons.²⁶⁴ Other courts have found that “poor work performance, abuse of company time, and other rule violations” constitute a legitimate reason for dismissal.²⁶⁵

In *El v. SEPTA*,²⁶⁶ plaintiff alleged that SEPTA's hiring policy had a disparate impact because African Americans and Hispanics were more likely to have a criminal record and they were more likely to run afoul of the policy that refuses to hire applications for employment with a serious criminal record. SEPTA responded by submitting three expert reports that showed high rates of recidivism in the first 3 years of release from prison. SEPTA's policy was deemed by the court consistent with business necessity and racially not discriminatory.²⁶⁷

c. Plaintiff's Rebuttal

Under the third and final step of the *McDonnell Douglas* analysis, if the defendant provides a nondiscriminatory reason for the employment action, the presumption of discrimination “simply drops out of the picture,”²⁶⁸ and the governing standard is whether the evidence, taken as a whole, reasonably supports an inference of intentional discrimination.²⁶⁹ The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated remains at all times with the plaintiff.²⁷⁰

²⁶³ *Duncan v. N.Y. City Transit Auth.*, 127 F. Supp. 2d 354 (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).

²⁶⁴ *Maresco v. Evans Chemetics*, 964 F.2d 106, 111 (2d Cir. 1992).

²⁶⁵ *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 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.

²⁶⁶ *El v. SEPTA*, 479 F.3d 232 (3d Cir. 2006).

²⁶⁷ A civil rights employment discrimination claim also failed in *Chung v. WMATA*, 2007 U.S. Dist. LEXIS 28489 (D.D.C. 2007).

²⁶⁸ *St. Mary's Honor Ctr.*, 509 U.S. at 511.

²⁶⁹ *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

²⁷⁰ *Stockett v. Muncie Ind. Transit System*, 221 F.3d 997, 1000 (7th Cir. 2000).

Specifically, the plaintiff must prove that the legitimate reasons offered by the defendant were not its true reasons, but were instead a pretext²⁷¹ for discrimination.²⁷² 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.²⁷³ Plaintiff must prove through either direct, 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.²⁷⁴ The plaintiff may also prevail if he or she can prove that an alternative employment

²⁷¹ “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)).

²⁷² *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (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*, 509 U.S. at 515. 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.*, 201 F.3d 430 (2d Cir. 1999) (Unpublished). 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 non-discriminatory reasons for transfer.

²⁷³ *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 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.

²⁷⁴ *Gallo v. Prudential Residential Services*, 22 F.3d 1219, 1255 (2d Cir. 1994). *St. Mary's Honor Ctr.*, 509 U.S. at 515.

practice with a less disparate impact would also serve the employer's legitimate business interest.²⁷⁵

4. Retaliation Claims

Retaliation claims may arise under (1) the First Amendment to the United States Constitution; (2) similar provisions of state constitutions; (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.²⁷⁶ An employer may not lawfully retaliate against an employee for the exercise of his or her free speech rights.²⁷⁷ Such a claim against a public transit operator can be brought pursuant to 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, which balances 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 retaliated against because of such speech.²⁷⁸ The fundamental question is whether the speech in question may be "fairly characterized as constituting speech on a matter of public concern."²⁷⁹ Whether particular speech addresses a matter of public concern must be determined by the content, form, and context of the statement.²⁸⁰ 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.²⁸¹

²⁷⁵ *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975).

²⁷⁶ *Rankin v. McPherson*, 483 U.S. 378, 383, 107 S. Ct. 2891, 2896, 97 L. Ed. 2d 315, 323 (1987); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 282-84, 97 S. Ct. 568, 574, 50 L. Ed. 2d 471, 481 (1977).

²⁷⁷ *Connick v. Myers*, 461 U.S. 138, 140, 103 S. Ct. 1684, 1686, 75 L. Ed. 2d 708, 715 (1983) ("A public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment.").

²⁷⁸ *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1058 (2d Cir. 1993).

²⁷⁹ *Myers*, 461 U.S. at 146.

²⁸⁰ *Id.* at 147-8 (1983).

²⁸¹ *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.:

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."²⁸² 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);²⁸³ (2) such participation is known to the retaliator;²⁸⁴ (3) an adverse employment action based on the employee's activity;²⁸⁵ and (4) a causal connection

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].

²⁸² 42 U.S.C. § 2000e-3(a).

²⁸³ 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).

²⁸⁴ 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).

²⁸⁵ 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.

between the protected activity and the employment action.²⁸⁶ If plaintiff proves a *prima facie* case of retaliation, the burden shifts to the defendant in the *McDonnell Douglas* manner described above to demonstrate a legitimate, nondiscriminatory reason for the adverse employment action.²⁸⁷ If the defendant does so, the plaintiff must prove that the defendant's proffered reason was merely a pretext for retaliation.²⁸⁸

For example, in *Adams v. New Jersey Transit Rail Operations*,²⁸⁹ 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.²⁹⁰

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.²⁹¹ 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.²⁹² 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.²⁹³ To determine whether the environment is hostile, the conduct must be examined in the totality of the circum-

stances.²⁹⁴ In assessing whether a hostile environment exists, one must consider the "quantity, frequency, and severity of the racial, ethnic, or sexist slurs,"²⁹⁵ and whether it interferes unreasonably with an employee's work performance.²⁹⁶

Isolated or sporadic incidents of discrimination do not usually create an unlawful sexually or racially hostile environment in violation of Title VII.²⁹⁷ For example, isolated verbal abuse, intimidation, and racial epithets without more may not give rise to a Title VII claim.²⁹⁸ 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."²⁹⁹ The harassment must be "extreme."³⁰⁰ 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.³⁰¹

In addition to demonstrating a hostile environment, plaintiffs must impute such harassment to the employer. An employer is liable for a supervisor's harass-

²⁹⁴ *Kotcher v. Rosa and Sullivan Appliance Ctr.*, 957 F.2d 59, 63 (2d Cir. 1992).

²⁹⁵ *Vore v. Indiana Bell Tel. Co., Inc.*, 32 F.3d 1161, 1164 (7th Cir. 1994).

²⁹⁶ *Harris*, 510 U.S. at 23.

²⁹⁷ *Baskerville v. Culligan Intern. Co.*, 50 F.3d 428, 430-31 (7th Cir. 1995).

²⁹⁸ *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 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 was 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.").

²⁹⁹ *Harris*, 510 U.S. at 21 (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986)).

³⁰⁰ *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998).

³⁰¹ *Castro v. Local 1199*, 964 F. Supp. 719 (S.D.N.Y. 1997).

²⁸⁶ *DeCintio v. Westchester County Medical Center*, 821 F.2d 111, 115 (2d Cir.). 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).

²⁸⁷ 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).

²⁸⁸ *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); *aff'd Sotolongo v. N.Y. City Transit Auth.*, 216 F.3d 1073 (2d Cir. 2000).

²⁸⁹ 2000 U.S. Dist. LEXIS 2154 (S.D.N.Y. 2000).

²⁹⁰ *Id.* at 47.

²⁹¹ *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65, 106 S. Ct. 2399, 2404-05, 91 L. Ed. 2d 49, 60 (1986).

²⁹² *Harris v. Forklift System, Inc.*, 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993).

²⁹³ *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986).

ment if his or her acts fell within the scope of his authority or were foreseeable, and the employer failed to take remedial action.³⁰² 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.³⁰³ Appropriate action must be prompt, and likely to prevent future harassment.³⁰⁴ As the U.S. Supreme Court held in *Faragher v. City of Boca Raton*,³⁰⁵

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 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."³⁰⁶ The failure of the employee to report a racial epithet to the employer may thwart the imputation of liability.³⁰⁷

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.³⁰⁸ 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

preventative or corrective opportunities provided by the employer or to avoid harm otherwise."³⁰⁹

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.³¹⁰ 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*³¹¹ involved a claim of racial discrimination by an African-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.³¹² 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...."³¹³

³⁰⁹ *Faragher*, 524 U.S. at 807 (holding the city vicariously liable for harassment and discrimination by the plaintiff's supervisors and concluding any affirmative defense would fail because the city failed to clarify or discuss its policy on harassment with its employees).

³¹⁰ *Alston v. N.Y. City Transit Auth.*, 14 F. Supp. 2d 308 (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). See also *Godbold v. Edmond Transit Management, Inc.*, 2013 U.S. Dist. 260 (W.D. Okla. 2013).

³¹¹ 60 F. Supp. 2d 23 (E.D.N.Y. 1999).

³¹² *Id.* at 25.

³¹³ *Id.* 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

³⁰² *Williams v. Banning*, 72 F.3d 552, 555 (7th Cir. 1995). *Burlington Indus. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998). *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463 (7th Cir. 1990).

³⁰³ *Burlington Indus., Inc.*, 524 U.S. 742.

³⁰⁴ *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990).

³⁰⁵ 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998).

³⁰⁶ *Id.* at 807.

³⁰⁷ *Robinson v. Chicago Transit Auth.*, 1999 U.S. Dist. LEXIS 8994 (N.D. Ill. 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 (N.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.)

³⁰⁸ *Burlington Indus.*, 524 U.S. at 749.

In *de Silva v. New York City Transit Agency*,³¹⁴ 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 was 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.³¹⁵ 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.³¹⁶

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."³¹⁷

In *Stockett v. Muncie Indiana Transit System*,³¹⁸ 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 being under the influence of a controlled substance, this established 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. The employee also failed to prove that non-black employees were treated more favorably.³¹⁹

court held that plaintiff failed to produce evidence proving defendant's reasons for dismissal were pretextual, *Id.* at 7.

³¹⁴ 1999 U.S. Dist. Lexis 19998 (E.D.N.Y. 1999).

³¹⁵ *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, 108 S. Ct. 2777, 2790, 101 L. Ed. 2d 827, 846 (1988); see also *Dimino v. N.Y. City Transit Auth.*, 64 F. Supp. 2d 136, 157 (E.D.N.Y. 1999).

³¹⁶ *De Silva*, 1999 U.S. Dist. Lexis 19998.

³¹⁷ *Brown v. D.C. Transit System*, 523 F.2d 725, 728 (D.C. Cir. 1975).

³¹⁸ *Stockett v. Muncie Ind. Transit Sys.*, 221 F.3d 997 (7th Cir. 2000).

³¹⁹ *Id.* at 997, 1002. *But see Shazor v. Professional Transit Management, Ltd.*, 744 F.3d 948 (6th Cir.).

Sometimes transportation unions find themselves sued for discrimination.³²⁰ 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."³²¹ 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.³²² 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.³²³

7. Reverse Discrimination

In the employment context, to establish a *prima facie* case of reverse discrimination, the plaintiff must prove that: (1) he or she belongs to a class; (2) he or she was qualified for and applied for a job or a promotion; (3) he or she was rejected despite his/her qualifications; and (4) other employees with equal or lesser qualifications who were members of a protected minority were hired or promoted.³²⁴ A typical case is where a Caucasian employee alleges evidence that African American employees were treated more favorably than Caucasians on the basis of race.³²⁵

One transit case in this regard is *Malabed v. North Slope Borough*,³²⁶ in which Defendant 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 was 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.

³²⁰ 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).

³²¹ *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S. Ct. 903, 910, 17 L. Ed. 2d 842, 850 (1967); *Parker v. Metro. Transp. Auth.*, 97 F. Supp. 2d 437 (S.D. N.Y. 2000).

³²² *Gorham v. Transit Workers Union of America*, 1999 U.S. Dist. LEXIS 3573 (S.D.N.Y. 1999).

³²³ *Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65, 76, 111 S. Ct. 1127, 1134, 113 L. Ed. 2d 51, 63 (1991).

³²⁴ See *Roberts v. Gadsden Mem'l Hosp.*, 1988 U.S. App. LEXIS 19507 (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).

³²⁵ See, e.g., *Schlesinger v. N.Y. City Transit Auth.*, 2001 WL 62868 (S.D.N.Y. 2001).

³²⁶ 42 F. Supp. 2d 927 (D. Alaska 1999).

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,³²⁷ 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.³²⁸ In so doing, the court cited *City of Richmond v. J.A. Croson Co.*,³²⁹ 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.³³⁰ However, one must recognize that reverse discrimination cases are difficult for plaintiffs to prove.

8. National Origin Discrimination

Title VII also prohibits employment discrimination on the basis of the employee's national origin.³³¹ 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 that the employees are informed of the rule and the consequences for its violation.³³² 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 have been struck down by the U.S. Supreme Court,³³³ and were later repealed.³³⁴

³²⁷ 42 U.S.C. § 2000e-2(i).

³²⁸ *Malabed*, 241 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.

³²⁹ 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989).

³³⁰ *Id.* at 498–501.

³³¹ See Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*; 29 C.F.R. pt. 1606 (2012).

³³² U.S. Equal Employment Opportunity Commission, *Federal Laws Prohibiting Job Discrimination, Questions and Answers*, <http://www.eeoc.gov/facts/qanda.html>; 29 C.F.R. § 1606.7 (2012). (Last visited July 2014).

³³³ *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998).

³³⁴ Sex Discrimination Guidelines and National Origin Discrimination Guidelines, 64 Fed. Reg. 58,333 (Oct. 29, 1999).

