ADA TITLE III OUTLINE

1. Elements

1. The elements of plaintiff’s prima facie case are often described as:

   1. plaintiff is an individual with a disability (as defined in II below);
   2. defendant owned, leased, or operated a place of public accommodation; and
   3. defendant discriminated against plaintiff on the basis of his/her disability.


3. It is unclear whether proving plaintiff is otherwise “qualified” is an element of plaintiff’s case.

   1. Several cases reference such an element in dicta, often relying on precedent decided under Title I or Title II of the ADA. E.g. *Louie v. National Football League*, 185 F.Supp.2d 1306, 1308 (S.D.Fla. 2002).

   2. But in contrast to Titles I and II, the statutory language in Title III does not include the term. Compare 42 U.S.C. §12112(a) (Title I) and 42 U.S.C. §12132 (Title II), with 42 U.S.C. §12182(a) (Title III). See also *Motzkin v. Trustees of Boston University*, 938 F.Supp. 983, 996 (D.Mass. 1996) (holding that in part because of this difference in the statutory language, Title III does not apply to employment relationships).

   3. It probably makes more sense to say that a Title III plaintiff need not show he or she is “otherwise qualified.” *Matter of Baby K*, 832 F.Supp. 1022, 1028 (E.D.Va. 1993) (holding it is not a requirement), aff’d on other grounds, 16 F.3d 590 (4th Cir.), cert. denied sub nom Baby K v. Ms. H, 513 U.S. 825 (1994). See also *Menkowitz v. Pottstown Memorial Medical Center*, 154 F.3d 113, 121 (3rd Cir. 1998) (finding that Title III protects all “individuals”).
4. Note, however, that a plaintiff will have to prove sufficient standing, see IX.E below, and similar issues may arise in the context of whether a requested policy modification is reasonable, or if the defendant asserts a fundamental alterations defense. *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 154 (1st Cir.1998); *Menkowitz, supra*; *Bowers v. National Collegiate Athletic Ass'n*, 118 F.Supp.2d 494, 517 n.18 (D.N.J. 2000).

4. There is no “intent” requirement. *Lentini v. California Center for the Arts, Escondido*, 370 F.3d 837, 846-847 (9th Cir. 2004); *Association for Disabled Americans, Inc. v. Concorde Gaming Corp.*, 158 F.Supp.2d 1353 (S.D.Fla. 2001) (Title III applies not just to intentional exclusions, but “also extends to some forms of de facto discrimination”); *Independent Living Resources v. Oregon Arena Corp.*, 1 F.Supp.2d 1159, 1169 (D.Or. 1998); *Dunlap v. Association of Bay Area Governments*, 996 F.Supp. 962, 965-966 (N.D.Cal. 1998) (“plaintiff need not show that the defendant was motivated by a desire to discriminate against disabled persons ... Rather, the plaintiff need only show that she is an individual with a disability and that because of her disability she was denied participation in or the benefit of a service provided by the theater.”); *U.S. v. Morvant*, 898 F.Supp. 1157, 1163 n.7 (E.D.La. 1995); *Emery v Caravan of Dreams*, 879 F. Supp. 640, 643 (N.D. Tex. 1995), aff’d without opinion sub nom Emery v. Dreams Spirits, Inc., 85 F.3d 622 (5th Cir. 1996) (unnecessary for a Title III plaintiff to prove discriminatory intent to establish a violation of the ADA). See also *Down in Front: Entertainment Facilities and Disabled Access Under the Americans with Disabilities Act*, 20 Hastings Comm. & Ent. L.J. 897, 903 (1998) (“Intent to discriminate is not a necessary element of a prima facie case under the ADA.”); *Crowder v. Kitagawa*, 81 F.3d 1480, 1483-1484 (9th Cir. 1996) (holding that ADA Title II claims do not require a showing of intentional discrimination); *Mayberry v. Von Valtier*, 843 F.Supp. 1160, 1166 (E.D.Mich. 1994) (concluding that the parallel Rehabilitation Act “does not require a plaintiff to prove discriminatory intent in order to make out a prima facie case of handicap discrimination,” based in part the Congressional findings in the ADA at 42 U.S.C. §12101(a)(5)).

1. “Benign” reasons are no defense, because Congress expressly recognized that persons with disabilities suffer not just intentional discrimination, but “the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.” 42 U.S.C. §12101(a)(5). See also *Parr v. L & L Drive-Inn Restaurant*, 96 F.Supp.2d 1065, 1084 (D.Hawaii 2000) (ADA covers not only intentional


2. Who is Protected  

1. Persons with disabilities.  


2. Includes persons  

1. with an impairment that substantially limits one or more major life activities. 42 U.S.C. §12102(2)(A); 28 C.F.R. §36.104.  

