THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Appalachian Stitching Company LLC

v.

Patricia Crowe

Case No. 2021-0129

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# BRIEF FOR PATRICIA CROWE

APPELLANT

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## Questions Presented

1. Whether the trial court erred by ruling that Mrs. Crowe was not a "qualified individual" while on leave. App. at 37-40.
2. Whether the trial court erred by dismissing counts (or portions of counts) related to adverse actions that occurred at times when Mrs. Crowe was not on leave (and was a qualified individual), including the Company failing to provide requested reasonable accommodations, refusing to engage in an interactive dialogue, and subjecting Mrs. Crowe to an unpaid suspension. App. at 37-40.
3. Whether the trial court erred by considering Mrs. Crowe's leave under a "qualified individual" analysis, instead of under the undue burden analysis. App. at 37-40.

## Constitutional Provisions and Statutes Involved in the Case

RSA 354-A. App at 124.

Americans with Disabilities Act ("ADA"). App at 137.

## Statement of the Case

On March 1, 2021, the trial court granted the summary judgement motion of Defendant Appalachian Stitching Company LLC (the "Company") dismissing all R.S.A. 354-A and ADA claims of Mrs. Crowe based on the finding that Mrs. Crowe was not a qualified individual *after* the Company forced her to go on leave due to her sciatica disability. App. 34-40. Not only did the trial court improperly fail to apply an analysis of whether the requested accommodation of a temporary leave was an undue burden (instead improperly ruling because Mrs. Crowe was on leave she was not a qualified individual) it also dismissed, without even addressing, Mrs. Crowe's R.S.A. 354-A and ADA claims based on adverse actions imposed on her *before* her leave commenced,

including the Company's refusal to provide requested reasonable accommodations (which would have prevented her needing to go out on leave in the first place), its refusal to engage in an interactive dialogue related to Mrs. Crowe's reasonable accommodation requests, and the subjection of Ms. Crowe to an unpaid suspension. App. 34-40. Mrs. Crowe appeals from this Order and respectfully requests that this court REVERSE the trial court's order granting summary judgment and REMAND the case for a jury trial.

## Statement of Facts

Mrs. Crowe hereby presents the facts underlying the trial court's erroneous grant of summary judgment to the Company on the question of whether Mrs. Crowe was subject to disability discrimination and retaliation while employed by the Company due to her disability and/or in retaliation for engaging in protected activity.

On or around June 12, 2016, Mrs. Crowe began her employment with the Company as an assembler. App. at 35. Mrs. Crowe was a qualified employee for the Company, who performed at a satisfactory level, having no history of formal discipline. Appx at 45-46, 98 ¶2. On or around May 7, 2017, upon a visit to the emergency room, Mrs. Crowe was diagnosed with sciatica, a physical impairment that limited one or more of Mrs. Crowe's major life activities, including, but not limited to, sleeping and moving without pain during flare ups. App- 99 ¶11. As such, Mrs. Crowe's sciatica was (and continues to be) a disability under New Hampshire law and the ADA.

On May 8, 2017, the day after being diagnosed with sciatica, Mrs. Crowe disclosed her sciatica disability to her direct supervisor at the Company, Melody Dumais ("Dumais"). App-35; App-66. To help manage her sciatica-related pain, Mrs. Crowe also requested from Dumais the accommodation of being able to periodically (and for a limited duration) perform her work while sitting in work stations that followed long periods of standing. App-35; App-66. ("A: I explained

to her that I had been diagnosed with sciatica and that I could do my job standing and sitting, but in standing I would need to sit for a limited amount of time in order—until the pain relieved and then I could go back to my standing position. Q: And what did Melody say? A: She had no problem with it."). Notably, this disability-related accommodation request was not an undue burden on the Company, as Mrs. Crowe could still perform all the essential functions of her position even when periodically sitting while continuing to work. App-100 ¶14.

Indeed, Mrs. Crowe's position involved regularly alternating between workstations that involved sitting and standing, and assemblers had discretion over which station to utilize (and for how long) at each time. App-73; Appx at 98-99 ¶¶5-6. Dumais granted this accommodation and Dumais admitted that Mrs. Crowe was able to perform the essential functions of her job satisfactorily even after she started to utilize her approved sitting accommodation. App-77 ("Q: During those two or so days she was there, did she perform her work satisfactorily? A: She did her work, yeah. She stood on her white glue machine. She folded. She did everything that you--she would normally do"); App-100, ¶ 14. Indeed, Mrs. Crowe satisfactorily performed her job as an assembler for *several days*, utilizing her reasonable accommodation approved by Dumais. App-100, ¶14; App-67 ("A: I told her that I had been doing it for a few days and it was working out fine with Melody letting me have the limited time to sit.").

Dumais eventually informed the Company's Human Resources Manager Jodie Wiggett ("Wiggett") of Mrs. Crowe's sciatica disability. The Company then demanded that Mrs. Crowe provide a doctor's note. App-100 ¶16. As requested, Mrs. Crowe provided this medical note on May 12, 2017, confirming her disability to Wiggett, which also noted the restrictions of "NO LIFTING, BENDING OR STOOPING FOR 1 WEEK." App-35; App-85. Notably, Mrs. Crowe's position did not require lifting, bending, or stooping. App-99. ¶7; App-65 ("Q: You didn't have

to bend, stoop or lift? A: No."); App-74 ("Q: Are there any other qualifications that Appalachian Stitching is looking for in assemblers? A: No. You want to be able to stand. You must have good attendance.").

Ms. Crowe presented the note to Wiggett and sought to continue working with the requested accommodations for the one week at issue. App-100, ¶¶18-19. However, upon seeing the note, Wiggett unjustifiably declared that Mrs. Crowe could not return to work until she had "no restrictions." App-67. ("Q: What did Jody [Wiggett] say in response? A: She said, no, you have restrictions, you cannot work here...."); App-51 ("Q: Did you tell Mrs. Crowe that she could not return unless her restrictions were lifted? A: I told her—correct."). Notably the Company never engaged with Mrs. Crowe in an interactive dialogue regarding her request and instead summarily stated that she could not work with restrictions. App-101, ¶20; App-67; App-50 (As to whether Mrs. Crowe's restrictions were ever clarified: "Q: Did you clarify with Mrs. Crowe exactly how much lifting, bending—you know, clarify with Mrs. Crowe what the lifting, bending, and stooping restriction meant? A: I didn't clarify with her."). Even if there was an infrequent situation in which Mrs. Crowe needed to bend, lift, or stoop, there were several accommodations that would have allowed Mrs. Crowe to perform her job without doing so, such as utilizing the wheeled cart regularly used by assemblers, using a handheld grabbing device, or even requesting momentary assistance from another assembler (notably she worked side by side with multiple people and accordingly this type of assistance was routine and would not have slowed down the other assembler's work). App-99 ¶¶8-9.

In refusing to allow Mrs. Crowe to continue to work, the Company thus revoked the reasonable accommodation Dumais had previously provided to Mrs. Crowe and forced Mrs. Crowe out on what amounted to an unpaid suspension, even though she was still capable of

performing the essential functions of her job and was seeking to continue to work with a few temporary accommodations. App-100 ¶ 18. The Company unjustifiably asserted that Mrs. Crowe could not have restrictions (despite Mrs. Crowe having successfully performed her job over the last several days). App-100 ¶14; App-77 "Q: During those two or so days she was there, did she perform her work satisfactorily? A: She did her work, yeah. She stood on her white glue machine. She folded. She did everything that you--she would normally do"). Other than declaring that having any restrictions was unacceptable, the Company never put forward any argument as to why Ms. Crowe could not perform her job, never communicated with Mrs. Crowe's doctor, and never spoke with Mrs. Crowe herself about her restrictions or her disability. App-102 ¶27 ; App-61 ("Q: Did you ever talk to Mrs. Crowe about what bending, lifting, and stooping meant? A: I did not. She knows what bending, lifting, and stooping are. Q: Okay. Did you follow up with her doctor about what he meant by no lifting, bending, or stooping? I mean, there could be a lot of definitions of what 'stooping' is, or what 'bending' is. A: You're right.").

Mrs. Crowe protested Wiggett's unjustified refusal to allow her to work, saying that she had been performing all the essential functions of her job for days with the very minor accommodation of sometimes working while sitting. Appx-66-67 ("Q: And what did you say in response to that? A: I told her that I had been doing it for a few days and it was working out fine with Melody [Dumais] letting me have the limited time to sit."). The Company refused to engage in any further dialogue with Mrs. Crowe surrounding Mrs. Crowe's repeated assertions that she could work and her request to continue to do so, and therefore the Company forced Mrs. Crowe out of work until and unless she could convince her doctor to write a noting stating that she had "no restrictions." App-101 ¶20; App-67.

When Mrs. Crowe told her doctor that the Company was refusing to let her work unless she had no restrictions, her doctor gave her a note asking for a week out of work in order to see if her sciatica symptoms would improve enough for her to have no restrictions (even though this was not Mrs. Crowe's preferred reasonable accommodation and was merely a response to the Company's illegal refusal to allow Mrs. Crowe to continue working). App-101 ¶¶20-21 ("I went to my doctor explaining that Wiggett would not let me return to work unless I had no restrictions. I did so because of Defendant's refusal to grant my initially requested reasonable accommodations."); App-67. Importantly, Mrs. Crowe's doctor and Mrs. Crowe believed that she could perform her assembler position so long as she was allowed to work with minimal accommodations. App-101 ¶¶20-21. Mrs. Crowe's doctor was unable to immediately fulfill the Company's unnecessary and discriminatory request that Mrs. Crowe be released without *any* restrictions and it was for this reason that he issued a note justifying Mrs. Crowe being out of work (despite his continued belief that she could continue to work if allowed some minor accommodations). App-101 ¶ 22.

Notably, after the initial one-week period, Mrs. Crowe could do some lifting, bending, or stooping. App-102 ¶27 ("Importantly, I could now do some bending, lifting, and stooping as my initial restriction of 'no bending, lifting, or stooping,' had expired after 1 week."). To meet the Company's unnecessary requirement of returning only with "no restrictions," Mrs. Crowe's doctor suggested a leave of a few weeks and submitted paperwork to the Company requesting this. App-101 ¶24 ("My doctor recommended that I apply for FMLA leave and told me that his office would handle the request….I did so because Defendant's discriminatory request I return with 'no restrictions' necessitated me going out on leave."); App-87.

