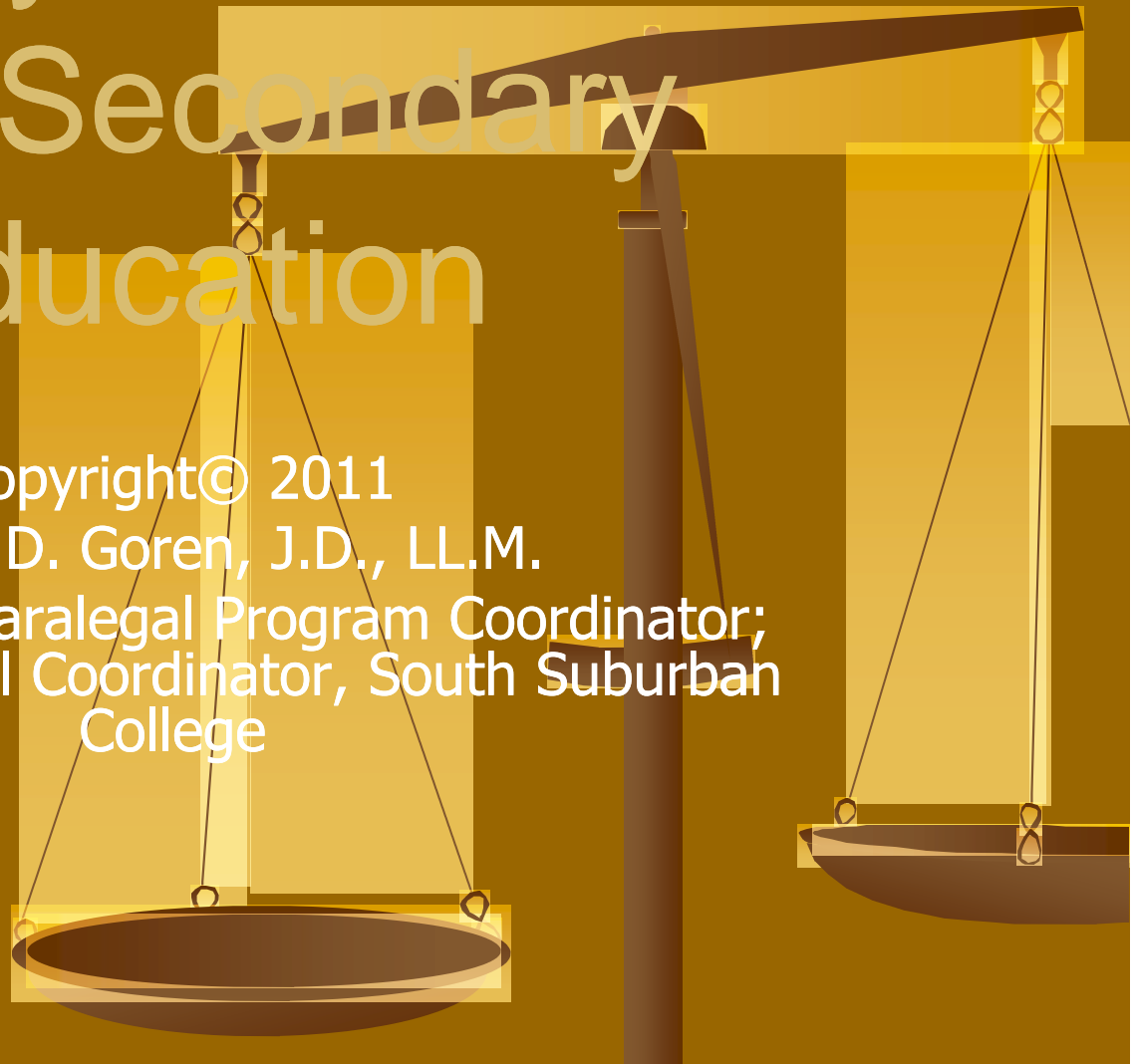


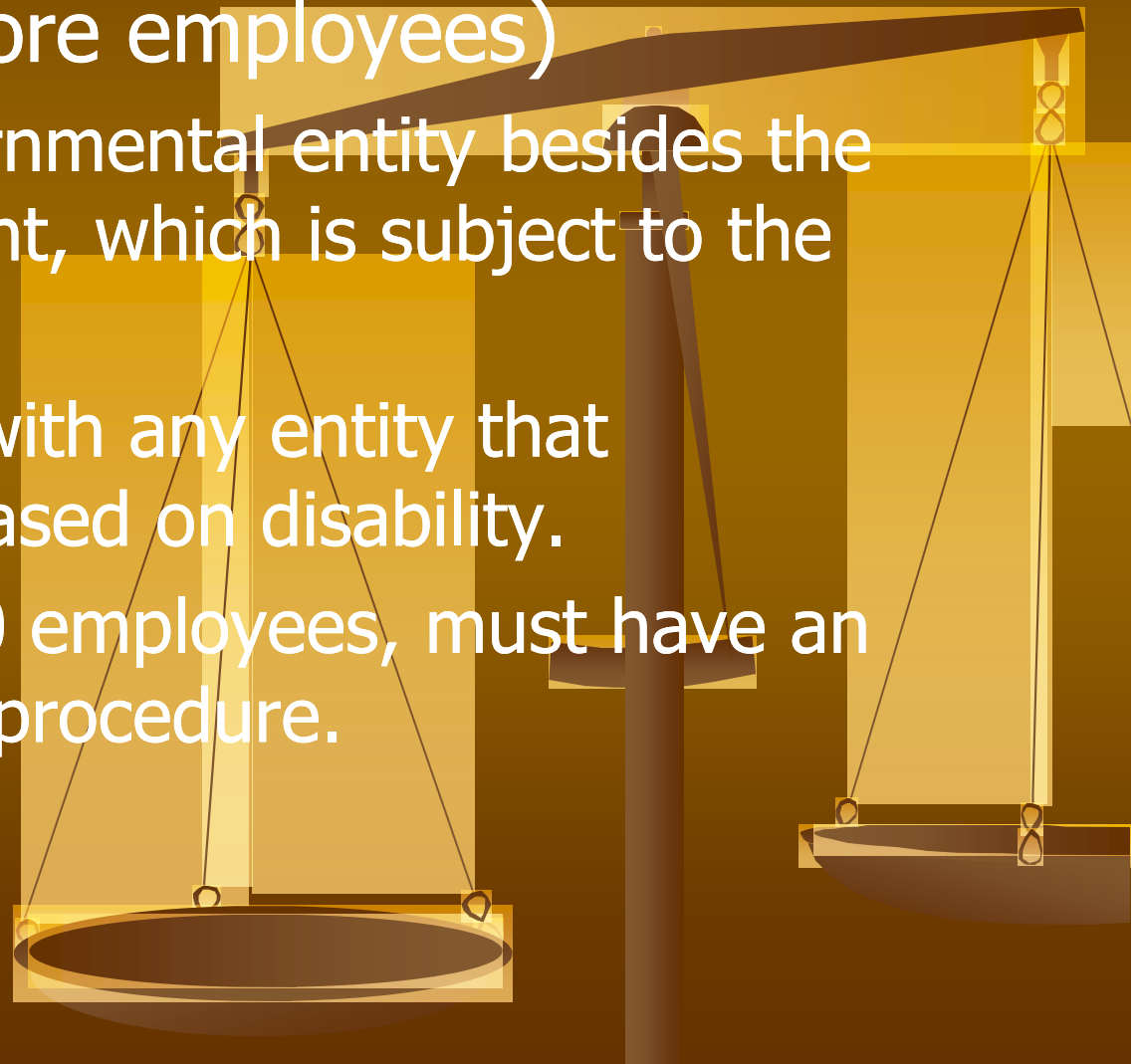
Amendments and How it Affects you in Public Post Secondary Education

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Who is covered by the ADA

- Title I (15 or more employees)
- Title II (any governmental entity besides the federal government, which is subject to the rehabilitation act)
 - Can't contract with any entity that discriminates based on disability.
 - If more than 50 employees, must have an ADA grievance procedure.