2. with a record of such an impairment. 42 U.S.C. §12102(2)(B); 28 C.F.R. §36.104.  

3. who are regarded as having such an impairment. 42 U.S.C. §12102(2)(C); 28 C.F.R. §36.104.  

2. ADA protections may extend to some people without any disability.  

1. ADA prohibits discrimination because of an association with a person with a disability (see III.C.3 below).
2. ADA prohibits retaliation (see III.E below).

3. Title III does not cover employment discrimination (which is instead covered by Title I of the ADA), but it does protect individuals who are not “employees” from work-related discrimination. See, e.g., Menkowitz v. Pottstown Memorial Medical Center, 154 F.3d 113 (3rd Cir. 1998) (independent contractor doctor could sue hospital for discriminatory denial of staff privileges); Levinger v. Mercy Medical Center, 75 P.3d 1202, 1208 (Idaho 2003).

3. Discrimination Prohibited

1. General rule - 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 by any person who owns, leases (or leases to), or operates a place of public accommodation. 42 U.S.C. §12182(a); 28 C.F.R. §36.201(a).

2. General prohibitions.

   1. This general rule is construed to prohibit covered entities — either directly, or through licensing, contractual, or other arrangements — from:

      1. denying the participation in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity, 42 U.S.C. §12182(b)(1)(A)(i); 28 C.F.R. §36.202(a);

      2. providing an unequal benefit, 42 U.S.C. §12182(b)(1)(A)(ii); 28 C.F.R. §36.202(b); or

      3. providing a separate benefit (unless necessary to provide a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others), 42 U.S.C. §12182(b)(1)(A)(iii); 28 C.F.R. §36.202(c).

   2. Violation of a general prohibition alone is sufficient to state a prima facie case, without proving a violation of one of the four specified types of discrimination listed in III.D below. Morvant, 898 F.Supp. 1157, 1161 (E.D.La. 1995).

3. General requirements:

1. Most integrated setting - Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual. 42 U.S.C. §12182(b)(1)(B); 28 C.F.R. §36.203. For examples, see Pinnock v. International House of Pancakes Franchisee, 844 F.Supp. 574, 583 (S.D.Cal. 1993) (upholding integration provision).

2. Administrative methods - An individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration (I) that have the effect of discriminating on the basis of disability; or (ii) that perpetuate the discrimination of others who are subject to common administrative control. 42 U.S.C. §12182(b)(1)(D); 28 C.F.R. §36.204.

3. Association - A public accommodation shall not exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association. 42 U.S.C. §12182(b)(1)(E); 28 C.F.R. §36.205. See also Freilich v. Board of Directors of Upper Chesapeake Health, Inc., 142 F.Supp.2d 679, 700 (D.Md. 2001) (recognizing claim, but holding that it does not cover advocacy for a class of medical patients); Bravin v. Mount Sinai Medical Center, 186 F.R.D. 293, 307 (S.D.N.Y. 1999) (recognizing a claim based on the refusal of a childbirth class to provide a sign language interpreter for the deaf husband of a class member), vacated in part on other grounds, 58 F.Supp.2d 269 (S.D.N.Y. 1999).

4. Four kinds of discrimination specified.

1. A public accommodation shall not impose or apply eligibility criteria that screen out, or tend to screen out, an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations.


3. This provision prohibits surcharges. 28 C.F.R. §36.301(c); ADA Technical Assistance Manual III-4.1400.


5. Defenses - such criteria may be permitted if they are:
   (1) necessary for the provision of the goods, services, facilities, privileges, advantages, accommodations being offered. 28 C.F.R. §36.301(a); and
   (2) legitimate safety requirements necessary for safe operation, based on actual (not speculative) risk. 28 C.F.R. §36.301(b); Leiken v. Squaw Valley Ski Corp., 3 AD Cases (BNA) 945, 953 (E.D.Cal. 1994). Note that it is unclear if this is substantively different from the direct threat defense (described in VII.B below). Leiken, supra, 3 AD Cases at 953, n.19.

2. Failure to Make Reasonable Modifications.

1. A public accommodation shall make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities. 42 U.S.C. §12182(b)(2)(A)(ii); 28 C.F.R. §36.302(a).

2. Specific examples:
   (1) accommodating service animals. 28 C.F.R. §36.302(c); and
(2) providing accessible checkout aisles or alternatives. 28 C.F.R. §36.302(d).