In *Sotolongo v. New York City Transit Authority*,³³⁵ 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."³³⁶

Further, with respect to language, Executive Order No. 13166,³³⁷ issued in 2000, "Improving Access to Services for Persons with Limited English Proficiency," issued on August 11, 2000, and DOT's "Policy Guidance Concerning Recipients' Responsibilities to Limited English Proficient (LEP) Persons," issued in 2005, identify the responsibilities of FTA grantees to persons with limited English proficiency, pursuant to Title VI of the Civil Rights Act of 1964.³³⁸

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.³³⁹

In *Mateen v. Connecticut Transit*,³⁴⁰ 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 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."³⁴¹

In another 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 Ad-

³³⁵ *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 332.

³³⁶ *Sotolongo*, 63 F. Supp. 2d at 360.

³³⁷ Executive Order No. 13166, "Improving Access to Services for Persons with Limited English Proficiency" (Aug. 11, 2000), 42 U.S.C. § 2000d-1 note.

³³⁸ See FTA Circular 4702.1B, "Title VI and Title VI-Dependent Guidelines for FTA Recipients," 05-13-07.

³³⁹ U.S. Equal Employment Opportunity Commission, *supra* note 332; 29 C.F.R. pt. 1605 (2012).

³⁴⁰ 550 F. Supp. 52 (D. Conn. 1982).

³⁴¹ *Id.* at 55.

ventist, 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 schedule 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.³⁴²

There have been a number of 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*,³⁴³ 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. One transit case on point is *Kalsi v. New York City Transit Authority*.³⁴⁴ 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 in legitimate safety concerns, and that Mr. Kalsi's dismissal was not religiously motivated.³⁴⁵

10. Sexual Discrimination

Title VII of the Civil Rights Act of 1964³⁴⁶ prohibits discrimination on the basis of sex.³⁴⁷ 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 position 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.³⁴⁸ Employers also may not discriminate against employees on the basis of pregnancy, childbirth, and related medical conditions,³⁴⁹ nor 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.³⁵⁰

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.³⁵¹ However, such comments, if made contemporaneously with the employment decision in question, may constitute sexual discrimination.³⁵² 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.³⁵³

The Pregnancy Discrimination Act (PDA) declares that discrimination against a woman because of her pregnancy is sex discrimination.³⁵⁴ It prohibits policies that discriminate against fertile women, but not fertile men.³⁵⁵ Unless pregnant women differ from other employees in their ability or inability to work, they must

³⁴⁸ *Davis v. Chevron USA, Inc.*, 14 F.3d 1082, 1087 (5th Cir. 1994).

³⁴⁹ See the Family and Medical Leave Act, 29 U.S.C. § 2611 (2009). See also *Rowe v. Laidlaw Transit, Inc.*, 244 F.3d 1115 (9th Cir. 2001). See generally the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), discussed below.

³⁵⁰ See the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56, codified at 29 U.S.C. § 206(d) (2007). *Garcia v. Chicago Transit Auth.*, 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, 94 S. Ct. 2223, 41 L. Ed. 2d 1 (1974) for a good example of a wage act case in which men were collecting greater salaries for equal work on a nightshift.

³⁵¹ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S. Ct. 1775, 1791, 104 L. Ed. 2d 268, 288 (1989).

³⁵² *Schrean v. Chicago Transit Auth.*, 1999 U.S. Dist. LEXIS 16614, at 19 (N.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."), *Id.* at 17.

³⁵³ *Id.*

³⁵⁴ 42 U.S.C. § 2000e(k). See, e.g., *Legrand v. N.Y. City Transit Auth.*, 205 F.3d 1323 (2d Cir. 2000). (Unpublished).

³⁵⁵ *Dimino v. N.Y. City Transit Auth.*, 64 F. Supp. 2d 136 (E.D. N.Y. 1999).

³⁴² In the Matter of N.Y. City Transit Auth. v. State of N.Y. Executive Dep't, 211 A.D.2d 220, 627 N.Y.S.2d 360 (N.Y.S. Ct. 1995).

³⁴³ *Goldman v. Weinberger*, 475 U.S. 503, 106 S. Ct. 1310, 89 L. Ed. 2d 478 (1986).

³⁴⁴ 62 F. Supp. 2d 745 (E.D.N.Y. 1998).

³⁴⁵ A similar suit brought under Section 707 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-6, alleging that the Metropolitan Transportation Authority (MTA) and the New York City Transit Authority (TA) pursued policies that discriminate against employees whose religious beliefs require them to wear certain headwear, such as turbans and khimars, also failed in *United States v. N.Y. City Transit Auth.*, 2010 U.S. Dist. LEXIS 102704 (E.D.N.Y. 2010).

³⁴⁶ 42 U.S.C. 2000 *et seq.*

³⁴⁷ See generally Maxine N. 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).

be treated the same as all other employees.³⁵⁶ The PDA neither requires the creation of special programs for pregnant women, nor mandates special treatment for them.³⁵⁷ 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.³⁵⁸

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.³⁵⁹ 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 employ-

³⁵⁶ *International Union UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 111 S. Ct. 1196, 113 L. Ed. 2d 158 (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).

³⁵⁷ *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, 97 S. Ct. 401, 50 L. Ed. 2d 343 (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).

³⁵⁸ *Dimino v. N.Y. City Transit Auth.*, 64 F. Supp. 2d 136, 147 (E.D. N.Y. 1999). *See also* *International Union UAW v. Johnson Controls*, 499 U.S. 187, 111 S. Ct. 1196, 113 L. Ed. 2d 158 (1991), in which an employer implemented a policy that excluded women who were pregnant or capable of bearing children from being placed in jobs involving lead exposure. The court held that employer's fetal-protection policy explicitly discriminated against women on the basis of their sex. The court ruled that this sex-based discrimination was not permissible. Under the Pregnancy Discrimination Act, 42 U.S.C.S. § 2000e(k), for all Title VII purposes, discrimination based on a woman's pregnancy was on its face discrimination because of her sex. Despite evidence about the debilitating effect of lead exposure on the male reproductive system, employer's policy only addressed female employees. Thus, the policy was not neutral. The absence of a malevolent notice did not convert the facially discriminatory policy into a neutral policy with a discriminatory effect. The court also held that this discrimination could not be justified as a BFOQ. Discrimination under the safety exception to the BFOQ was allowed only in narrow circumstances. Danger to the women did not justify the discrimination.

³⁵⁹ U.S. Equal Employment Opportunity Commission, *supra* note 332.

ment 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.³⁶⁰

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.³⁶¹ To provide a defense, the anti-harassment policy (1) must be written, (2) must be widely disseminated, (3) must be uniformly enforced regardless of the position of the complainant and the respondent within the organization, and (4) 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*,³⁶² 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.³⁶³

12. Age Discrimination

The Age Discrimination in Employment Act of 1967 (ADEA),³⁶⁴ and the Age Discrimination Act of 1975³⁶⁵ 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.³⁶⁶

³⁶⁰ *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998).

³⁶¹ *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998).

³⁶² 191 F.3d 283 (2d Cir. 1999).

³⁶³ *Id.* at 295. A co-worker's allegations of physical actions qualified as unwelcome sexual conduct that established a hostile environment, and the supervisor was found to have maliciously thwarted any legitimate investigation thereof in *Berry v. Chicago Transit Auth.*, 618 F.3d 688 (7th Cir. 2010).

³⁶⁴ 29 U.S.C. § 621 *et seq.* (2006).

³⁶⁵ 42 U.S.C. §§ 6101 *et seq.*

³⁶⁶ U.S. Equal Employment Opportunity Commission, *supra* note 332.

The ADEA³⁶⁷ protects employees who are at least 40 years old from discrimination on the basis of their age.³⁶⁸ 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.”³⁶⁹

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 younger person, or the position remains open.³⁷⁰ 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.³⁷¹

For example, in *Ralkin v. New York City Transit Authority*,³⁷² 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.³⁷³ 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....”³⁷⁴ 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.³⁷⁵

The plaintiff fared better in *Epter v. New York City Transit Authority*,³⁷⁶ 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).³⁷⁷ 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.³⁷⁸

In another case, however, the U.S. Supreme Court held that although the ADEA reflects a clear intent to abrogate a state’s sovereign immunity, this abrogation exceeded Congress’s authority under the 11th Amendment of the U.S. Constitution.³⁷⁹ In *Kimel v. Florida Board of Regents*,³⁸⁰ 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.³⁸¹ Neither the 14th Amendment nor the Commerce Clause conferred on Congress the authority to arrest age discrimination. Thus, a public transit operator that enjoys state sovereign immunity may be shielded from suit under the ADEA.³⁸² This is true when decisions concerning the hiring, firing, and disciplining of employees are discre-

³⁶⁷ 29 U.S.C. § 621–34.

³⁶⁸ See *Brown v. Mass Transit Admin.*, Not Reported in F. Supp. 2d, 2013 U.S. Dist. LEXIS 50266 (D. Md. 2013).

³⁶⁹ 29 U.S.C. § 623(a) (2008).

³⁷⁰ *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.

³⁷¹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Metz v. Transit Mix, Inc.*, 828 F.2d 1202 (7th Cir. 1987).

³⁷² *Ralkin v. N.Y. City Transit Auth.*, 62 F. Supp. 2d 989 (E.D. N.Y. 1999)

³⁷³ 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.

³⁷⁴ *Ralkin v. N.Y. City Transit Auth.*, 62 F. Supp. 2d 989, 1002 (E.D. N.Y. 1999).

³⁷⁵ *Heuser v. Metro. Transit Auth.*, 173 F.3d 844 (2d Cir. 1999).

³⁷⁶ 127 F. Supp. 2d 384 (E.D.N.Y. 2001).

³⁷⁷ 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).

³⁷⁸ 127 F. Supp. 2d 384 (E.D.N.Y. 2001).

³⁷⁹ *Epter v. Fla. Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000).

³⁸⁰ *Epter*, 528 U.S. 62.

³⁸¹ See also *Federal Maritime Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 122 S. Ct. 1864, 152 L. Ed. 2d 962 (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.

³⁸² *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).

tionary (as opposed to ministerial) in nature, and therefore are immune from judicial review.³⁸³ Where the public transit operator is not considered an arm of the state for 11th Amendment purposes, however, it enjoys no such immunity.³⁸⁴

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 1972³⁸⁵ and the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970.³⁸⁶ 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, requir-

³⁸³ *Burkhart v. WMATA*, 112 F.3d 1207 (D.C. Cir. 1997) (hiring and supervision of a bus driver is discretionary in nature; court denied claim of negligent hiring, training, and supervision in a case of a physical altercation between a deaf passenger and a bus driver and thus held WMATA not 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, 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).

³⁸⁴ *Williams v. Dallas Area Rapid Transit*, 242 F.3d 215 (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).

³⁸⁵ Pub. L. No. 92-255, 86 Stat. 65 (Mar. 21, 1972), codified at 21 U.S.C. § 1101, *et seq.* It was recodified with modifications in the Alcohol, Drug Abuse and Mental Health Administration Reorganization Act of 1992, Pub. L. No. 102-321, 106 Stat. 323.

³⁸⁶ Pub. L. No. 91-616, Dec. 31, 1970; Public Health Service Act of 1912, 42 U.S.C. § 4541 *et seq.*

ing an employee to submit to a drug test may be an adverse employment action in violation of Title VII.³⁸⁷ Although discriminatory drug testing is prohibited by federal statute, nondiscriminatory drug testing is required of certain "safety sensitive" transportation employees.³⁸⁸ These requirements are discussed in detail above in Section 7—Safety.

In 1991, Congress passed the Omnibus Transportation Employee Testing Act.³⁸⁹ In response DOT issued regulations for the "safety-sensitive"³⁹⁰ workers of FHWA, FTA, FAA, FRA, FMCSA, and the RSPA.³⁹¹ 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.³⁹²

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

³⁸⁷ *Landon v. Nw. Airlines*, 72 F.3d 620, 624–25 (8th Cir. 1995).

³⁸⁸ Joe Maassen, *Drug Testing for Professional Drivers: It's the Law*, 13 No. 1 Complete L., S1 (1996), http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/w96maas.html.

³⁸⁹ 49 U.S.C. §§ 31301 and 31306.

³⁹⁰ The definition of "safety-sensitive" varies among the regulations for the different transportation agencies. See Department of Transportation Drug and Alcohol Testing Regulations (visited March 5, 2012), <http://www.afscme.org/members/member-resources/worker-rights/department-of-transportation-drug-and-alcohol-testing-regulations>. For example, the FHWA defines "safety-sensitive" employees as 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.*

³⁹¹ *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.

³⁹² *Testing and Documentation Procedures*, EMPLOY. DISCRIM. COORDINATOR, ¶ 26,520 (2001).

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."³⁹³ A handicapped individual is one who "[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."³⁹⁴ 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.³⁹⁵

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 who used drugs, concluding that such discrimination violated neither the Civil Rights Act of 1964 nor the Equal Protection Clause of the 14th Amendment.³⁹⁶

In *Teahan v. Metro-North Commuter Railroad*,³⁹⁷ 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

³⁹³ 29 U.S.C. § 794(a).