Who is covered by the ADA continued

■ Title III

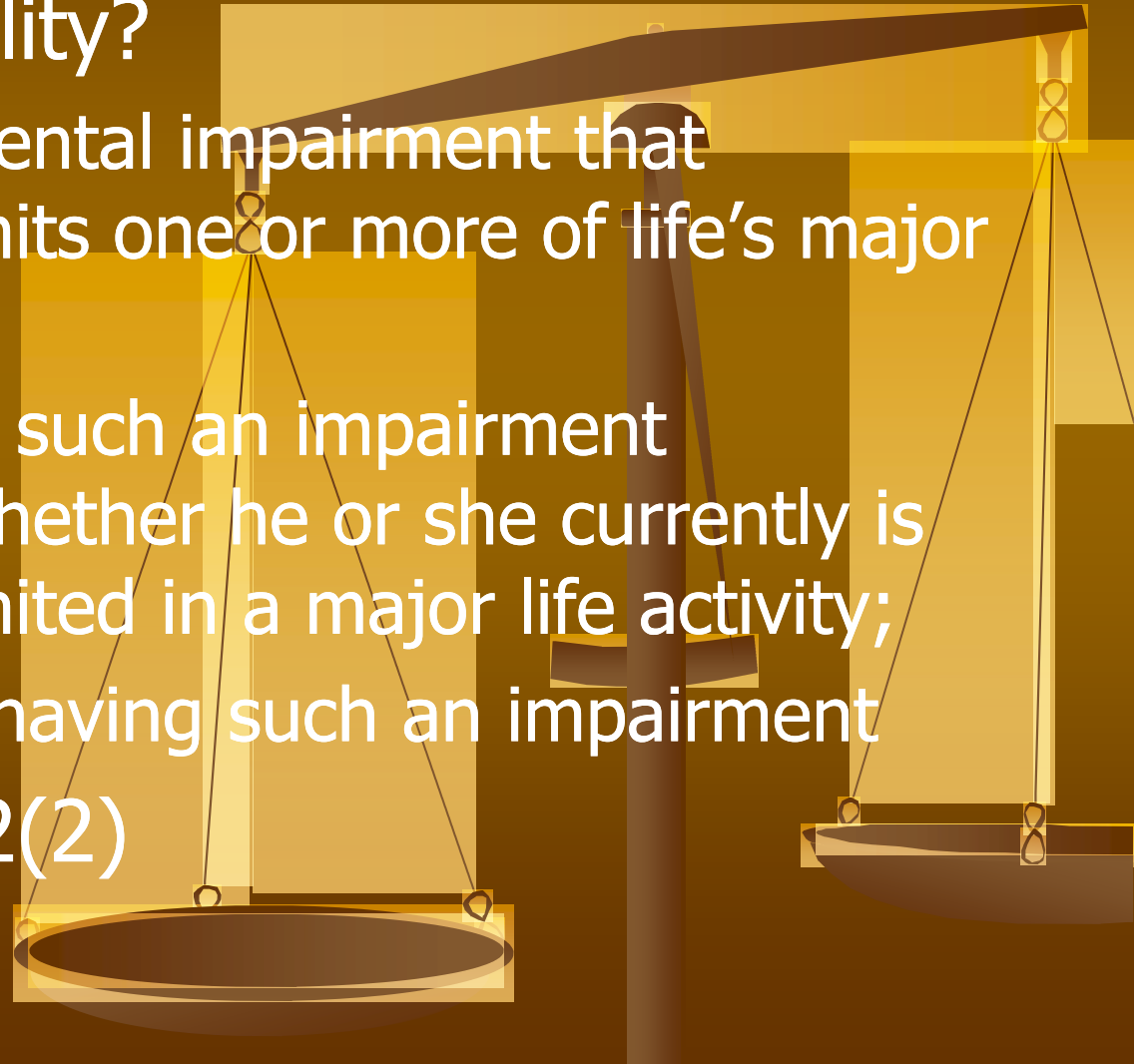
- Places of lodging; establishment serving food and drink; places of exhibition or entertainment; places of public gathering, such as a museum or library; sales or rental establishment; service establishments; Terminals and Depots; public display or collection; places of recreation; places of education; social service center; places of exercise or recreation
- Why do you care? (Internship site)



Definitional terms

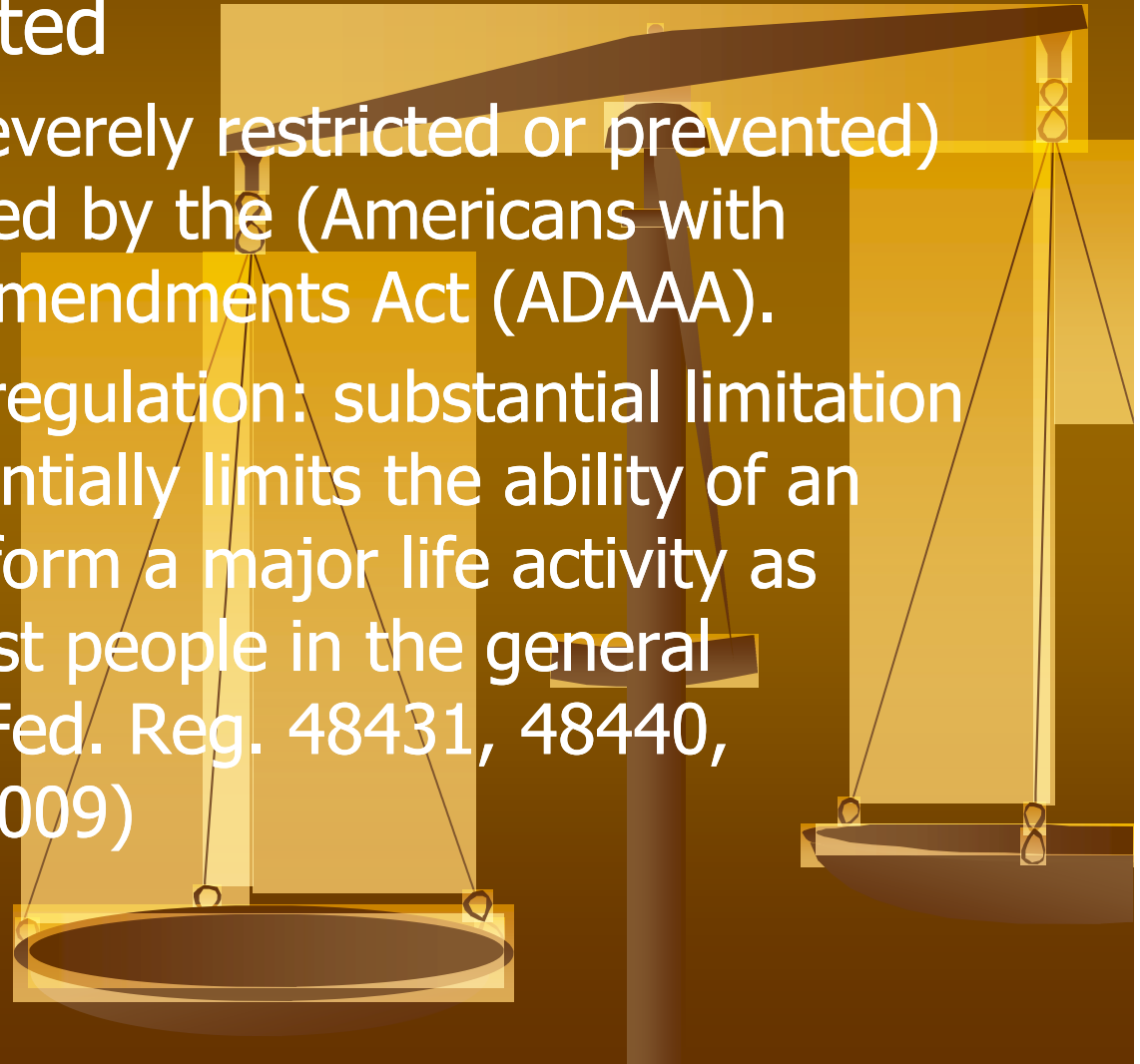
- What is a disability?
 - A physical or mental impairment that substantially limits one or more of life's major activities;
 - Has a record of such an impairment regardless of whether he or she currently is substantially limited in a major life activity;
 - Is regarded as having such an impairment

42 U.S.C. § 12102(2)



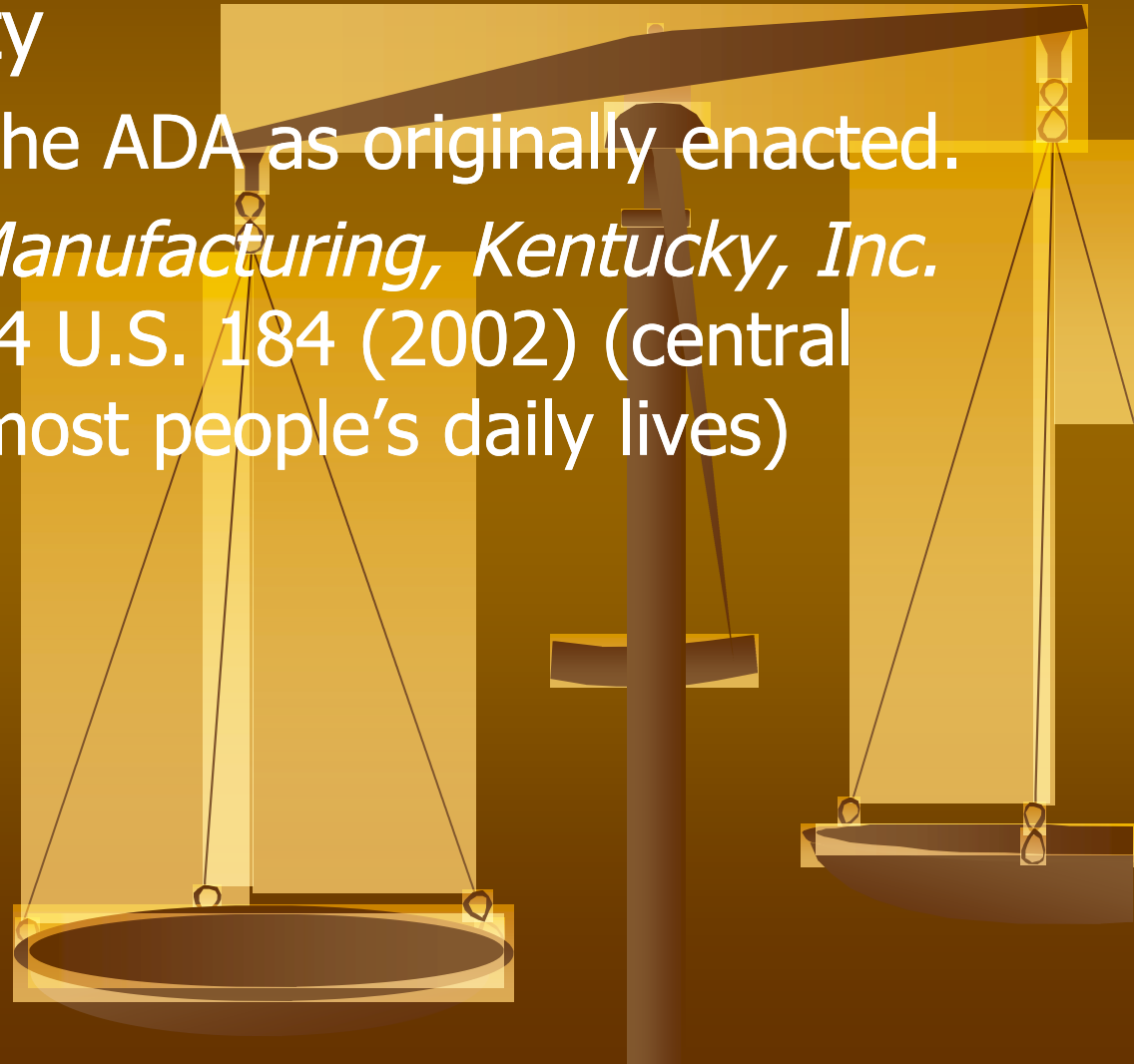
Definitional terms parsing the definitions