   (1) plaintiff has a disability;

   (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation;

   (3) the defendant employed a discriminatory policy or practice; and

   (4) the defendant discriminated against the plaintiff based upon the plaintiff’s disability by (a) failing to make a requested reasonable modification that was (b) necessary to accommodate the plaintiff’s disability.

4. Burden of proof - the plaintiff has the burden of proving that a modification was requested, and that it was reasonable in general sense, i.e., in the run of cases (without focusing on specifics of plaintiff’s or defendant’s circumstances). *Johnson v. Gambrinus Company/Spoetzl Brewery*, 116 F.3d 1052, 1059-1060 (5th Cir. 1997).

5. Determination of what is “reasonable”

   (1) Is fact-specific, and done on a case-by-case basis. *Fortune v. American Multi-Cinema, Inc.*, 364 F.3d 1075, 1083 (9th Cir. 2004); *Staron v. McDonald’s Corp.*, 51 F.3d 353, 356 (2d Cir. 1995).

   (2) Factors include effectiveness of the modification, nature of the particular disability, and cost. *Staron v. McDonald’s Corp.*, 51 F.3d 353, 356 (2d Cir. 1995).

   (3) Must not impose undue administrative or financial burden. *Staron v. McDonald’s Corp.*, 51 F.3d 353, 356 (2d Cir. 1995) (citing Rehabilitation Act precedent).
6. Defenses - such modifications are not necessary if:

(1) they would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations. 28 C.F.R. §36.302(a); and

(1) The fundamental alteration defense is a narrow one, Johnson v. Gambrinus Company/Spoetzl Brewery, 116 F.3d 1052, 1059 (5th Cir. 1997), intended to justify the exclusion of service animals only in “rare circumstances.” Id. at 1061 nn.6-7; 28 C.F.R. Part 36 App. B, §36.302.


(2) the services sought are outside the defendant’s area of specialization and the defendant would normally refer such a person to another. 28 C.F.R. §36.302(b); U.S. v. Morvant, 898 F.Supp. 1157, 1162-1163 (E.D.La. 1995) (recognizing the defense, but finding a dentist’s assertion that he needed to refer a patient with HIV to a specialist for teeth-cleaning to be a pretext for discrimination); Howe v. Hull, 873 F.Supp. 72, 78-79 (N.D.Ohio 1994) (similar).


1. A public accommodation shall take those steps that 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. 28 C.F.R. §36.303(a).

2. Examples:

(2) Failure to provide “qualified interpreter,” as defined in 28 C.F.R. §36.104.

(3) Failure to make TDD available to disabled clients if other clients are allowed to use the phone on more than incidental basis. 28 C.F.R. §36.303(d).

(4) Failure of place of lodging to provide close captioned decoders. 28 C.F.R. §36.303(e).

(5) Failure of McDonald’s restaurant to allow customers who are deaf to order at the drive-through window via pen and paper, and instead requiring all drive-through orders be given via loudspeaker. Bunjer v. Edwards, 985 F.Supp. 165 (D.D.C. 1997).

3. Defenses - need not provide auxiliary aids and services if doing so would be result in a:

(1) Fundamental alteration.

(1) Not specifically defined.

(2) Cf. Southeastern Community College v. Davis, 442 U.S. 397 (1979) (§504 case originating this defense, holding that requiring a nursing program to do away with its clinical portion would fundamentally alter it).

(3) Note, however, that even if a particular auxiliary aid or service would be a fundamental alteration or undue burden, defendant must still provide an alternative that ensures to the maximum possible extent that disabled receive the goods, services, etc. 28 C.F.R. §36.303(f).
Undue burden.

(1) Undue burden means significant difficulty or expense. 28 C.F.R. §36.303(a).

(2) According to 28 C.F.R. §36.104, in determining whether an action would result in an undue burden, factors to be considered include:

1) The nature and cost of the action;

2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;

3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;

4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and

5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

(3) Applicable tax incentives may also be relevant, i.e., http://www.usdoj.gov/crt/ada/taxpack.htm.
4. The person with a disability should be consulted as to the auxiliary aid preferred, but his or her choice is not binding. 28 C.F.R. Part 36 App. B, §36.303.

4. Failure to remove barriers in existing facilities. 42 U.S.C. §12182(b)(2)(A)(iv)-(v). This is described in more detail in IV.A below.


1. The plaintiff need not have a disability to state an actionable retaliation or interference claim. *Rhoads v. F.D.I.C.*, 257 F.3d 373, 391 (4th Cir. 2001); *Selenke v. Medical Imaging of Colorado*, 248 F.3d 1249, 1264 (10th Cir. 2001) (plaintiff need not prove an actual disability; a reasonable, good faith belief that the statute has been violated suffices); *Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778, 786 (3d Cir. 1998); *Taylor v. Lenox Hill Hospital*, 2003 WL 1787118, at *6 (S.D.N.Y. April 3, 2003) (plaintiff’s good faith belief that he had disability was sufficient); EEOC Compliance Manual, §8: Retaliation §8-II(B) at n 7 (May 20, 1998), online at http://www.eeoc.gov/docs/retal.txt.