³⁹⁴ The ability to think and concentrate while performing the duties of a position can constitute a physical and mental impairment that substantially limits one or more of a person's major life activities for purposes of bringing a Rehabilitation Act claim. *See, e.g., Miller v. A.P. Hersman*, 759 F. Supp. 2d 1 (2011) (defendant's motion for summary judgment partially denied after plaintiff, who was suffering from depression and anxiety, brought claim under Rehabilitation Act after being discharged from position at the National Transportation Safety Board even though he requested reasonable accommodation in form of a 6-month leave of absence).

³⁹⁵ 29 U.S.C. § 706(7)(B).

³⁹⁶ *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 99 S. Ct. 1356, 59 L. Ed. 2d 587 (1979).

³⁹⁷ 951 F.2d 511 (2d Cir. 1991).

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."³⁹⁸ 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.³⁹⁹ 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.⁴⁰⁰

Additionally, regulations promulgated under the Rehabilitation Act require employers to 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).⁴⁰¹ Employers must make accommodations unless they would impose an undue hardship upon the employers. Moreover, 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."⁴⁰²

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 1964.⁴⁰³ Once it is estab-

³⁹⁸ *Id.* at 515.

³⁹⁹ *Id.* at 517.

⁴⁰⁰ *Id.* at 518 [citations omitted].

⁴⁰¹ 45 C.F.R. § 84.12-13 (2012).

⁴⁰² 41 C.F.R. § 60-741.6 (2010).

⁴⁰³ Pub. L. No. 95-602, 92 Stat. 2955 (1978). 29 U.S.C. § 794a. *Jones v. Metro. Atlanta Rapid Transit Auth.*, 681 F.2d 1376 (11th Cir. 1982).

lished 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.⁴⁰⁴

b. The Americans with Disabilities Act

The ADA⁴⁰⁵ extends the prohibition against employment discrimination of people with disabilities to private employers.⁴⁰⁶ Title I of the ADA prohibits

⁴⁰⁴ Martin Schiff, *The Americans With Disabilities Act, Its Antecedents, and Its Impact on Law Enforcement Employment*, 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).

⁴⁰⁵ 42 U.S.C. § 12101 *et seq.* (2009), Pub. L. No. 101-336, 104 Stat. 328.

⁴⁰⁶ Elizabeth Clark Morin, *Americans With Disabilities Act of 1990: Social 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*, 536 U.S. 181, 122 S. Ct. 2097, 153 L. Ed. 2d 230 (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 Rights Act of 1991. *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 119 S. Ct. 2118, 144 L. Ed. 2d 494 (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. Echazabal*, 536 U.S. 73, 122 S. Ct. 2045, 153 L. Ed. 2d 82 (2002);

- Reasonable accommodation under the ADA does not require an employer to violate established seniority rules. *U.S. Airways v. Barnett*, 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002);

- Once a claim has been filed with the EEOC, the EEOC enjoys exclusive authority over the choice of forum and prayer for relief. *EEOC v. Waffel House*, 534 U.S. 279, 122 S. Ct. 754, 151 L. Ed. 2d 755 (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, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002);

employment discrimination against disabled individuals who can do a particular job with or without reasonable accommodation. "Disability" is defined in the same way as the Rehabilitation Act of 1973, or as "a physical or mental impairment that substantially limits one or more of the major life activities of an individual."⁴⁰⁷ 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.⁴⁰⁸ 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. It does not, however, include removing the essential functions of the job.⁴⁰⁹ An employer is required 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.⁴¹⁰

- Attorneys' fees are not recoverable under the ADA 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, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (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, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001).

⁴⁰⁷ 42 U.S.C. § 12102 (2009). 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) (2012).

⁴⁰⁸ *Nash v. Chicago Transit Auth.*, 1998 U.S. Dist. LEXIS 12668 (N.D. Ill. 1998).

⁴⁰⁹ *Irby v. N.Y. City Transit Auth.*, 2000 U.S. Dist. LEXIS 15822 (S.D.N.Y. 2000). In this case, the essential functions of the job in question were those of a bus driver. The plaintiff had requested reassignment as a result of polycystic kidney disease and polycystic liver disease, which caused numerous absences. The court dismissed the plaintiff's claim of denial of reasonable accommodation, suggesting that accommodation does not include elimination of any of the essential functions of a job.

⁴¹⁰ U.S. Equal Employment Opportunity Commission, *supra* note 332. 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

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 collective bargaining agreement.⁴¹¹ 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.⁴¹² The employer is only required to 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.⁴¹³

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.⁴¹⁴ Moreover, the ADA explicitly excludes from the definition of "disability" those employees or applicants currently engaged in the illegal use of drugs.⁴¹⁵ 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.⁴¹⁶ 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.⁴¹⁷

factors considered, *see* U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (last modified October 22, 2002), <http://www.eeoc.gov/policy/docs/accommodation.html>.

⁴¹¹ *Eckles v. Consolidated Rail*, 94 F.3d 1041 (7th Cir. 1996); AMERICAN BAR ASS'N, THE RAILWAY LABOR ACT 241 (BNA Supp. 2000).

⁴¹² *Bates v. Long Island R.R. Co.*, 997 F.2d 1028, 1035 (2d Cir. 1993).

⁴¹³ *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 (D. Kan. 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).

⁴¹⁴ *Beharry v. M.T.A. N.Y. City Transit Auth.*, 1999 U.S. Dist. LEXIS 3157 (E.D.N.Y. 1999).

⁴¹⁵ 42 U.S.C. § 12114 (2009).

⁴¹⁶ 49 C.F.R. pt. 655 (2012). *See* § 10.413 for various transportation agencies' definitions of "safety-sensitive."

⁴¹⁷ *Redding v. Chicago Transit Auth.*, 2000 U.S. Dist. LEXIS 14557 (N.D. Ill. 2000).

The ADA also requires that 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."⁴¹⁸ The "otherwise qualified" standard assumes that job qualifications are readily ascertainable and measurable as "job related" and "consistent with business necessity."⁴¹⁹ Such qualifications should be measured by criteria necessary for, and substantially related to, an employee's ability to perform essential job functions.⁴²⁰ 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 guidelines⁴²¹ 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."⁴²² Thus, a qualification that a truck driver meet minimum DOT vision standards would be deemed "job related" and "consistent with business necessity," thus not subjecting an employer to a discrimination claim under the ADA.⁴²³

The employment provisions of the ADA are enforced by the EEOC, which 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.⁴²⁴

⁴¹⁸ 29 C.F.R. § 1630.2(m) (2012).

⁴¹⁹ *Wendy Wilkinson, Judicially Crafted Barriers to Bringing Suit Under the Americans With Disabilities Act*, 38 S. TEX. L. REV. 907 (1997).

⁴²⁰ *Schiff, supra* note 404.

⁴²¹ *See* <http://www.eeoc.gov/employers/index.cfm> (last visited July 2014) for a comprehensive list of issues for which EEOC offers advice.

⁴²² 42 U.S.C. § 12111 (2009); *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).

⁴²³ *See* *Albertson's, Inc. v. Kirkingberg*, 527 U.S. 555, 119 S. Ct. 2162, 144 L. Ed. 2d 518 (1999).

⁴²⁴ *Elizabeth Clark 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

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.⁴²⁵ 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.⁴²⁶ Empirical research indicates that plaintiffs have lost 92 percent of all ADA discrimination claims taken to court, and 86 percent of all claims handled by the EEOC.⁴²⁷ The ADA requires that courts interpreting the ADA and other federal disability nondiscrimination laws focus on whether the covered entity has discriminated against a person with disabilities, rather than whether the person has an impairment that falls within the technical definition of the term "disability." The Act retains the ADA's definition of "disability" as an impairment substantially limiting one

or more major life activities, a record of impairment, or being perceived as having an impairment, but subordinates its importance to the issue of discrimination.⁴²⁸

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 Interstate Commerce Commission (ICC) found that racial discrimination by railroads violated the antidiscrimination provisions of the Interstate Commerce Act.⁴²⁹ 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*.⁴³⁰ When blatant acts of discrimination and inequality arose, the ICC took action to assure substantial equality in treatment of passengers.⁴³¹ As the motorbus industry grew, it followed a similar pattern.⁴³² Many states passed "Jim Crow" laws mandating racially separate but equal facilities.⁴³³ Yet it became increasingly apparent that separate transportation accommodations inherently could not be equal.

In 1955, Rosa Parks took a seat in the "white" 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

Alexander v. Sandoval, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

⁴²⁵ 42 U.S.C. §§ 2000e-5(e)(1), 12117(a).

⁴²⁶ 42 U.S.C. §§ 12101(2)(A)-(C), 12111(8), 12112(a) (2009). *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*, 45 F. 3d at 361.

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, 99 S. Ct. 2361, 60 L. Ed. 2d 980 (1979)). The Court went on to hold that, assuming the defendant [meets] its burden of proof "[t]he 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." *Id.*

⁴²⁷ 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).

⁴²⁸ The ADA Amendments of 2008 overturned the U.S. Supreme Court interpretations in *Toyota Motor Mfg., Ky., v. Williams*, 534 U.S. 184, 122 S. Ct. 681, 75 L. Ed. 2d 615 (2002), and *Sutton v. United Air Lines*, 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999). See also EEOC Amendments to Employment Provisions of the ADA, 29 C.F.R. pt. 1630, Rules and Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, As Amended, 76 Fed. Reg. 16,978 (Mar. 25, 2011).

⁴²⁹ *Council v. Western & Atlantic R.R. Co.*, 1 I.C.C. 339 (1887); *Heard v. Georgia R.R. Co.*, 1 I.C.C. 428 (1888).

⁴³⁰ 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed 256 (1896).

⁴³¹ See *Mitchell v. United States*, 313 U.S. 80, 61 S. Ct. 873, 85 L. Ed. 1201 (1941).

⁴³² *Day v. Atlantic Greyhound Corp.*, 171 F.2d 59 (4th Cir. 1948).

⁴³³ 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).

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 both the city ordinance and the state statute compelling segregation of intrastate passenger transportation.⁴³⁴

Relying on the U.S. Supreme Court decision in *Brown v. Board of Education*⁴³⁵ (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.⁴³⁶ 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.⁴³⁷

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.⁴³⁸ 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 as well.⁴³⁹ The “separate but equal” doctrine came crashing down in public and

private transportation venues.⁴⁴⁰ State and local laws mandating segregation in transportation facilities were struck down, and injunctions were issued prohibiting their enforcement.⁴⁴¹ Transit and municipal and inter-city companies were ordered to desegregate on Equal Protection Clause and Commerce Clause grounds.⁴⁴² 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.⁴⁴³ 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.”⁴⁴⁴

In this context, one must understand the DOT’s civil rights program and the role of the FTA Office of Civil Rights. The civil rights program is a vital part of the DOT’s civil rights operation, which includes both obligations to its employees and compliance with DOT’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 DOT transit grantees.

Transit grantees also 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

⁴³⁴ 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* 313 (Columbia University Press, 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).

⁴³⁵ 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).

⁴³⁶ *N.A.A.C.P. v. St. Louis-San Francisco 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).

⁴³⁷ *United States v. City of Shreveport*, 210 F. Supp. 708 (D. La. 1962).

⁴³⁸ *Henderson v. United States*, 339 U.S. 816, 70 S. Ct. 843, 94 L. Ed. 1302 (1950).

⁴³⁹ *Boynton v. Va.*, 364 U.S. 454, 81 S. Ct. 182, 5 L. Ed. 2d 206 (1960).

⁴⁴⁰ *Morgan v. Va.*, 328 U.S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317 (1946); *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956). The “Separate but Equal” doctrine was rejected in *Brown v. Board of Educ.*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).

⁴⁴¹ See, e.g., *United States v. City of Shreveport*, 210 F. Supp. 708 (W.D. La. 1962).

⁴⁴² See, e.g., *Boman v. Birmingham Transit Co.*, 280 F.2d 531 (5th Cir. 1960); *Morgan v. Va.*, 328 U.S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317 (1946); *Lewis v. Greyhound Corp.*, 199 F. Supp. 210 (N.D. Ala. 1961).

⁴⁴³ 49 C.F.R. pt. 21, App. C(a)(3)(iii) (2012).

⁴⁴⁴ VAN DE WALLE, *supra* note 55, at 16.

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 non-compliance, 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.⁴⁴⁵

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 over funded the road network (used primarily by nonminorities) while under-funding the bus system (used primarily by minorities). Similarly, 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.

In every case, although the complaining parties were able to show a disparate impact, the transportation agency showed a legitimate (nondiscriminatory) business justification. For example, in *Darensburg v. Metropolitan Transportation Commission*,⁴⁴⁶ plaintiffs filed a class action contending that MTC diverted funding from existing bus operations to costly expansion and rehabilitation of rail services, and that therefore, its funding decisions disproportionately harmed the district's predominately minority ridership. In response, MTC demonstrated a substantial legitimate justification for the manner in which it allocated funds. Therefore, the burden shifted back to plaintiffs to establish an equally effective alternative with less racially disproportionate impact. The court concluded that plaintiffs failed to prove that these alternatives would be equally effective while causing less racial disparity. The Ninth Circuit U.S. Court of Appeals affirmed.⁴⁴⁷

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."⁴⁴⁸ In this regard, the re-

ipient 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.⁴⁴⁹ Minority groups have alleged discrimination in service based on fare increases, inequitable transportation improvements, and inequitable transportation funding.⁴⁵⁰

In 1994, President Clinton signed an Executive Order to ensure that federal agencies address the disproportionate environmental effects on minority and low-income populations.⁴⁵¹ In 1997, DOT issued its own order with guidelines for incorporating this Executive

⁴⁴⁹ 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).