Mrs. Crowe was requesting leave of a few weeks to be able to meet Wiggett's demand that she return with "no restrictions." App-101 ¶24. The Company denied Mrs. Crowe this requested accommodation with no interactive dialogue. App-92. It did so despite neither Wiggett nor Manning ever following up with Mrs. Crowe to ask about the length of her requested leave. App-102 ¶¶26-30; App-55 ("Q: Did you follow up with Mrs. Crowe at all to ask her if or when she would return?" A: I did not."); App-92. Indeed, no employee at the Company ever clarified how long a leave Mrs. Crowe was requesting as a reasonable accommodation. App-56 ("Q: Did you follow up with either her doctor or Mrs. Crowe about how long a leave she was asking for with the FMLA request? A: I did not."). Indeed, Mrs. Crowe had made clear that she wanted to return to work immediately with accommodations Appx at 101-102 ¶¶23-26. After her request for leave was denied, Mrs. Crowe called Wiggett on May 23rd or May 24th and asked to be allowed to return to work with no restrictions. App-102 ¶26 ("I attempted to contact Wiggett on May 23, 2017 or May 24, 2017, as I had been denied FMLA leave and wanted to return to work, but Wiggett did not return my message."); Appx at 69-70 ("Q: After your May 19th visit, did you ever contact anyone at Appalachian Stitching to advise of your status? A: By May 23rd or the 24th I called and left a message for Ms. Wiggett telling her that I was denied for the FMLA and I wanted to come back to work, and I never heard back from her."). The Company refused to respond to this request to return and thus forced Mrs. Crowe to stay out of work against her will. App-102 ¶26; Appx at 69-70. Notably, after Mrs. Crowe left a message for Ms. Wiggett in late May asking to be allowed to return, the Company never asked Mrs. Crowe for a further note from her doctor releasing her to return. App-56; App-102 ¶¶26-30.

Notably, after a limited leave, Mrs. Crowe could have returned (and sought to return) with no restrictions, or in the very least less burdensome restrictions, than her doctor initially requested.

App-102 ¶¶ 26-27; Appx at 69-70. However, after refusing to engage in an interactive dialogue about Mrs. Crowe's initial accommodation requests and forcing Mrs. Crowe out of work on what amounted to an unpaid suspension, the Company swiftly terminated Mrs. Crowe on June 1, 2017, despite never contacting Mrs. Crowe after she reached out to the Company seeking to return to work on May 23rd or May 24th, 2017. App-56; App-102 ¶¶26-30. Notably, Mrs. Crowe was out of work (based on the Company's refusal to let her return until she had no restrictions) for less than 3 weeks before the Company suddenly terminated her employment without warning on June 1, 2017. App-102 ¶30; Appx at 69-70. During this entire period, Mrs. Crowe was ready and willing to work with accommodations, and repeatedly asked to be allowed to work, including by seeking to return from leave in late May 2017. App-102 ¶¶26-27.

The Company in this matter filed a summary judgment motion on November 13, 2020. Due to scheduling conflicts related to ongoing discovery, the deadline for the response to the Company's Motion for Summary Judgment was extended to January 26, 2021 by a court order affirming a joint motion by the parties. On January 26, 2021, the Company filed its response to the Company's Motion for Summary Judgment. On March 1, 2021, the trial court dismissed Mrs. Crowe's claims of discrimination and retaliation based on her sciatica disability, focusing only on the fact that the Company fired Mrs. Crowe before Mrs. Crowe's doctor (who never indicated that Mrs. Crowe could not work with accommodations, and asked for a leave only after she was told she could not work with any restrictions) provided any formal communication indicating that she was able to return to work without any restrictions. App-38. The trial court reasoned that since Ms. Crowe was out on a leave (albeit an involuntary one) and since the Company fired her before her doctor had formally released her to return to work (without restrictions), this meant that Mrs. Crowe was not a qualified individual entitled to protections under state or federal disability laws

and thus the Company had no obligation to provide any disability accommodations under the ADA or R.S.A. 354-A. Appx at 38-39. As detailed below, this was a clear error of law and accordingly this Court should reverse the trial court's ruling and remand the case for a jury trial.

## Summary of Argument

The trial court misapplied the law to the facts and ignored key relevant facts when it granted the Company's summary judgment motion and dismissed Mrs. Crowe's complaint. At the outset, the trial court improperly analyzed Mrs. Crowe's requests through the lens of what the Company claimed were the job functions (which were disputed by Ms. Crowe) rather than whether the requested accommodations were reasonable or an undue burden. Even under this improper analysis, the trial court additionally entirely ignored multiple clearly articulated adverse actions committed by the Company against Mrs. Crowe while she was still actively working, including improperly failing to accommodate Mrs. Crowe's disability (after she made multiple valid accommodation requests), failing to engage in an interactive dialogue with Mrs. Crowe to explore alternative reasonable accommodations, and forcing her onto an involuntarily leave of absence (which amounted to an unpaid suspension) by refusing to let Mrs. Crowe continue working until she could do so with "no restrictions" (i.e. no accommodations). App-67. ("Q: What did Jody [Wiggett] say in response? A: She said, No, you have restrictions, you cannot work here...."); App-51 ("Q: Did you tell Mrs. Crowe that she could not return unless her restrictions were lifted? A: I told her—correct.") These illegal adverse actions were clearly articulated and highlighted in both the Complaint and the Plaintiff's opposition to the summary judgment motion, including supporting evidence, and the trial court gave no meaningful explanation for why these earlier adverse actions were ignored in its ruling, which constitutes a clear error of both fact and law.

The trial court focused its ruling entirely on a later period after the Company had forced Ms. Crowe out on an involuntary leave of absence by rejecting her doctor's request that she be allowed to work with certain accommodations and instead insisting she could only return to work if she had "no restrictions." App-67. ("Q: What did Jody [Wiggett] say in response? A: She said, No, you have restrictions, you cannot work here...."), erroneously ruling that because Ms. Crowe had not been released to work at the moment she was fired, she "was not a "qualified individual" within the meaning of the ADA or RSA chapter 354-A." App-37. As shown below, this ruling constituted a clear error of both fact and law.

## Argument

### I) Standard of Review with Respect to the Trial Court's Order Granting Appalachian Stitching Company LLC's Summary Judgment Motion.

The Court must review *de novo* the trial court's application of the law to the facts. *Del Norte, Inc. v. Provencher*, 142 N.H. 535, 537 (1997). This Court's standard of review related to the trial court's findings of fact is whether or not a finding is "clearly erroneous." *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 499, (1984) ("Rule 52(a) never forbids such an examination, and indeed our seminal decision on the Rule expressly contemplated a review of the entire record, stating that a "finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."); *Concrete Pipe & Prod. of California, Inc. v. Constr. Laborers Pension Tr. for S. California*, 508 U.S. 602, 623, (1993).

### II) Mrs. Crowe Should Have Been Allowed to Continue to Work with the Limited Accommodations Requested by her Doctor and the Company Violated the Law by Refusing to Provide Mrs. Crowe with Reasonable Accommodations, Refusing to Engage in an Interactive Dialogue, and Subjecting her to an Unpaid Suspension.

Someone is a qualified individual so long as they can perform the essential functions of their position, even if it requires accommodations for them to do so. RSA 354-A:2 XIV-a ("Qualified individual with a disability" means an individual with a disability who, with or without a reasonable accommodation can perform the essential functions of the employment position…"). When a qualified individual asks for accommodations, the employer is legally obligated to either grant the accommodations or (if it believes that the requested accommodations would be unduly burdensome or otherwise prevent the completion of essential job functions) to engage in an interactive dialogue with the employee to explore whether less burdensome alternative accommodations would allow the completion of essential job functions. *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act,* EEOC-CVG-2003-1 (October 17, 2002). This requires communication and exploration of other alternative accommodations if the one requested by the employee is an undue burden, and the failure engage in an interactive process is a violation of the ADA. *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 317-318 (3rd Cir., 1999) ("Put differently, because employers have a duty to help the disabled employee devise accommodations, an employer who acts in bad faith in the interactive process will be liable if the jury can reasonably conclude that the employee would have been able to perform the job with accommodations. In making that determination, the jury is entitled to bear in mind that had the employer participated in good faith, there may have been other, unmentioned possible accommodations."); *Goodrich v. Wellpoint, Inc.*, 2015 WL 4647907, *10 (D. Me., Aug. 5, 2015) ("The April 11 meeting between Goodrich and Toot demonstrates that WellPoint initiated an interactive process in response to Goodrich's accommodation requests that he be permitted to work from home. It does not demonstrate that WellPoint's took steps to determine the

appropriate reasonable accommodation."). An employer may be obligated to change or relieve an employee from performing non-essential job functions. RSA 354-A:7 ("It shall be an unlawful discriminatory practice: …. VII(a) For any employer not to make reasonable accommodations for the known physical or mental limitations of a qualified individual with a disability…unless such employer can demonstrate the accommodation would impose an undue hardship…"). Likewise, an employer may be obligated to provide an employee certain help, assistance, or other accommodations in performing essential job functions, so long as this help, assistance, or other accommodations does not constitute an undue burden. The question of what constitutes essential job functions, of whether requested accommodations constitutes an undue burden, and whether less burdensome alternative accommodations exist that should be explored before determining that no plausible accommodations exist are all factual questions that are typically left to a jury to decide. *Tobin v. Liberty Mut. Ins. Co.* ("*Tobin II* "), 553 F.3d 121, 136 (1st Cir. 2009); *Sensing v. Outback Steakhouse of Fla., LLC*, 575 F.3d 145 (1st Cir. 2009).

**a. The Trial Court Failed to Address the Fact that Mrs. Crowe was a Qualified Individual Before she was Unjustifiably and Unnecessarily Forced on Leave.**

**i. Mrs. Crowe was a qualified individual satisfactorily performing her duties when she initially requested reasonable accommodations.**

At the outset, it is important to note that the trial court made no finding that Mrs. Crowe was not a qualified individual at the time that she initially requested reasonable accommodations for her sciatica disability. Indeed, the trial court's ruling focused only on the period of time *after* Mrs. Crowe's initial request to work with accommodations was denied and she was forced onto an involuntary leave. App-38 ("As such, an employee whose doctor has not released her to return to work is not a 'qualified individual' under the ADA.").

