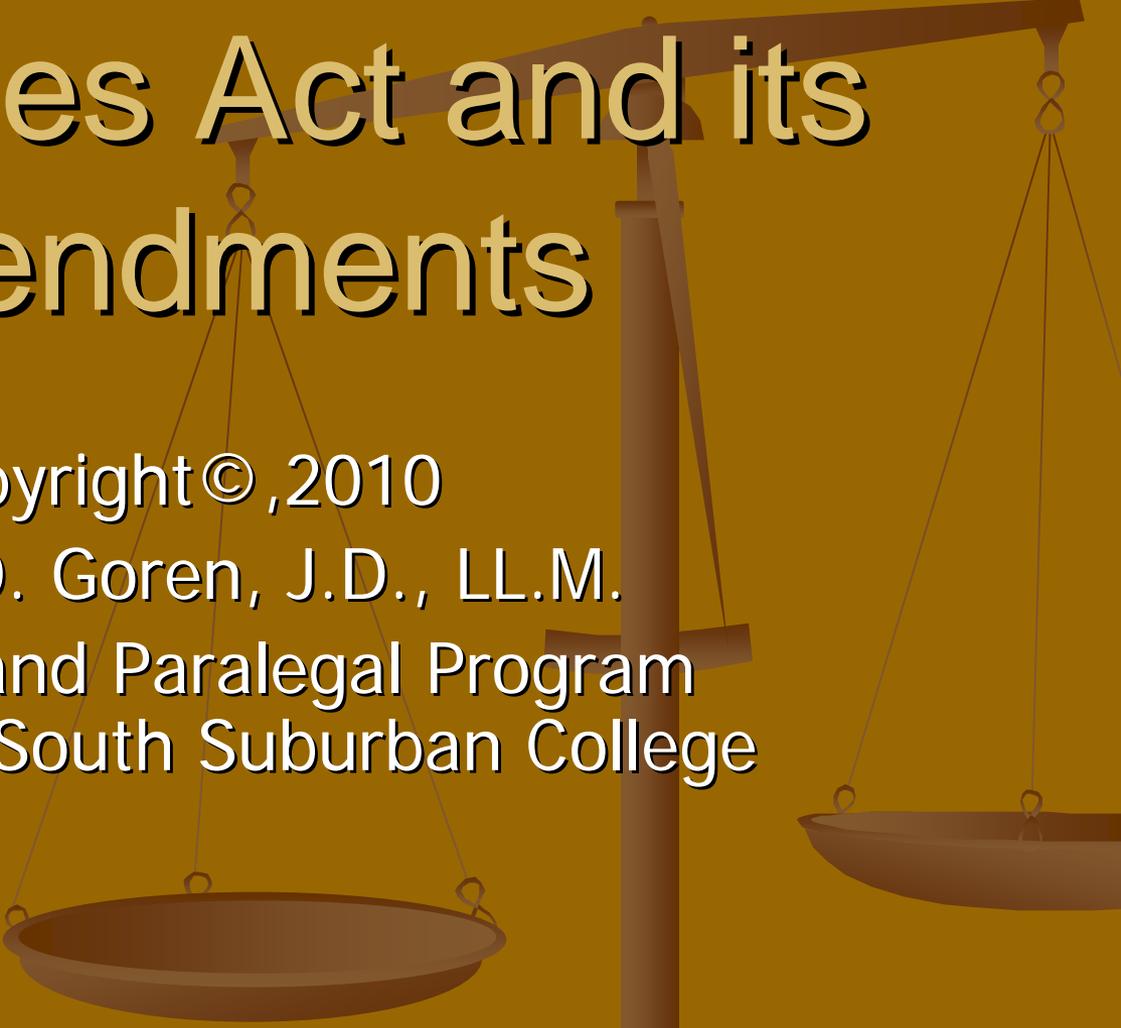


The Americans with Disabilities Act and its Amendments



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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 - Not defined in the ADA as originally enacted.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 proposed regulations added sitting, reaching, and interacting with others as major life activities. 74 Fed. Reg. at 48440.

Definitional terms

working at the major life activity

- Under the ADAAA, working as a major life activity.
 - No longer have to show that the plaintiff could not perform a broad class of jobs per *Sutton*.
 - EEOC proposed regulation says that the major life activity of working is substantially limited if it substantially limits an individual's ability to perform, or to meet the qualifications for, the type of work at issue. 74 Fed. Reg. at 48442.