⁴⁵⁰ *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 U.S. Dist. LEXIS 10895 (E.D. Pa. 1990), *aff'd without opinion* 935 F.2d 1280 (staying a motion for summary judgment pending settlement negotiations regarding the use of federal subsidies in transportation planning).

⁴⁵¹ *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994). The Environmental Justice Executive Order (EO) 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (EO 12898), addresses fair treatment of all people regardless of race, color, ethnicity, or income with respect to the benefits and burdens of environmentally related programs, policies and activities. EO 12898 directs each federal agency "to 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 EO and accompanying Presidential Memorandum provide that agencies should use existing laws, such as the National Environmental Policy Act (NEPA) and Title VI of the Civil Rights Act of 1964, to achieve this mission. FTA has integrated Title VI and Environmental Justice considerations into its general grant program.

⁴⁴⁵ VAN DE WALLE, *supra* note 55, at 16.

⁴⁴⁶ *Darensburg v. Metro. Transp. Comm'n*, 611 F. Supp. 2d 994 (N.D. Cal. 2009).

⁴⁴⁷ *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511 (9th Cir. 2011).

⁴⁴⁸ *Id.* at 522.

Order into transportation planning.⁴⁵² The DOT order seeks to achieve environmental justice by integrating NEPA and Title VI into the planning of all transportation projects.⁴⁵³ The DOT order specifically requires that transportation agencies address “adverse effects” on minority and low-income populations.⁴⁵⁴ 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 nonprofit 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.⁴⁵⁵

DOT and other transit authorities must address environmental justice and equity under the both 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, for example, minority bus riders of the Los Angeles County MTA filed a class action lawsuit under Title VI and the 14th Amendment.⁴⁵⁶ The plaintiffs alleged that the MTA spent a disproportionate amount of its budget on suburban rail lines and buses and neglected inner city buses while increasing bus fares.⁴⁵⁷ 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.⁴⁵⁸ 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.⁴⁵⁹ 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.⁴⁶⁰ The plaintiffs also presented MTA documents that acknowledged severe overcrowding on buses up to 140 percent above allowable capacity.⁴⁶¹ 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.⁴⁶²

Eventually, in 1996, the parties signed a consent decree to settle the lawsuit.⁴⁶³ The consent decree required the MTA to purchase 248 additional buses to prevent overcrowding and to continue the low monthly and daily fares.⁴⁶⁴ However, 14 months after signing the consent decree, the MTA failed to meet its requirements.⁴⁶⁵ Specifically, the MTA had not acted to reduce the overcrowding problems on the buses.⁴⁶⁶ The MTA argued that it had insufficient funds to purchase new buses and, therefore, could not meet its targeted goal.⁴⁶⁷ In 2001, the Ninth Circuit affirmed an earlier district court decision and ordered the MTA to comply with the consent decree.⁴⁶⁸ In this case, minority passengers were successful under Title VI and achieved a degree of transportation equality.⁴⁶⁹

By comparison, 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 increases.⁴⁷⁰ 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

⁴⁵² *DOT Order on Environmental Justice to Address Environmental Justice in Minority Populations and Low-Income Populations*, DOT Order No. 5610.2 (Apr. 15, 1997).

⁴⁵³ U.S. Dep’t of Transp., *The Facts: U.S. Department of Transportation Order on Environmental Justice* (last visited July 2014), <http://www.fhwa.dot.gov/environment/ejustice/facts/index.htm>. http://www.fhwa.dot.gov/environment/environmental_justice/facts/dot_ord.cfm.

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.*; *DOT Order on Environmental Justice to Address Environmental Justice in Minority Populations and Low-Income Populations*, DOT Order No. 5610.2 (Apr. 15, 1997) (superceded Aug. 4, 2011, by DOT Order No. 5610.2a).

⁴⁵⁶ *Labor/Community Strategy Center v. L.A. County Metro. Transp. Auth.*, 263 F.3d 1041, 1043 (9th Cir. 2001).

⁴⁵⁷ *Id.*

⁴⁵⁸ Environmental Defense Fund, *Fighting for Equality in Public Transit: Labor Community Strategy Center v. MTA*, Jan. 1, 1999.

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.*

⁴⁶² *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 construction of new rail lines to service predominantly minority areas; and the absence of rail stops in minority areas.

⁴⁶³ *Labor/Community Strategy Center*, 263 F.3d at 1044–45.

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.* at 1045.

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.* at 1049.

⁴⁶⁸ *Id.* at 1051.

⁴⁶⁹ See also *Buhendwa v. Regional Transp.*, 553 Fed. Appx. 768, 2014 U.S. App. LEXIS 241 (D. Colo. 2013).

⁴⁷⁰ *N.Y. Urban League, Inc. v. N.Y.*, 71 F.3d 1031 (2d Cir. 1995).

commuter lines.⁴⁷¹ 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.⁴⁷² The subways and buses served the predominantly minority, inner-city population and the commuter lines served a primarily suburban, white population.⁴⁷³ The district court found that the protected minority plaintiffs were disparately impacted by the fare increases and entered a preliminary injunction to enjoin the increases.⁴⁷⁴ However, on appeal, the Second Circuit reversed the district court's decision and held that the plaintiffs were not likely to succeed on the merits of the case.⁴⁷⁵

The Second Circuit looked beyond the fare increases and examined the larger administrative and financial situation of the transportation authorities.⁴⁷⁶ 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.⁴⁷⁷ 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.⁴⁷⁸ This decision continued what some experts conclude is a "legacy of inequity" in the New York transportation system.⁴⁷⁹

As a result of the litigation in New York, Los Angeles, and other cities like Philadelphia and Atlanta, transit agencies should be aware that proposed increases or changes in their fare structures or in their routes may result in litigation if such changes are perceived to have an unjustified adverse impact on minorities.⁴⁸⁰ 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...."⁴⁸¹ Federal agencies such as DOT have adopted environmental justice strategies and promulgated regulations to accomplish the goals of the Executive Order.⁴⁸²

In 2012, the DOT issued DOT Order 5610.2(a), Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,⁴⁸³ updating DOT's original Environmental Justice Order, which was published in 1997. The updated order explains how the principles of environmental justice are to be integrated into DOT planning, programming, rulemaking, and policy formation. The DOT Order requires FTA to consider environmental justice when administering the requirements of NEPA, Title VI of the Civil Rights Act of 1964, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Congressionally authorized planning requirements, and other laws, regulations, and executive orders that address or affect infrastructure planning and decision-making.

Three months later, the FTA issued Circular 4703.1 to provide policy guidance on the implementation of the Environmental Justice mandate for State DOTs, MPOs, and transit providers on issues of:

1. How to fully engage EJ populations in the transportation decision-making process,
2. How to determine whether EJ populations would be subjected to disproportionately high and adverse human health or environmental effects of a public transportation project, policy, or activity, and
3. How to avoid, minimize, or mitigate these effects.⁴⁸⁴

DOT and FTA embrace the following principles:

⁴⁷¹ *Id.* at 1035.

⁴⁷² *Id.*

⁴⁷³ *Id.*

⁴⁷⁴ *Id.* at 1035, 1037.

⁴⁷⁵ *Id.* at 1036.

⁴⁷⁶ *Id.* at 1037.

⁴⁷⁷ *Id.* at 1040.

⁴⁷⁸ *Id.* at 1039.

⁴⁷⁹ Klesh, *supra* note 449, at 649, 677.

⁴⁸⁰ See Van De Walle, *supra* note 55, at 456; see also Committee for a Better North Phila. v. Southeastern Pa. Transp. Auth., 1990 U.S. Dist. LEXIS 10895 (E.D. Pa. 1990) (challenging the use of federal subsidies in transportation planning); Klesh, *supra* note 449, 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).

⁴⁸¹ *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

⁴⁸² See ch. 3 of this volume, *Transit Law*, for a discussion of the regulations promulgated in August 2012 to comply with the Executive Order; Federal Highway Administration, *The Facts—Nondiscrimination: Title VI and Environmental Justice*, which provides a list of federal government legislation and rulemaking related to environmental justice issues (visited May 7, 2013), http://www.fhwa.dot.gov/environmental_environmental_justice/facts/#nprm.

⁴⁸³ U.S. DOT Order 5610.2(a), Actions to Address Environmental Justice in Minority Populations and Low-Income Populations. See Department of Transportation Updated Environmental Justice Order 5610.2a, 77 Fed. Reg. 27534 (May 10, 2012).

⁴⁸⁴ Environmental Justice Policy Guidance for Federal Transit Administration Recipients, FTA Circular 4703.1 (Aug. 15, 2012).

- To avoid, minimize, or mitigate disproportionately high and adverse human health and environmental effects, including social and economic effects, on minority populations and low-income populations.⁴⁸⁵

- To ensure the full and fair participation by all potentially affected communities in the transportation decision-making process.

- To prevent the denial of, reduction in, or significant delay in the receipt of benefits by minority and low-income populations.

The focus of environmental justice analysis is an evaluation of whether minority populations⁴⁸⁶ and/or low-income populations⁴⁸⁷ may experience “disproportionately high and adverse effect on human health or

⁴⁸⁵ The DOT Order defines an adverse effect as follows:

the totality of significant individual or cumulative human health or environmental effects, including interrelated social and economic effects, which may include, but are not limited to: 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 individuals within a given community or from the broader community; and the denial of, reduction in, or significant delay in the receipt of benefits of DOT programs, policies, or activities.

U.S. DOT Order 5610.2(a), Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 77 Fed. Reg. 27534 (May 10, 2012).

⁴⁸⁶ The FTA Circular defines a minority population as:

a readily identifiable group or groups of minority persons who live in geographic proximity, and if circumstances warrant, geographically dispersed or transient persons such as migrant workers or Native Americans who will be similarly affected by a proposed DOT program, policy or activity. Minority includes persons who are American Indian and Alaska Native, Asian, Black or African American, Hispanic or Latino, and Native Hawaiian and other Pacific Islander.

Environmental Justice Policy Guidance for Federal Transit Administration Recipients, FTA Circular 4703.1 (Aug. 15, 2012).

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The FTA Circular defines a low-income person as one: whose median household income is at or below the Department of Health and Human Services (HHS) poverty guidelines. However, you are encouraged to use a locally developed threshold, such as that used for FTA's grant program, or a percentage of median income for the area, provided that the threshold is at least as inclusive as the HHS poverty guidelines.

Environmental Justice Policy Guidance for Federal Transit Administration Recipients, FTA Circular 4703.1 (Aug. 15, 2012) [citation omitted]. The FTA Circular defines a low-income population as: “any readily identifiable group of low-income persons who live in geographic proximity, and, if circumstances warrant, geographically dispersed/transient persons (such as migrant workers or Native Americans) who will be similarly affected by a proposed FTA program, policy or activity.” *Id.*

the environment,”⁴⁸⁸ as a result of a proposed program, project, or activity.

The FTA Circular essentially recommends a four-step process for transportation planning:

1. Gather and analyze demographic data to determine whether the project area has significant numbers of minority or low-income populations, or both;

2. Develop a robust Public Engagement Plan to ensure full and fair participation of all members of the community, including minority and low-income populations;⁴⁸⁹

3. Consider the proposed project and its likely adverse effects⁴⁹⁰ and benefits upon minority and low-income populations, and determine whether there would be a “disproportionately high and adverse effect” on minority or low-income populations; and

4. Select alternatives to minimize or mitigate such adverse impacts.

⁴⁸⁸ The DOT Order defines a disproportionate adverse effect as one that:

- (1) is predominantly borne by a minority population and/or a low-income population, or

- (2) will be suffered by the minority population and/or low-income population and is appreciably more severe or greater in magnitude than the adverse effect that will be suffered by the non-minority population and/or non-low-income population.

U.S. DOT Order 5610.2(a), Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 77 Fed. Reg. 27534 (May 10, 2012).

⁴⁸⁹ The CEQ NEPA regulation, 40 C.F.R. 1501.7 and the FTA/FHWA regulation, 23 C.F.R. 771.105(c) and 771.111, require public participation during the NEPA process.

⁴⁹⁰ Adverse effects include:

- 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 nonprofit 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.

U.S. DOT Order 5610.2(a), Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Appendix, 77 Fed. Reg. 27534 (May 10, 2012).

2. Disabilities Discrimination

a. Development of the Law of the Disabled 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 seniors and/or persons with disabilities 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 seniors and/or persons with disabilities will be assured.⁴⁹¹ The National Mass Transportation Assistance Act of 1974 enacted the current requirement that fares for seniors and/or persons with disabilities not exceed half the general rate during peak hours.⁴⁹²

Section 504 of the Rehabilitation Act of 1973—commonly known as “the civil rights bill of the disabled”—provides: “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.”⁴⁹³

Despite these requirements, however, 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.⁴⁹⁴ 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.”⁴⁹⁵

⁴⁹¹ 49 U.S.C. § 5301.

⁴⁹² *Id.* at 327. 49 U.S.C. § 5305(c)(1)(D). 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, 99 S. Ct. 675, 58 L. Ed. 2d 596 (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 senior persons, which include at least persons 65 years of age or older. 49 C.F.R. § 609.23 (2012).

