

- ***Flakes v. Frank***, 322 F. Supp. 2d 981 (W.D. Wisc. 2004). The court decides to reconsider whether plaintiff, a prison inmate, has a claim under Title II of the ADA, in light of the Supreme Court's decision in *Tennessee v. Lane*.

- ***Section 504 Immunity Waiver***

The Fifth Circuit vacated three opinions in which panels found that states did not waive sovereign immunity from suit under Section 504 of the Rehabilitation Act by accepting federal funds. The court will rehear them all en banc. See *Pace v. Bogalusa School District*, 325 F.3d 609 (5th Cir. 2003), reh. granted 339 F.3d 348; *Johnson v. La. Dep't Education*, 330 F.3d 362 (5th Cir. 2003), reh. granted 343 F.3d 732 (5th Cir. 2003); *Miller v. Tex. Tech. Univ. Health Svs Center*, 330 F.3d 691 (5th Cir. 2003), reh. granted 2003 U.S. App. LEXIS (5th Cir. Aug. 12, 2003). See discussion of *Pace* and *Garcia*, above.

The Ninth Circuit has repeatedly rejected the reasoning of *Garcia* and found that states waive sovereign immunity from suit under Section 504 if they accept federal funds. *Miranda B. v. Kitzhaber*, 328 F.3d 1181 (9th Cir. 2003); *Lovell v. Chandler*, 303 F.3d 1039 (9th Cir. 2002); *Pugliese v. Dillenberg*, No. 01-06544, 2003 U.S. App. LEXIS 20361 (9th Cir. Oct. 7, 2003) (*per curiam*).

- ***Garrett v. University of Alabama Bd. of Trustees***, 344 F.3d 1288 (11th Cir. 2003). The court reversed the district court's finding that Alabama had not waived immunity from suit under Section 504 by accepting federal funds. The court rejected the reasoning of *Garcia*, discussed above.

- ***Doe v. Nebraska***, 345 F.3d 593 (8th Cir. 2003). The panel majority held that Arkansas had waived its sovereign immunity from suit under Section 504 by accepting federal funds, rejecting the rationale of *Garcia*, discussed above. Among other points, the court noted that the state has significant resources and extensive legal representation and should have been well aware, even before *Garrett*, that the ADA might not have validly abrogated the states' immunity. The dissent argued that the majority erred by presuming in favor of finding a waiver, rather than following Supreme Court precedent requiring that every presumption be against waiver.

- ***Bruggeman v. Blagojevich***, No. 02-1730, 2003 U.S. App. LEXIS 6536 (7th Cir. Apr. 7, 2003). The court held that Title II of the ADA's ban on discrimination by public entities and programs can be enforced through against state officials through the *Ex Parte Young* exception (which provides for an action against state officials in an official capacity to enjoin ongoing violations of federal law). It also held that plaintiffs' claims of discrimination in violation Section 504 of the Rehabilitation Act could be enforced through the *Ex Parte Young* exception. (See also *Medicaid Cases*)

- ***Pace v. Bogalusa City School Board***, 325 F.3d 609 (5th Cir. 2003). The Fifth Circuit held that the Individuals with Disabilities Education Act did not validly abrogate the states' sovereign immunity. It also held that the state did not "knowingly" waive sovereign immunity under IDEA, Section 504 of the Rehabilitation Act, or Title II of the ADA because, at the time the state accepted funds, the state could not have known that Congress did not have the power to abrogate sovereign immunity because the Supreme Court had not yet made its rulings on this issue.

- ***United States v. Mississippi Dept. of Public Safety***, 321 F.3d 495 (5th Cir. 2003). The court held that the 11th Amendment does not bar an ADA suit for damages brought by the Equal Opportunity Employment Commission on behalf of an individual employee. The court also held that Congress did not exceed its Commerce Clause powers by enacting Title I of the ADA, because regulation of the national labor market is a valid exercise of that power.

- ***Pennsylvania Protection and Advocacy v. Department of Public Welfare***, 243 F. Supp. 2d 184 (M.D. Pa. 2003). The court granted summary judgment to defendants in suit by residents of a psychiatric transitional facility claiming that their unnecessary institutionalization violated the ADA and Section 504. The court held that it would be fundamental alteration to require the defendants to move the plaintiffs into the community and also provide services for others with mental health needs.

- ***Richard S. v. Department of Developmental Services***, 317 F.3d 1080 (9th Cir. 2003). The court held that plaintiff could be awarded attorneys fees and costs upon entry of a settlement agreement consistently with *Buckhannon*.

