

ALI-ABA Audio Seminar

NEW Proposed Regulations for the ADA Amendments Act

October 21, 2009

Telephone Seminar/Audio Webcast

**The Americans with Disabilities Act:
Selected Developments as of July 2009**

By

Frank C. Morris, Jr.
Epstein Becker & Green, PC
Washington, D.C.

Note: This paper was first prepared and presented by Mr. Morris for ALI-ABA's live seminar, "Current Developments in Employment Law," that took place July 23 -25, 2009 in Santa Fe, New Mexico.

EPSTEIN BECKER & GREEN, P.C.

ATTORNEYS AT LAW
1227 25TH STREET, NW, SUITE 700
WASHINGTON, DC 20037-1175
202.861.0900
FAX: 202.296.2882
EBGLAW.COM

FRANK C. MORRIS, JR.
TEL: 202.861.1880
FAX: 202.296.2882
FMORRIS@EBGLAW.COM

ALI-ABA'S

CURRENT DEVELOPMENTS IN EMPLOYMENT LAW

July 23-25, 2009

Santa Fe, New Mexico

**THE AMERICANS WITH DISABILITIES ACT -
SELECTED DEVELOPMENTS**

by

Frank C. Morris, Jr.

**EPSTEIN BECKER & GREEN, P.C.
Washington, D.C.**

**THE AMERICANS WITH DISABILITIES ACT
SELECTED DEVELOPMENTS**

I.	ADA AMENDMENTS ACT OF 2008 (“ADAAA”).....	1
II.	INDIVIDUAL WITH A DISABILITY	3
	A. IMPAIRMENT	4
	B. MAJOR LIFE ACTIVITY	5
	C. SUBSTANTIALLY LIMITING	6
	1. Major Life Activities Other than Working.....	7
	2. Major Life Activity of Working.....	17
	3. Inability to Work with a Particular Supervisor	22
	4. Temporary/Intermittent Impairments.....	22
	D. CONSIDERATION OF MITIGATING MEASURES	25
	E. RECORD OF A DISABILITY	27
	F. REGARDED AS HAVING A DISABILITY	28
	G. HIV/AIDS	37
	H. ILLEGAL USE OF DRUGS.....	38
III.	QUALIFIED INDIVIDUAL WITH A DISABILITY.....	40
	A. GENERALLY	40
	B. QUALIFICATION STANDARDS	45
	C. ATTENDANCE.....	47
	D. ESSENTIAL FUNCTIONS	48
	E. DIRECT THREAT.....	53
	1. Burden of Proof.....	53
	2. Threat To Self Versus Others.....	54
	3. Direct Threat and Qualification Standards.....	55
	4. HIV/AIDS	57
	5. Other Disabilities	57
	F. STATEMENTS MADE IN CONJUNCTION WITH APPLICATIONS FOR DISABILITY BENEFITS	58
IV.	REASONABLE ACCOMMODATION.....	60
	A. WHEN DUTY ARISES.....	60
	B. THE INTERACTIVE PROCESS	62
	C. BURDEN OF PROOF.....	65
	D. REASONABLE ACCOMMODATION FOR INDIVIDUALS REGARDED AS DISABLED.	66
	E. PART-TIME POSITION OR MODIFIED SCHEDULE	67
	F. PERMANENT ASSIGNMENT TO TEMPORARY OR ROTATING POSITIONS	68
	G. LEAVE.....	69
	1. Indefinite Leave	69
	2. Other Leave Issues	70
	H. WORK AT HOME OR OTHER LOCATION.....	71
	I. REASSIGNMENT TO VACANT POSITION	73
	J. RESTRUCTURING JOB	78
	K. SENIORITY-BASED LAYOFFS.....	79
	L. OTHER ACCOMMODATIONS	80
V.	ASSOCIATION/RELATIONSHIP	82