⁴⁹³ 29 U.S.C. § 794(a).

⁴⁹⁴ PAUL DEMPSEY & WILLIAM THOMS, *LAW & ECONOMIC REGULATION IN TRANSPORTATION* 328 (Quorum 1986).

⁴⁹⁵ 23 U.S.C. § 142. DEMPSEY & THOMS, *supra* note 494, at 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 avail-

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.⁴⁹⁶ As will be seen momentarily, 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.⁴⁹⁷ In fact, public transit claims are often brought under both statutes.⁴⁹⁸

Acting under the Rehabilitation Act and Section 16 of the Urban Mass Transportation Act, the Urban Mass Transportation Administration (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.⁴⁹⁹ Many transportation agencies devoted resources to purchasing new buses with wheelchair lifts, while 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 pro-

able to and can be effectively utilized by senior persons and persons with disabilities. 49 U.S.C. § 5310 (formerly § 16(a) of the FT Act), (tit. III of Pub. L. No. 102-240, ISTEA).

⁴⁹⁶ *Knapp v. Nw. Univ.*, 101 F.3d 473, 478 (1996).

⁴⁹⁷ *Hamlyn v. Rock Island County Metro. Mass Transit Dist.*, 986 F. Supp. 1126 (C.D. Ill. 1997) (transit authority’s reduced fare program violated the Rehabilitation Act because it discriminated against passengers with AIDS).

⁴⁹⁸ *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.

⁴⁹⁹ Martha McCluskey, *Rethinking Equality and Difference*, 97 YALE L.J. 863, 873 (1988); DEMPSEY & THOMS, *supra* note 494, 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 the 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.” McCluskey, 97 YALE L. J. at 873.

grams to “mainstream” disabled persons.⁵⁰⁰ The guidelines specifically required retrofitting of subways and buses to make them fully accessible to the handicapped.⁵⁰¹ 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.”⁵⁰²

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.⁵⁰³ 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.⁵⁰⁴ One half of peak-hour buses were required to be accessible within 3 years (10 years for modification of existing vehicles or facilities requiring extensive structural changes).⁵⁰⁵

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.⁵⁰⁶ In response,

⁵⁰⁰ 45 C.F.R. §§ 85.57(a), 85.58(a) (2012); Dempsey and Thoms, *supra* note 494, at 330.

⁵⁰¹ 45 C.F.R. §§ 85.57(b), 85.58 (2012).

⁵⁰² Coordination of Federal Agency Enforcement of Section 504 of the Rehabilitation Act of 1973, 43 Fed. Reg. 2,134 (Jan. 13, 1978).

⁵⁰³ McCluskey, *supra* note 499. 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.

⁵⁰⁴ Transportation for Individuals with Disabilities, 55 Fed. Reg. 40, 778 (Oct. 4, 1990); DEMPSEY & THOMS, *supra* note 494, at 330.

⁵⁰⁵ McCluskey, *supra* note 499, at 863, 874.

⁵⁰⁶ American Public Transit Ass’n v. Lewis, 655 F.2d 1272 (D.C. Cir. 1981); DEMPSEY & THOMS, *supra* note 494, 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, 99 S. Ct. 2361, 60 L. Ed. 2d 980 (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. *Davis*, 442 U.S. at 409–414.

DOT withdrew the challenged regulations, and substituted interim rules similar to the “special efforts” regulations it had adopted in 1977.⁵⁰⁷

Congress responded by promulgating the Surface Transportation Advancement Act (STAA) of 1982⁵⁰⁸ 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.⁵⁰⁹

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 transportation available to the disabled.⁵¹⁰ 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.⁵¹¹

⁵⁰⁷ McCluskey, *supra* note 499, 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, 105 S. Ct. 712, 83 L. Ed. 2d 661 (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, *supra* note 499, at 875.

⁵⁰⁸ 49 U.S.C. §§ 1601, 1612(d), recodified at 49 U.S.C. § 5301 *et seq.* (2006) The statute added Section 1612(d) to the Urban Mass Transit Act.

⁵⁰⁹ Transportation for Individuals with Disabilities, 55 Fed. Reg. 40,762 (Oct. 4, 2002). The new section required the Department to issue a new rule containing minimum service criteria for service to disabled passengers.

⁵¹⁰ Nondiscrimination on the Basis of Handicap in the Department of Transportation Financial Assistance Program, 51 Fed. Reg. 18,994 (May 23, 1986). 49 C.F.R. § 27.95 (1987). McCluskey, *supra* note 499, 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.

⁵¹¹ 49 C.F.R. § 27.95 (2012).

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.⁵¹² 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 1988.⁵¹³ DOT subsequently deleted the 3 percent "cost cap" expenditure on handicapped facilities.⁵¹⁴

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.⁵¹⁵ Mainstreaming was not required under the legislation that then existed, for there was no right, legislative or constitutional, of equal access.⁵¹⁶

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.⁵¹⁷

Today, the FTA ensures that transportation facilities covered under the ADA are in compliance with the requirements of the ADA.⁵¹⁸ The FTA monitors the

implementation of the ADA by its grantees, concentrating on three principal areas: (1) ADA Complementary Paratransit Service, (2) accessibility of the fixed route, and (3) the accessibility of rail service through the enforcement of the requirements applicable to existing designated key stations as well as those newly built or undergoing major renovations.⁵¹⁹

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.⁵²⁰ The legislation created federally mandated rights and responsibilities for a class of beneficiaries unparalleled since the 1960s.

The ADA mandates accessibility and nondiscriminatory service.⁵²¹ 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...."⁵²²

The transportation provisions of the ADA were among the most hotly contested, primarily because of the cost of compliance.⁵²³ In sum, the ADA requires that

37.9 sets forth standards for accessible transportation facilities:

(a) For purposes of this part, a transportation facility shall be considered to be readily accessible to and usable by individuals with disabilities if it meets the requirements of this part and the requirements set forth in Appendices B and D to 36 C.F.R. part 1191, which apply to buildings and facilities covered by the Americans with Disabilities Act, as modified by Appendix A to this part.

Heightened Independence and Progress v. Port Auth. of N.Y. and N.J., 2008 U.S. Dist. LEXIS 104948 (D. N.J. 2008).

⁵¹⁹ The duty of a transit authority to make stations accessible to persons with disabilities is addressed in *Disabled in Action of Pa. v. SEPTA*, 635 F.3d 87 (3d Cir. 2011). FTA Circular 4220.1F, §§ IV-14; IV-15; IV-1; IV-15; IV-16; App. A-3.

⁵²⁰ Randall Samborn, *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 Henry H. Perrett, *Americans With Disabilities Act Handbook*, Aspen, (1990) [hereinafter *ADA Handbook*].

⁵²¹ 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). 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).

⁵²² 42 U.S.C. § 12182(a).

⁵²³ Bonnie P. Tucker, *The Americans with Disabilities Act: An Overview*, 1989 U. Ill. L. Rev., 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

⁵¹² McCluskey, *supra* note 499, 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.

⁵¹³ *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).

⁵¹⁴ *Transportation for Individuals with Disabilities*, 55 Fed. Reg. 40,762 (Oct. 4, 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.

⁵¹⁵ *ADAPT v. Skinner*, 881 F.2d 1184, 1198 (3d Cir. 1989) (en banc).

⁵¹⁶ *Id.*

⁵¹⁷ 136 CONG. REC. H2421, H2435 (daily ed. May 17, 1990) (statement of Rep. Anderson).

⁵¹⁸ 49 C.F.R. § 37.9(d)(5).

Title 49 of the Code of Federal Regulations requires recipients of federal funding to comply with the applicable requirements of the ADA: "Recipients subject to this part (whether public or private entities as defined in 49 C.F.R. part 37) shall comply with all applicable requirements of the Americans with Disabilities Act (ADA) of 1990..."

49 C.F.R. § 27.19. These provisions, when viewed in combination with 49 C.F.R. pt. 37, establish that FTA has jurisdiction to hear ADA claims. Section 37.1 of Title 49 of the Code of Federal Regulations provides, "The purpose of this part is to implement the transportation and related provisions of titles II and III of the Americans with Disabilities Act of 1990." Section

all new vehicles purchased by public and private transportation firms be equipped with lifts and other facilities to accommodate access by disabled passengers.⁵²⁴ 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.⁵²⁵

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....”⁵²⁶ During debate, one Congressman stated the purpose of the ADA’s provisions on transportation was 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.”⁵²⁷

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 unem-

cited by the transportation companies were unrealistic. For example, during Congressional hearings on the ADA, Greyhound alleged that it cost \$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.

⁵²⁴ 49 U.S.C. § 5301(d) (2006) expresses the federal policy that seniors 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.

⁵²⁵ 49 C.F.R. pts. 27, 37, and 38 (2012). 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.

⁵²⁶ Americans with Disabilities Act of 1990, Pub. L. No. 101-596, § 2(a)(7), 104 Stat. 3000 (1990) [hereinafter ADA].

⁵²⁷ 136 Cong. Rec. H2599, H2608 (daily ed. May 22, 1990) (statement of Rep. Fish.).

ployment, and 28 percent blamed transportation barriers. More than half of those with severe disabilities identified transportation barriers as limiting their social activity.⁵²⁸ Transportation access is essential for many of the human activities nondisabled persons take for granted—employment, education, shopping, recreation, and political participation.⁵²⁹ As will be seen, each of these activities except political participation are defined as “major life activities” in the ADA paratransit regulations.

c. Definition of “Disability”

The ADA begins with a Congressional finding that 43 million Americans “have one or more physical or mental disabilities.”⁵³⁰ 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.”⁵³¹ 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.⁵³²

⁵²⁸ 134 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.

⁵²⁹ McCluskey, *supra* note 499, at 863, 864.

⁵³⁰ ADA, *supra* note 526 § 2(a).

⁵³¹ Randall Samborn, *Will Disabilities Law Produce Litigation*, NAT’L L.J., Aug. 13, 1990, at 3.

⁵³² 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, Lisa Damon & Carole Wilder, *Walking a Fine Line: Managing the Conflicting Obliga-*

While courts interpreting Section 504 of the Rehabilitation Act of 1973⁵³³ have construed the term "handicapped" as including transsexuals and compulsive gamblers, the ADA specifically excludes them.⁵³⁴ In fact, the 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.⁵³⁵ 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.⁵³⁶ DOT regulations define a disability as a "physical or mental impairment that substantially limits one or more of the major life activities...."⁵³⁷

tions 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).

⁵³³ 29 U.S.C. §§ 794. See Paul Stephen Dempsey, *The Civil Rights of the Handicapped in Transportation: The Americans With Disabilities Act and Related Legislation*, 19 TRANSP. L.J. 309, 321 (1991).

⁵³⁴ Gary Lawson, *AIDS, Astrology, and Airline: Towards a Casual Interpretation of Section 504*, 17 HOFSTRA L. REV. 237 (1989); Arthur S. Leonard, *AIDS and Employment Law Revisited*, 14 HOFSTRA L. REV. 11 (1985). An ongoing illness like tuberculosis is considered a disability, thus subject to protection against discrimination. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1986). Since AIDS is also an ongoing illness like tuberculosis, then the ADA should apply to AIDS patients as well.

⁵³⁵ 29 U.S.C. § 705(E) (2010); 42 U.S.C. § 12211 (2009). Tucker, *supra* note 523, at 923, 925–26.

⁵³⁶ See Dempsey, *supra* note 533, at 322.

⁵³⁷ 49 C.F.R. § 37.3 (2012). 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;

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 discrimination because of the disability.⁵³⁸ The major difference is that the Rehabilitation Act is triggered by the receipt of federal financial assistance, while 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.⁵³⁹ The requirements of public transportation companies as providers of transportation services is the focus of the instant discussion.

The ADA divides transportation firms into two categories: public and private.⁵⁴⁰ 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.⁵⁴¹ 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 individu-

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) (2012). 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....

⁵³⁸ 42 U.S.C. § 12101(2) (2009); *Doe v. University of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1264–65 (4th Cir. 1995).

⁵³⁹ See Dempsey, *supra* note 539, 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.

⁵⁴⁰ *William Kenworthy, Legislative Update* (address before the Transportation Law Institute, Washington, D.C., Nov. 5, 1990), at 10.

⁵⁴¹ 49 C.F.R. § 37.5(b) and (d) (2012).

als with disabilities who use the service in a courteous and respectful way.⁵⁴²

Redmond v. SEPTA,⁵⁴³ involved an ADA discrimination claim. When attempting to enter SEPTA's bus terminal, plaintiff requested a SEPTA attendant "buzz" him through a gate because he was carrying a large bag at his side, was recovering from an automobile accident, and the turnstiles caused him too much pain. Despite three requests, the attendant refused to allow him to enter the terminal through the gate and insisted that he use the turnstiles. Plaintiff then requested intervention by a SEPTA police officer, whereupon the attendant opened the gate. Plaintiff alleged that defendant violated his right to use public transportation as protected by Title VI and the ADA, seeking damages for pain and suffering.⁵⁴⁴

The court noted that to establish a *prima facie* claim under the ADA and the Rehabilitation Act, plaintiff must prove that (1) he is a qualified individual with a disability; (2) he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability.⁵⁴⁵ The Rehabilitation Act also requires that plaintiff demonstrate the public entity receives federal funds.⁵⁴⁶

The ADA, defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."⁵⁴⁷ Under the ADA, a "disability" is "(1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment."⁵⁴⁸ The court concluded that temporary, non-chronic impairment of short dura-

tion does not constitute a disability under the ADA, and that therefore, there was no violation of the statute.⁵⁴⁹

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."⁵⁵⁰ 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."⁵⁵¹ A "public accommodation" is defined to include "a terminal, depot, or other station used for specified public transportation...."⁵⁵² Included among the prescribed conduct is denial of the opportunity "to participate in or benefit from the goods, services, facilities, privileges, or accommodation...."⁵⁵³ A public entity is defined to include a state or local government or its agencies (meaning essentially public bus and rail transit systems) and

⁵⁴⁹ *Redmond v. SEPTA*, 2010 U.S. Dist. LEXIS 28436 (E.D. Pa. 2010).