Working continued

- Considering how the ADAAA defines disability, it is hard to believe that another major life activity could not be found; thereby making it unnecessary to allege that working as the major life activity. *See also* 74 of Fed. Reg. at 48442.

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.
- 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).

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 continued

- Otherwise qualified title III
 - Title III does not explicitly contain such a concept. However, similar concepts are at work with respect to fundamental alteration of the business.
 - The ADAAA made no changes to these concepts.

Issues created by the ADA's definition of otherwise qualified

- 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.
- ADAAA makes no changes to the concepts.

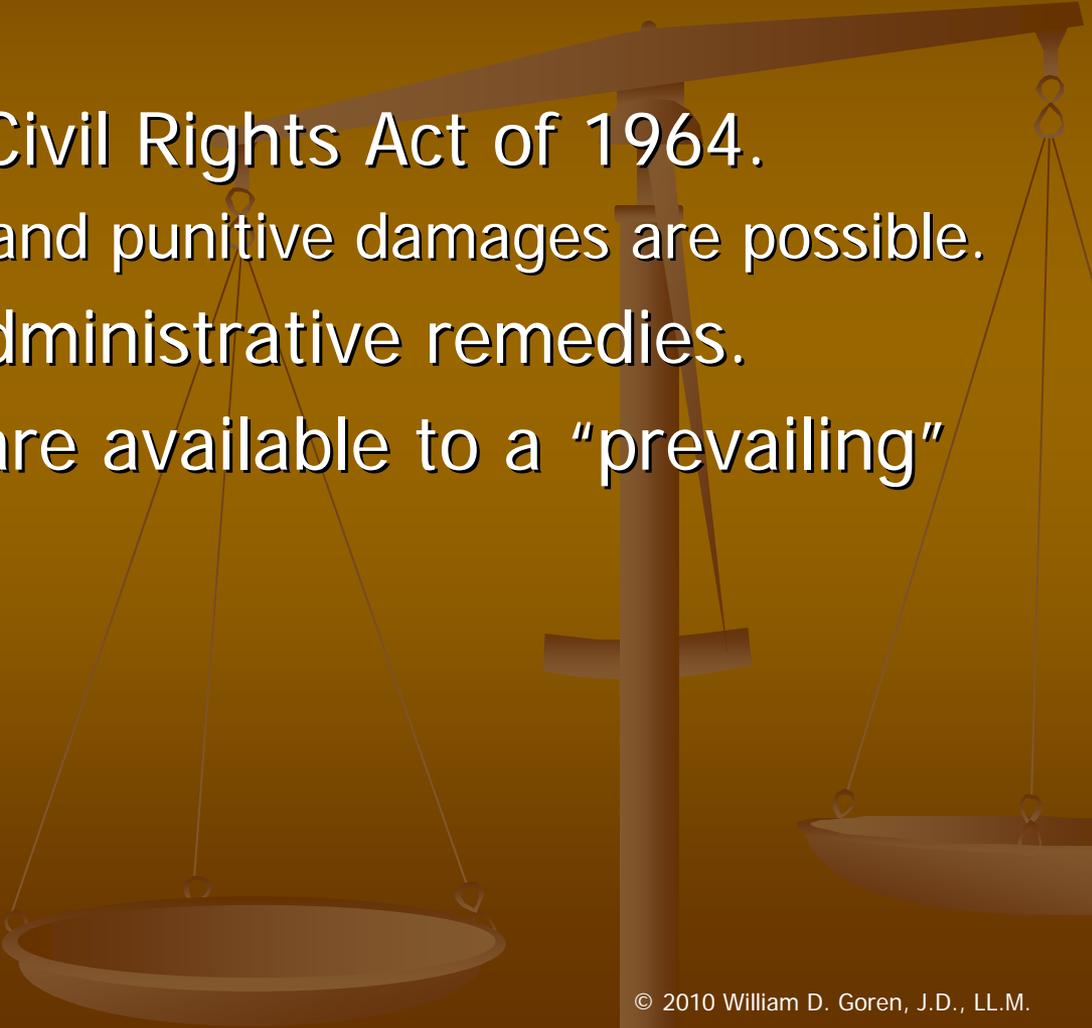
Reasonable accommodation continued

- Think of reasonable accommodation as anything that gets the person to the same starting line.
- Who has the burden of proof to show that a reasonable accommodation exist?
 - Depends upon the Circuit and cases are hard to reconcile/understand when taken together.
 - **Branham v. Snow**
392 F.3d 896 (7th Cir. 2004). (plaintiff has the burden of proof to show that they can perform the essential functions of the job with or without reasonable accommodations, but undue hardship is an affirmative defense).