To the extent that the trial court's ruling was imputed to constitute an implicit finding that Ms. Crowe was not a qualified individual even before she went out on leave, this clearly constituted an error of law based on the facts in the record. Before asking for any reasonable accommodations, Mrs. Crowe was performing at a satisfactory level. Thereafter, Mrs. Crowe successfully performed her job as an assembler for several days despite already being under the very restrictions the Company claims it could not provide. Appx at 78-79 ("Q: During those two or so days that she was there, did she perform her work satisfactorily? A: She did her work, yeah. She stood on her white glue machine, she folded. She did everything that you—she would normally do. Q: Did she, at any time, indicate that she could not do any task that was assigned to her? A: She never mentioned anything to me. Q: Okay. And, in fact, she was performing all the tasks that were assigned to her? A: Yes."); App-49 ("Do you recall Ms. Dumais saying that to you or do you recall her not saying that to you? A: That Pat couldn't do her job? Q: Correct. A: She did not tell me that.").

Indeed, Mrs. Crowe had shown, over a period of almost a full week that she could perform the essential functions of her position with minimal accommodations (indeed, Ms. Crowe didn't need the accommodation of no bending, lifting, or stooping because she could and did perform her job without doing so). App-77 ("Q: How long did Mrs. Crowe continue to do her work after this? A: She had a couple more days before she left. I mean she was there for maybe two—two more days. Q: During those two or so days that she was there, did she perform her work satisfactorily? A: She did her work yeah."); App-65. Notably Mrs. Crowe's supervisor, Dumais, did not see any reason why Mrs. Crowe could not perform the essential functions of her job after Mrs. Crowe returned with the restrictions, saying that after she allowed Mrs. Crowe the reasonable accommodation of sitting periodically, Mrs. Crowe was able to perform her job satisfactorily (and

as such since that was the only accommodation necessary, it is clear Mrs. Crowe could do her job after the doctor's note saying no bending, lifting or stooping for one week was issued). App-77 ("Q: Did she perform her job responsibilities satisfactorily? A: Yeah,…She just continued to do her work.").

**ii. The trial court acknowledged that Mrs. Crowe's testimony about the essential functions of her job disputed the Defendant's assertions and erred by inexplicably finding that this did not create a "genuine issue of material fact."**

The trial court inexplicably ruled that "the plaintiff's assertion that her job as an assembler at Appalachian 'did not require lifting, bending and stooping does not create a genuine issue of material fact.'" App-38. This conclusion is a clear error of law, as Mrs. Crowe clearly presented sufficient evidence that made for a genuine issue of material fact as to whether Mrs. Crowe was capable of performing the essential functions of her job and whether she was a qualified individual. App-65 ("Q: The doctor indicates under instructions, no lifting, bending or stooping for one week. Do you see that? A: Yes, I do. Q: And you understand that those were requirements in order to work at Appalachian Stitching, isn't that right? A: No, it was not. Q: You didn't have to bend, lift or stoop? A: No."); App-102 ¶27. This testimony is supported by the fact that her direct supervisor acknowledges she was performing well during the almost 1 week she worked after receiving the doctor's note. App-77.

The trial court's summary dismissal of Mrs. Crowe's assertions (and ample evidence supporting those assertions) is a clear error of law. *Tobin v. Liberty Mut. Ins. Co.* ("*Tobin II* "), 553 F.3d 121, 136 (1st Cir. 2009) ("The question whether a particular job function is essential is for the jury when there is sufficient evidence."); *Sensing v. Outback Steakhouse of Fla., LLC*, 575 F.3d 145 (1st Cir. 2009) (finding genuine issues of material fact existed as to whether restaurant

employee with multiple sclerosis (MS) was able to perform the essential functions of her job handling customers' take-out orders and therefore precluding summary judgment.)); *Ward v. Massachusetts Health Research Institute, Inc.,* 209 F.3d 29 (1st Cir. 2000) (Plaintiff's contention that she could perform the essential functions of her job created a fact dispute not ripe for summary judgment.).

In this case, the trial court erroneously focused exclusively on the Company's job description and gave no explanation justifying the decision to ignore Mrs. Crowe's testimony that her job did not require lifting, bending, or stooping. App-35. However, "an employer may not turn every condition of employment which it elects to adopt into a job function, let alone an essential job function, merely by including it in a job description." *Cripe v. City of San Jose*, 261 F. 3d 877, 887 (9th Cir., 2001). As there was a clear dispute of fact as to what the essential functions of Mrs. Crowe's position were, this was an issue that needed to be left to a jury.

**iii. The trial court ignored the Company's failure to engage in an interactive dialogue.**

Additionally, the trial court failed to address the fact that the Company never engaged in an interactive dialogue with Mrs. Crowe as to clarify her reasonable accommodation request and explore alternative accommodations. After receiving her May 7th doctor's note on May 12, 2017, the Company refused to allow Mrs. Crowe to return to work and no effort was taken to engage in an interactive dialogue about *any* reasonable accommodations. App-50 ("Q: Did you discuss at all any modifications that could be done to help Mrs. Crowe do her job without bending lifting or stooping? A: There---I don't see that there is any."); Appx at 58-59 ("Q: Sure. So what I'm—what I am getting at, right, is what is the process in place? What is the procedures of the company when a person with a disability asks for a reasonable accommodation? Does that include the interactive dialogue? And how does that start? A: Yes, it would, and it would be a discussion that we would

sit down with Scott Manning. Q: Okay. Would you sit down with Scott Manning with that employee? A: Yes Q: Okay. Why was that not done in Mrs. Crowe's situation? A: Because there no was no request by Mrs. Crowe. Q: Did you not understand her doctor's note to be a request for a reasonable accommodation? A: I did not.").

Indeed, after the note's one week duration, the Company never followed up with Mrs. Crowe or Mrs. Crowe's doctor to see if Mrs. Crowe could perform any amount of bending, lifting, or stooping. App-61 ("Q: Okay. Did you follow up with her doctor about what he meant by no lifting, bending or stooping? I mean, there could be a lot of definitions of what "stooping" is, or what "bending" is. A: You're right."). Instead, Defendant insisted that Mrs. Crowe could not return to work until there were absolutely no restrictions at all. App-67 ("Q: What did Jody [Wiggett] say in response? A: She said, No, you have restrictions, you cannot work here."); App-51 ("Q: Did you tell Mrs. Crowe that she could not return unless her restrictions were lifted? A: I told her—correct."). Similarly, Defendant never sought to explore with Mrs. Crowe or her doctor whether there were any alternative accommodations that would have allowed Ms. Crowe to perform essential functions. App-50 ("Q: Did you discuss at all any modifications that could be done to help Mrs. Crowe do her job without bending lifting or stooping? A: There---I don't see that there is any."). Notably there were several accommodations that would have allowed Mrs. Crowe to perform her job even if bending, lifting, or stooping was required (it wasn't), such as utilizing the wheeled cart regularly used by assemblers, using a handheld grabbing device, or even requesting momentary assistance from another assembler (notably she worked side by side with multiple people and accordingly this type of assistance was routine and would not have slowed down the other assembler's work). App-99 ¶¶8-9.

Failure to engage in the interactive dialogue is a clear violation of the law. *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 317-318 (3rd Cir., 1999) ("Put differently, because employers have a duty to help the disabled employee devise accommodations, an employer who acts in bad faith in the interactive process will be liable if the jury can reasonably conclude that the employee would have been able to perform the job with accommodations. In making that determination, the jury is entitled to bear in mind that had the employer participated in good faith, there may have been other, unmentioned possible accommodations."); *see also Miceli v. JetBlue Airways Corp.*, 914 F.3d 73, 82 (1st Cir. 2019) ("If the requested accommodation is not suitable or the request is otherwise inappropriate, the employer nonetheless 'must make reasonable effort to determine the appropriate accommodation…through a flexible interactive process that involves both the employer and the qualified individual with a disability."); *Goodrich v. Wellpoint, Inc.*, 2015 WL 4647907, *10 (D. Me., Aug. 5, 2015) ("The April 11 meeting between Goodrich and Toot demonstrates that WellPoint initiated an interactive process in response to Goodrich's accommodation requests that he be permitted to work from home. It does not demonstrate that WellPoint took steps to determine the appropriate reasonable accommodation.").

Strangely, the trial court in no way addresses the Company's failure to provide accommodations or explore alternatives, instead focusing on only the period of Mrs. Crowe's later involuntary leave, despite the fact that this earlier adverse action was a clear part of the Summary Judgment Record. App-116.

Additionally, the Company's insistence that Mrs. Crowe return with "no restrictions" is a clear violation of well-established case law and has been ruled by many courts to be a *per se* violation of the Americans with Disabilities Act ("ADA"). *Heise v. Genuine Parts Co.*, 900 F. Supp. 1137, 1154 &n.10 (D. Minn 1995) (holding that a "must be cured" or "100% healed" policy

is a *per se* violation of the ADA because the policy does not allow a case-by-case assessment of an individual's ability to perform essential functions of the individual's job, with or without accommodation.); *see also Hutchinson v. United Parcel Serv., Inc.* 883 F. Supp. 379, 397 (N.D. Iowa 1995); *Sarsycki v. United Parcel Service*, 862 F. Supp. 336, 341 (W.D. Okla. 1994) (holding that under the ADA "individualized assessment is absolutely necessary if persons with disabilities are to be protected from unfair and inaccurate stereotypes and prejudices."). The trial court put forward no explanation or excuse for ignoring this *per se* violation clearly set forth in the briefing and record. Indeed, the failure of the trial court to even consider the Company's failure to provide accommodations and explore alternatives through an interactive dialogue constitutes a clear error of law.

#### iv. The trial court ignored the fact that the Company forced Mrs. Crowe onto an unpaid leave.

Another adverse action that was completely ignored by the trial court was the fact that the Company additionally placed Mrs. Crowe on what amounted to an unpaid suspension while Mrs. Crowe tried to meet the Company's *per se* discriminatory requirement that she return with "no restrictions." Mrs. Crowe did not request this leave and in fact requested to continue working. App-100 ¶19. This unpaid suspension, at a time that Ms. Crowe was clearly a qualified employee successfully performing her duties, was an adverse action clearly articulated in the Complaint and summary judgement briefing. The trial court made a clear error of law by entirely ignoring this adverse action and focusing exclusively on the period of time after Ms. Crowe was forced out on leave. Appx 34-40.