⁵⁵⁰ 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) (2012). 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 service," imposing special charges on disabled individuals, or those with wheelchairs. 49 C.F.R. § 37.5(b), (d) (2012). *See, e.g., Cisneros v. Metro Transit Auth.*, Slip Copy, 2013 U.S. Dist. LEXIS 24011 (M.D. Tenn. 2013); *Askins v. N.Y. City Transit*, 2013 U.S. Dist. LEXIS 5340 (S.D.N.Y. 2013).

⁵⁵¹ ADA at § 302(a).

⁵⁵² *Id.* § 301(7).

⁵⁵³ *Id.* § 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 were 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).

⁵⁴² 49 C.F.R. § 37.7 (2012).

⁵⁴³ *Redmond v. SEPTA*, 2010 U.S. Dist. LEXIS 28436 (E.D. Pa. 2010).

⁵⁴⁴ Section 504 of the Rehabilitation Act provides:

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(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States..., shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a).

⁵⁴⁵ 42 U.S.C. § 12132.

⁵⁴⁶ *See* 29 U.S.C. § 794(a).

⁵⁴⁷ 42 U.S.C. § 12131(2).

⁵⁴⁸ 42 U.S.C. § 12102(2) (2009).

Amtrak.⁵⁵⁴ 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.⁵⁵⁵ 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.”⁵⁵⁶

The ADA provides a private cause of action.⁵⁵⁷ Actionable discrimination occurs when an eligible recipient is not provided special transportation services in accordance with the transit provider’s approved special transportation plan, or when it fails to follow the approved plan or fails to provide disabled individuals with a comparable level of service and response time as to those without disabilities. A plaintiff must prove that discrimination exists as a result of the implementation of the plan, rather than challenging the plan itself.⁵⁵⁸

In *Burkhart v. Washington Metropolitan Area Transit Authority*,⁵⁵⁹ 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.⁵⁶⁰ The court found, however, the evidence that Burkhart was discriminated “by reason of his deafness” to be unpersuasive. 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.”⁵⁶¹

⁵⁵⁴ ADA § 201(1).

⁵⁵⁵ *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.

⁵⁵⁶ 49 C.F.R. § 37.105 (2012); Transportation for Individuals with Disabilities, 61 Fed. Reg. 25,409, 25,416 (May 21, 1996).

⁵⁵⁷ *Barnes v. Gorman*, 536 U.S. 181, 122 S. Ct. 2097, 153 L. Ed. 2d 230 (2002).

⁵⁵⁸ *Martinson v. VIA Metro. Transit*, 2006 U.S. Dist. LEXIS 80555 (W.D. Tex. 2006).

⁵⁵⁹ 112 F.3d 1207 (D.C. Cir. 1997).

⁵⁶⁰ 42 U.S.C. § 12132; 29 U.S.C. § 794.

⁵⁶¹ *Burkhart*, 112 F.3d at 1215.

However, this 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,⁵⁶² compliance with the following requirements is a condition of receiving federal financial assistance from DOT.⁵⁶³

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.⁵⁶⁴ New public

⁵⁶² 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 (2012). In practice, however, such discretion has only been rarely conferred.

⁵⁶³ 49 C.F.R. § 27.19 (2012).

⁵⁶⁴ ADA *supra* note 526 §§ 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 (2012). 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 (2012) 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

buses and rail cars be fitted with lifts or ramps and fold-up seats or secured spaces that accommodate wheelchairs.⁵⁶⁵ FHWA has also promulgated proposed safety standards addressing requirements for platform lifts, and a vehicle standard for all vehicles equipped with such lifts.⁵⁶⁶ Today, all new transit buses must be equipped with lifts.⁵⁶⁷

The regulations defining specifications of accessibility for buses, vans, and systems are meticulously detailed, addressing such minutiae as the design load of the lift (600 pounds),⁵⁶⁸ the platform barriers, surface,

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.

The accessible vehicle dimensions in 48 C.F.R. pt. 38 ([see](http://www.fta.dot.gov/12876_3905.html) http://www.fta.dot.gov/12876_3905.html) 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, 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 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.

⁵⁶⁵ 49 C.F.R. § 37.71 (2012); Tucker, *supra* note 523.

⁵⁶⁶ Federal Motor Vehicle Safety Standards: Platform Lift Systems for Accessible Motor Vehicles Platform Lift Installation on Motor Vehicles, 65 Fed. Reg. 46,228 (July 27, 2000).

⁵⁶⁷ Transportation for Individuals with Disabilities, 55 Fed. Reg. 40,770 (Oct. 4, 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.

⁵⁶⁸ Transportation for Individuals with Disabilities, 55 Fed. Reg. 40,764, 40,767-68 (Oct. 4, 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

gaps, entrance ramp and deflection, stowage, handrails, priority seating signs, lighting (2-foot candles of illumination), and the location of the fare box.⁵⁶⁹ Regulations governing rapid rail,⁵⁷⁰ light rail,⁵⁷¹ commuter rail cars,⁵⁷² intercity rail cars, and systems⁵⁷³ 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,⁵⁷⁴ automated guideway transit,⁵⁷⁵ high speed rail cars and monorails,⁵⁷⁶ and trams and similar systems⁵⁷⁷ 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 authorities must purchase accessible new equipment.⁵⁷⁸ 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.⁵⁷⁹ Thus, the delays from the moment service is requested to the time it is provided must be equivalent for handicapped and nonhandicapped passengers.⁵⁸⁰ 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.⁵⁸¹

believes it can successfully secure the mobility device but not the passenger while sitting in the device.

⁵⁶⁹ 49 C.F.R. §§ 38.1–38.39 (2012).

⁵⁷⁰ 49 C.F.R. §§ 38.51–38.63 (2012).

⁵⁷¹ 49 C.F.R. §§ 38.71–38.87 (2012).

⁵⁷² 49 C.F.R. §§ 38.91–38.109 (2012).

⁵⁷³ 49 C.F.R. §§ 38.111–38.127 (2012).

⁵⁷⁴ 49 C.F.R. §§ 38.151–38.157 (2012).

⁵⁷⁵ 49 C.F.R. § 38.173 (2012).

⁵⁷⁶ 49 C.F.R. § 38.175 (2012).

⁵⁷⁷ 49 C.F.R. § 38.179 (2012).

⁵⁷⁸ ADA § 224.

⁵⁷⁹ *Id.*; Transportation for Individuals with Disabilities, 55 Fed. Reg. 40, 764, 40,772 § 37.27 (Oct. 4, 2002).

⁵⁸⁰ *Id.* at 40,773. 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.

⁵⁸¹ *Id.* at 40,774-75.

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.⁵⁸² 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.⁵⁸³ However, unlike the new vehicle rules, no formal waiver need be requested from DOT.⁵⁸⁴

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.⁵⁸⁵ Exceptions are made for historical vehicles.⁵⁸⁶ 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.⁵⁸⁷ The House

⁵⁸² ADA §§ 222(b), 242(c).

⁵⁸³ Transportation for Individuals with Disabilities, 55 Fed. Reg. 40,764, 40,771 (Oct. 4, 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. There is, however, no 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.

⁵⁸⁴ *Id.*

⁵⁸⁵ ADA § 222(c) (1), 242(d). 49 C.F.R. § 37.75 (1999).

⁵⁸⁶ 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. Although 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. For example, while 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.

⁵⁸⁷ Transportation for Individuals with Disabilities, 55 Fed. Reg. 40,764, 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 fac-

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."⁵⁸⁸

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.⁵⁸⁹ 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.

In 2012, FTA invited comments on its new proposed Circular on vehicle acquisition in compliance with ADA requirements.⁵⁹⁰

Facilities. New facilities (including those used in intercity and commuter rail transportation) must be made readily accessible to and usable by disabled individuals.⁵⁹¹ In remodeling or altering existing facilities, those areas renovated must be accessible to disabled persons.⁵⁹² 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).⁵⁹³ Transit authorities were given 3 years in which to ensure their key rapid and light rail stations⁵⁹⁴ are accessible to the

tors among those that may be considered in determining feasibility.

⁵⁸⁸ *Id.* at 40,772 (Oct. 4, 2002); 104 ADA *supra* note 526 § 223.

⁵⁸⁹ Transportation for Individuals with Disabilities, 55 Fed. Reg. 40,764, 40,772 (Oct. 4, 2002).

⁵⁹⁰ Americans with Disabilities Act: Proposed Circular Chapter, Vehicle Acquisition, 77 Fed. Reg. 60,170 (Oct. 2, 2012).

⁵⁹¹ 49 C.F.R. § 37.41 (2012)

⁵⁹² ADA *supra* note 526 § 227(a).

⁵⁹³ 49 C.F.R. § 37.43 (2012).

⁵⁹⁴ 49 C.F.R. § 37.51 (2012) 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 disabilities, 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, hospi-

handicapped,⁵⁹⁵ unless structural changes are extraordinarily expensive, in which case they may receive extensions up to 20 years.⁵⁹⁶ The 500 existing intercity

tals 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 (2012).

⁵⁹⁵ 49 C.F.R. § 37.47 (2012).

⁵⁹⁶ ADA §§ 227(b), 242(e); 49 C.F.R. § 37.47(b)(2) (2009). 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. Even those requests turned out to be optimistic, however, as transit operators proceeded to violate their own set deadlines. Transit operators that have consistently failed to meet their own self-provided

rail (Amtrak) stations shall be made accessible to the disabled in not less than 20 years.⁵⁹⁷ Failure to make "key stations" in rapid rail systems readily accessible to disabled individuals, including those in wheelchairs, constitutes discrimination under the ADA.⁵⁹⁸

In *Hassan v. Slater*,⁵⁹⁹ a disabled person complained that the decision of the Long Island Rail Road and Metropolitan Transit Authority 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."⁶⁰⁰ 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.⁶⁰¹ 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.⁶⁰²

deadlines leave themselves vulnerable to litigation by the disabled because of their noncompliance.

⁵⁹⁷ See ADA § 242(e).

⁵⁹⁸ 49 U.S.C. §§ 12132, 12147(b)(1). The FTA performs ADA Key Station Assessments. Like the triennial review, these assessments are a "check and balance" tracking system. ADA key rail station compliance continues to be challenging in that these stations were built at different times, with differing facilities and standards in their construction. Key Stations are addressed in *Disabled in Action of Penn. v. SEPTA*, 2006 U.S. Dist. LEXIS 84730 (E.D. Pa. 2006).

⁵⁹⁹ 41 F. Supp. 2d 343 (E.D. N.Y. 1999).

⁶⁰⁰ *Id.*

⁶⁰¹ *Id.* at 345.

