CHAPTER 14

AMERICANS WITH DISABILITIES ACT

REQUIREMENTS FOR PUBLIC ACCOMMODATIONS

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(§14.1) INTRODUCTION AND SCOPE

Oregon's public policy on disability discrimination, ORS 659.405, has been renumbered ORS 659A.103.

TITLE III OF THE AMERICANS WITH DISABILITIES ACT

(§14.3) General Requirements

See Book §14.3 CAVEAT: It is equal opportunity that must be provided, not merely equal treatment. Equal treatment alone, without the adjustments or accommodations necessary to achieve equal opportunity, may itself be discrimination. *Shapiro v. Cadman Towers, Inc.*, 51 F3d 328 (2nd Cir 1995) (rejecting argument that reasonable accommodation requires only equal treatment).

Title III outlines specific acts which will be considered discriminatory when performed by public accommodations. 42 USC §12182(b)(2)(A).

Although separate programs are permitted where necessary to ensure equal opportunity, a separate program must be appropriate to the particular individual. In most cases, the Americans with Disabilities Act (ADA) prohibits individuals with disabilities from being excluded from the regular program or being required to accept special services or benefits. 28 CFR §36.203.

CAVEAT: However specific provisions, including the limitations on those

provisions, control over the general provisions in circumstances where both specific and general provisions apply. *U.S. v. National Amusements, Inc.*, 180 F Supp 2d 251, 259 (CD Cal 2001). The Americans with Disabilities Act Accessibility Guidelines (ADAAG), therefore, control over 28 CFR §36.203. *See U.S. v. AMC Entertainment, Inc.*, 245 F Supp 2d 1094 (CD Cal 2003); *Small v. Dellis*, 1997 US Dist LEXIS 23611 (D Md 1997).

Covered Entities

(§14.6) Examinations and Courses

Title III of the ADA requires, inter alia, entities offering licensing examinations to provide reasonable accommodations to disabled individuals. 42 USC §12189; See 29 CFR §1630.2(j); *Rush v. National Board of Examiners*, 2003 US Dist LEXIS 10487 (ND Tex 2003).

Exempt Entities

(§14.7) Religious Entities

See Book §14.7. The United States District Court of Colorado found that a seminary was exempt from compliance with Title III of the ADA, 42 USC §12187; *White v. Denver Seminary*, 157 F Supp 2d 1171 (D Colo 2001).

(§14.8) Private Clubs

The Ninth Circuit has affirmed that a facility, such as a movie studio lot, which is not open to the public but falls within the descriptive language of the categories listed under 42 USC §12181(7)(B), (E) and (F) is not subject to Title III of the ADA. *Jankey v. Twentieth Century Fox Film Corporation*, 212 F3d 1159 (9th Cir 2000).

(§14.10) Who Is Protected

A recent case from the Supreme Court illustrates the current status of the law regarding categories of persons protected under the ADA. The Supreme Court reversed the Sixth Circuit Court of Appeals, who found that a woman who suffered

from carpal tunnel was limited in the major life activity of performing manual tasks and therefore was disabled under the ADA. The Court reversed because, "the court of appeals did not apply the proper standard in making this determination because it analyzed only a limited class of manual tasks and failed to ask whether respondent's impairments prevented or restricted her from performing tasks that are of central importance to most people's daily lives." *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 US 184, 187; 122 S Ct 681, 686; 151 L Ed 2d 615, 624 (2002). The Court considered tasks such as household chores, bathing, and brushing one's teeth among the types of manual tasks that are of central importance to people's daily lives.

See Book §14.10. The first protected category, "individuals with physical or mental impairments," includes:

(1) Physiological disorders or conditions;

(2) Cosmetic disfigurement; or

(3) Anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs (such as vocal cords, tongue, soft palate), respiratory, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine. 56 Fed Reg 35,544 (1991).

See Book §14.10. CAVEAT: Drug addiction (the use of one or more drugs, the possession, use, or distribution of which is unlawful under the Controlled Substances Act) is an impairment under the terms of the ADA. However, the protection of Title III of the ADA extends only to those individuals who have successfully completed a supervised drug rehabilitation program or who have otherwise been rehabilitated successfully and who are not currently using illegal drugs. This protected group also includes those individuals who are currently participating in a supervised rehabilitation program and are not currently using illegal drugs. *See* 42 USC §12210(a),(b).