- Substantially limited
 - *Toyota Motor* (severely restricted or prevented) explicitly overruled by the (Americans with Disabilities Act Amendments Act (ADAAA)).
 - EEOC proposed regulation: substantial limitation exists if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population (74 Fed. Reg. 48431, 48440, September 23, 2009)



Definitional terms parsing the definitions

- Major life activity
 - Not defined in the ADA as originally enacted.
 - *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) (central importance to most people's daily lives)



Definitional terms

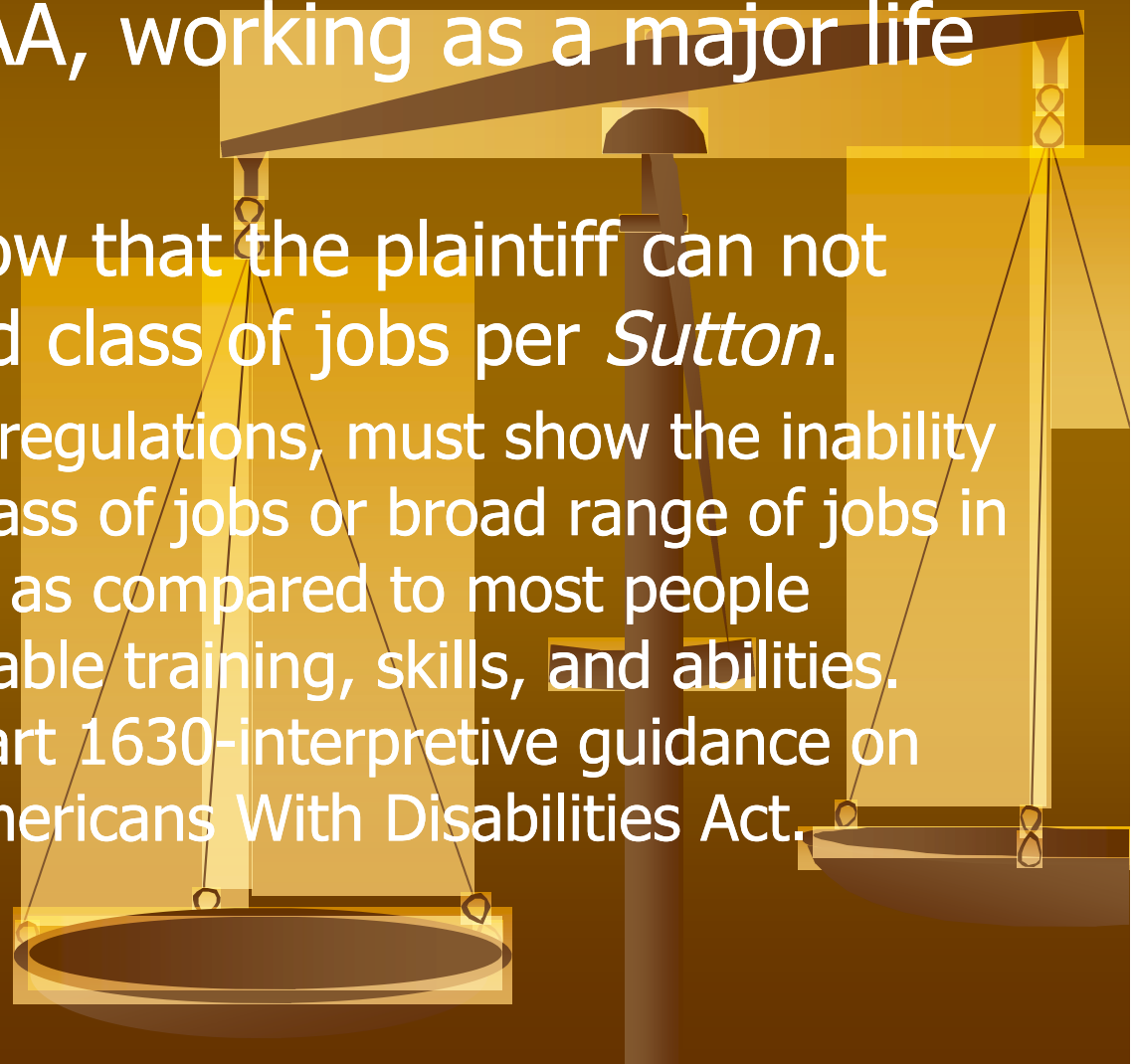
parsing the definitions

- Definition under ADAAA: Includes: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. It also includes: operation of major bodily function, such as but not limited to: functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. 42 U.S.C.A. § 12102(2).
 - EEOC in their final regulations added sitting, reaching, and interacting with others as major life activities. 29 CFR 1630.2 (i)(1)(i).