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)).
 - The ADAAA made no changes to this concept.
 - Is direct threat an affirmative defense or must it be shown as part of plaintiff's case?
 - Depends on Circuit (In 7th Circuit, direct threat is an affirmative defense. See *Branham v. Snow*, 392 F.3d 896 (7th Cir. 2004))

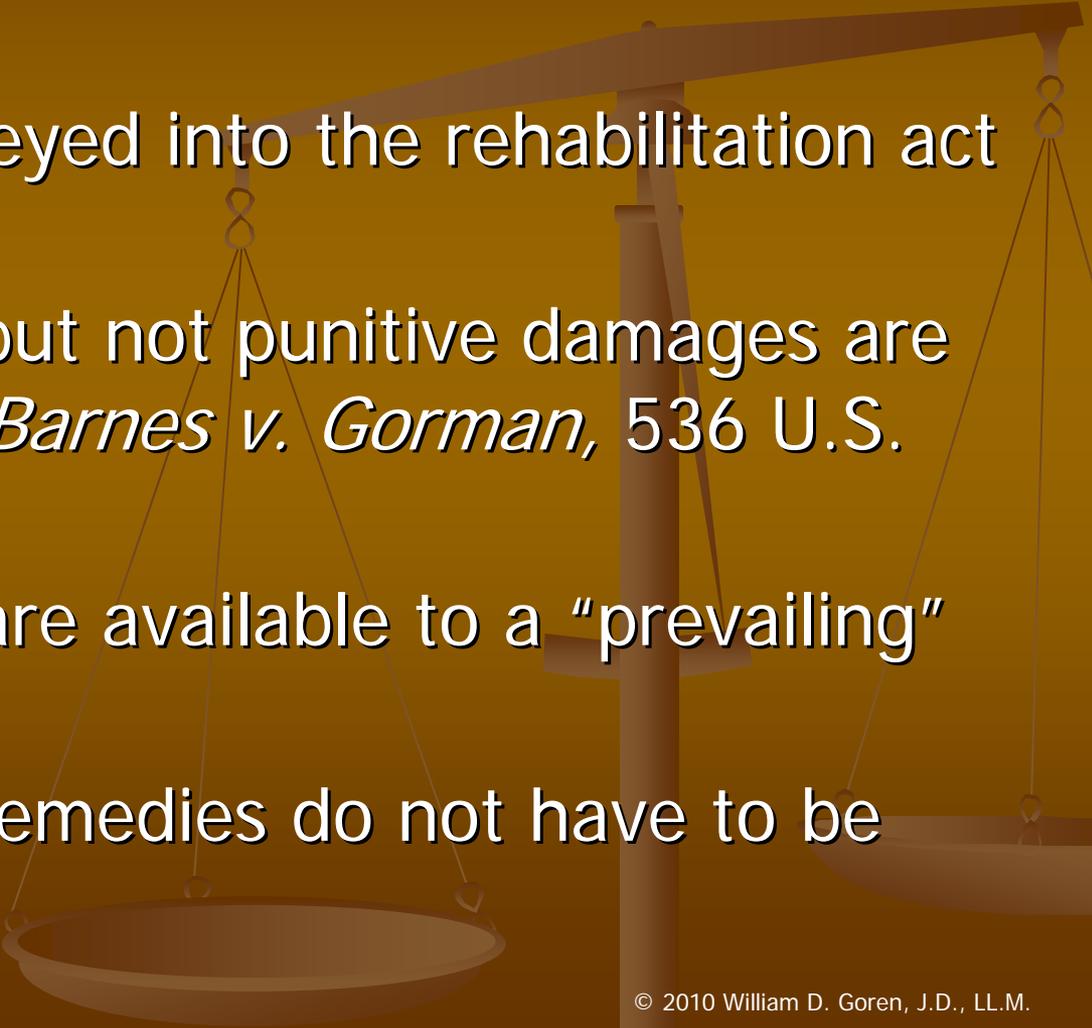
Remedies



■ Title I

- Keyed into the Civil Rights Act of 1964.
 - Compensatory and punitive damages are possible.
- Must exhaust administrative remedies.
- Attorneys fees are available to a “prevailing” party.