2. At least one court has held that individuals can be liable for retaliation. *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161 (11th Cir. 2003).

3. The courts are divided over whether damages are available for ADA retaliation claims. *See Kramer v. Banc of America Securities, LLC*, 355 F.3d 961 (7th Cir. 2004) (collecting cases and rejecting damage recovery), *cert. denied, ___ U.S. ___,* 2004 WL 874937 (June 21, 2004).


4. Architectural Accessibility

1. Removal of Barriers in Existing Facilities (see III.D.4 above)


2. Defendant must remove in existing facilities:

1. architectural barriers;
2. communication barriers that are structural in nature; and

3. transportation barriers

   (1) in existing vehicles and rail passenger cars

   (2) used for transporting individuals

   (3) not including barriers that can only be removed by installing lift.

3. Unless such removal is not \textit{readily achievable}.

1. “Readily achievable” means easily accomplished, and not requiring much difficulty or expense. 42 U.S.C. §12181(9); 28 C.F.R. §36.104.

2. Factors to be considered, per 42 U.S.C. §12181(9)(A) - (D), and 28 C.F.R. §36.104, include:

   (1) the nature and cost of the action needed;

   (2) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

   (3) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

   (4) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

4. The resources of the parent corporation may need to be considered. Guzman v. Denny’s Inc., 40 F.Supp.2d 930, 936 (S.D.Ohio 1999)

5. The tax incentives for barrier removal may also be relevant. See http://www.usdoj.gov/crt/ada/taxpack.htm.

6. Burden of proof - Colorado Cross Disability Coalition v. Hermanson Family Ltd. Partnership I, 264 F.3d 999, 1005-1006 (10th Cir. 2001) (“Plaintiff bears the initial burden of production to present evidence that a suggested method of barrier removal is readily achievable, i.e., can be accomplished easily and without much difficulty or expense. If Plaintiff satisfies this burden, Defendant then has the opportunity to rebut that showing. Defendant bears the ultimate burden of persuasion regarding its affirmative defense that a suggested method of barrier removal is not readily achievable.”).


8. Examples of barrier removal likely (but not necessarily) to be readily achievable are at 28 C.F.R. §36.304(b); ADA Technical Assistance Manual III-4.4200. See also Colorado Cross Disability Coalition v. Hermanson Family Ltd. Partnership I, 264 F.3d 999, 1008 (10th Cir. 2001).

9. Barrier removal required in pre-existing buildings shall not exceed the standards for alterations (referred to in IV.C. below), 28 C.F.R. §36.304(g)(1), or if no relevant standards for alterations, shall not
exceed the new construction standards (referred to in IV.B. below), 28 C.F.R. §36.304(g)(2).


4. If defendant can show a particular barrier removal is not readily achievable, defendant must still make available its goods, services, facilities, privileges, advantages, and accommodations through alternative methods that do not fully comply with specified requirements:

1. if readily achievable, and

2. if will not pose a significant risk to health or safety.


4. Examples: curb service, home delivery, retrieving merchandise from inaccessible shelves, relocating activities to accessible locations. 28 C.F.R. §36.305(b).

5. Note that carrying someone in a wheelchair should be used only in manifestly exceptional cases, consistent with the ADA Title II guidance. See 28 C.F.R. Part 35 App. B, §35.150; DOJ Opinion Letter, 4 NDLR ¶ 234 (Sept. 7, 1994); ADA Technical Assistance Manual II-5.2000.

5. Special provisions.

1. Defendant must provide seating in assembly areas, if readily achievable, that meets certain requirements. 28 C.F.R. §36.308(a)
2. Exams and courses (see V.C below).

3. Transportation by public accommodations.


1. Facilities designed or constructed for first occupancy after 1/26/93 must be accessible. 28 C.F.R. §36.401(a)(2)

2. Accessibility means the facility must comply with ADAAG new construction standards (which are set out in Appendix A to 28 C.F.R. Part 36). 28 C.F.R. §36.406(a); *Long v. Coast Resorts, Inc.*, 267 F.3d 918, 923 (9th Cir. 2001).

1. There is no discretion to deny relief based on factors like substantial compliance or financial expense, *Long, supra*, 267 F.3d at 923. See also ADAAG §4.1.1(1).