Definitional terms

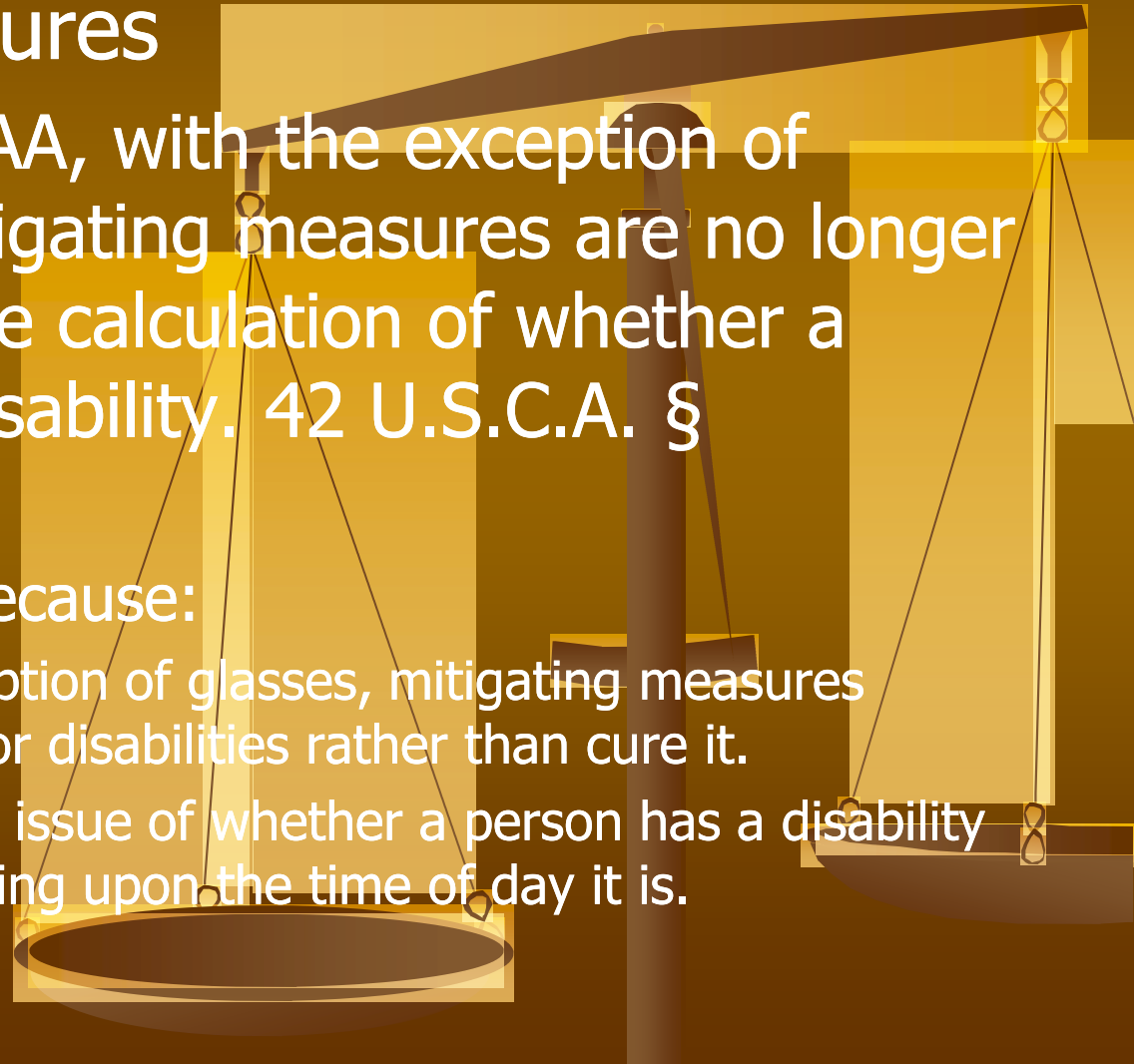
working as the major life activity

- Under the ADAAA, working as a major life activity.
 - Still have to show that the plaintiff can not perform a broad class of jobs per *Sutton*.
 - Per EEOC final regulations, must show the inability to perform a class of jobs or broad range of jobs in various classes as compared to most people having comparable training, skills, and abilities. Appendix To Part 1630-interpretive guidance on title I of the Americans With Disabilities Act.



Definitional terms

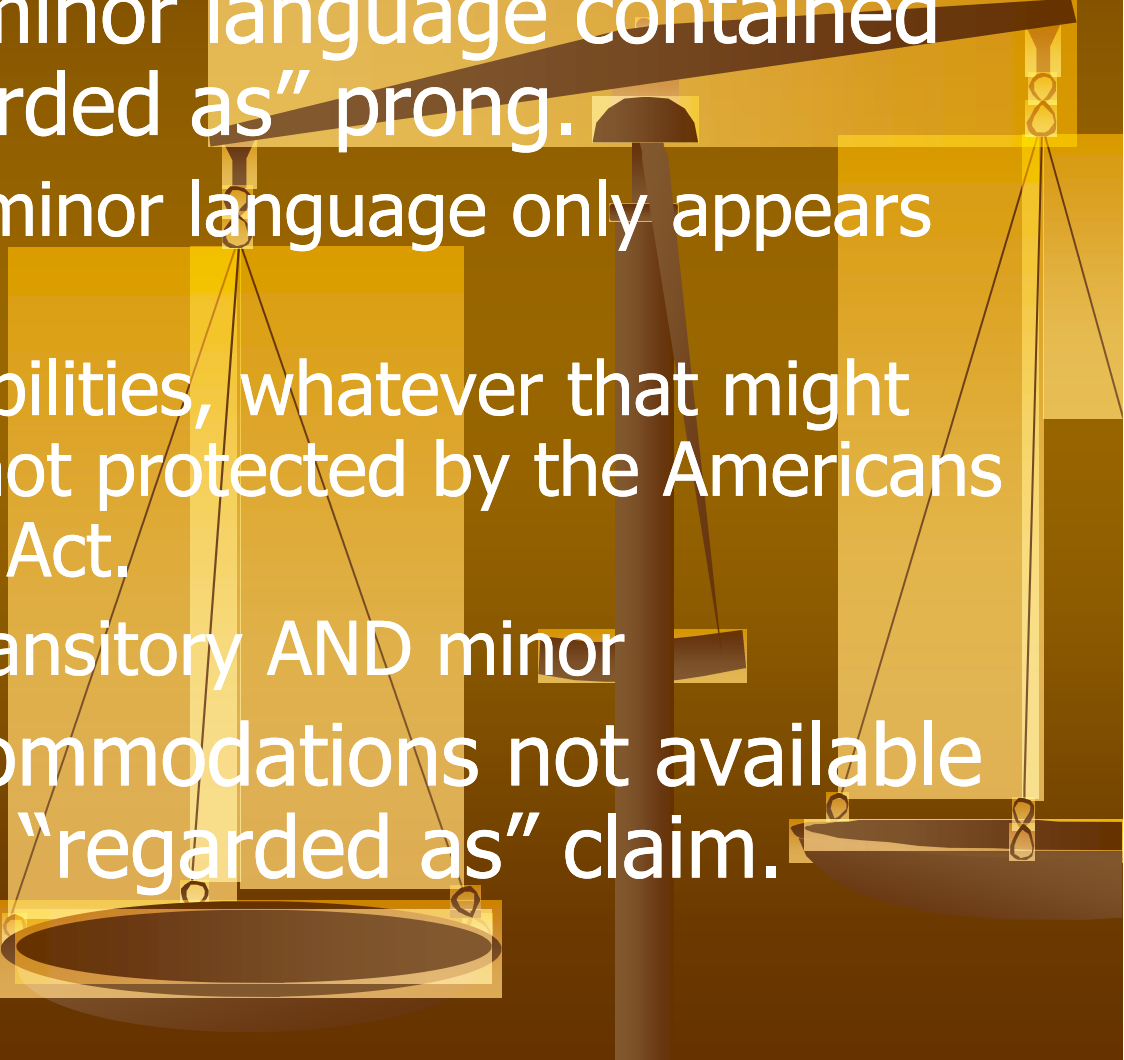
- Mitigating measures
 - Under the ADAAA, with the exception of eyeglasses, mitigating measures are no longer factored into the calculation of whether a person has a disability. 42 U.S.C.A. § 12102(4)(E)(i)
 - Makes sense because:
 - With the exception of glasses, mitigating measures compensate for disabilities rather than cure it.
 - Eliminates the issue of whether a person has a disability varies depending upon the time of day it is.



Definitional terms “regarded as”

- Under the ADAAA, it is no longer necessary per *Sutton v. United Airlines*, 527 U.S. 471 (1999), to have to show that the employer regards an employee as having both a physical or mental impairment and a substantial limitation on a major life activity. The ADAAA only requires a showing that the employer regarded a person as having a physical or mental impairment.

Definitional terms “regarded as”

- Transitory and minor language contained within the “regarded as” prong.
 - Transitory and minor language only appears in this section.
 - Temporary disabilities, whatever that might mean, are still not protected by the Americans with Disabilities Act.
 - Must be both transitory AND minor
 - Reasonable accommodations not available per ADAAA in a, “regarded as” claim.
- 