The Oregon District Court, in an unreported case, *Graham v. Connie's Inc.*, Case No CV97-815-AS, has determined that an insulin-dependent diabetic was not "substantially limited" in any major life activity and has dismissed the plaintiff's ADA claim of employment discrimination. The Ninth Circuit Court of Appeals affirmed the District of Oregon case in an unpublished opinion without reaching the issue of whether Graham was disabled. *Graham v. Connie's Inc.*, 1999 US App LEXIS 5401(9th Cir 1999).

Three crucial decisions came down from the United States Supreme Court in April 1999 that narrowed the definition of disability under the ADA.

Twin sisters, each who suffered from severe myopia which was correctable with appropriate lenses, applied for positions as pilots with the airline. The airline failed to hire either of the sisters despite their meeting all the qualifications for the job except the requirement that their uncorrected vision be better than 20/100. The sisters subsequently alleged that due to their severe myopia they actually had a substantially limiting impairment or are regarded as having such an impairment and are thus disabled under the Act.

The sisters contended that the airline's refusal to hire them as pilots because of their uncorrected visual acuity was based upon their disability and was impermissible discrimination under the ADA. The Supreme Court held that a disability under the ADA had to be determined with regard to the corrective measures that were used and a person whose physical or mental impairment was corrected by medication or other measures did not have an impairment that substantially limited a major life activity. *Sutton v. United Air Lines Inc.*, 527 US 471, 119 S Ct 2139, 144 L Ed 2d 518 (1999).

The second case involved a mechanic, Mr. Murphy, who UPS hired. His blood pressure exceeded the limit for the Department of Transportation (DOT) health certification. A doctor, however, erroneously certified him. When UPS discovered how high his blood pressure was they fired Mr. Murphy. Three issues were subsequently addressed in *Murphy v. United Parcel Service*.

The first issue was whether the Court should have considered Mr. Murphy's blood pressure medication when determining whether Mr. Murphy had a disability. The Court, applying their holding from the Sutton case, agreed that mitigating measures must be considered when assessing Mr. Murphy's claimed disability.

The second issue in this case pertained to Mr. Murphy's argument that the court of appeals erred in holding that he was not *regarded as* disabled because of his high blood pressure. The Supreme Court held, however, that a person was *regarded as* disabled within the meaning of the ADA if a covered entity mistakenly believed that the person's actual, non-limiting impairment substantially limited one or more major life activities. UPS did not believe that Mr. Murphy's impairment substantially limited any of his major life activities. *Murphy v. United Parcel Service*, 527 US 516, 525, 119 S Ct 2133,2139, 144 L Ed 2d 484, 492 (1999).

The third and final issue was whether the evidence that Mr. Murphy was *regarded as* unable to obtain DOT certification was sufficient to create a genuine issue of material fact as to whether Mr. Murphy was *regarded as* substantially limited in one or more major life activities. The Court determined that Mr. Murphy was capable of performing an array of mechanic jobs that did not require DOT certification and therefore he failed to show that he was *regarded as* unable to perform a class of jobs. Rather, the record demonstrated that

petitioner was only regarded as being unable to perform a particular job. The Court held that the record was insufficient to prove that Mr. Murphy was regarded as substantially limited in the major life activity of working. *Murphy v. United Parcel Service*, 527 US 516, 524, 119 S Ct 2133, 2139, 144 L Ed 2d 484, 492 (1999).

The third case arose in Portland. Mr. Kirkingburg, a truck driver for Albertsons, had monocular vision and was fired because he did not meet the Department of Transportation's vision standards to drive large trucks. The court of appeals held that this was inappropriate because Mr. Kirkingburg's different way of seeing qualifies as a disability and not giving him a permissible waiver under the DOT regulations meant that Albertsons would have to justify its independent standard. The Ninth Circuit determined that Albertsons would be unable to do that.

The Supreme Court reversed and held that Albertsons was not required to justify enforcing the federal regulation when a waiver was available. The Court found that the waiver regulation was an experiment, did not rest on any conclusion that a waiver was conducive to public safety, and did not modify the substantive content of the general acuity regulation. Nothing in the waiver regulation required petitioner to participate in the experiment. The Court held that employers need not justify requiring an employee to meet an otherwise applicable federal safety regulation just because its standard may be waived in an individual case. *Albertsons, Inc. v. Kirkingburg*, 527 US 555, 119 S Ct 2162, 144 L Ed 2d 518

(1999).