**b. The Court Misapplied the Law to the Facts by Declaring Mrs. Crowe not a Qualified Individual, Resulting in no Consideration of the Multiple Adverse Actions that Happened Before her Leave.**

As discussed in detail above, the trial court did not consider three distinct adverse actions imposed by the Company before Mrs. Crowe's leave: 1. the Company's improper failure to accommodate Mrs. Crowe's sciatica disability; 2. the Company's failure to explore alternative accommodations through an interactive dialogue with Mrs. Crowe; and 3. the Company's forcing Mrs. Crowe onto an unpaid suspension as a result of the Company's *per se* discriminatory insistence that Mrs. Crowe could only work if she had "no restrictions." App-67; App-51 ("Q: Did you tell Mrs. Crowe that she could not return unless her restrictions were lifted? A: I told her—correct."). Without explanation, the trial court only addressed later adverse actions that occurred after Mrs. Crowe was instructed she would need to have "no restrictions" in order to resume work, which caused her doctor, solely because of this illegal rule, to request she be given time to more fully recover. App-38. ("As such, an employee whose doctor has not released her to return to work is not a "qualified individual" under the ADA."). As such, even accepting arguendo the trial court's false premise that once Mrs. Crowe went out on leave she was no longer a qualified individual (and thus not entitled to any state or federal disability protections), the trial court still committed a clear error of law by refusing to evaluate the adverse actions that happened *prior* to Mrs. Crowe's leave.

## III) The Company Violated the Law by Refusing to Grant Mrs. Crowe's Requested Reasonable Accommodation of a Short Extension to her Leave.

**a. Mrs. Crowe Remained a Qualified Individual While on Involuntary Leave**.

The trial court made a clear error of law when it held that Mrs. Crowe somehow ceased being a qualified individual as soon as her doctor asked for her to be given a brief period off of

work because supposedly "an employee whose doctor has not released her to return to work is not a 'qualified individual'" under the ADA and RSA 354-A. App-38. It is well-established that an employee who is out on leave remains a qualified individual within the meaning of the ADA. Americans with Disabilities Act of 1990, § 101(8), 42 U.S.C.A. § 12111(8); *Bernhard v. Brown & Brown of Lehigh Valley, Inc.*, 720 F. Supp. 2d 694, 701 (E.D. Pa., 2010) ("It would be entirely against the import of the ADA if Mr. Bernhard were not considered qualified because he was not able to perform the essential functions during his leave, as leave itself was the accommodation requested by Mr. Bernhard."); *Garcia-Ayala v. Lederle Parenterals, Inc.,* 212 F.3d 638, 647 (1st Cir. 2000) ("It is simply not the case, under our precedent that an employee's request for an extended medical leave will necessarily mean, as the district court suggested, that the employee is unable to perform the essential functions of her job."). [1]

If the trial court's ruling were an accurate representation of the law, then any employee who ever took a leave would immediately cease to be a qualified individual for the length of the leave and could be fired by their employer with impunity during the leave, even if the employer fired the employee due to disability-related bias. If this happened no employee who took a leave would have the protection of the ADA and R.S.A. 354-A and could be terminated even during a single day of leave. This is simply not the law.

[1] Analysis of leave of absences under NH 354-A is largely instructed by analysis under the ADA. *Calero-Cerezo v. U.S. Dep't of Just.*, 355 F.3d 6, 24 (1st Cir. 2004) (finding federal law "instructive" in analyzing claims under NH 354-A); *Dennis v. Osram Sylvania, Inc.*, 549 F.3d 851, 856 (1st Cir. 2008) ("The New Hampshire Supreme Court looks to and finds 'instructive' federal standards established under Title VII ... in resolving retaliation claims under N.H. Rev. Stat. Ann. § **354**–**A**.").

As such, the trial court's assertion is utterly against well-established case law and an error of law as applied to the facts. Mrs. Crowe did not cease being a qualified individual when she went on leave for her sciatic disability.

**b. Even if Certain Indefinite Leaves May Eventually Cause an Employee to Lose the Protection of the ADA, There is Clear Evidence that Mrs. Crowe and her Doctor Made Clear that her Leave Would be of Short Duration and that she Wished to Return Quickly.**

Further the trial court ignored the fact that this was not an indefinite leave. Mrs. Crowe's leave was clearly of a finite nature. Mrs. Crowe and her doctor always believed that Mrs. Crowe was able to do her job with accommodations. App-101 ¶¶20-21 ("even though my doctor believed that I could perform the essential functions of my job with the restrictions given and my doctor was only holding me out of work because the Company refused to let me return unless I could return with 'no restrictions.'"). Mrs. Crowe's doctor believed that she could be released without restrictions (as the Company unnecessarily and illegally insisted) if she were allowed a leave of a few weeks. App-102 ¶ 27. Mrs. Crowe even attempted to come back to work on or around May 23rd or 24th, 2017 without restrictions and communicated this to the Company. Appx at 69-70 ("Q: After your May 19th visit, did you ever contact anybody at Appalachian Stitching to advise of your status? A: By May 23rd or 24th, I called Ms. Wiggett telling her that I was denied the FMLA and I wanted to come back to work, I never heard back from her.").

As such, Mrs. Crowe and her doctor clearly communicated to the Company that Mrs. Crowe's leave was to be of a limited and short duration. Indeed, throughout Mrs. Crowe's leave, Mrs. Crowe and her doctor communicated to the Company that Mrs. Crowe was entirely capable of coming back to work, with Mrs. Crowe's doctor only keeping her out for short durations in order to try to meet the discriminatory and unnecessary requirement she return with no restrictions. App-102 ¶ 27 ("I remained willing and capable of returning to work, as indeed I could and had

satisfactorily performed all essential functions of my position with my restriction of no lifting, bending or stooping.") App-83.

Despite the clear communications from Mrs. Crowe and her doctor that her leave was limited and that she was capable of returning, the Company terminated Mrs. Crowe only a week after Mrs. Crowe requested to return to work. App-102 ¶ 30. Through these clear communications that Mrs. Crowe's leave was limited and of a definite duration, Mrs. Crowe remained a qualified individual while on unpaid suspension and the leave she was requesting (to meet the unnecessary and discriminatory requirement she return with no restrictions) was not an undue burden. Furthermore, the fact that the Company terminated Ms. Crowe after she was out on leave for only three weeks means that her leave was inherently of a finite "short term" duration and the Company cannot claim that a longer leave (which Mrs. Crowe never requested) would have somehow been an undue burden or otherwise have caused her to stop being a qualified employee. *Garcia-Ayala v. Lederle Parenterals, Inc.,* 212 F.3d 638, 648 (1st Cir. 2000) ("Some employees, by the nature of their disability, are unable to provide an absolutely assured time for their return to employment, but that does not necessarily make a request for leave to a particular date indefinite. Each case must be scrutinized on its own facts. An unvarying requirement for definiteness again departs from the need for individual factual evaluation."); *LaFlamme v. Rumford Hosp.,* No. 2:13-CV-460-JDL, 2015 WL 4139478, at *14 (D. Me. July 9, 2015) ("there are triable issues of fact as to whether the plaintiff's request was reasonable. While employers are not required to leave a position open indefinitely, a request for extended leave can be reasonable, depending on the circumstances").

In applying these facts to the law the trial court improperly failed to analyze this under the lens of whether the requested leave was an undue burden. Appx at 34-40. This was improper as the burden is on the employer to show that a requested accommodation is an undue hardship, which

was not done in this case. *Garcia-Ayala v. Lederle Parenterals, Inc.,* 212 F.3d 638, 649 (1st Cir. 2000) ("The employer, Lederle, has the burden of proof on the issue of undue hardship, and it did not put on any evidence of undue hardship from García's proposed accommodation."). Notably, courts have found even relatively lengthy leaves to be reasonable accommodations (and not undue burdens) under the ADA and RSA 354-A, with an employee remaining "qualified" and entitled to accommodations during the full length of the leave. *Garcia-Ayala v. Lederle Parenterals, Inc.,* 212 F.3d 638, 648 (1st Cir. 2000) (allowing leave of one year); *Ralph v. Lucent Technologies*, 135 F. 3d 166 (1st Cir. 1998) (holding that a leave of 52 weeks was reasonable and not an undue burden.); *see also Criado v. IBM Corp.*, 145 F.3d 437 (1st. Cir. 1998) (ruling that a leave of one month was reasonable, "especially where the extra leave requested is not expected to be prolonged or perpetual.").

As such, the trial court's application of the law to the facts was clearly in error.

**c. When Mrs. Crowe Tried to Return to the Company, the Company Again Violated the Law by Refusing to Allow her to Return and Likewise Refusing to Engage in an Interactive Dialogue Clarify any Questions About Whether she Could Perform Essential Job Functions with or Without Accommodations.**

It is clear from the Summary Judgment record that the Company rushed to terminate Mrs. Crowe when she attempted to return from leave and never communicated with Mrs. Crowe after receiving her request to return. App-55 ("Q: Did you follow up with Mrs. Crowe at all to ask her if or when she would return? A: I did not.").

Indeed, after Mrs. Crowe communicated to the Company that she wanted to return to work on or around May 23rd or 24th, 2017, no Company employee ever reached out to Mrs. Crowe to discuss this request or engage in an interactive dialogue with Mrs. Crowe about whether she was requesting any reasonable accommodations associated with her return. Appx at 69-70 ("Q: After

your May 19th visit, did you ever contact anybody at Appalachian Stitching to advise of your status? A: By May 23rd or 24th, I called Ms. Wiggett telling her that I was denied the FMLA and I wanted to come back to work, I never heard back from her.").

The Company therefore rushed to terminate Mrs. Crowe only 6 days later, on or around June 1, 2017 without ever engaging in any interactive dialogue with Mrs. Crowe. App-102 ¶ 30. This is despite the fact that it is clear from the Summary Judgment record that Mrs. Crowe communicated with the Company about being able, and wanting, to immediately return to work at the Company. Appx at 69-70. As stated before, Mrs. Crowe was (and continued to be) a qualified individual while on leave from the Company. As such, the trial court incorrectly applied the facts to the law in relation to this adverse action by somehow ruling that Mrs. Crowe was not a qualified individual (despite the facts clearly indicating otherwise) and failing to even address the fact that the Company committed an adverse action by refusing to allow Mrs. Crowe to return to work when she requested to.