2. It is not a defense that there are other accessible facilities available. *Small v. Dellis*, 1997 WL 853515, at *5-6 (D.Md. Dec. 18, 1997).

3. At least some courts have held that plaintiffs can sue for lack of accessibility over elements for which there are not yet ADAAG specifications. *Access Now, Inc. v. Holland America Line-Westours, Inc.*, 147 F.Supp.2d 1311, 1312-1313 (S.D. Fla. 2001) (lack of ADAAG guidelines is not a bar to suit).

3. Defenses:

1. Need not comply with ADAAG if it is structurally impracticable to do so. 42 U.S.C. §12183(a)(1); 28 C.F.R. §36.401(c); ADAAG §4.1.1(5)(a).

   (1) This is a narrow and particularized defense that must be established on a case-by-case basis, and it applies only “in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features.”
28 C.F.R. §36.401(c)(1); Long v. Coast Resorts, Inc., 267 F.3d 918, 923 (9th Cir. 2001); Caruso v. Blockbuster-Sony Music Entertainment Centre at Waterfront, 193 F.3d 730, 737-738 (3d Cir. 1999).

(2) It is the Defendant’s burden to show this. 42 U.S.C. §12183(a)(1); 28 C.F.R. §36.401(c)(1); ADAAG §4.1.1(5)(a).

(3) Even if a particular element were structurally impracticable, all other elements would still have to comply with ADAAG. 28 C.F.R. § 36.401(c)(2).

2. Elevator exemption. 42 U.S.C. §12183(b); 28 C.F.R. §36.401(d).

3. ADAAG itself provides that its specifications need not be followed if an alternative design provides “substantially equivalent or greater access to and usability of the facility.” ADAAG §2.2.

4. ADAAG also states that “[a]ll dimensions are subject to conventional building industry tolerances for field conditions.” ADAAG §3.2. This is an affirmative defense, however, requiring proof that defendant could not have complied with the dimensional requirements by exercising due care in the design and construction, and also requiring proof of what the particular conventional tolerances are for the construction in question. Independent Living Resources v. Oregon Arena Corp., 1 F.Supp.2d 1124, 1135 and 1138 (D.Or. 1998). Courts should be “especially reluctant to accept the ‘dimensional tolerances’ excuse in a situation where the regulations specify a minimum clearance that is necessary for that element to be usable by persons with disabilities.” Id.

3. Alterations of Existing Facilities


3. Each altered area must:

1. be readily accessible to, and usable by, individuals with disabilities to the maximum extent feasible. 28 C.F.R. §36.402(a). "Maximum extent feasible" means except for the occasional case where the nature of the facility makes it virtually impossible to comply fully 28 C.F.R. §36.402(c); and

2. comply with the ADAAG requirements for alterations. 28 C.F.R. §§ 36.402(b)(2) and 36.406(a).

4. Alterations include:

1. Changes that affect or could affect the usability of a building or facility, or any part thereof, 42 U.S.C. §12183(a)(2), 28 C.F.R. §36.402(b), and include “employee-only” areas. 28 C.F.R. Part 36 App. B, §36.403.

2. Remodeling, renovation, rehabilitation, reconstruction, moving walls. 28 C.F.R. §36.402(b)(1). If changes are considered an alteration, then each element in the altered area must comply with ADAAG. 28 C.F.R. §36.402(b)(2).


5. Alterations do not include maintenance, re-roofing, painting or wallpapering, asbestos removal, changes to mechanical or electrical systems, unless they affect the usability of the building or facility. 28 C.F.R. §36.402(b)(1).

6. No alteration shall be undertaken which decreases or has the effect of decreasing accessibility or usability of a building or facility below the requirements for new construction at the time of alteration. ADAAG §4.1.6(1)(a).

7. Exceptions to alterations requirements.
1. Elevator exemption - The alterations provisions do not require the installation of an elevator in an altered facility that is less than three stories or has less than 3,000 square feet per story, except with respect to any facility that houses a shopping center, a shopping mall, the professional office of a health care provider, a terminal, depot, or other station used for specified public transportation, or an airport passenger terminal. 28 C.F.R. §36.404(a).

2. Historic preservation - Alterations to designated historic facilities must comply with the special accessibility guidelines in ADAAG §4.1.7, unless doing so will threaten or destroy the historic significance of the building or facility, in which case alternative methods of access shall be provided pursuant to the requirements of 28 C.F.R. §36.305.