VI.	RETALIATION	83
VII.	HOSTILE WORK ENVIRONMENT	88
VIII.	DISCRIMINATION	91
IX.	DISCRIMINATORY FAILURE TO REINSTATE.....	93
X.	DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS	94
	A. STANDING	94
	B. PRE-EMPLOYMENT	94
	C. CURRENT EMPLOYEES	96
XI.	CONFIDENTIALITY OF MEDICAL INFORMATION	100
XII.	CLAIMS AGAINST UNIONS.....	101
XIII.	HEALTH AND DISABILITY BENEFITS.....	101
	A. DIFFERENT BENEFITS FOR MENTAL AND PHYSICAL DISABILITIES DO NOT VIOLATE THE ADA.....	101
	B. SCOPE OF HEALTH INSURANCE COVERAGE.....	103
	C. THE STANDING ISSUE.....	103
XIV.	CLAIMS AGAINST INSURERS.....	104
XV.	WHO IS AN EMPLOYEE	104
XVI.	E-DISCOVERY ISSUES	106
XVII.	INDIVIDUAL LIABILITY	106
XVIII.	VERDICTS AND SETTLEMENTS	106
XIX.	ELEVENTH AMENDMENT IMMUNITY	109
	A. TITLES I AND II	109
	B. OTHER ISSUES	111
XX.	RETROACTIVITY OF THE ADA AMENDMENTS ACT OF 2008 (“ADAAA”).....	111
XXI.	ADA TITLE III: HIGHLIGHTS FROM PUBLIC ACCOMMODATIONS CASES.....	113
	A. MODIFICATION IN POLICIES, PRACTICES AND PROCEDURES	113
	B. DEFINITION OF PUBLIC ACCOMMODATION.....	114
	C. INDIVIDUAL LIABILITY/OPERATOR LIABILITY	116
	D. ARCHITECT LIABILITY	116
	E. PROVISION OF AUXILIARY AIDS AND SERVICES.....	117
	F. REMOVAL OF ARCHITECTURAL AND COMMUNICATION BARRIERS	117
	G. NEW CONSTRUCTION/ALTERATIONS	120
	H. PROFESSIONAL PLAINTIFFS	121
	I. STANDING.....	121
XXII.	EEOC GUIDANCES	121

TABLE OF CASES

<u>Albertsons, Inc. v. Kirkingburg</u> , 527 U.S. 555 (1999).....	7, 45
<u>Alexander v. Choate</u> , 469 U.S. 287 (1985).....	110
<u>Allen v. Hamm</u> , No. Civ. A. RDB 05-879, 2006 WL 436054 (D. Md. Feb. 22, 2006)	79
<u>Allen v. Pacific Bell</u> , 348 F.3d 1113 (9th Cir. 2003).....	65
<u>Allmond v. Akal Sec., Inc.</u>, 558 F.3d 1312 (11th Cir. 2009)	50
<u>Amadio v. Ford Motor Co.</u> , 238 F.3d 919 (7th Cir. 2001)	29, 71
<u>Ammons v. Aramark Uniform Servs., Inc.</u> , 368 F.3d 809 (7th Cir. 2004).....	62
<u>Anders v. Waste Mgmt. of Wis.</u> , 463 F.3d 670 (7th Cir. 2006)	25
<u>Armstrong v. Turner Indus., Inc.</u> , 141 F.3d 554 (5th Cir. 1998)	94
<u>Arrieta-Colon v. Wal-Mart P.R., Inc.</u> , 434 F.3d 75 (1st Cir. 2006).....	88
<u>Bailey v. Ga.-Pac. Corp.</u> , 306 F.3d 1162 (1st Cir. 2002).....	33
<u>Baker v. CSX Transp., Inc.</u> , 2008 WL 623213 (W.D.N.Y. March 4, 2008)	7
<u>Banks v. CBOCS W., Inc.</u> , 2005 WL 1126913 (N.D.Ill. May 9, 2005), <u>amended by</u> , 2006 WL 648136 (N.D. Ill. Feb. 17, 2006)	15
<u>Barclay v. Amtrak</u> , 2007 WL 2004382 (3d Cir. July 12, 2007)	88
<u>Barnett v. U.S. Air, Inc.</u> , 228 F.3d 1105 (9th Cir. 2000), <u>vacated on other grounds</u> , 122 S. Ct. 1516 (2002).....	63, 64
<u>Bartlett v. N.Y. State Bd. of Law Exam'rs</u> , 226 F.3d 69 (2d Cir. 2000).....	14
<u>Basith v. Cook County</u> , 241 F.3d 919 (7th Cir. 2001).....	49
<u>Bates v. United Parcel Serv.</u> , 2006 WL 2864438 (9th Cir. Oct. 10, 2006).....	46
<u>Battle v. United Parcel Serv.</u> , 438 F.3d 856 (8th Cir. 2006).....	10
<u>Baum v. Rockland County</u> , 161 F. App'x 62, 2005 WL 3527543 (2d Cir. Dec. 25, 2005).....	84
<u>Bay v. Cassens Transp. Co.</u> , 212 F.3d 969 (7th Cir. 2000)	44