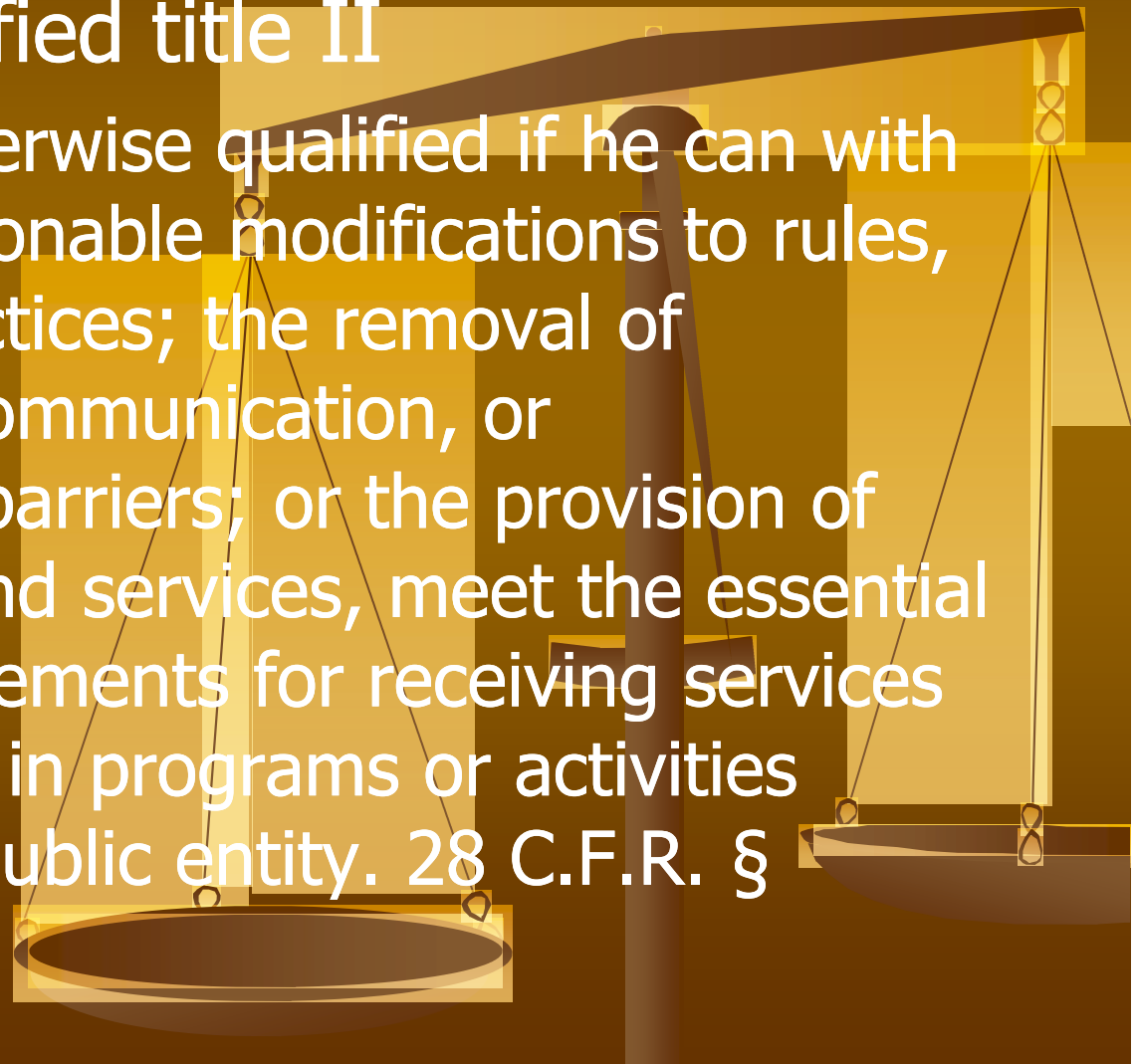
Otherwise qualified



- In addition to having a disability, a person must also be otherwise qualified.
 - Title I: Otherwise qualified defined (title I): a person must satisfy the requisite skill, experience, and education requirements of the position and can, with or without reasonable accommodation, perform the essential functions of the job. 29 C.F.R. § 1630.2(m).
 - Importance of having current job descriptions that are accurate.

Otherwise qualified continued

- Otherwise qualified title II
 - A person is otherwise qualified if he can 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, meet the essential eligibility requirements for receiving services or participating in programs or activities provided by a public entity. 28 C.F.R. § 35.104.



“Otherwise qualified” title II

- Title II: essential eligibility requirements of the program are going to be critical.



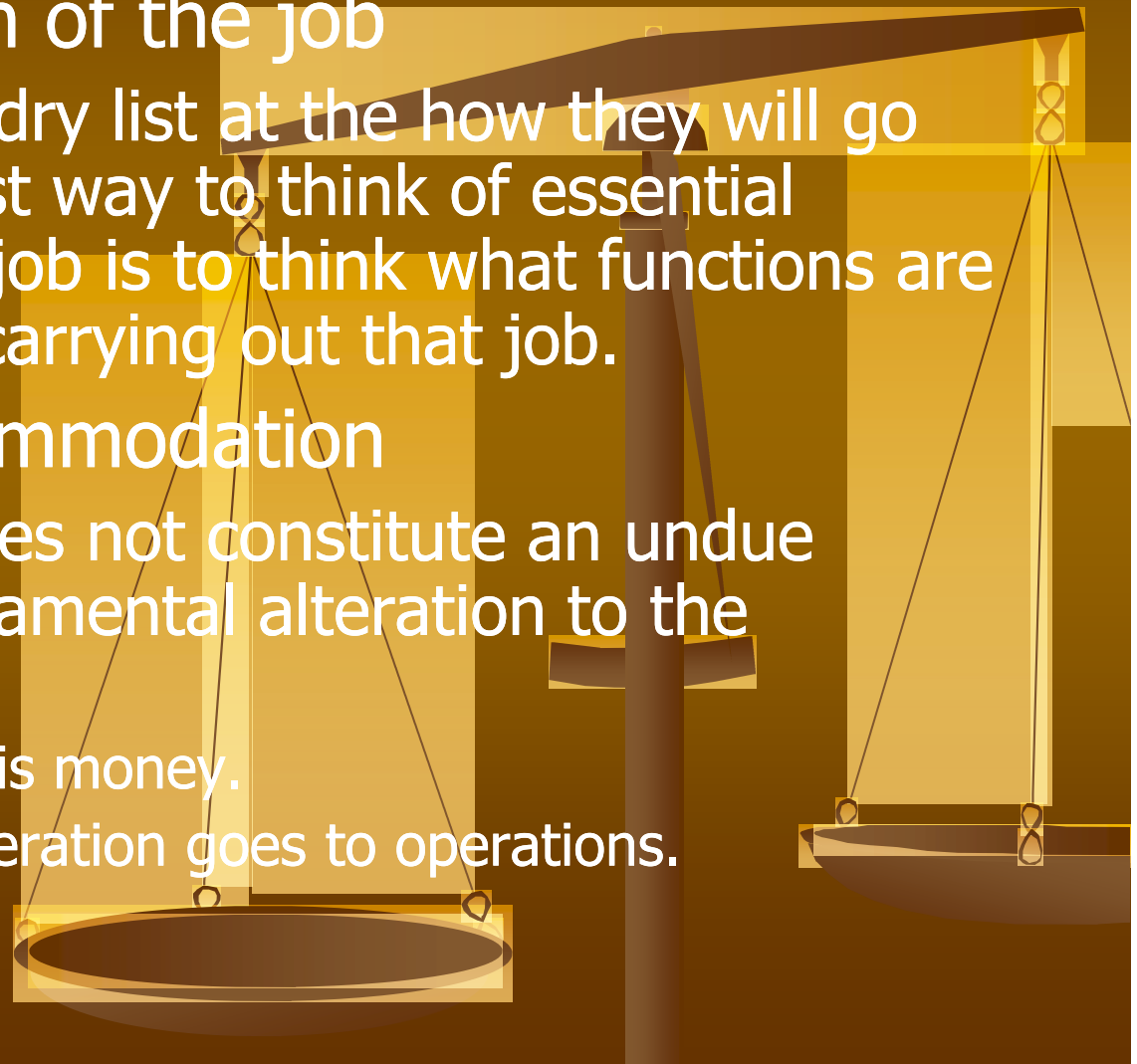
Otherwise qualified title III

- Title III:
 - Term does not appear in title III
 - Fundamental alteration analysis results in a similar critical thinking exercise (see *PGA Tour v. Martin*).



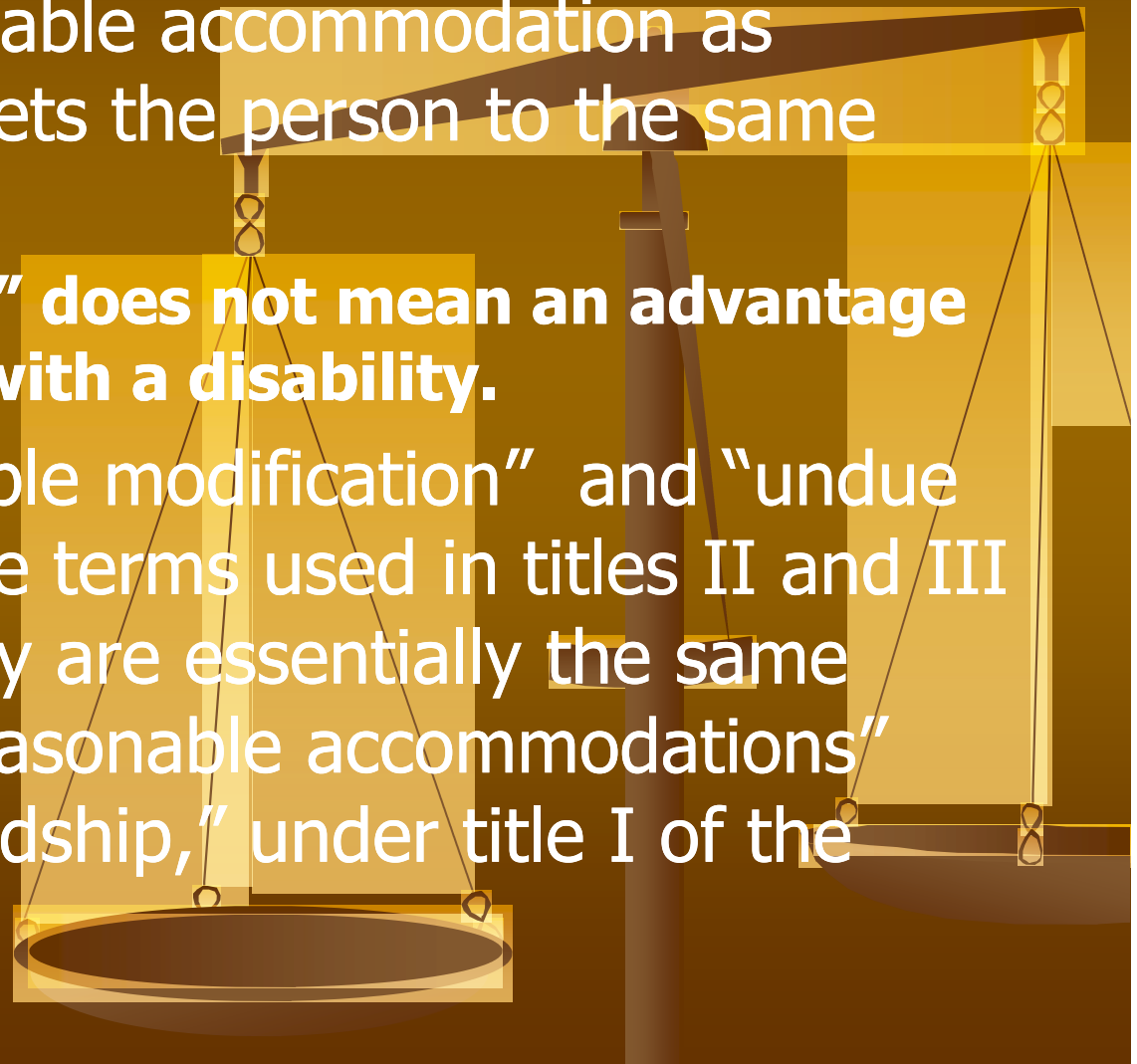
Issues created by ADA's definition of otherwise qualified Title I

- Essential function of the job
 - EEOC has a laundry list at the how they will go about it. The best way to think of essential functions of the job is to think what functions are fundamental to carrying out that job.
- Reasonable accommodation
 - Anything that does not constitute an undue hardship or fundamental alteration to the business.
 - Undue hardship is money.
 - Fundamental alteration goes to operations.