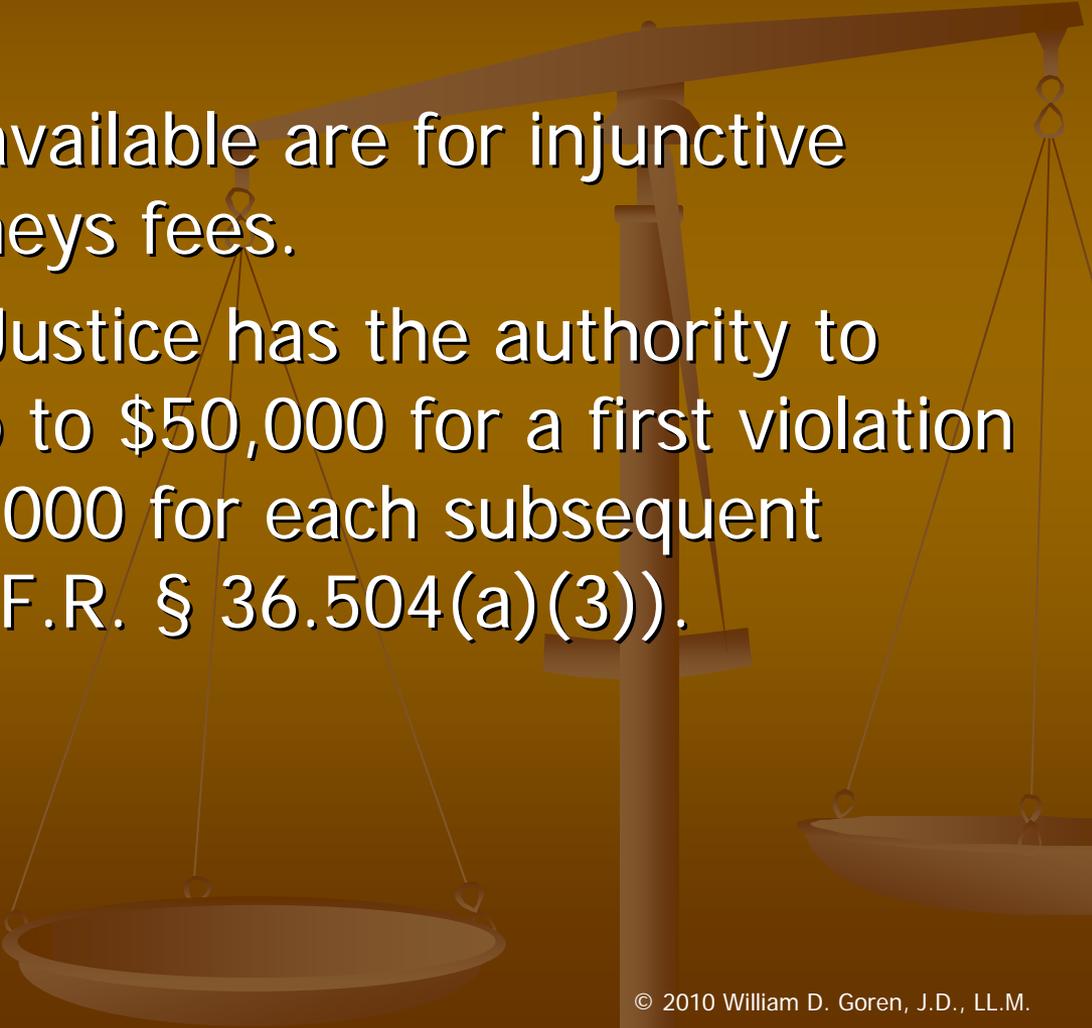
Remedies continued



■ 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.