- ***Barrios v. California Interscholastic Federation***, 277 F.3d 1128 (9th Cir. 2002), cert. den. 123 S.Ct. 98 (2002). The court held that it could award plaintiff his attorneys fees and costs in a disability discrimination suit that was resolved by settlement agreement consistently with *Buckhannon*.

- ***Travis D. v. Eastmont Human Services Center***, No. CV 96-63-H-DWM (D. Mont. Nov. 18, 2002) (Order). The court granted certification to a class individuals with developmental disabilities residing in state-operated developmental centers and denied state's 11th Amendment motion to dismiss. Defendants have appealed this order to the Ninth Circuit.

- ***Motion Picture Ass'n v. FCC***, 353 U.S. App. D.C. 405 (D.C. Cir. 2002). D.C. Circuit vacates FCC rules requiring video descriptions of television programs for hearing and visually impaired.
- ***Wesel v. Glendening***, 306 F.3d 203 (4th Cir. 2002). The Court holds that Congress exceeded its authority when it attempted to abrogate states' sovereign immunity from claims under Part A of Title II of the Americans with Disabilities Act. Part A of Title II of the ADA prohibits discrimination in public services.
- ***Orr v. WalMart Stores, Inc.*** 297 F.3d 720 (8th Cir. July 22, 2002) reh. den. 2002 U.S. App. LEXIS 20338 (Sept. 2, 2002). The court held that plaintiff, who had diabetes, had not shown a substantial limitation in a major life activity and therefore did not show a violation of the ADA.
- ***Koslow v. Commonwealth of Pennsylvania***, 302 F.3d 461 (3rd Cir. 2002). The court holds that: (1) Pennsylvania waived Eleventh Amendment immunity by accepting funds under Section 504 of the Rehabilitation Act; (2) conditioning federal funds on the waiver of Eleventh Amendment immunity is not unconstitutional per se; (3) the conditions imposed upon acceptance of funds do not abridge the Spending Clause; (4) federal claims for prospective injunctive relief against state officials under the ADA are authorized by Ex Parte Young.
- ***Kiman v. New Hampshire Department of Corrections***, 2002 U.S. App. LEXIS 16698, 2002 WL 18880377 (1st Cir. August 20, 2002). The Court holds that imprisoned plaintiff could proceed with his claim under Title II of the ADA because, as applied to the facts of the case, the statute properly enforces the constitutional rights embodied in the Eighth Amendment. This case has been vacated and remanded for rehearing en banc. 310 F.3d 785 (1st Cir. 2002).
- **[\*Barnes v. Gorman\*](#)** (Justice Stevens cites *Westside Mothers v. Haveman* (posted June 17, 2002))
- ***Clackamas Gastroenterology Assoc. v. Wells***, 271 F.3d 903 (9th Cir. 2001). The U.S. Supreme Court has granted certiorari in this case to determine whether the Ninth Circuit erred when it held that physician-shareholders of a professional corporation were employees for the purpose of determining whether the corporation was large enough to be sued under the ADA. To qualify as an "employer" a person must have 15 or more employees. The Ninth Circuit had concluded that the physician-shareholders were employees and not partners.

- ***Estes v. Wyoming Dept. of Transportation***, 302 F.3d 1200 (10th Cir. 2002). The court held that when a state is sued in state court under Title I of the ADA and removes the suit to federal court, it waives its sovereign immunity.

- ***Lovell v. Chandler***, 2002 303 F.3d 1039 (9th Cir. 2002). The court held that Congress validly abrogated the states' sovereign immunity in passing Title II of the ADA and that Hawaii had waived its sovereign immunity when it accepted funds under the Rehabilitation Act. Accordingly, it affirmed a grant of partial summary judgment for plaintiffs, who had been excluded from a Medicaid managed care program because of their disabilities.

- [Radaszewski v. Garner](#) The district court held that the 11th Amendment does not bar a Medicaid beneficiary's claims under the ADA and Rehabilitation act for prospective injunctive relief (June 17, 2002)

- [Garrett v. Board of Trustees](#) (March '05)
- [ADA Case: Clackamas Gastroenterology Associates, Inc. v. Wells](#) (April '03)
- [Bad NY Decision on ADA and Section 504 Enforceability](#) (Dec. '04)
- [Suit Filed Against CT for Denying DME to Disabled / Low-Income Elderly](#) (Nov. '02)
- [Court Watch - ADA Cases. Radaszewski v. Garner](#) (June '02)
- [Supreme Court Blocks Remedies Against Illegal State Actions](#) (Aug. '99)