<u>Bd. of Trs. of Univ. of Ala. v. Garrett</u> , 531 U.S. 356 (2001).....	109
<u>Bekker v. Humana Health Plan</u> , 229 F.3d 662 (7th Cir. 2000), <u>cert. denied</u> , 532 U.S. 972 (2001).....	58
<u>Benoit v. Technical Mfg. Corp.</u> , 331 F.3d 166 (1st Cir. 2003).....	13
<u>Berry v. T-Mobile, USA, Inc.</u> , 490 F.3d 1211 (10th Cir. 2007).....	31
<u>Blanks v. Sw. Bell Commc'ns, Inc.</u> , 310 F.3d 398 (5th Cir. 2002)	5
<u>Bogner v. Wackenhut Corp.</u> , 2008 U.S. Dist. LEXIS 1063 (W.D.N.Y. Jan. 7, 2008).....	7
<u>Bones v. Honeywell Int'l, Inc.</u> , 366 F.3d 869 (10th Cir. 2004)	85
<u>Bonner v. N. Y. State Elec. & Gas Corp.</u> , 195 F. Supp. 2d 429 (W.D.N.Y 2002).....	68
<u>Borgialli v. Thunder Basin Coal Co.</u> , 235 F.3d 1284 (10th Cir. 2000)	54
<u>Bowen v. Income Producing Mgmt. of Okla., Inc.</u> , 202 F.3d 1282 (10th Cir. 2000).....	16
<u>Boykin v. ATC/Vancom of Colo., L.P.</u> , 247 F.3d 1061 (10th Cir. 2001)	74
<u>Brady v. Wal-Mart Stores, Inc.</u>, 531 F.3d 127 (2nd Cir. 2008).....	60, 62, 106
<u>Brady v. Wal-Mart Stores, Inc.</u> , No. 03-3834, 2005 WL 1521407 (E.D.N.Y. June 21, 2005)	108
<u>Bragdon v. Abbott</u> , 524 U.S. 624 (1998).....	5, 37, 57
<u>Breen v. Dep't of Transp.</u> , 282 F.3d 839 (D.C. Cir. 2002)	68
<u>Brenneman v. Medcentral Health Sys.</u> , 366 F.3d 412 (6th Cir. 2004)	47
<u>Bristol v. Bd. of County Comm'rs of the County of Clear Creek</u> , 281 F.3d 1148 (en banc), <u>vacated in part on other grounds</u> , 312 F.3d 1213 (10th Cir. 2002).....	6
<u>Brown v. City of Tucson</u> , 336 F.3d 1181 (9th Cir. 2002).....	90
<u>Brown v. Cox Med. Ctrs.</u> , 286 F.3d 1040 (8th Cir. 2002).....	5, 35
<u>Brown v. Lucky Stores, Inc.</u> , 246 F.3d 1182 (9th Cir. 2001)	39
<u>Brown v. Unified Sch. Dist. No. 500</u> , 368 F. Supp. 2d 1250 (D. Kansas 2005)	11, 69