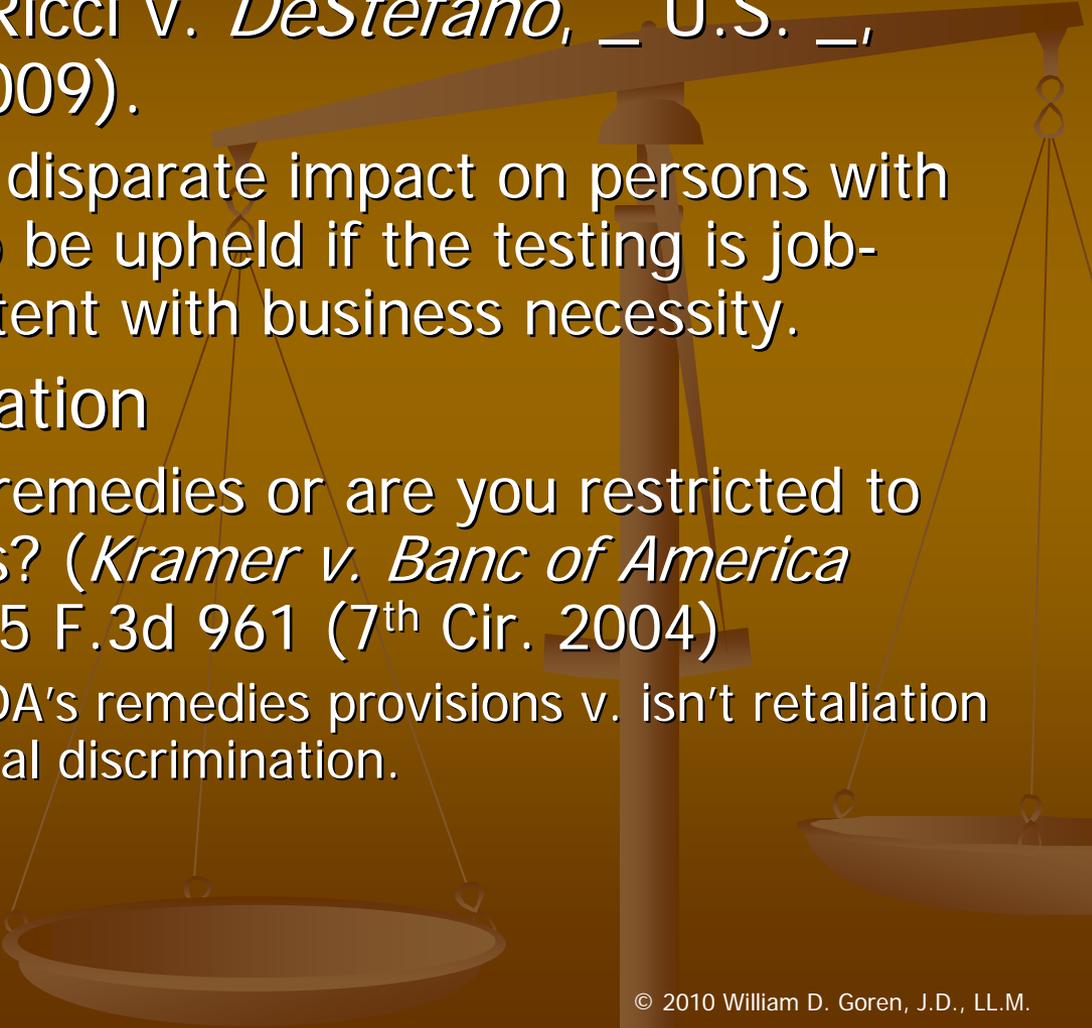
Remedies continued



■ Title III

- Only remedies available are for injunctive relief and attorneys fees.
- Department of Justice has the authority to fine violators up to \$50,000 for a first violation and up to \$100,000 for each subsequent violation. (28 C.F.R. § 36.504(a)(3)).

Hot Employment Cases By Topic



- Disparate impact (*Ricci v. DeStefano*, __ U.S. __, 129 S. Ct. 2658 (2009)).
 - Testing that has a disparate impact on persons with disabilities likely to be upheld if the testing is job-related and consistent with business necessity.
- Remedies for retaliation
 - Can you get legal remedies or are you restricted to equitable remedies? (*Kramer v. Banc of America Securities, LLC*, 355 F.3d 961 (7th Cir. 2004))
 - Plain reading of ADA's remedies provisions v. isn't retaliation a form of intentional discrimination.

Hot Employment Topics Continued

■ Jury instructions

- Is a mixed motive instruction proper in an ADA case? *Serwatka v. Rockwell Automation, Inc.*, __ F.3d __, 2010 WL 137343 (7th Cir. January 15, 2010)
 - *Gross v. FBL Financial* (ADEA case)
 - Does it matter that the ADA remedies are integrated into the Civil Rights Act and the ADEA remedies are not? (EEOC view)
 - Significance of changing “because” in the ADA to, “on the basis of” in the ADAAA?