⁶⁰² *But see* *Heightened Independence and Progress, Inc. v. The Port Authority of New York and New Jersey*, 2011 U.S. Dist. LEXIS 104948 (D. N.J.), where the court granted plaintiff's motion for summary judgment after concluding that Defendant failed to make a PATH station handicapped accessible to persons in wheelchairs in violation of the ADA; *Hulihan v. The Regional Transportation Commission of Southern Nevada*, 2011 U.S. Dist. LEXIS 131323 (D. Nev.) (defendant's motion for summary judgment denied after plaintiff, who was confined to the use of a wheelchair, provided sufficient evidence that defendant violated Title II of ADA and Section 504 of Rehabilitation Act of 1973 by failing to pick her up at appointed time and to adequately strap her wheelchair on defendants' bus, causing her injury when she was ejected from the wheelchair after bus driver applied brakes); *Stamm v. N.Y. City Transit Auth. and the Manhattan and Bronx Surface Transit Operating Auth.*, U.S. Dist. LEXIS 36195 (E.D.N.Y.) (court denied defendants' motion for summary judgment after holding that plaintiff provided evidence sufficient to present genuine questions of material fact as to whether defendants violated Title II of the ADA and Section 504 of the Rehabilitation Act of 1973

Courts have also recognized that non-disabled individuals may themselves, in certain instances, bring claims pursuant to both the ADA as well as Section 504 of the Rehabilitation Act of 1973. For example, in *Hale v. Pace*,⁶⁰³ the court held that a disabled plaintiff's mother who herself was also a plaintiff and her son's personal care attendant, provided evidence sufficient to show that she was discriminated against as a result of her association with her son after the defendants threatened several times to force her and her son out of their paratransit vehicles if she did not pay the fare both for herself and her son. Defendants then subsequently refused to provide service to the plaintiffs, and when plaintiff called defendants to resolve the matter, was told by one defendant "Bitch, I'm not taking your retarded ass son nowhere. Don't nobody like ya'll that's why [defendants] trying to get you kicked off the service, cause don't nobody like you." Moreover, the court ruled that her injury was not just an indirect result of her son's injury, but rather, because plaintiff was traveling with her son, she was also seeking services for herself as her son's personal care attendant and was denied those services by defendants. Plaintiff, therefore, sufficiently stated an associational discrimination claim under both the ADA and the Rehabilitation Act.⁶⁰⁴

In *Neighborhood Ass'n of the Back Bay v. FTA*,⁶⁰⁵ the U.S. Court of Appeals for the First Circuit assessed whether the FTA, in providing funding to the MBTA to make the Copley Square station (adjacent to the Boston Public Library and the Old South Church both of which were designated as National Landmarks and listed on the National Register of Historic Places) compliant with the ADA⁶⁰⁶ violated other federal statutes. Under 49 U.S.C. § 5310, the FTA provides federal funds to assist compliance with the ADA. However, the FTA must ensure that the funded projects comply with federal statutes addressing historic preservation.⁶⁰⁷ The FTA also must comply with Section 4(f) of the Department of Transportation Act of 1966.⁶⁰⁸ The First Circuit affirmed the Federal District Court's finding that the FTA's "no adverse effect" finding related to the project as a whole, including the outbound elevator, and was not erroneous. "The FTA determined that placing the handicap accessible elevator entrance 150 feet from the main entrance would create a segregated handicap entrance and violate ADA regulations." The court con-

by failing to ensure that their vehicles and facilities were accessible to her and other individuals with disabilities who utilized service animals). 29 U.S.C. § 794; Americans with Disabilities Act of 1990, § 201 *et seq.*, 42 U.S.C. § 1231 *et seq.*

⁶⁰³ 2011 U.S. Dist. LEXIS 35281 (N.D. Ill. 2011).

⁶⁰⁴ 29 U.S.C. § 794; Americans with Disabilities Act of 1990, § 201 *et seq.*, 42 U.S.C. § 1231 *et seq.*

⁶⁰⁵ 463 F.3d 50 23394 (1st Cir. 2006).

⁶⁰⁶ 42 U.S.C. §§ 12101–12213 (2009).

⁶⁰⁷ The National Historic Preservation Act (NHPA)—16 U.S.C. § 470f (2006) ("section 106"), and 16 U.S.C. § 470h-2(f) (2006) ("section 110(f)").

⁶⁰⁸ 49 U.S.C. § 303 (2006) ("section 4(f)").

cluded that the FTA's decision was neither arbitrary nor capricious.

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.⁶⁰⁹ The ADA requires that public entities providing fixed route systems operate nondiscriminatory paratransit services,⁶¹⁰ 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.⁶¹¹ 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 for⁶¹² and implement origin-to-destination paratransit service for those unable to use the normal fixed route system.⁶¹³ 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.⁶¹⁴

⁶⁰⁹ See Federal Transit Admin., *ADA Paratransit Eligibility Manual 2* (1993); see also R. Thatcher & J. Gaffney, *ADA Paratransit Handbook: Implementing the Complementary Paratransit Service Requirements of the Americans with Disabilities Act of 1990*, U.S. DOT, Urban Mass Transp. Admin. (1991).

⁶¹⁰ ADA § 223.

⁶¹¹ *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 (2012). See also Tucker, *supra* note 523, 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.

⁶¹² 49 C.F.R. § 37.137 (2012).

⁶¹³ 49 C.F.R. § 37.121 (2012); William Kenworthy, *Legislative Update* (address before the Transportation Law Institute, Washington, D.C., Nov. 5, 1990), at 10.

⁶¹⁴ DOT regulations, "Transportation Services for Individuals with Disabilities (ADA)," at 49 C.F.R. §§ 37.77, 37.105 (2012). 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., 1998 WL 324907 (E.D. Pa. 1998).

Public entities that operate paratransit services must develop a formal process for certifying ADA paratransit eligible patrons.⁶¹⁵ 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.⁶¹⁶ 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.⁶¹⁷ 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.⁶¹⁸

- *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.⁶¹⁹

- *Category III Eligibility*—These are disabled patrons with specific impairment-related conditions that prevent them from traveling to, boarding, or disembarking from a point on the system.⁶²⁰ Two points determine

FTA and grantees alike deal on a daily basis with the service criteria because disability advocacy groups and citizens routinely 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/12325_9564.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.

⁶¹⁵ 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) (2012).

⁶¹⁶ Federal Transit Admin., *supra* note 609, at 3.

⁶¹⁷ *Id.* at 15.

⁶¹⁸ *Id.* at 4.

⁶¹⁹ *Id.* at 6–7.

⁶²⁰ 49 C.F.R. 37.123(e)(3) (2012).

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.⁶²¹ 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 cannot 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.⁶²²

⁶²¹ Federal Transit Admin., *supra* note 609, at 7–8.

⁶²² *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. As a safety net, the ADA requires 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 are 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 senior 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. 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) (2012) 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.)

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 to do so when there are significant accumulations of snow.⁶²³ In this instance, 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.⁶²⁴

Personal care attendants (PCAs). Each paratransit rider is allowed to be accompanied by one PCA, who may not be charged for transportation.⁶²⁵ A family member or friend riding with an eligible disabled

With regard to eligibility determinations, FTA appears to take the position that those decisions are best made by those on 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—and whether the transit operator's eligibility policy conforms with the regulation's minimum criteria, whether the applicant was informed that he or she had a right to an appeal, and whether the appeal board as constituted was consistent with the ADA regulation. The transit lawyer may find guidance at FTA's letter of findings Web site at http://www.fta.dot.gov/12325_9564.html.

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. Thus, 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. 1 Unpub. LEXIS 823 (2001); Sell v. N.J. Transit Corp., 298 N.J. Super. 640, 689 A.2d 1386 (1997); Pfister v. City of Madison, 198 Wis. 2d 387, 542 N.W.2d 237 (1995). The first and last of these three decisions are unpublished, and therefore of no precedential value.

⁶²³ *Id.* at 15–16.

⁶²⁴ 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.

⁶²⁵ 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) (2012).

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, or communicating.⁶²⁶ 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.⁶²⁷

Operators of demand-responsive systems must establish a system of frequent and regular maintenance of wheelchair lifts.⁶²⁸ 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.⁶²⁹ 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.⁶³⁰

Personnel must be trained to operate the vehicles and equipment safely and properly and treat disabled patrons in a courteous and respectful way.⁶³¹ The problems of lack of driver training and driver rudeness are serious. Grantees receive numerous complaints of driver rudeness, although the opposite also occurs: Drivers communicate many complaints of unruly, angry, impolite passengers. The ADA regulations place the burden on the grantee to operate a paratransit sys-

⁶²⁶ 49 C.F.R. § 37.123(f)(1)(ii) (2012); 59 Fed. Reg. 37208 (July 21, 1994).

⁶²⁷ Federal Transit Admin., *supra* note 609, at 40–41 (Sept. 1993). However, one must recognize certification procedures change based on operational considerations, fraud, and abuse.

⁶²⁸ 49 C.F.R. § 37.163(b) (2012).

⁶²⁹ *Id.*

⁶³⁰ 49 C.F.R. §§ 37.161, 37.163 (2012).

⁶³¹ 49 C.F.R. § 37.173 (2012).

tem 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. 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.⁶³² 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.⁶³³ 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.⁶³⁴ 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.

Service Animals. DOT regulations require transit providers to "permit service animals to accompany individuals with disabilities in vehicles and facilities."⁶³⁵

⁶³² James v. Peter Pan Transit Management, Inc., 1999 U.S. Dist. LEXIS 2565 (E.D. N.C. 1999).

⁶³³ Collins v. Southeastern Pa. Transp. Auth., 69 F. Supp. 2d 701 (E.D. Pa. 1999).

⁶³⁴ 49 C.F.R. § 37.125(h) (2012).

⁶³⁵ 49 C.F.R. § 37.167(d) (2012). A "service animal" is defined as:

[A]ny guide dog, signal dog, or other animal individually trained to work or perform tasks for an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.

49 C.F.R. § 37.3 (2012). In one case, the New York City Transit Authority prohibited passengers from

bring[ing] any animal on or into any conveyance or facility unless enclosed in a container and carried in a manner which would not annoy other passengers...[but exempted] dogs for law enforcement agencies, to service animals or to animals which are being trained as service animals and are accompanying persons with disabilities, or to animals which are being trained as service animals by a professional trainer.

Half fare requirement for elderly and disabled persons. Applicants for FTA funding must provide assurance that rates charged to elderly and handicapped persons during nonpeak hours will not exceed one-half of the rates generally applicable to other persons at peak hours.⁶³⁶ One who does not fall within the definition of a disabled or elderly person does not qualify for the half fare program.⁶³⁷ 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 also require that eligible individuals carry an identification card, and deny half fare treatment to those without it, although the FTA does not endorse this practice.⁶³⁸

In *Crosby v. Regional Transp. Auth.*,⁶³⁹ plaintiff alleged that requiring senior citizen paratransit patrons to pay a fare while allowing senior fixed-route passengers to pay nothing violated his rights under the ADA. The court concluded that the ADA gave the DOT Secretary discretion to issue regulations effectuating the statute's guarantee of comparable paratransit service, including fares charged to a paratransit rider. These regulations permitted disparate treatment; therefore,

Although the court found that neither travel nor commuting are, themselves, major life activities, the defendant's allegations that the emotionally disturbed plaintiffs dogs were "emotional support or comfort animals" did not sustain a motion for summary judgment. *Stamm v. N.Y. City Transit Auth.*, 2011 U.S. Dist. LEXIS 36195 (E.D.N.Y. 2011).

⁶³⁶ 49 C.F.R. § 609.23 (2012); Transportation for Elderly and Handicapped Persons, 41 Fed. Reg. 18,239 (Apr. 30, 1976); 49 U.S.C. §§ 5307(d) and 5308(b) (2011); 23 U.S.C. §§ 134, 135, and 142 (2008); 29 U.S.C. § 794; 49 C.F.R. 1.51 (2012). FTA funded recipients must ensure that seniors and/or persons with disabilities, 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.* (2006) or 42 U.S.C. § 1395 *et seq.* (2006)), will be charged for transportation during non-peak hours, and who are using or involving a facility or equipment of a project financed with federal assistance authorized for 49 U.S.C. § 5307 (2011) or for Section 3037 of the Transportation Equity Act for the 21st Century (TEA-21), 49 U.S.C. § 5309 note (2011), not more than 50 percent of the peak hour fare. Special statutory requirements also exist for seniors and persons with disabilities formula projects. These include 49 U.S.C. § 5310(a)(2) (2006) (eligible subrecipients); 49 U.S.C. § 5310, FTA Circular 9070.1E (state procedures); 49 U.S.C. § 5310(h) (2006) (eligible project activities); and 49 U.S.C. §§ 5334(g), 5311 (2011) (transfer of assets).

⁶³⁷ *Marsh v. Skinner*, 922 F.2d 112 (2d Cir. 1990).

⁶³⁸ 49 C.F.R. pt. 609, App. A, Question 11 (2012).

⁶³⁹ *Crosby v. Regional Transp. Auth.*, 2010 U.S. Dist. LEXIS 57656 (N.D. Ill. 2010).

the differences in fares complained of were not unlawful.⁶⁴⁰

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*, for example, held that a city may not avoid its obligations under Title II of the ADA by contracting with an independent contractor.⁶⁴¹ Title II of the ADA prohibits discrimination by public entities, while 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.⁶⁴²

⁶⁴⁰ The court reasoned as follows:

Title II, Part B of the ADA states that a public entity charged with operating a fixed route transit system must provide disabled persons with paratransit services that are "comparable to the level of designated public transportation services provided to individuals without disabilities[.]" 42 U.S.C. § 12143(a). The same statute gives the Secretary of Transportation the exclusive authority to issue regulations to effectuate the statute's guarantee of comparable paratransit service. 42 U.S.C. § 12143(b). To that end, the Secretary has issued regulations governing various aspects of paratransit service, including the fares a public transit body may charge a paratransit rider. See 49 C.F.R. §§ 37.123-37.133 (2012). Under 49 C.F.R. § 37.131(c), an entity's paratransit fare "shall not exceed twice the fare that would be charged to an individual paying full fare (i.e., without regard to discounts) for a trip of similar length, at a similar time of day, on the entity's fixed route system." An accompanying appendix providing "definitive guidance" concerning the meaning of the fare regulation states that when calculating the appropriate paratransit fare, "[a]pplicable charges like transfer fees or premium service charges may be added to the amount, but discounts (e.g., the half-fare discount for off-peak fixed route travel by elderly and handicapped persons) would not be subtracted." 49 C.F.R. pt. 37, app. D at 1, 35-36.

The court therefore concluded that CTA's senior citizen paratransit fares were lawful under both the ADA and the Rehabilitation Act. *Crosby v. Regional Transp. Auth.*, 2010 U.S. Dist. LEXIS 57656 (N.D. Ill. 2010).

⁶⁴¹ "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 (2012). Transportation for Individuals with Disabilities, 55 Fed. Reg. 40,764, 40,776 (Oct. 4, 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.