**d. If There was Ambiguity Regarding whether a Requested Leave is of Indefinite Duration the Company has an Obligation to Clarify this with the Employee Before Concluding that the Leave is Indefinite**.

Notably, despite receiving (and summarily rejecting) a request for FMLA leave, the Company never asked for clarification as to the duration of Mrs. Crowe's leave. App-55 ("Q: Did you follow up with Mrs. Crowe at all to ask her if or when she would return? A: I did not."); App-92 ("Q: Did you inquire as to how much longer Mrs. Crowe would be out? A: That was, I would assume, Mrs. Crowe's responsibility to get back to us."). A request for leave is a request for a reasonable accommodation. *Criado v. IBM Corp*., 145 F.3d 437, 443 (1st Cir. 1998) ("A leave of absence and leave extensions are reasonable accommodations."). Therefore, once Mrs. Crowe requested further leave from the Company (as requested through her doctor), it was the Company's

obligation to either grant or clarify Mrs. Crowe's request through an interactive dialogue. *Calero-Cerezo v. U.S. Dep't of Just.*, 355 F.3d 6, 24 (1st Cir. 2004) ("[O]nce an accommodation is properly requested, the responsibility for fashioning a reasonable accommodation is shared between the employee and employer. Thus, it is the employee's initial request for accommodation which triggers the employer's obligation to participate in the interactive process of determining one.").

Additionally, Mrs. Crowe's request for leave on May 19, 2017, even though articulated by her doctor as a request for FMLA leave, clearly constituted a disability-related accommodation request and triggered an obligation on the Company's part to engage in a formal interactive process to determine the necessary accommodation for Mrs. Crowe, rather than just summarily denying her request and terminating her. *Calero-Cerezo v. U.S. Dep't of Just*., 355 F.3d 6, 24 (1st Cir. 2004) ("The scope of the employer's obligation in this process is not crystal clear, but '[t]he employer has at least some responsibility in determining the necessary accommodation,' since 'the regulations envision an interactive process that requires participation by both parties.' 29 C.F.R. § 1630.2(*o*)(3).'")[2]; *see also Garcia-Ayala v. Lederle Parenterals, Inc.,* 212 F.3d 638, 648 (1st Cir. 2000) ("Some employees, by the nature of their disability, are unable to provide an absolutely assured time for their return to employment, but that does not necessarily make a request for leave to a particular date indefinite. Each case must be scrutinized on its own facts.") Notably, after Mrs. Crowe's FMLA request was denied, she called the Company and again asked to return to work, but the Company did not respond to her. App-69.

[2] "To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the *precise* limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(*o*)(3).

As such, it is clear from the summary judgment record that no Company representative communicated with Mrs. Crowe while she was on unpaid suspension either before or after she requested to come back to work on May 23rd or May 24th, 2017. App-56; App-92. As such, the Company failed in its obligation to engage in an interactive dialogue with Mrs. Crowe both related to her leave request and her request to return, and thus the Company violated the law by summarily terminating her employment. Indeed, it is clear from the Summary Judgment record that the Company did not want to engage in an interactive dialogue with Mrs. Crowe just as it had never wanted to allow her earlier requested accommodations, and instead rushed to terminate her before she could return. Appx at 93-94 ("Q: Besides waiting to get a doctor's note clearing her of all of those restrictions, there was no other process to try to accommodate Mrs. Crowe? A: No").

The trial court rested its entire ruling on the (erroneous) finding that Mrs. Crowe was not a qualified individual and hence enjoyed no protections under state and federal disability laws. Accordingly, the trial court engaged in no finding or analysis related to whether Ms. Crowe's requests for extended leave, and later request to return, and then to be allowed to return, were an undue burden. As such, the trial court erred in applying the law to the facts in regard to the Company's refusal to extend Mrs. Crowe's leave, its failure to allow her return, and its rushed termination of her employment after denying her other accommodation and work requests.

## Conclusion

The Court should vacate the trial court's March 1, 2021 Order granting the Company Appalachian Stitching Company summary judgment and remand the case to the trial court for a jury trial on all counts.

## Statement Regarding Oral Argument

The appellant requests 15 minutes oral argument and designates Timothy Brock, Esq., as the attorney to be heard.

## Certificate of Attachment of Appealed Decision

I hereby certify that the appealed decisions are in writing and appended to the Brief.

Respectfully Submitted,

PATRICIA CROWE

By her attorneys,

THE LAW OFFICES OF WYATT & ASSOCIATES P.L.L.C

Date: June 4, 2021 By: */s/Timothy J. Brock*

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**Certificate of Service**

I, Timothy Brock, hereby certify that the foregoing was served via filing through electronic filing and email, on Gary Burt, Esq., counsel for the Defendant, on June 4, 2021.

Dated: 6/4/2021__ */s/Timothy Brock*_____

Timothy Brock

## Appendix Index

**Appendix I**



**Appendix II**

# THE STATE OF NEW HAMPSHIRE

**GRAFTON, SS.** **SUPERIOR COURT**

No. **215-2019-CV-00159**

**PATRICIA CROWE**

**v.**

**APPALACHIAN STITCHING COMPANY, LLC**

**ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

In this civil action the plaintiff, Patricia Crowe, asserts disability discrimination and failure to accommodate claims under the Americans with Disabilities Act ("ADA") and RSA chapter 354-A and retaliation claims under the ADA and RSA chapter 354-A against the defendant, Appalachian Stitching Company, LLC ("Appalachian"). This matter is now before the Court on the defendant's Motion for Summary Judgment (Index #10), which is supported by a Memorandum of Law (Index #11) and a Statement of Material Facts. (Index #12). The plaintiff has filed an objection (Index #15), a Memorandum of Law (Index #16), and her Response to the defendant's Statement of Material Facts (Index #20), to which the Court will refer as the Final Statement of Material Facts ("FSMF"). The plaintiff has also filed a Statement of Disputed Material Facts (Index #17), to which the defendant filed a Response. (Index #23). In addition, the defendant has filed a Reply. (Index #22). Because the Court finds that a hearing will not aid in its analysis, the Court acts on the basis of the parties' pleadings and the record before it. See Super. Ct. Civ. R. 13(b). Based on the parties' pleadings and arguments, the undisputed material facts, and the applicable law, the Court finds and rules as follows.

## I. Factual Background

The summary judgment record reflects the following material facts which, unless otherwise

noted, are undisputed and are drawn from the Final Statement of Material Facts. The defendant hired the plaintiff as an assembler on June 6, 2016. (FSMF ¶1.) The job description for an assembler states that "[w]hile performing the duties of this job, the employee is regularly required to stand for prolonged periods of time." (Id. ¶3.) The job description for an assembler further provides that an employee "[m]ust have the ability to bend, lift and turn, freely." (Id. ¶4.)

Early on May 8, 2017, the plaintiff sent a text to the defendant's human resources director, Jodie Wiggett ("Wiggett") advising Wiggett that the plaintiff had been at the hospital emergency room with her husband "most of the night," had gotten "very little sleep," and felt "like [crap] so I'm not coming in ok?" (Id. ¶5.) Wiggett "okayed" the plaintiff's request to be excused from work, stating "K, have the ER fax over a note . . . Thanks." (Id. ¶6.) The plaintiff returned to work on May 9, 2017, but did not provide Wiggett with a note from the hospital before doing so. (Id. ¶7.) Later that day the plaintiff informed Melody Dumais ("Dumais"), the defendant's lead floor person, that she "had been diagnosed with sciatica" and that she "would need to sit for a limited amount of time . . . until the pain relieved and then [she] could go back to a standing position." (Id. ¶8.) Thereafter, Wiggett spoke with the plaintiff and asked her to provide a doctor's note. (Id. ¶9.) On May 12, 2017, the plaintiff provided Wiggett with Littleton Regional Healthcare Patient Discharge Instructions that included a highlighted, capitalized instruction reading "NO LIFTING, BENDING OR STOOPING FOR 1 WEEK." (Id. ¶13.) Later on May 12, 2017, the defendant received a fax from Dr. Jeffrey Reisert ("Dr. Reisert") stating that he had seen the plaintiff that day for "non-worked related back pain" and that he had "asked that she not work until she is seen back in follow up by me in one week." (Id. ¶15.) On May 19, 2017, Dr. Reisert faxed another letter to the defendant stating that "Mrs. Crowe still cannot return to work due to NON-work related back problems. She remains under treatment." (Id. ¶16.) The plaintiff never provided the defendant with a doctor's note stating that the plaintiff was capable of returning to work. (Id. ¶17.) The

plaintiff never returned to work at Appalachian after May 12, 2017. (Id. ¶19.)

The plaintiff was an at-will employee at Appalachian. (Id. ¶22.) She missed eight days of work between May 20, 2017, and June 1, 2017. (Id. ¶21.) The defendant's Employee Policy Manual, the signature page of which the plaintiff executed on June 4, 2016, provides that "[e]mployees who are absent from work for three consecutive days without calling in will be considered to have voluntarily quit." (Id. ¶¶23, 24.) The defendant determined that the plaintiff had voluntarily quit her position "based on her failure to provide any information regarding her intent or ability to return to work between May 20, 2017, and June 1, 2017." (Id. ¶23.) The plaintiff asserts that she attempted to contact Wiggett on or around May 23 or 24, 2017, about returning to work but "never heard back from" Wiggett, and the plaintiff denies that she voluntarily quit her employment with the defendant. (Id. ¶¶20, 21, 23.)

## II. Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:9-a, III; see Super. Ct. Civ. R. 12(g). "An issue of fact is 'material" for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law." VanDeMark v. McDonald's Corp., 153 N.H. 753, 756 (2006) (citation omitted). The moving party bears the burden of proving its entitlement to summary judgment. Concord Grp. Ins. Cos. v. Sleeper, 135 N.H. 67, 69 (1991). In evaluating a motion for summary judgment, the Court considers "the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of all favorable inferences that may be reasonably drawn from the evidence." Id.