3. ADAAG requirements provide exception to compliance if:

   (1) an alternative design provides “substantially equivalent or greater access to and usability of the facility.” ADAAG §2.2;

   (2) the Defendant can demonstrate that a particular requirement is “structurally impracticable.” ADAAG §4.1.1(5)(a); and

   (3) deviations are consistent with “conventional building industry tolerances for field conditions.” ADAAG §3.2. This is an affirmative defense, however, requiring proof that defendant could not have complied with the dimensional requirements by exercising due care in the design and construction, and also requiring proof of what the particular conventional tolerances are for the construction in question. Independent Living Resources v. Oregon Arena Corp., 1 F.Supp.2d 1124, 1135 (D.Or. 1998). Courts should be “especially reluctant to accept the ‘dimensional tolerances’ excuse in a situation where the regulations specify a minimum clearance that is necessary for that element to be usable by persons with disabilities.” Id.

8. Alteration affecting an area of primary function - Alterations that affect or could affect the usability of, or access to, an area of a facility that contains a primary function shall be made so as to ensure that, to the maximum extent
feasible, the path of travel to the altered area and the restrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities. 28 C.F.R. §36.403(a).

1. A primary function is a major activity for which the facility is intended. 28 C.F.R. §36.403(b). See also the examples at 28 C.F.R. §36.403(c).

2. A path of travel includes:
   (1) a continuous, unobstructed way of pedestrian passage by means of which the altered area may be approached, entered, and exited, and which connects the altered area with an exterior approach (including sidewalks, streets, and parking areas), an entrance to the facility, and other parts of the facility. 28 C.F.R. §36.403(e)(1);
   (2) walks and sidewalks, curb ramps and other interior or exterior pedestrian ramps; clear floor paths through lobbies, corridors, rooms, and other improved areas; parking access aisles; elevators and lifts; or a combination of these elements. 28 C.F.R. §36.403(e)(2); and
   (3) the restrooms, telephones, and drinking fountains serving the altered area. 28 C.F.R. §36.403(e)(3).

3. Defense -
   (1) Such alterations need not be made if the cost of altering the path of travel disproportionate, i.e., exceeds 20% of the cost of altering the primary function area. 28 C.F.R. §36.403(a); 28 C.F.R. §36.403(f).
   (2) But even if the cost would exceed 20%, the path of travel must still be made accessible to the extent the cost does not exceed 20%. 28 C.F.R. §36.403(g).

5. Who can be sued

1. Public Accommodations


2. There is no size requirement for acts or omissions after 1/26/93. See Sec. 310(b) of the ADA, set out in a Note to 42 U.S.C. §12181.

3. Includes entities that own, lease, lease to, or operate a public accommodation. 28 C.F.R. §36.104 (“public accommodation”).

1. Both the landlord and the tenant may be public accommodations subject to ADA regulations. 28 C.F.R. §36.201(b); Botosan v. Paul McNally Realty, 216 F.3d 827, 832-834 (9th Cir. 2000) (landlord liable for non-compliance, even though lease stated that tenant was solely responsible); ADA Technical Assistance Manual III-1.2000 (“any allocation made in a lease or other contract is only effective as between the parties, and both landlord and tenant remain fully liable for compliance with all provisions of the ADA relating to that place of public accommodation.”). See also Simpson v. City of Charleston, 22 F.Supp.2d 550, 555 (S.D.W.Va. 1998) (supermarket leasing property was liable for barriers on surrounding sidewalks, despite city ordinance making landowners responsible for sidewalks); Independent Living Resources v. Oregon Arena Corp., 1 F.Supp.2d 1124, 1148 (D.Or. 1998) (facility’s contract with the City absolving it of responsibility for improvements cannot control the operation of federal law).

2. The lessee may be covered even if lessor is exempt, Fiedler v. American Multi-Cinema, Inc., 871 F.Supp. 35, 37-38 (D.D.C. 1994), although the lessee may only be covered if it has paid consideration (i.e., is not using donated space). 28 C.F.R. Part 36 App. B, §36.201.

4. Regarding architect and designer liability, the courts are divided. See, e.g., *Lonberg v. Sanborn Theaters Inc.*, 259 F.3d 1029 (9th Cir. 2001) (collecting authorities, and holding no such liability).


5. The courts are divided on whether public accommodations are limited to physical structures.

1. Holding Title III is not so limited: *Rendon v. Valleycrest Productions, Ltd.*, 294 F.3d 1279 (11th Cir. 2002) (public accommodations not limited to physical structures, but also includes intangible barriers. at least when there is a nexus between the intangible barrier and the premises of the public accommodation); *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001) (“An insurance company can no more refuse to sell a policy to a disabled person over the Internet than a furniture store can refuse to sell furniture to a disabled person who enters the store.”); *Carparts Distribution Center, Inc. v. Automotive Wholesaler’s Ass’n of New England, Inc.*, 37 F.3d 12, 18-20 (1st Cir. 1994) (public accommodations not limited to physical structures; group health insurance plan may be a public accommodation); *Matthews v. NCAA*, 179 F.Supp.2d 1209, 1219 et seq. (E.D.Wash. 2001) (interpreting cases in the 6th and 9th circuits as holding that in order for Title III to apply, some “nexus” must exist between the physical place of public accommodation and the services or privileges denied in a discriminatory manner).