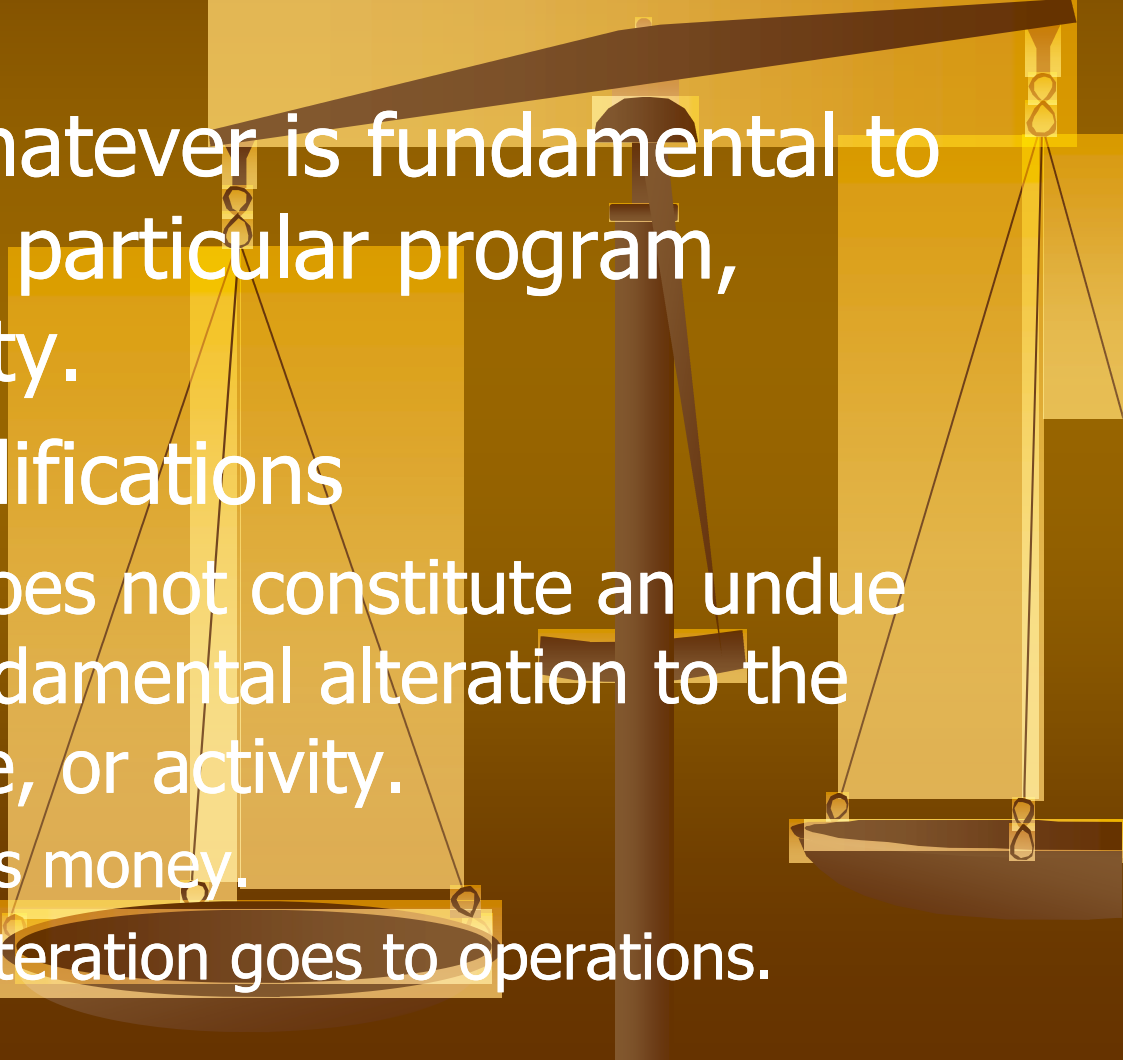


Reasonable accommodation continued

- Think of reasonable accommodation as anything that gets the person to the same starting line.
 - **“starting line” does not mean an advantage to a person with a disability.**
- While “reasonable modification” and “undue burden,” are the terms used in titles II and III of the ADA, they are essentially the same concepts as “reasonable accommodations” and “undue hardship,” under title I of the ADA.

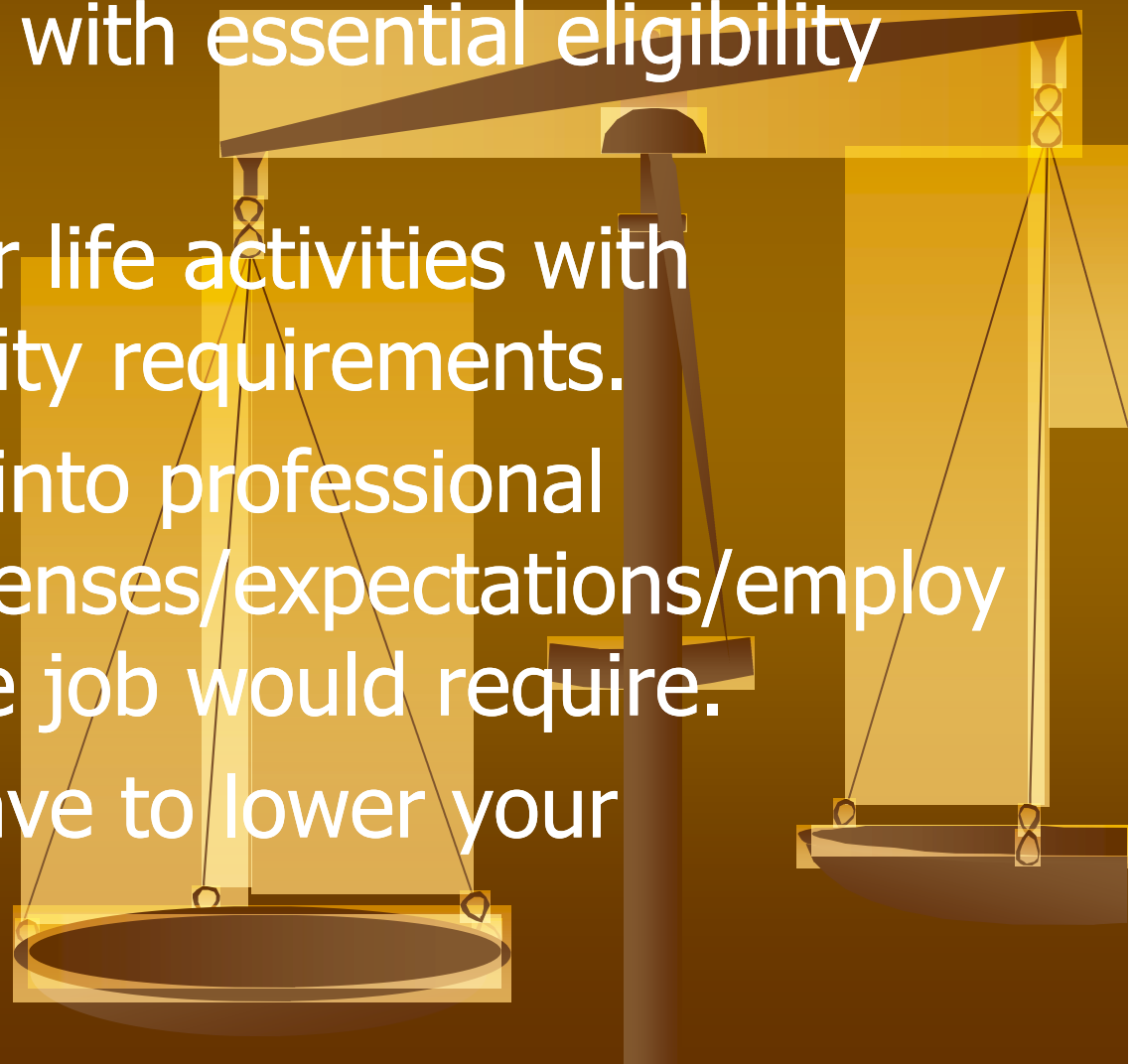


Issues created by ADA's definition of essential eligibility requirements title II