## III. Discussion

The defendant argues that each of the plaintiff's disability discrimination claims and retaliation claims under the ADA and RSA chapter 354-A "is fatally flawed" because:

> Crowe never provided Appalachian with a doctor's note confirming that she could return to work. Without such a note, Crowe was not a "qualified individual" for the purposes of the ADA or [RSA chapter 354-A]. As Crowe was not a "qualified individual," she cannot maintain a discrimination claim under state or federal law.

(Def's Mot. Summ. J. ¶4.) The defendant further contends that because the plaintiff was not a "qualified individual" within the meaning of the ADA or RSA chapter 354-A, the defendant "was not obligated to make reasonable accommodations for her, nor to allow her to work against her doctor's orders." (Id. ¶5.) The plaintiff maintains that "the evidence clearly demonstrates that Mrs. Crowe was a qualified disabled individual" and that, at the very least, there are disputed issues of material fact regarding the plaintiff's "ability to perform the essential functions of her position." (Pl.'s Obj. at 1; Pl.'s Mem. Law at 1,8.)

The ADA prohibits a "covered entity" from discriminating "against **a qualified individual** on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (emphasis added). Under the ADA, such discrimination against a qualified individual includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual. Id. § 12112 (b)(5)(A). "In order to establish a *prima facie* case of ADA employment discrimination, a plaintiff must show", among other things, "that she was able to perform the essential functions of her job with or without accommodation." Duhy v. Concord General Mut. Ins. Co., 2009 WL 1650024 at *8 (D.N.H. June 10, 2009). "An employee who has not been released by her doctor to return to work is not qualified to perform the essential functions of the job." Pate v. Baker Tanks Gulf South, Inc., 34 F. Supp.

2d 411, 416 (W.D. La. 1999); see Gantt v. Wilson Sporting Goods Co., 143 F. 3d 1042, 1047 (6th Cir. 1998). As such, an employee whose doctor has not released her to return to work is not a "qualified individual" under the ADA. See e.g. E.E.O.C. v. Methodist Hospitals of Dallas, 218 F. Supp. 3d 495, 501 (N.D. Tex. 2016); Horn v. Southern Union Gas Co., 2009 WL 462697 at *5 (D.R.I. Feb. 20, 2009); Kitchen v. Summers Continuous Care Center, LLC, 552 F. Supp. 2d 589, 594 (S.D. W. Va 2008).

The summary judgment record in this case establishes, as a matter of law, that the plaintiff is not a "qualified individual" within the meaning of the ADA and that, therefore, the defendant is entitled to summary judgment on the plaintiff's ADA discrimination claims. The undisputed material facts show that (1) on May 9, 2017, the plaintiff told Dumais that she "had been diagnosed with sciatica" and "would need to sit for a limited amount of time ... until the pain relieved and then [she] could go back to a standing position" (FSMF ¶8); (2) on May 12, 2017, the plaintiff gave Wiggett the Littleton Regional Healthcare Patient Discharge Instructions for the plaintiff stating "NO LIFTING, BENDING OR STOOPING FOR 1 WEEK" (Id. ¶13); (3) later that day the defendant received a fax from Dr. Reisert instructing the plaintiff not to work until he saw her for a follow up visit in one week (Id. ¶15); (4) on May 19, 2017, Dr. Reisert notified the defendant by fax that the plaintiff "still cannot return to work due to NON-work related back problems" and "remain[ed] under treatment" (Id. ¶16); (5) the plaintiff never furnished to the defendant "a doctor's note stating that she was capable of returning to work" (Id. ¶17); and (6) the plaintiff never did return to work after May 12, 2017. (Id. ¶19). As a matter of law, at all relevant times the plaintiff was not qualified to perform the essential functions of her job and was not a "qualified individual" as that term is used in the pertinent provisions of the ADA. See Gantt, 143 F. 3d at 1047; Kitchen, 552 F. Supp. 2d at 594. The plaintiff's assertion that her job as an assembler at Appalachian "did not require lifting, bending and stooping" (Crowe Aff. ¶7), does not create a genuine issue of material fact for two

separate reasons. First, absent certain circumstances that do not appear in the summary judgment record, it is the employer, not the employee, who determines the essential functions of the job. See Davidson v. Am. Online, Inc., 337 F. 3d 1179, 1991 (10th Cir. 2003); see also Lloyd v. Swifty Transp., Inc., 552 F. 3d 594, 601 (7th Cir. 2009); Dropinski v. Douglas Cty., Neb., 298 F. 3d 704, 709 (8th Cir. 2002); Cruz v. McAllister Bros., 52 F. Supp. 2d 269, 284 (D.P.R. 1999). Second, it is undisputed that the plaintiff never provided the defendant with a release authorizing her to return to work but only documentation indicating that she could not return to work.

The defendant is likewise entitled to summary judgment on the plaintiff's ADA retaliation claims. The plaintiff asserts that the defendant retaliated against her "for requesting . . . reasonable accommodations." (Pl's Mem. Law, 16.) Under the ADA, however, an employer is required to participate in an interactive accommodation process and to make reasonable accommodations only for "an otherwise qualified individual." 42 U.S.C. §12112(b)(5)(A); see Hohider v. United Parcel Serv., Inc., 574 F. 3d 169, 194 n.20 (3d Cir. 2009); Gibson v Milwaukee County, 95 F. Supp. 3d 1061, 1068 n.3 (E.D. Wis. 2015) (observing that "an employer is not required to engage in the interactive process where . . . the employee was not a qualified individual"). Because the undisputed material facts establish that the plaintiff suffered an injury or illness (sciatica), was instructed by her doctor not to return to work, and was not medically released to return to work, she is not a "qualified individual" under the ADA. See E.E.O.C. v. Methodist Hospitals of Dallas, 218 F. Supp. 3d at 501; Pagel v. Premier Mfg. Support Servs., Inc., 2005 WL 1785178 at *8 (M.D. Tenn. July 21, 2005). Accordingly, the plaintiff's retaliation claims under the ADA fail as a matter of law.

The defendant is entitled to summary judgment on the plaintiff's discrimination and retaliation claims under RSA chapter 354-A for the same reason: she is not a qualified individual. The plaintiff's state law claims are predicated on her being "a qualified individual with a disability."

(Pl.'s Compl. ¶62); see RSA 354-A:7, VII. In interpreting the provisions of RSA chapter 354-A, the New Hampshire Supreme Court has found analogous federal law "instructive." See Madeja v MPB Corp., 149 N.H. 371, 379 (2003). Applying the applicable and well settled federal law as discussed hereinabove, the Court concludes that the undisputed material facts demonstrate that the plaintiff is not a "qualified individual" within the meaning of RSA chapter 354-A.

## IV. Conclusion

For the foregoing reasons, the Court rules that the defendant is entitled to judgment as a matter of law on the plaintiff's ADA and RSA chapter 354-A claims. Accordingly, the Court GRANTS the defendant's Motion for Summary Judgment.

SO ORDERED.

Dated: 3/1/2021

Peter H. Bornstein
Presiding Justice

PHB:lat

Clerk's Notice of Decision
Document Sent to Parties
on 03/01/2021

STATE OF NEW HAMPSHIRE

GRAFTON COUNTY SUPERIOR COURT

DOCKET NO:
214-2019-CV-00159

PATRICIA CROWE,

Plaintiff

v.

APPALACHIAN STITCHING COMPANY, LLC

Defendant

**AFFIDAVIT OF TREVOR BRICE**

Exhibit 1 of this affidavit is a true and accurate copy of pages: Cover, 14-15, 22-23, 28, 30-31, 33, 37-39, 44, 51- 55 of the deposition of Jodie Wiggett taken on December 16, 2020.

Exhibit 2 of this affidavit is a true and accurate copy of pages: 1, 14-17, 20, 26-27 of the verified transcript of the deposition of Patricia Crowe taken on October 20, 2020.

Exhibit 3 of this affidavit is a true and accurate copy of pages: 1, 30, 45-47, 49-51 of the verified transcript of the deposition of Melody Dumais taken on December 16, 2020.

Exhibit 4 of this affidavit is a true and accurate copy of the documents Bates stamped PC000023 which was produced to my law firm by the Defendants associated with this litigation. This document was also introduced as Exhibit 6 in the deposition of Jodie Wiggett taken on December 16, 2020. See page 28 of deposition transcript (See Ex. 1 of this Affidavit).

Exhibit 5 of this affidavit is a true and accurate copy of the documents Bates stamped PC000025 which was produced to my law firm by the Defendants associated with this litigation. This document was also introduced as Exhibit 7 in the deposition of Jodie Wiggett taken on December 16, 2020. See page 33 of deposition transcript (See Ex. 1 of this Affidavit).

Exhibit 6 of this affidavit is a true and accurate copy of the documents Bates stamped PC000029 which was produced to my law firm by the Defendants associated with this litigation. This document was also introduced as Exhibit 10 in the deposition of Jodie Wiggett taken on December 16, 2020. See page 37 of deposition transcript (See Ex. 1 of this Affidavit)

Exhibit 7 of this affidavit is a true and accurate copy of the documents Bates stamped PC000031 which was produced to my law firm by the Defendants associated with this litigation. This

document was also introduced as Exhibit 11 in the deposition of Jodie Wiggett taken on December 16, 2020. See page 38 of deposition transcript (See Ex. 1 of this Affidavit).

Exhibit 8 of this affidavit is a true and accurate copy of pages: 1, 25, 30, 39, 46-47 of the verified transcript of the deposition of Scott Manning taken on December 16, 2020.

Exhibit 9 of this affidavit is a true and accurate copy of the documents Bates stamped PC000021 which was produced to my law firm by the Defendants associated with this litigation. This document was also introduced as Exhibit 4 in the deposition of Jodie Wiggett taken on December 16, 2020. See page 22 of deposition transcript (See Ex. 1 of this Affidavit).

FURTHER AFFIANT SAYETH NOT.

Trevor Brice

Sworn to and subscribed before me this 26 day of January, 2021.