APPLICATION OF TITLE III REQUIREMENTS

(§14.11) Who Is Responsible (Landlord vs. Tenant)

When the lease is silent on allocation of responsibility for ADA compliance, the general rule, absent specific statutory law, is that the allocation of responsibility for removing barriers is governed by the intentions of the parties at the time they entered the lease, as determined by the overall context in which the lease was negotiated and the surrounding circumstances. The economics of the lease deal are of particular importance. Various boilerplate lease-language components provide some guidance on these issues. They include compliance with applicable law, indemnification and hold harmless provisions, common-area cost pass-through provisions, and alteration and tenant improvements.

Nonstructural Reasonable Accommodation

(§14.12) Reasonable Modifications to Policies, Practices, and Procedures

Casey Martin, a golfer with a disability, requested the use of a golf cart as a

reasonable modification to the rules of golf, which prohibit their use in certain golf events. PGA Tour, Inc. argued without success that walking was a fundamental part of the game of golf and that to grant such a modification would *fundamentally alter* the nature of the competition at issue. *PGA Tour, Inc. v. Casey Martin*, 532 US 661, 121 S Ct 1879, 149 L Ed 2d 904 (2001).

The Supreme Court has held that reasonable modifications must be viewed on a case by case basis. "To comply with this command, an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration." *PGA Tour, Inc. v. Casey Martin*, supra, 532 US at 688; 121 S Ct at 1896; 149 L Ed 2d at 927 (2001).

PGA Tour, Inc. complained that it would be difficult to evaluate the best method of modification that individual golfers may request. The Court did not agree with PGA Tour, Inc. "Nowhere in 42 U.S.C. §12182(b)(2)(A)(ii) does Congress limit the reasonable modification requirement only to requests that are easy to evaluate." *PGA Tour, Inc. v. Casey Martin*, supra, 532 US at 690; 121 S Ct at 1897; 149 L Ed 2d at 929 (2001) note 53.

A public accommodation must also modify its policies to permit the use of

service animals by persons with disabilities unless the public accommodation can demonstrate that it would result in a fundamental alteration or jeopardize the safe operation of the public accommodation. Service animals include any animal, such as a seeing-eye or hearing-ear animal, that is individually trained to do work or perform tasks for the benefit of a person with a disability. The care or supervision of a service animal is the responsibility of its owner.

As explained in Book §14.12, a public accommodation has a duty to effectively communicate with all of its customers. For example, when a public accommodation determines that a sign language interpreter is necessary to ensure effective communication, the ADA requires that it provide a *qualified sign language interpreter*. A statewide list of such interpreters is available in the state of Oregon.

(§14.13) Auxiliary Aids

Book §14.13 mentions that the determination of *undue burden* must be evaluated in light of technological advances. For example, if a nonprofit historical facility has little or no budget to provide a sign language interpreter for a deaf person who wishes to participate in a tour, the facility may be required to provide a

written script of the tour because the script would unlikely result in an undue burden.

Generally, the public accommodation is allowed to choose what type of auxiliary aid and service should be provided. However, the public accommodation should always consult with the individual with the disability wherever possible to determine what type of auxiliary aid will best meet his or her needs. In many cases more than one type of auxiliary aid or service may make effective communication possible. While consultation is not required, it is strongly encouraged. The ultimate decision as to what measure to take to ensure such effective communication rests with the public accommodation. *See* Appendix B to Part 36 of 28 CFR Ch.1(legislative history demonstrates that Congress did not intend under Title III to impose upon a public accommodation the requirement that it give primary consideration to the request of the individual with a disability but does encourage consulting with persons with disabilities.)

Existing Structures

(§14.14) Barrier Removal

Existing structures are those commercial facilities which were first occupied before January 26, 1993, and for which the last application for a building permit or permit extension is certified as complete before January 26, 1992. Unlike commercial facilities built subsequent to January 26, 1992, commercial facilities built prior to 1992 are not required to comply with the Americans with Disabilitilies Act Accessibility Guidelines (ADAAG), unless they alter the structure. *See* Book §14.19. As of January 26, 1992, owners and operators of existing structures are required, however, to undertake readily achievable barrier removal even if they make no alterations or renovations. 28 CFR §36.304. *See* Book §14.22.

The Practice Tip in Book §14.14 is no longer applicable.

All building owners and operators of public accommodations should take the following steps:

(1) Conduct an audit of existing buildings to identify architectural and communication barriers that are structural in nature;

(2) Prepare a report that lists all the barriers and the cost of removing them;

(3) Consult with organizations representing persons with disabilities for help in identifying barriers, prioritizing barrier removal, and collecting ideas on the

most economical methods of removing the barriers;

(4) Prioritize the barrier removal;

(5) Determine what revenues from the facility and owner or operator are available to pay for the project; and

(6) Remove the barriers in order of priority to the extent funds are available.