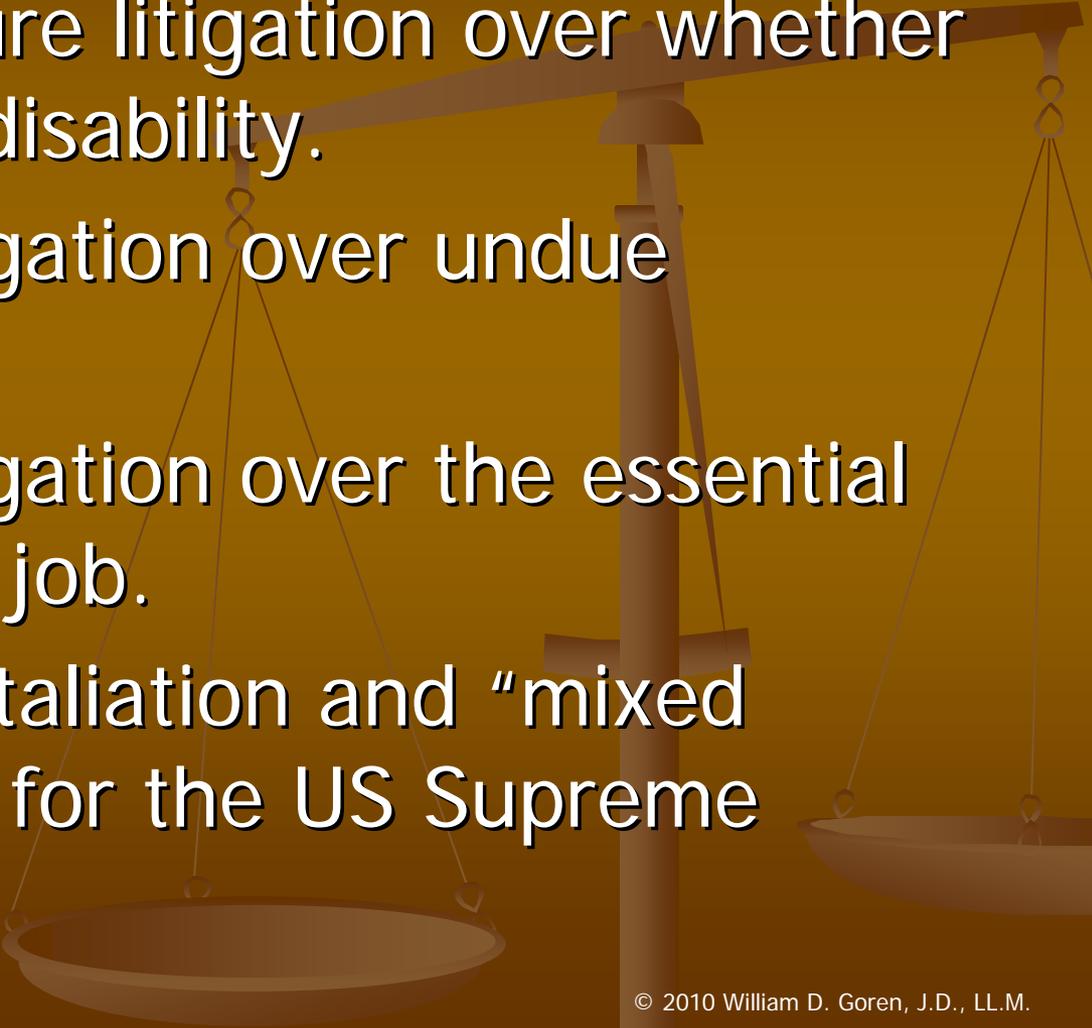
Hot Employment Topics Continued

- *14 Penn Plaza LLC v. Pyett*, 120 S. Ct. 1456 (2009). Held: a collective bargaining agreement that clearly and unmistakably required union member to arbitrate claims arising under the age discrimination in employment act was enforceable.
 - Problem for unions as it sets themselves up for fair representation issues.
- *Batson v. Kentucky* and prospective jurors with disabilities.