⁶⁴² Civil Rights Division, U.S. Dep't 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.

f. Private Transit Providers: Discrimination

The ADA states 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."⁶⁴³ The regulations prohibit discrimination by private entities "against any individual on the basis of disability in the full and equal enjoyment of specified transportation services."⁶⁴⁴ 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, 1993.⁶⁴⁵

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..."⁶⁴⁶ 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 sys-

⁶⁴³ 42 U.S.C. § 12182(b)(2)(C)(i).

⁶⁴⁴ 49 C.F.R. § 37.5(f) (2012). However, it is not discrimination to refuse service to a disabled individual because he or she "engages in violent, seriously disruptive, or illegal conduct." Denial of service, however, 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).

⁶⁴⁵ J. Frierson, *Major Changes May Be Needed to Conform to the Americans With Disabilities Act 15-16* (1990) (unpublished monograph).

⁶⁴⁶ ADA, *supra* note 526 § 304(a).

tem provides service equivalent to that provided the general public.⁶⁴⁷ Thus, taxi cabs are exempt from the vehicular requirements,⁶⁴⁸ though they are not exempt from the nondiscrimination requirements in providing service.⁶⁴⁹

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.⁶⁵⁰ Certain historical or antiquated rail cars more than 30 years old, with a manufacturer that is no longer in the business, are exempt.⁶⁵¹

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.⁶⁵² 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.⁶⁵³

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.⁶⁵⁴ 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 capac-

ity of 16 or fewer must provide equivalent service to individuals with disabilities.⁶⁵⁵

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.⁶⁵⁶ Within a year after the study was completed, DOT was required to promulgate regulations identifying how over-the-road buses shall comply with the ADA.⁶⁵⁷ Compliance was targeted for 7 years for small providers and 6 years for others.⁶⁵⁸ In the interim, DOT could not require retrofitting-structural changes to existing over-the-road buses in order to obtain access for the disabled.⁶⁵⁹ Such regulations also could not require installation of accessible restrooms in the buses if such installation would result in a loss of seating capacity.⁶⁶⁰

Accessibility requirements for over-the-road buses—DOT 1999 regulations. DOT promulgated extensive rules governing the design features of over-the-road buses⁶⁶¹ to be accessible to persons with wheelchairs and other mobility aids.⁶⁶² DOT also promulgated an over-the-road accessibility rule⁶⁶³ that, *inter alia*, imposed the following requirements:

- *Class I Fixed Route*⁶⁶⁴ *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

⁶⁵⁵ Transportation for Individuals with Disabilities, 61 Fed. Reg. 25409 (May 21, 1996). 49 C.F.R. § 37.101(e) (2012).

⁶⁵⁶ ADA § 305.

⁶⁵⁷ *Id.* § 306(a)(2)(B).

⁶⁵⁸ H.R. CONF. REP. NO. 596, 101st Cong., 2d Sess. 79 (1990).

⁶⁵⁹ *Id.*

⁶⁶⁰ ADA § 306(a)(2)(C).

⁶⁶¹ An "over-the-road bus" is one with an elevated passenger deck located over a baggage compartment. Revision of Gate Requirements for High Lift Device Controls, 64 Fed. Reg. 6160, 6165 (Feb. 8, 1999).

⁶⁶² 36 C.F.R. pt. 1192 (2012). TEA-21, § 3038 of 49 U.S.C. § 5310; 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 (2012).

⁶⁶³ 49 C.F.R. pt. 37 (2012).

⁶⁶⁴ "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).

⁶⁴⁷ *Id.* § 304(b)(3).

⁶⁴⁸ Paul Stephen Dempsey, *Taxi Industry Regulation, Deregulation & Reregulation: The Paradox of Market Failure*, 24 TRANSP. L.J. 73 (1996).

⁶⁴⁹ 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 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) (2012).

⁶⁵⁰ ADA § 304(b)(6)-(7).

⁶⁵¹ *Id.* § 304(c).

⁶⁵² 42 U.S.C. § 12181(4).

⁶⁵³ 42 U.S.C. § 12181(b)(2)(B)(i).

⁶⁵⁴ ADA § 302(b)(2)(B) & (D); Transportation for Individuals with Disabilities, 55 Fed. Reg. 40,764, 40,774 (Oct. 4, 2002); 49 C.F.R. § 37.101 (2012).

wheelchairs. By 2012, their entire fleets also 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.⁶⁶⁵

Attempting to ameliorate the economic burden imposed by DOT rules, Congress included a provision⁶⁶⁶ 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.⁶⁶⁷

The bus industry sought judicial review of DOT's over-the-road accessibility rules. The U.S. Court of Appeals for the D.C. Circuit⁶⁶⁸ upheld all the regulations save one—a requirement that bus operators compensate disabled patrons when required vehicles or service are not provided.⁶⁶⁹ DOT later withdrew the requirement.⁶⁷⁰

h. Remedies

The ADA provides that remedies for violations are the same as for those under Section 505 of the Federal Rehabilitation Act of 1973.⁶⁷¹ The Federal Rehabilitation Act, in turn, provides that remedies for violations are the same as for those under Title VI of the Civil Rights Act of 1964.⁶⁷² Remedies include back pay,

⁶⁶⁵ Revision of Gate Requirements for High Lift Devise Controls, 64 Fed. Reg. 6160, 6165 (Feb. 8, 1999).

⁶⁶⁶ TEA-21 § 3038.

⁶⁶⁷ Over-the-Road Bus Accessibility, 64 Fed. Reg. 18,476 (Apr. 14, 1999); Over-the-Road Bus Accessibility Program Grants, 64 Fed. Reg. 23,896 (May 4, 1999); Over-the-Road Bus Accessibility Project Selections, 64 Fed. Reg. 46,224 (Aug. 24, 1999); Over-the-Road Bus Accessibility Program Grants, 65 Fed. Reg. 2772 (Jan. 18, 2000).

⁶⁶⁸ *American Bus Ass'n v. Slater*, 231 F.3d 1 (D.C. Cir. 2000).

⁶⁶⁹ 49 C.F.R. 37.199 (2012).

⁶⁷⁰ *Transportation for Individuals with Disabilities—Accessibility of Over-the-Road Bus*, 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 (2012).

⁶⁷¹ 29 U.S.C. § 794a(a)(2).

⁶⁷² 42 U.S.C. § 2000d. *See* ADA, 42 U.S.C. § 12133, *Barnes v. Gorman*, 536 U.S. 181, 122 S. Ct. 2097, 153 L. Ed. 2d 230 (2002) (holding that punitive damages are not available under Title II of ADA); *Garcia v. State Univ. of N.Y. Health Scis. Ctr.*, 280 F.3d 98 (2d Cir. 2001) (addressing the limits on suits

reinstatement, damages, attorney's fees, and injunctions.⁶⁷³ Courts have held that plaintiffs may recover compensatory damages if they can prove intentional discrimination,⁶⁷⁴ and under the Rehabilitation Act, punitive damages if they can prove malice or reckless indifference.⁶⁷⁵ Prevailing parties may also recover reasonable attorney's fees in the discretion of the court.⁶⁷⁶

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.⁶⁷⁷ 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. Thus, violations of the physical accessibility rules may be handled by EEOC complaint, private lawsuit, or action by the U.S. Attorney General.⁶⁷⁸

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.⁶⁷⁹

Injunctive relief is also available.⁶⁸⁰ Moreover, the U.S. Attorney General may investigate alleged viola-

against the state). *Stewart v. N.Y. City Transit Auth.*, 2006 U.S. Dist. LEXIS 4279 (S.D.N.Y. 2006).

Because the ADA does not include a statute of limitations for Title II claims, federal courts ordinarily employ the statute of limitations for personal injury actions in the jurisdiction where the action arises. *Okure v. Owens*, 816 F.2d 45 (2d Cir. 1987), *aff'd*, 488 U.S. 235 (1989). *Stewart v. N.Y. City Transit Auth.*, 2006 U. S. Dist. LEXIS 4279 (S.D.N.Y. 2006).

⁶⁷³ 29 U.S.C. § 794a.

⁶⁷⁴ *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).

⁶⁷⁵ *Pandazides v. Va. Bd. of Educ.*, 13 F.3d 823, 832 (4th Cir. 1994).

⁶⁷⁶ 42 U.S.C. § 12205; *see also* *Collins v. Southeastern Pa. Transp. Auth.*, 69 F. Supp. 2d 701 (E.D. Pa. 1999).

⁶⁷⁷ 42 U.S.C. §§ 2000a-3(a), 2000e-4, 2000e-5, 2000e-6, 2000e-8, 2000e-9; *Rights Law for Disabled*, N.Y.L.J., July 26, 1990, at 5.

⁶⁷⁸ *Frierson*, *supra* note 645, at 16.

⁶⁷⁹ A complaint form is published at Federal Transit Admin., *Office of Civil Rights Complaint Form* (visited Mar. 5, 2012), <http://www.fta.dot.gov/documents/TitleVIComplaintForm.doc>. Some FTA decisions are published on its Web site. *See, e.g.*, Federal Transit Admin., http://www.fta.dot.gov/documents/Birmingham_Final_Report_021025.doc (finding the LYNX complimentary paratransit program consistent with ADA requirements), at 6.

⁶⁸⁰ 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

tions of the ADA.⁶⁸¹ 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.⁶⁸² However, punitive damages are specifically excluded.⁶⁸³

In *Boose v. Tri-County Metro. Transp. Dist.*,⁶⁸⁴ Ms. Boose requested that the court order TriMet to dispatch sedan cars or taxis only, rather than buses, to satisfy her demand for transportation services. The court denied her motion for declarative and injunctive relief under Title II of the ADA and Section 504 of the Rehabilitation Act to require TriMet to modify the operation of its paratransit program to accommodate her medical condition.

The U.S. Court of Appeals for the Ninth Circuit addressed the issue of whether under the ADA and Rehabilitation Act, a transit provider must accommodate a patron pursuant to a Department of Justice regulation requiring public entities to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."⁶⁸⁵ The ADA prohibits discrimination against the disabled by public entities,⁶⁸⁶ and the Attorney General has the authority to promulgate regulations implementing Part A of the ADA.⁶⁸⁷ However, Part A also specifically prohibits the DOJ from making rules that "include any matter within the scope of the authority of the Secretary of Transportation under section 12143." *Id.* Although Part A of Title II deals with public entities in general, Part B deals with public transportation. Part B provides:

It shall be considered discrimination for purposes of [the ADA] and [the Rehabilitation Act] for a public entity which operates a fixed route system...to fail to provide...paratransit and other special transportation services to individuals with disabilities...that are sufficient to provide to such individuals a level of service (1) which is comparable to the level of designated public transportation services provided to individuals without disabilities using such system; or (2) in the case of response time, which is comparable, to the extent practicable, to the level of designated public transportation services pro-

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.

⁶⁸¹ *Id.* § 308(b)(i)(A).

⁶⁸² *Id.* § 308(b)(2)(B)-(C).

⁶⁸³ *Id.* § 308(b)(4). The ADA issues in this section are also addressed in Paul Stephen Dempsey, *The Civil Rights of the Handicapped in Transportation: The Americans With Disabilities Act and Related Legislation*, 19 *TRANSP. L.J.* 309 (1991).

⁶⁸⁴ 2008 U.S. Dist. LEXIS 79438 (D. Or. 2008).

⁶⁸⁵ 28 C.F.R. § 35.130(b)(7).

⁶⁸⁶ 42 U.S.C. 12132.

⁶⁸⁷ *Id.* § 12134(a).

vided to individuals without disabilities using such system.⁶⁸⁸

The DOT has sole authority to issue regulations to carry out Part B. The Ninth Circuit concluded:

We decline to impose a requirement on TriMet that would upset the balance of authority that Congress has carefully allocated between the Attorney General and Secretary of Transportation. Consequently, we conclude that the DOJ's reasonable modification regulation does not, and cannot, apply by its own independent force. See *Melton v. Dallas Area Rapid Transit*, 391 F.3d 669, 675 (5th Cir. 2004) (holding that a reasonable modification that "relates specifically to the operation of [a paratransit system's] service" is "exempt from the Attorney General's regulations in 28 C.F.R. part 35").⁶⁸⁹

The ADA does not require "reasonable modifications" of paratransit services.⁶⁹⁰

⁶⁸⁸ *Id.* § 12143(b).

⁶⁸⁹ *Boose v. Tri-County Metro. Transp. Dist. of Oregon*, 587 F.3d 997 (9th Cir. 2009).

⁶⁹⁰ Subtitle B of title II of the ADA addresses paratransit services. 49 C.F.R. part 37. The "reasonable modifications" requirements, however, appear only in subtitle A. "It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994). A paratransit provider must provide disabled individuals with service comparable to that provided to individuals without disabilities. 42 U.S.C. § 12143(a). Congress provided that Title II's transportation regulations are to "establish minimum service criteria." *Melton v. Dallas Area Rapid Transit*, 326 F. Supp. 2d 767 (N.D. Tex. 2003).

In *Abrahams v. MTA Long Island Bus*, 644 F.3d 110 (2d Cir. 2011), court dismissed action brought by disabled users of paratransit services who filed actions against municipalities claiming violation of the Rehabilitation Act and ADA after reduction of paratransit services beyond those required by ADA.