Because the Department of Justice did not provide specific guidance regarding the level of spending that is appropriate to comply with the obligation to undertake readily achievable barrier removal, it is critical that the above steps be accomplished to demonstrate a "good faith" effort to comply with the law. Any owner or operator can substantially reduce the risk of being sued, or incurring penalties if they are sued, by using such a procedure. *See* Book Appendix 14B.

The State of Oregon, pursuant to ORS 447.241, has implemented a statutory scheme for building owners to develop a "barrier improvement plan." This Oregon statute provides a process for building owners to use an ADA compliance survey in addressing readily achievable barrier removal, tenant improvements, and future plans for alterations to buildings. This survey allows a building jurisdiction to issue building permits to building owners for tenant improvements and other renovation projects as long as a building owner submits an ADA compliance plan with an

articulated process and procedure to bring the facility into full ADA compliance over the period of years as mutually agreed on by the building owner and the building jurisdiction.

Several recent cases have discussed *readily achievable* barrier removal in structures constructed for occupancy before January 26, 1993. *Botosan v. Paul McNally Realty*, 216 F3d 827 (9th Cir 1999) (holding that the term *readily achievable* is not vague and documentation found in the ADAAG is specific enough to explain the type of modification and auxiliary aids a public accommodation built before 1993 should provide. The Court determined that the realty office did not perform that which was *readily achievable* when it failed to provide handicapped parking); *Smith v. Wal-Mart Stores, Inc.*, 167 F3d 286 (6th Cir. 1999) (reversing the district court's holding that the lack of grab bars for the disabled in a restroom in a Wal-Mart built in 1991 did not qualify as negligence per se under the *readily achievable* standard of the ADA); *Alford v. City of Cannon Beach*, 2002 US Dist LEXIS 2257 (D Or 2002) (holding that the installation of a ramp leading to a wine shop is not readily achievable, within the meaning of the ADA, when the cost to install the ramp would be more than 60% of the net profit of the wine shop).

The District Court of Oregon has found that, "there is no private right of action under O.R.S. Chapter 447. Under the statute, the provisions of O.R.S. 447.210 through O.R.S. 447.280 are to be considered 'part of the state building code and violations shall be subject to the

provisions of ORS 455.450.' O.R.S. 447.280." *Alford v. City of Cannon Beach*, 2000 US Dist LEXIS 20730, *37–38 (D Or 2000). A private citizen may, however, report a suspected violation of the code.

(§14.17) Alternatives to Barrier Removal

The District Court of Oregon found a wine shop and restaurant's alternative methods of providing goods and services was a suitable alternative to barrier removal. *Alford v. City of Cannon Beach*, 2000 US Dist LEXIS 20730 (D Or 2000).

(14.18) New Construction

While no court has found a new building to be *structurally impracticable* to make fully accessible under the exemption, several cases have addressed the standard. *See Independent Living Resources v. Oregon Arena Corp.*, 982 F Supp 698, 770 (D Or 1997).

The District Court of Oregon has held that,"the ADAAG Standards act as a safe harbor. A designer who adheres to the letter of those standards (as interpreted by the courts and DOJ) ordinarily will be in compliance with the ADA regulations, at least with regard to the particular design elements covered by those standards." *Independent Living Resources, supra*, at 727. The district court downplayed the likelihood that designers in droves would flout the ADAAG in favor of their own alternative methods of ensuring access to the disabled, because the designers would risk an enforcement action if the DOJ or the courts did not agree with their choice. "[I]n extreme cases the court may order a non-compliant structure to be torn down and rebuilt in compliance with ADA standards. That prospect should serve to discourage abuse of the equivalent facilitation exception." *Independent Living Resources, supra.* An equivalent facilitation is defined as providing "substantially equivalent or greater *access to and usability* of the facility." Standard 2.2. *Independent Living Resources*, supra, at 728.

New commercial facilities must be built in strict compliance with the ADAAG. There is no cost defense to the new construction requirements. ADA Title III Technical Assistance Manual §§ III-5.1000; 28 CFR 36.401; 36.406; Appendix A.

Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc. is the latest

decision coming out of the Ninth Circuit Court of Appeals regarding new construction. This case concerns the placement of wheelchair accessible seating in stadium-style movie theaters built after January 1993. The Ninth Circuit held that, "[the] [Department of Justice's] interpretation of 'lines of sight comparable to those for members of the general public' in §4.33.3 to require a viewing angle for wheelchair seating within the range of angles offered to the general public in the stadium-style seats is valid and entitled to deference." *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*, 2003 US App LEXIS 16541 at *21,22 (9th Cir 2003). The DOJ's interpretation is valid despite the widespread use of stadium-style movie theaters post dating §4.33.3 of the ADAAG because the regulation was drafted broadly enough to encompass the new building design. *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*, *supra*, at *19.

Alterations

(§14.19) Generally

The term *alteration* does not include things such as normal maintenance, painting or wallpapering, asbestos removal, or changes to mechanical, heating, and ventilation systems. Public accommodations must maintain in good working order equipment and other features of the facility that are required to provide access to and usability by persons with disabilities. Repairs that are not promptly effectuated or improper or inadequate maintenance that causes repeated or persistent failures could be a violation of the ADA. Temporary or isolated interruptions in access caused by routine maintenance or repair of accessible features are not prohibited. 28 CFR §36.211.

Multiple alterations to elements within a space, when considered together, could constitute an alteration of the entire space, and the entire space then must be upgraded to meet the ADAAG. For example, an office suite undertaking a remodel of the conference room by installing new carpet and moving one of the walls and relocating the doorway might be considered a remodel of the entire conference room and, therefore, require a full upgrade of the entire conference room facility.

If an alteration in a place of public accommodation or commercial facility is begun after January 26, 1992, that alteration must be readily accessible to and usable by individuals with disabilities in accordance with ADAAG to the maximum extent feasible. An alteration is any change that affects usability.

(§14.20) Path of Travel

If an alteration changes the usability of or access to a *primary function area*, then to the maximum extent feasible, the path of travel to the altered area and the restrooms, telephones, and drinking fountains serving the altered area must be made readily accessible to persons with disabilities, unless the alterations are disproportionate to the overall alterations in terms of cost and scope. A primary function area includes an area in which a major activity for which the facility was designed occurs. Examples include conference rooms in a hotel, dressing rooms of an apparel store, and hotel rooms within a hotel facility.

The District Court of Oregon found that replacing part of a wooden walkway with brick stairs did not alter a place of public accommodation and thus did not trigger path-of-travel requirements when the wooden walkway was not the primary entrance to the restaurant or wine shop in question but rather a pathway to the

common area outside the retail establishments. *Alford v. City of Cannon Beach*, 2000 US Dist LEXIS 20730 (D Or 2000).

Elevator lifts are not a preferred method of providing a path of travel in altered buildings. Lifts are permitted in certain circumstances but they must comply with the ADAAG and applicable state or local building codes. Finally, under the regulations, lifts must "facilitate unassisted entry, operation, and exit from the lift." 28 C.F.R. Pt. 36, app. A, ADAAG 4.11.3; *Disabled in Action of Metropolitan New York v. Trump International Hotel & Tower*, 2003 US Dist LEXIS 5145 (SDNY 2003).

(§14.21) Costs

A good example of how a court calculates costs for path of travel alterations may be found in *W.G. Nichols, Inc. v. Ferguson*, 2002 US Dist LEXIS 10707, *19–22; 14 Am. Disabilities Cas. (BNA) 633 (ED Pa 2002).

ENFORCEMENT AND PENALTIES

(§14.23) Private Suits

The enforcement provisions for Title III of the ADA are borrowed from Title II of the Civil Rights Act of 1964. 42 USC §12188 provides that the remedies set forth in 42 USC §2000(a)-3(a) of this title are the remedies and procedures that are applicable to any person who is being subjected to discrimination on the basis of disability or who has reasonable grounds for believing that such person is about to be subjected to discrimination. *See* 42 USC § 12188(a)(1), *Pickern v. Holiday Quality Foods*, 293 F3d 1133 (9th Cir 2002), cert. denied, *Holiday Quality Foods, Inc. v. Doran*, 2002 US LEXIS 8495 (US Nov. 18, 2002).

Congress created a cause of action for private individuals in order to provide people with disabilities access to places of public accommodations, but limited the remedies available under that cause of action to "preventative" or equitable relief. *See* 42 USC §12188(a)(1), 42 USC §12182(a), *Fischer v. SJB-P.D., Inc.*, 214 F3d 1115,1120 (9th Cir 2000). Under Title III, monetary relief is not available for private individuals.