Notary Public, Julie F. Emineth

My Commission Expires: March 21, 2023

JULIE F. EMINETH
MY COMMISSION EXPIRES MARCH 21, 2023
NOTARY PUBLIC
NEW HAMPSHIRE

# Brice Aff. Exhibit 1

**STATE OF NEW HAMPSHIRE**

**GRAFTON, SS** **SUPERIOR COURT**

**PATRICIA CROWE, )**
**Plaintiff, )**
**v. ) DOCKET NO.: 214-2019-Cv-00159**
**APPALACHIAN STITCHING )**
**COMPANY, LLC, )**
**Defendant. )**
**_____)**

# ZOOM DEPOSITION OF JODIE WIGGETT

**THIS DEPOSITION REMOTELY TAKEN PURSUANT TO NOTICE ON WEDNESDAY, DECEMBER 16, 2020, COMMENCING AT 1:25 P.M.**

**DUFFY & MCKENNA COURT REPORTERS**
**P. O. Box 1658**
**Dover, New Hampshire 03821-1658**
**(603) 743-4949**
**(800) 600-1000**

Q. Okay. And how did Mrs. Crowe come to work for Appalachian Stitching?
A. She filled out an application.
Q. Okay. In May of 2017, did you have a sense of how Mrs. Crowe's work performance was?
A. I did.
Q. How was Mrs. Crowe's work performance?
A. It varied. She had good days. She had bad days.
Q. Okay. Had Mrs. Crowe ever been given any discipline for her behavior?
A. She was brought into the -- into Scott Manning's office with Melody Dumais and myself, and she was spoken to about her attitude on the floor because she was throwing things and swearing, and it was upsetting the floor.
Q. When was this?
A. I don't know the exact date.
Q. Was it in 2017 or before 2017?
A. It was in 2017.
Q. Okay. How close to May of 2017 was it?
A. I don't know.
Q. Was Mrs. Crowe ever given a warning slip?
A. Physical? Written?
Q. Yes, correct.

A. No.
Q. What is the usual progressive discipline policy at Appalachian Stitching?
A. We're very flexible. It varies, depending on the situation.
Q. Okay. With a normal situation involving performance, so not Ms. Crowe's conduct, walk me through a typical progression.
A. Well, we would certainly have a sit-down discussion with the employee, find out where they were struggling, or if there was something that wasn't clear, and try to work through it that way, and revisit the situation a week or two later.
Q. Were employees ever let go with only having the sit-down discussion for performance?
A. No.
Q. What would typically happen next, then?
A. We would revisit in two weeks, a week or two, see how they were doing. If they were still struggling, we'd try to find another avenue to make it right.
Q. Did the policy typically include written warnings if the behavior did not improve?
A. Written warnings were more along the lines of misconduct,

3.

(Exhibit 3 marked for identification.)

(Discussion off record.)

BY MR. BROCK:

Q. Do you recognize this?

A. I do.

Q. What is this?

A. It's an ad for a newspaper.

Q. Did you put together this ad or did someone else?

A. Jeremiah does.

Q. Okay. Was this approved by you?

A. Yes.

MR. BROCK: Okay. You can pull that down, Trevor, and then we'll move on to tab 14. I believe this is Exhibit 4, if I'm asking right, Trevor?

MR. BRICE: Yes, you are correct. Let me note that down.

(Exhibit 4 marked for identification.)

(Discussion off record.)

BY MR. BROCK:

Q. Do you recognize this?

A. Yes, I do.

Q. Okay. What is this?

A. It's a private Facebook message from Pat to myself.
Q. And you recall receiving this?
A. I do.
Q. What happens after you receive this message?
A. I don't understand your question.
Q. Sure. So it looks like she is saying that she's not coming in. You say, "Okay." I'm assuming she then doesn't come in the next day. Is that accurate?
A. She did come in the next day.
Q. Okay.
A. This is May 8th at 4:30 in the morning.
Q. You're right. I'm sorry. I was thinking "next day" as far as -- you're right. So she doesn't come in on May 8th.
A. Correct.
Q. Okay. Does she, in fact, come in on May 9th?
A. She does.
Q. Okay. What happens on May 9th?
A. I never saw her. I was preoccupied in the morning. Melody came to me and said, right after lunch, that Pat told her she was diagnosed with sciatica, and she had restrictions, which I was very confused because this is -- this note that you see, this private message, is

A. She said that she was bending, lifting, and stooping. She never asked to sit. She didn't -- she didn't ask, you know, to sit down because she was in pain. She never mentioned anything. She went about her job.
Q. Did Mrs. Crowe ever tell you that she could not perform her job?
A. I never asked her.
Q. Okay. Did Ms. Dumais ever convey to you that Ms. Crowe had said that she could not do her job?
A. I can't answer that.
Q. Well, she either conveyed it to you or she didn't. Do you recall Ms. Dumais saying that to you or do you recall her not saying that to you?
A. That Pat couldn't do her job?
Q. Correct.
A. She did not tell me that.

MR. BROCK: Okay. Can you pull up tab 15, Trevor? This should be Exhibit 6.

(Exhibit 6 marked for identification.)

(Discussion off record.)

BY MR. BROCK:

Q. Is this the doctor's note that Mrs. Crowe provided to you on May 11th?

in?
Q. Before Mrs. Crowe came into the room.
A. Well, I just -- it wasn't very long. There's not very many options.
Q. Sure. Did you discuss at all any modifications that could be done to help Mrs. Crowe do her job without bending, lifting, or stooping?
A. There -- I don't see that there is any.
Q. Did you clarify with Mrs. Crowe exactly how much lifting, bending -- you know, clarify with Mrs. Crowe what the lifting, bending, and stooping restriction meant?
A. I didn't clarify with her because I read her note that she brought in that says no lifting, bending, or stooping for one week, and it was highlighted.
Q. Okay. And you testified that Mrs. Crowe told you that she had been doing her job for the last week? Did you have any response to that?
A. Yes, I did. I told her that had I had this note, I wouldn't have allowed it because she would have further injured herself.
Q. Did Mrs. Crowe suggest any -- well, let me strike that.
Anything else from this conversation that you recall that was either said by you or said by Mrs. Crowe or

Mrs. Dumais?
A. That I haven't already told you?
Q. Correct.
A. Not that I recall.
MR. BROCK: Okay. You can pull down the exhibit, Trevor.
BY MR. BROCK:
Q. What happens after this?
A. Mrs. Crowe stormed out of the office, swearing in a rage, and that was that. She went to her doctor's because he faxed over a note saying that she was still unable to return to work.
Q. Did you tell Ms. Dumais -- sorry, let me strike that.
Did you tell Mrs. Crowe that she could not return unless her restrictions were lifted?
A. I told her -- correct. Until she could bend, lift, and stoop.
Q. Okay. Did you talk to Mr. Manning at all after this?
A. I did.
Q. Okay. When did you talk to Mr. Manning?
A. I don't know the exact time. Once he returned.
Q. What did you and Mr. Manning discuss?
A. Just that I showed him the note and said that Pat was out

Q. But was there any clarification of what bending, lifting, and stooping meant, and whether there were ways to do that job without bending, lifting, and stooping, according to the note?
A. There is no way to do that job without bending, lifting, and stooping.
Q. Okay, but Mrs. Crowe had claimed that she had been doing that job?
A. She had been doing that, but I didn't have the note that said that she was not able to do that. She was not supposed to be doing that. Had I had that, she would not have been doing that.
Q. Did Mr. Manning have anything else to add in this conversation?
A. No.

MR. BROCK: Trevor, can you pull up tab 16? It'll be Exhibit 7.

(Exhibit 7 marked for identification.)

(Discussion off record.)

BY MR. BROCK:

Q. Do you recognize this document?
A. I do.
Q. When did you first see this document?

out. That was the only conversation I had with Melody, and I was keeping Scott up to date on it as well.

MR. BROCK: Okay. And why don't we pull up tab 18, Trevor? That'll be Exhibit 10.

(Exhibit 10 marked for identification.)

(Discussion off record.)

BY MR. BROCK:

Q. Okay. Do you recognize this document?

A. I do.

Q. When did you first see this document?

A. It was faxed over on that date.

Q. Okay. What did you do in response to this document?

A. As far as?

Q. Did you do any follow-ups? Did you reach out to Mrs. Crowe? Did you talk to Mr. Manning? I'm just trying to see what you did after receiving this document.

A. I did let Mr. Manning know. I showed it to him. I also let Melody know that she will be out, still, and I wasn't sure when. And I did not reach out to Mrs. Crowe because, if you recall, in her text message to me, she said she would let me know how her doctor appointment went.

MR. BROCK: Okay. And then can you do tab 19,

Trevor? That'll be Exhibit 11.

(Exhibit 11 marked for identification.)

MR. BRICE: This, again, is one page, but let me know if you want me to scroll up or down.

THE WITNESS: No, I'm set.

BY MR. BROCK:

Q. Do you recognize this document?

A. I do.

Q. Okay. When did you -- well, your signature line is at the bottom. Did you draft this document?

A. I did.

Q. Okay. And I see a date at the top, May 22nd, 2017. Is that date accurate?

A. It is.

Q. To the best of your knowledge?

A. Yes.

Q. Okay. And I see that you are responding to Mrs. Crowe's doctor saying that she's not eligible for FMLA; is that correct?

A. That is.

Q. Did you make that determination yourself or did you consult with anyone?

A. No, I looked it up. I researched that.

Q. Okay. Did you talk to Mr. Manning at all before sending this letter?
A. I did.
Q. What was -- explain to me that conversation.
A. There was no conversation. I showed it to him. I showed him that when I showed him the letter from the fax that we received from her doctor.
Q. Did you receive any sort of response to this letter?
A. After I sent this?
Q. Yes.
A. No.
Q. Did you follow up with Mrs. Crowe at all to ask her if or when she would return?
A. I did not.
Q. Why not?
A. I would assume that she was going to let me know, and we received a letter literally three days before saying that she was out under treatment.
Q. So you understood that she was out under treatment?
A. Correct.
Q. Do you have a sense of when she would be able to return?
A. I do not. That, I would imagine, would be up to her

Q. Okay. Last you had heard from the doctor, it was a request for FMLA, which responded to on May 22nd, a week before you sent this letter; is that accurate?
A. He had sent a notification on the 19th.
Q. Right. Which you responded to on May 22nd, correct?
A. That is correct.
Q. And your response was that Mrs. Crowe was not eligible for FMLA, correct?
A. That is correct.
Q. Okay. Did you, at any time, follow up to figure out how long a period of time Mrs. Crowe was requesting an FMLA even though she wasn't eligible for it?
A. I'm sorry, I don't understand your question.
Q. Did you follow up with either her doctor or Mrs. Crowe about how long a leave she was asking for with the FMLA request?
A. I did not.
Q. Why?
A. Because she never asked for it. He said he believed she qualified for it.
Q. Okay. It looked like you might have froze for a second. Sorry. You're good? You can hear me?
A. I can hear you.