- Think of it as whatever is fundamental to carrying out the particular program, course, or activity.
 - Reasonable modifications
 - Anything that does not constitute an undue burden or a fundamental alteration to the program, course, or activity.
 - Undue burden is money.
 - Fundamental alteration goes to operations.
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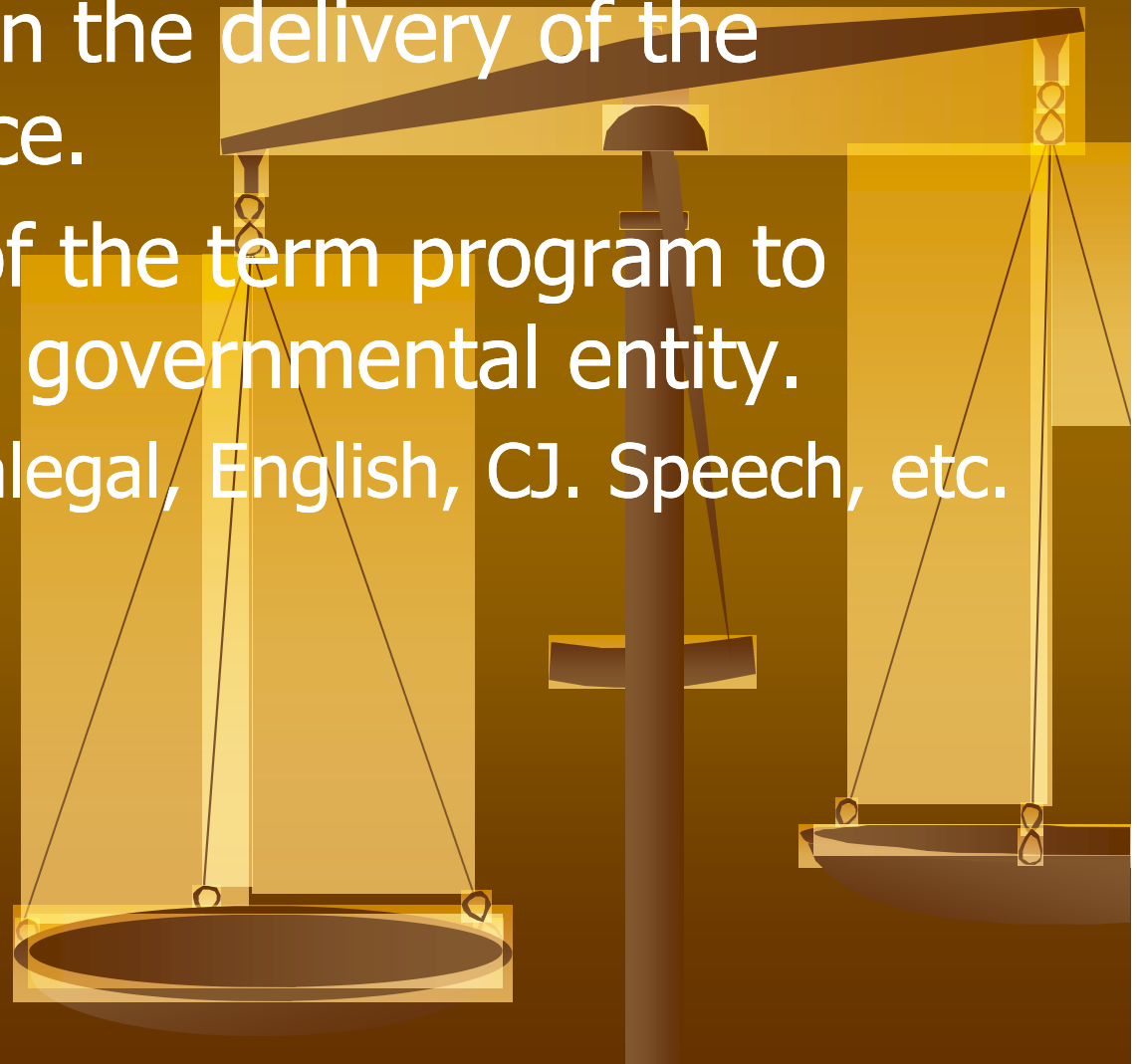
Traps regarding essential eligibility requirements title II

- Confusing tasks with essential eligibility requirements.
- Confusing major life activities with essential eligibility requirements.
- Getting sucked into professional certifications/licenses/expectations/employability/ what the job would require.
- Thinking you have to lower your standards.



Determining what is a program title II

- Commonalities in the delivery of the program's service.
- Common uses of the term program to members of the governmental entity.
 - HR, SSDO, Paralegal, English, CJ. Speech, etc.



Direct threat

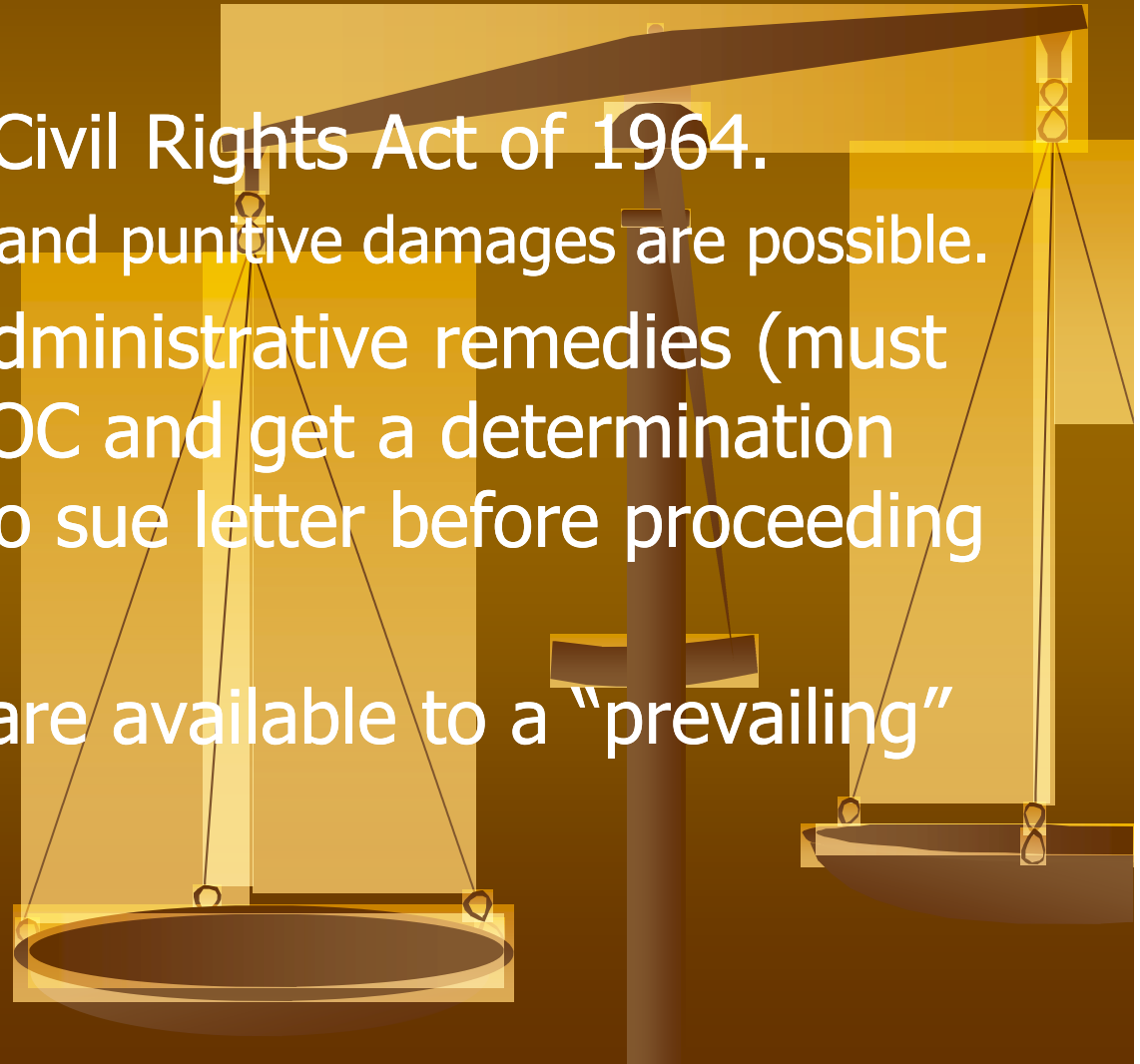


- Not protected under the ADA if a person is a direct threat to himself or to others.
 - Prefer to think of direct threat as a different concept than otherwise qualified.
 - Determination must be based upon a reasonable medical judgment relying on the most current medical knowledge and/or the best available objective evidence. (*Chevron v. Echazabal* 536 U.S. 73, 86 (2002)).