The Ninth Circuit has held that a plaintiff who is disabled need not engage in futile gestures of attempting to gain access to the public accommodation to which he or she desires access in order to show actual injury during the limitations period, the plaintiff just need actual notice that access would be denied. *Pickern, supra.* "Thus, under the ADA, once a plaintiff has actually become aware of

discriminatory conditions existing at a public accommodation, and is thereby deterred from visiting or patronizing that accommodation, the plaintiff has suffered an injury." *Pickern, supra,* 293 F3d at 1136-37. (attempting to enter the store once was sufficient). A private right of action is available for individuals who suffer a single incident of discrimination. *Pickern, supra*, *Dudley v. Hannaford Bros. Co.,* 333 F3d 299 (1st Cir 2003).

NOTE: A plaintiff has no cause of action under the ADA for an injury that occurred outside the limitations period. Because the ADA does not contain a statute of limitations, the court must apply the statute of limitations of the most analogous state law. *See Addisu v. Fred Meyer, Inc.,* 198 F3d 1130, 1140 (9th Cir 2000). Courts characterize a claim under the ADA as a personal injury action, and they apply the personal injury statute of limitations of the state where the claim arose. Thus, in Oregon, the two year personal injury statute of limitations ORS 12.110(1) applies. The limitations period begins to run when the plaintiff discovers the injury. *Pickern, supra*. A plaintiff has a cause of action, and is therefore entitled to injunctive relief, for any injury that is occurring within the limitations period and also any future threatened injury. *Pickern, supra* at 1137. Injunctive relief is available either to stop or prevent future injury.

Under Title III of the ADA, the Ninth Circuit has held that a plaintiff in a

private Title III action is not required to provide notice to any state or local agency prior to filing suit. *Botosan v. Paul McNally Realty*, 216 F3d 827, 831 (1999). Therefore, plaintiffs are not required to exhaust administrative remedies prior to filing suit. *See Wyatt v. Liljenquist,* 96 FSupp 2d 1062, 1064 (CD Cal. 2000), *Cornilles v. Regal Cinemas, Inc.,* 2000 US Dist LEXIS 15465 (D Or 2000).

28 CFR §36.505 allows the court, according to its discretion to grant the prevailing party attorney fees, including litigation expenses, and costs. The Ninth Circuit has held that even though a plaintiff settled his case, in relation to the remedies that are allowed in Title III, the settlement agreement was a significant victory, thus plaintiff could be considered "prevailing party" for the purpose of awarding attorney fees and costs. *Fischer, supra* 214 F3d at 1121 (blind restaurant patron settled his suit against the establishment for not allowing his service dog by forcing the restaurant to change its practice of denying access to services dogs and to expand their policy of nondiscrimination.)

(§14.24) Suits by the United States Attorney General

Title III of the ADA permits the Attorney General to bring enforcement actions to compel compliance with the ADA and to obtain monetary damages for persons who have been aggrieved. *See* 42 USC §12188(b)(2)(B), *Molski v. Gleich,* 318 F3d 937 (9th Cir 2003).

(§14.26) RELATIONSHIP TO STATE LAW

ORS 447.210-447.280 are the standards and specifications for physical access by disabled persons. It is the purpose of the statutes to make public accommodations in the state accessible to and useable by persons with disabilities as provided in the ADA. "Pursuant to the ADA the Director of the Department of Consumer and Business Services may provide greater protection to individuals with disabilities by adopting more stringent standards than those prescribed by the ADA." ORS 447.220 (2001).

ORS 659A.400 provides the definition for place of public accommodation

and ORS 659A.142(3) make it unlawful for any place of public accommodation to discriminate based on disability.

Unlike Title III of the ADA, an action brought alleging a violation of ORS 659A.142(3) allows the court to award compensatory or punitive damages in addition to injunctive or equitable relief. ORS 659A.885(3)(a). Oregon courts allow monetary damages for emotional distress, embarrassment, and mental anguish. *Brasch v. Quan*, 162 Or App 472 (1999) (wheel chair bound plaintiff was refused service at a restaurant and initiated an action under ORS 659.425(3), renumbered 659A.142(3), and recovered monetary damages.)

TAX INCENTIVES FOR COMPLIANCE

(§14.30) Eligible Access Expenditures

Where a dentist who previously used handwritten notes to communicate with deaf patients, purchased a camera system to allow all patients to view the examination, the purchase according to the U.S. tax court did not qualify for the

disabled access credit. The reasoning was that the dentist was already in compliance with the ADA prior to the purchase and it was not a replacement for the handwritten notes. *Fan v. Commissioner of Internal Revenue,* 117 TC 32 (2001).