Hot topic title III

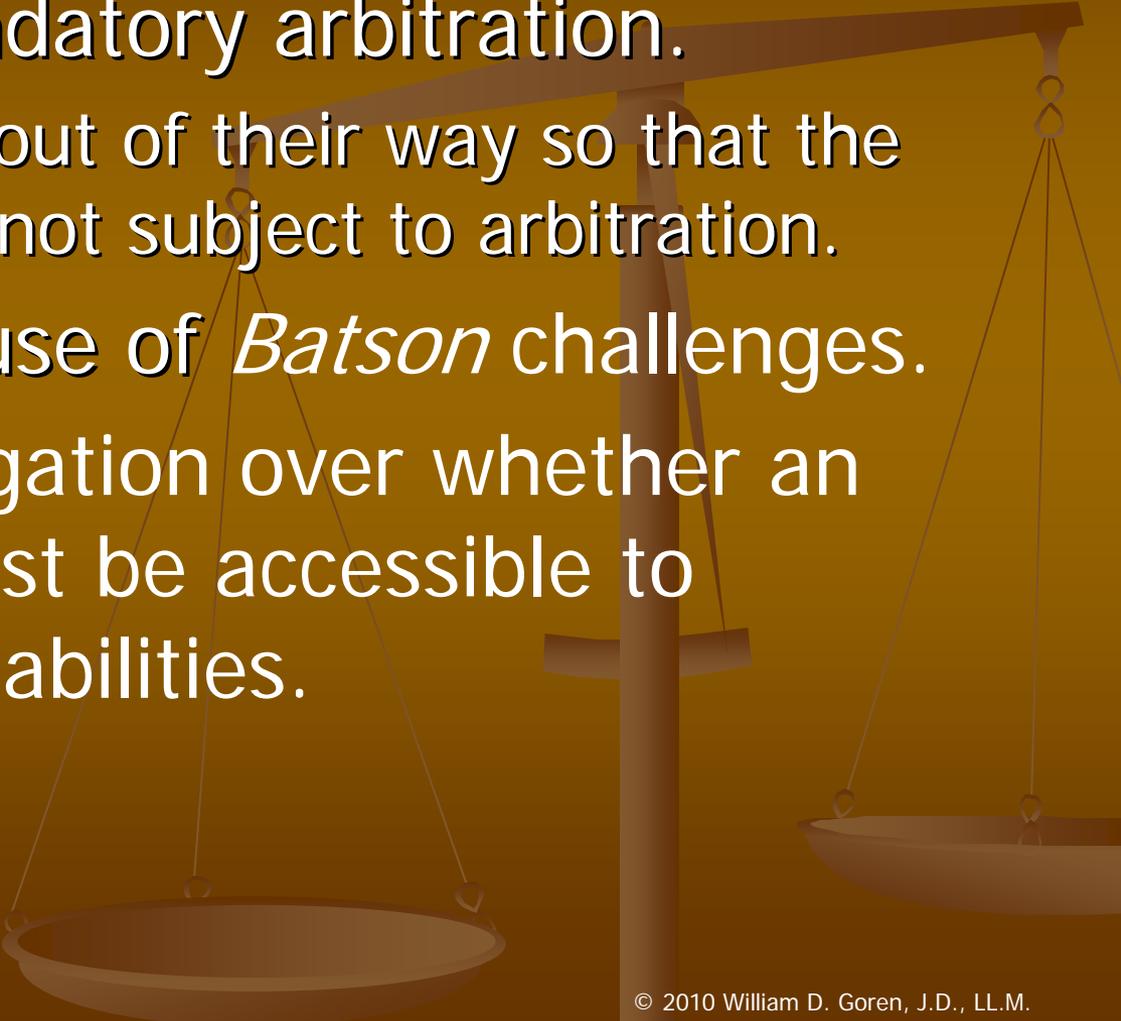
- Must an Internet site of a business be accessible to persons with disabilities?
 - Arguably yes (*Doe v. Mutual Of Omaha Insurance Company*, 179 F.3d 557 (7th Cir. 1999)).
 - Depends (*National Federation of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006)).
 - No (*Access Now, Inc. v. Southwest Airlines Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002)).

Trends



- Expect little future litigation over whether a person has a disability.
- Expect more litigation over undue hardship.
- Expect more litigation over the essential functions of the job.
- Remedies for retaliation and “mixed motive” headed for the US Supreme Court?

Trends Continued



- Unions and mandatory arbitration.
 - Unions may go out of their way so that the ADA claims are not subject to arbitration.
- Expect greater use of *Batson* challenges.
- Expect more litigation over whether an Internet site must be accessible to persons with disabilities.