Remedies

■ Title I

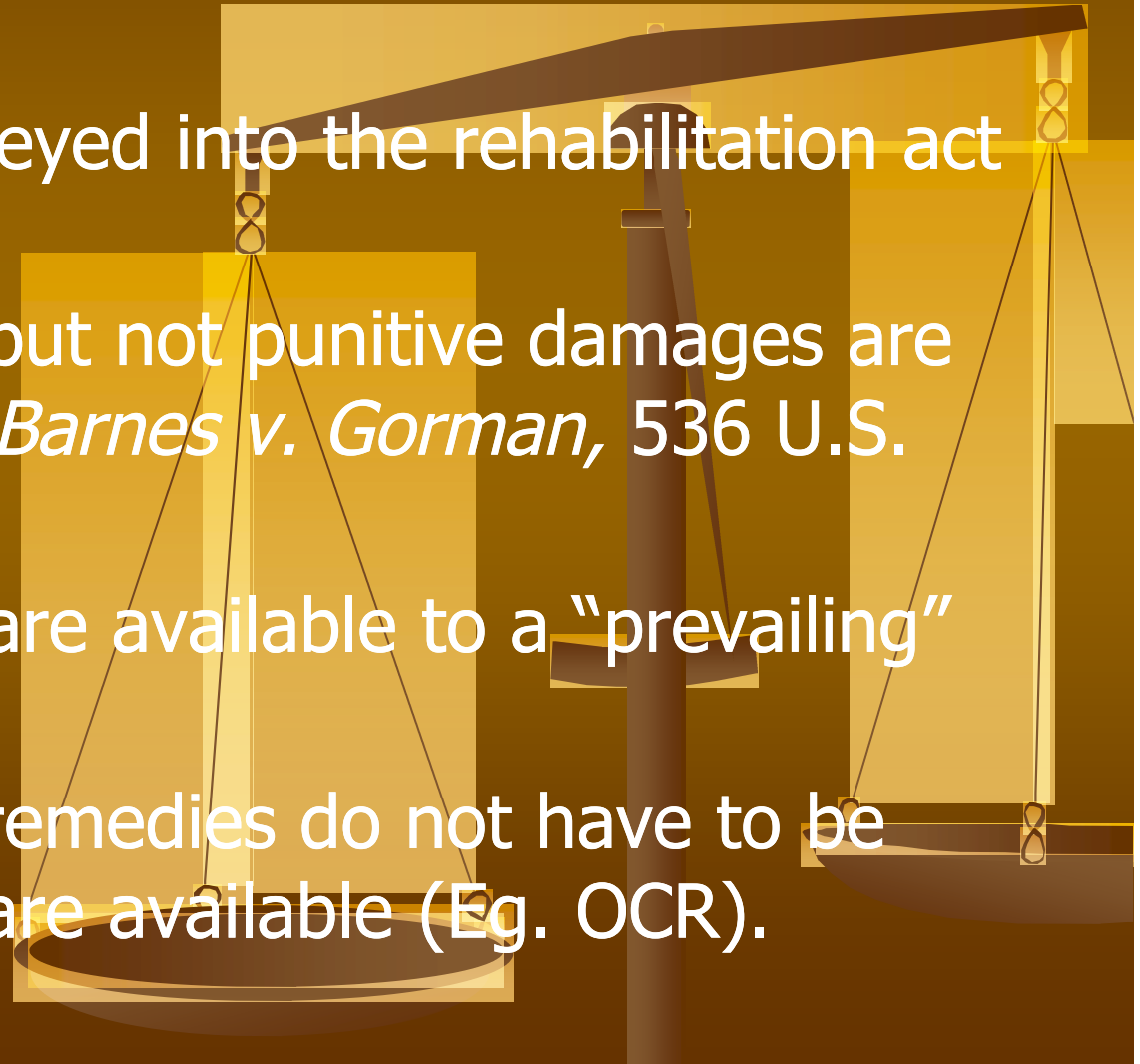
- Keyed into the Civil Rights Act of 1964.
 - Compensatory and punitive damages are possible.
- Must exhaust administrative remedies (must file with the EEOC and get a determination and/or a right to sue letter before proceeding in court).
- Attorneys fees are available to a “prevailing” party.



Remedies continued

■ Title II

- Remedies are keyed into the rehabilitation act of 1973.
- Compensatory but not punitive damages are available. (*See Barnes v. Gorman*, 536 U.S. 181 (2002)).
- Attorneys fees are available to a “prevailing” party.
- Administrative remedies do not have to be exhausted but are available (Eg. OCR).



Remedies continued

- Title III
 - Injunctive relief
 - Attorneys fees
 - Court imposed civil penalties
 - Administrative remedies do not have to be exhausted



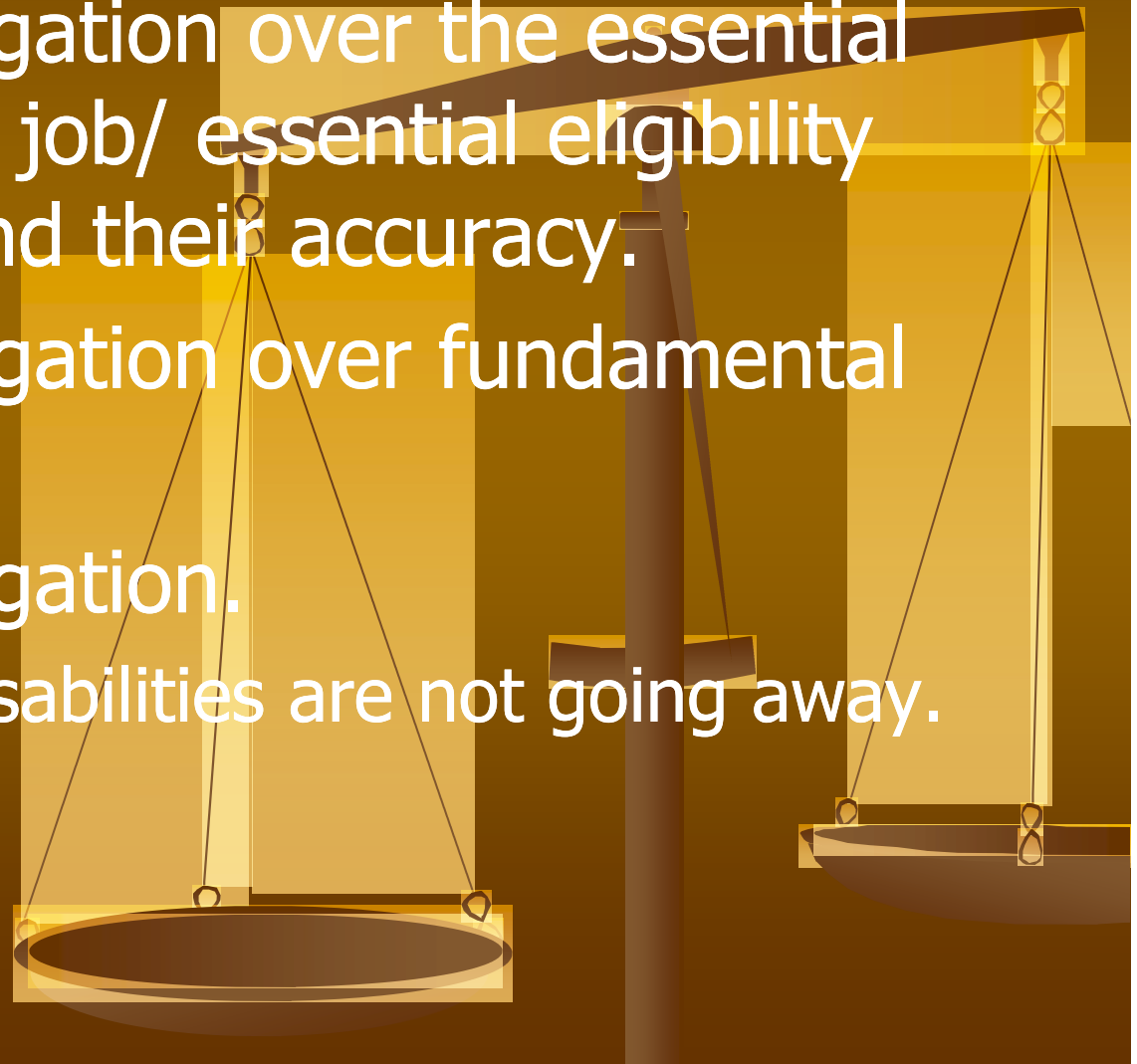
Trends



- Expect little future litigation over whether a person has a disability.
- Expect more litigation over undue hardship/burden.
 - Litigation of undue burden likely to be very complicated in light of a Supreme Court case (*Olmstead*) and 28 C.F.R. §35.150(a)(3) (CEO of public entity certification and accommodations up until the point of undue burden).

Trends Continued

- Expect more litigation over the essential functions of the job/ essential eligibility requirements and their accuracy.
- Expect more litigation over fundamental alteration.
- Expect more litigation.
 - Persons with disabilities are not going away.



ADA Instructional Coordinator at South Suburban College

- What it is not
 - Investigator
 - College's Attorney
- What it is
 - Technical Assistance
 - Essential eligibility requirements of a program or activity
 - Policies and procedures
 - Grievances



ADA Instructional Coordinator Continued (What It Is)

- Training
- Mediator



ADA Instructional Coordinator Continued(Process)

- Process for utilizing ADA Instructional Coordinator
 - Matter Involving Students
 - Go through manager of disability student services
 - When necessary, manager of disability student services will contact ADA Instructional Coordinator for technical assistance
 - Matter Involving Employment
 - Union
 - Human resources Department
 - ADA/504 grievance procedure
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