3. Additional cases have held that Title III does not apply to insurance policies, e.g., *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1115 (9th Cir. 2000); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 614 (3rd Cir. 1998), but their applicability to other Title III contexts is unclear. *Matthews v. NCAA*, 179 F.Supp.2d 1209, 1219 et seq. (E.D.Wash. 2001).

2. Commercial Facilities - may be sued, whether or not they are a public accommodation, *U.S. v. Days Inns of America, Inc.*, 151 F.3d 822, 825 (8th Cir. 1998), *cert. denied*, 526 U.S. 1016 (1999), but only as to new construction and alterations. 42 U.S.C. §12183(a); 28 C.F.R. §§ 36.102(c) and 36.104 (definition); ADA Technical Assistance Manual III-1.1000.

3. Examinations or Course - 28 C.F.R. §§ 36.102(d) and 36.309.


5. Not applicable to


   1. The cases interpreting the similar restriction in Title II of the Civil Rights Act of 1964 are relevant in determining whether a defendant is a private club. 42 U.S.C. §12187; 28 C.F.R. Part 36 App. B, §36.104 (collecting cases, and listing as factors the degree of member control of club operations, the selectivity of the membership selection process, whether substantial membership fees are charged, whether the entity is operated on a nonprofit basis, the extent to which the facilities are open to the public, the degree of public funding, and whether the club was created specifically to avoid compliance with civil rights laws).

   2. Facilities operated by a private club may be public accommodations if open to the public, but they are exempt if they are only available to club members or patrons. 28 C.F.R. Part 36 App. B, §36.201.

1. Note that it is not the purpose that determines whether the facility is exempt, but the nature of the entity that owns or operates it.

2. Thus, a religious purpose does not necessarily mean the entity can claim the religious exemption. DOJ Opinion Letter (March 4, 1996), http://www.usdoj.gov/crt/foia/cltr182.txt (finding Providence-St. Mel Catholic School was not a religious entity, even though it was organized for religious purposes, because it was “not in any manner owned, operated or controlled by a particular religious organization.”).

3. Nor does a secular purpose necessarily mean it cannot. 28 C.F.R. Part 36 App. B, §36.104 (“Even when a religious organization carries out activities that would otherwise make it a public accommodation, the religious organization is exempt from ADA coverage. Thus, if a church itself operates a day care center, a nursing home, a private school, or a diocesan school system, the operations of the center, home, school, or schools would not be subject to the requirements of the ADA or this part. The religious entity would not lose its exemption merely because the services provided were open to the general public.”); White v. Denver Seminary, 157 F.Supp.2d 1171 (D.Colo. 2001); ADA Title III Technical Assistance Manual III-1.5200.


5. Note, too, that a private business renting space from a religious organization is covered by Title III, even if its landlord is not. ADA Technical Assistance Manual III-1.5200; DOJ Opinion Letter, 7 NDLR ¶28 (Dec. 8, 1994) (Title III applies to private day care renting space from religious facility). See also V.A.3.b above.


1. Common areas may be covered if they are open to general use, and not restricted to use by residents and their guests. DOJ Opinion Letter, 4 NDLR ¶ 451 (July 29, 1992).

2. Public accommodation portions located in a private residence are covered. 28 C.F.R. §36.207 (the portion of a private residence used both for the place of public accommodation and for residential purposes is covered, and the covered portion extends to those elements used to enter the place of public accommodation, including the front sidewalk, the door or entryway, and hallways; and those portions of the residence, interior or exterior, available to or used by customers or clients, including restrooms); *No Barriers, Inc. v. BRH Texas GP, LLC*, 2001 WL 896924, at *3 (N.D.Tex. Aug. 2, 2001) (apartment leasing office was a public accommodation). See also *Sapp v. MHI Partnership, Ltd.*, 199 F.Supp.2d 578 (N.D.Tex. 2002) (developer’s model home was a place of public accommodation).


6. One circuit has held that Indian tribes cannot be sued under Title III, even though tribal facilities may be covered. *Florida Paraplegic Ass’n, Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1129-1130 (11th Cir. 1999).


8. Individual liability
   
   
   2. The only circuit court to address the issue has held that individuals are not otherwise liable under Title III. *Emerson v. Thiel College*, 296 F.3d 184, 188-189 (3d Cir. 2002). See also *Howard v. Cherry Hills Cutters, Inc.*, 979 F.Supp. 1307, 1309 (D.Colo. 1997) (although an individual who owns, leases, or operates a public accommodation may be liable, an individual employee without the power of control is not liable).

6. Remedies
   
   1. Authorities: 42 U.S.C. §12188(a)(a) adopts remedies and procedures of §204(a) of the 1964 Civil Rights Act (42 U.S.C. §2000a-3(a)) (injunctive relief and attorneys’ fees).
   
   2. Injunctive relief - 28 C.F.R. §36.501(a) and (b).
   


3. Note that such damages may be available under state law. *See, e.g.*, *Lentini v. California Center for the Arts, Escondido*, 370 F.3d 837 (9th Cir. 2004) (upholding award of damages to California theater patron who was excluded from a performance because she used a service animal); *Johnson v. Gambrinus Company/Spoetzl Brewery*, 116 F.3d 1052, 1065 (5th Cir. 1997) (Texas state law provides a damage remedy); *Smith v. Wal-Mart Stores, Inc.*, 167 F.3d 286 (6th Cir. 1999) (plaintiff had claim under Georgia statute creating cause of action for damages based on a breach of statutory duty, and Title III imposed such a duty).

4. Attorneys’ fees and costs

   1. They are recoverable. 42 U.S.C. §12205; 28 C.F.R. §36.505.


   4. The Supreme Court has held that plaintiffs are not entitled to recover attorneys fees (in cases involving certain pre-trial settlements) under a “catalyst theory.” *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001).
7. **Defenses**

1. Specified defenses (set out in III.D. above)

2. Direct threat defense - Nothing in Title III requires an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations if such individual poses a direct threat to the health or safety of others. 42 U.S.C. §12182(b)(3); 28 C.F.R. §36.208.

   1. The term “direct threat” means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services. 42 U.S.C. §12182(b)(3); 28 C.F.R. §36.208(b).

   2. In determining if there is a direct threat, defendant must make an individual assessment, including several listed factors. 28 C.F.R. §36.208(c); ADA Technical Assistance Manual III-3.8000; Bragdon v. Abbott, 524 U.S. 624, 648-651 (1998); Abbott v. Bragdon, 163 F.3d 87 (1st Cir. 1998) (opinion on remand); Anderson v. Little League Baseball, Inc., 794 F.Supp. 342, 345 (D.Ariz.1992). See also Echazabal v. Chevron USA, Inc., 336 F.3d 1023 (9th Cir. 2003) (opinion on remand) (decided under Title I, and holding that defendant must establish a direct threat based on reasonable medical judgment relying on the most current medical knowledge and/or the best available objective evidence).

   3. Note that a defendant’s mistaken “belief that a significant risk existed, even if maintained in good faith, would not relieve him from liability.” Bragdon v. Abbott, 524 U.S. 624, 649 (1998) (dentist refused to treat a customer with HIV disease based on the dentist’s mistaken belief that doing so would constitute a direct threat to health).

   4. The Title III regulations do not include a “threat to self” defense, in contrast to the Title I regulations. Compare 28 C.F.R. §36.208 (Title III) with 29 C.F.R. §1630.2(v) (Title I).

8. **Rules of Interpretation**


9. Procedural Matters

1. Jurisdiction


2. Limitations

   1. There is no express statute of limitations for ADA claims (except under Title I).

   2. Most courts apply the state’s personal injury statute if the case involves a single discriminatory act. *Gaona v. Town & Country Credit*, 324 F.3d
1050, 1054-1056 (8th Cir. 2003) (finding this to be the rule in all circuits but the Fourth).


4. Notice requirements

1. The courts are divided on whether pre-suit notice is required, *Disabled in Action of Metropolitan New York v. Trump Intern. Hotel & Tower*, 2003 WL 1751785, at *10 (S.D.N.Y. Apr. 2, 2003) (collecting cases and holding no such notice is required), but the only circuit to address the issue has held that no such notice is required, based on the plain language of the statute. *Botosan v. Paul McNally Realty*, 216 F.3d 827, 831-832 (9th Cir. 2000).

2. Practical considerations may warrant giving pre-suit notice.

5. Standing is required.


10. Other Federal Accessibility Laws


**Resources**

The statute, Title III regulations (28 C.F.R. Part 36), Appendix B to those regulations (the DOJ interpretive guidance), the ADAAG (Appendix A to 28 C.F.R. Part 36), the Technical Assistance Manuals, and other resources are all available online, including at <http://www.jan.wvu.edu/links/adalinks.htm>.

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