Q. Okay.
A. There was no communication from Pat regarding that.
Q. What is the company's policy regarding how an employee is to ask for a reasonable accommodation?
A. Again, it's communication. There is no policy, per day, in place. We're not a very big company. As a rule, anybody that is in need of something would either ask myself or Scott or their supervisor on the floor, and then ultimately it all goes back to Scott Manning.
Q. Okay. Would it be Mr. Manning's ultimate decision whether to grant an accommodation or not?
A. Yes, of course.
Q. Okay. Do you have any policies or procedures in place related to engaging in an interactive dialogue with an employee with a disability?
A. Again, I mean, we're pretty laid back. Everything is just communication. I mean, it's worked so far.
Q. Sure. What's your understanding of what reasonable accommodation means?
A. Well, I guess it would mean trying to find a way for a job to be done in a different way.
Q. Have you ever granted a reasonable accommodation during your time at Appalachian Stitching?

A. I'm not sure.
Q. Have you ever seen Mr. Manning grant an accommodation while you were at Appalachian Stitching?
A. I'm not sure.
Q. What's your understanding of what the phrase "interactive dialogue" means?
A. I'm not sure.
Q. Okay. You don't know what the phrase "interactive dialogue" means?
A. I would assume -- and that's exactly what it is -- that it's having a conversation trying to come up with a common ground, something that works for both.
Q. And do you understand that the law obligates employers to engage in this interactive dialogue with qualified employees with disabilities?
A. Okay. I -- I understand that, but there has been no request made.
Q. How would you make a request?
A. I'm sorry, maybe I'm not understanding what you're asking.
Q. Sure. So what I'm -- what I am getting at, right, is what is the process in place? What is the procedures of the company when a person with a disability asks for a

reasonable accommodation? Does that include the interactive dialogue? And how does that start?

A. Yes, it would, and it would be a discussion that we would sit down with Scott Manning.

Q. Okay. Would you sit down with Scott Manning with that employee?

A. Yes.

Q. Okay. Why was that not done in Mrs. Crowe's situation?

A. Because there was no request by Mrs. Crowe.

Q. Did you not understand her doctor's note to be a request for a reasonable accommodation?

A. I did not.

Q. Why not?

A. I did not see that. I did not --

Q. How did -- sorry, go ahead.

A. I didn't see a note where he was asking for reasonable accommodations. I saw a note where he said that she was unable to come back to work because she was still under treatment.

MR. BROCK: Trevor, can you pull Exhibit 6 back up? This was tab 15.

MR. BRICE: yes. Can you see that?

THE WITNESS: I can.

BY MR. BROCK:
Q. Okay. We talked about this exhibit earlier. This is Exhibit 6.
A. Okay.
Q. Did you not understand that this was a request for a reasonable accommodation?
A. I did not.
Q. Okay. Do you not understand that Mrs. Crowe was asking to perform her job but to do so in a way that did not involve lifting, bending, or stooping?
A. I did. Again, there is no way to do an assembler's position, or shipping, without lifting, bending, or stooping. Those are necessary to do that job, either one of them.
Q. Did you ever have -- sorry, go ahead.
A. No, that's okay.
Q. Did you ever have a conversation with Mrs. Crowe about whether she felt she could do the job or whether there's any alternative she felt that she could do the job with that would have allowed her to continue after providing this note?
A. I didn't have -- I didn't have a dialogue with her because she has a doctor's note stating that she is

unable to. She is not supposed to bend, lift, or stoop for one week. There's no way to do that job, either of those jobs, without doing that. Whether she felt that she could do it, she could further injure herself. Her doctor said that she is not to do those things.

Q. Did you ever talk to Mrs. Crowe about what bending, lifting, and stooping meant?

A. I did not. She knows what bending, lifting, and stooping are.

Q. Okay. Did you follow up with her doctor about what he meant by no lifting, bending, or stooping? I mean, there could be a lot of definitions of what "stooping" is, or what "bending" is.

A. You're right, but this -- on this particular note, it says, "No bending, lifting, or stooping for one week."

Now, if you can pull up the other -- the following doctor's note, I believe it says that she is still unable to return to work.

Q. Okay. But you had told her that she had to come back without these restrictions, correct?

A. She has to be able to do these, correct.

Q. Okay. So she can't just come back with another note with restrictions. She has to have another note that says she

# Brice Aff. Exhibit 2

THE STATE OF NEW HAMPSHIRE
GRAFTON, SS. SUPERIOR COURT

* * * * * * * * * *

PATRICIA CROWE

V.

APPALACHIAN STITCHING COMPANY, L.L.C.

Docket No. 214-2019-cv-159

* * * * * * * * * *

# DEPOSITION OF PATRICIA CROWE

Zoom deposition taken by agreement of counsel on Tuesday, October 20, 2020, commencing at 2:20 p.m.

Court Reporter: (Via Zoom)

Michele M. Allison, LCR, RPR, CRR
LCR #93 (RSA 310-A:161-181)

Q. And apparently it was a message you sent to Jody advising her that you had been with your husband at the hospital emergency room and you weren't coming in that day; is that correct?

A. Correct.

Q. And she asked you for a fax, ER fax, just to note that you had been there, correct?

A. Correct.

Q. Was this typically how you would commute with Jody -- commute -- communicate with Jody when --

A. Not -- not normally. I would talk to her on the phone or in person, but my husband has Parkinson's disease and I would go to the hospital with him several times.

Q. All right. So I want to show you the next exhibit, which is Exhibit No. 2. If your attorney can pull that up.

MR. BRICE: Yep. Okay.

Q. So this is a note from the emergency room, and in the lower left-hand corner, kind of still showing is a date of 5/7/2017. Do you see that?

A. Yes.

Q. And apparently, you were seen for left sciatica at the emergency room along with your husband --

A. Yes, I was.

Q. Okay. Let me finish --
A. Exactly.
Q. Let me finish the --
A. Exactly.
Q. Let me finish. Okay? So the doctor notes here under additional instructions, no lifting, bending or stooping for one week. Did I read that accurately?
A. You broke up.
Q. The doctor indicates under instructions, additional instructions, no lifting, bending or stooping for one week. Do you see that?
A. Yes, I do.
Q. And you understood that those were requirements in order to work at Appalachian Stitching; isn't that right?
A. No, it was not.
Q. You didn't have to bend, stoop or lift?
A. No.
Q. What did you understand?
A. It was standing and sitting for long periods of time.
Q. And what did Jody ask you to do when you -- well, let me -- did you go to work the next day?
A. I did.

Q. All right. Did you complain of any problems the next day?
A. I talked to Melody Dumais.
Q. And what did you tell her?
A. I explained to her that I had been diagnosed with sciatica and that I could do my job standing and sitting, but in standing I would need to sit for a limited amount of time in order -- until the pain relieved and then I could go back to my standing position.
Q. And what did Melody say?
A. She had no problem with it.
Q. And what day was this, was this the 8th or 9th?
A. You broke up.
Q. What day was this, the 8th or 9th of May?
A. What was the date?
Q. Yeah, that you returned to work.
A. I went back on the 9th and I worked through the 11th.
Q. What happened on the 11th?
A. The 11th Jody called me into her office and said that I couldn't continue working because I had restrictions of no lifting, bending or stooping.
Q. And what did you say in response to that?

A. I told her that I had been doing it for a few days and it was working out fine with Melody letting me have the limited time to sit.

Q. What did Jody say in response?

A. She said, No, you have restrictions, you cannot work here. You know you have restrictions. No lifting, bending or stooping.

Q. And in response to --

A. She sent --

Q. Repeat that. She did what?

A. She sent me home.

Q. Did she ask you to bring home a note from your doctor saying you were capable of continuing work?

A. She did, but when I saw the doctor he had still put me on a week off.

Q. Which doctor was this?

A. Dr. Reisert.

Q. And when did you see him?

A. What?

Q. When did you see him?

A. When did I see him?

Q. Yes.

A. Probably on the 12th.

Q. And did you tell your doctor you needed a note to return to work?
A. I did.
Q. And he did not give you the note to return to work, did he?
A. No, he did not.
Q. In fact, he held you out of work for another week dependent upon a follow-up visit, correct?
A. Correct.
Q. Now, he says in your medical report here you had something suggesting drop foot. Do you know what that is?
A. Having what?
Q. Drop foot. Left foot.
A. I have no idea what that is.
Q. Would you agree with me that the doctor was in the best position to determine whether you were physically capable of working?
A. No.
Q. Do you think that Appalachian Stitching should have ignored the doctor's statement to the effect that you could not work?
A. Can you repeat that, please?
Q. Sure. Is it your position that Appalachian

Q. Do you know how to spell his last name?
A. Dr. Thomas, T-H-O-M-A-S.
MR. BURT: Trevor, have I been provided with this guy's records?
MR. BRICE: I don't believe so. This is the first time I'm hearing of this name, to be quite honest.
MR. BURT: Oh, Lord.
Q. So did Dr. Thomas discharge you and allow you to go to work?
A. I was already let go -- terminated from Appalachian.
Q. Did you ask him for a note saying you were physically capable of working?
A. I did not.
Q. After the May 19th visit with Dr. Reisert, did you ever contact anybody at Appalachian Stitching to tell them your status?
A. You broke up. I didn't understand you.
Q. After your May 19th visit, did you ever contact anybody at Appalachian Stitching to advise of your status?
A. By May 23rd or the 24th I called and left a message for Ms. Wiggett telling her that I was denied for the FMLA and I wanted to come back to work, and I never heard back

from her. Around June 1st I was terminated.

Q. Well, where did you go see this Dr. Thomas?

A. The beginning of June.

Q. When did you make the appointment?

A. I went to -- I made the appointment with him on the 1st. I went to see him on the 13th.

Q. Did you tell Ms. Wiggett that you were seeking a second opinion about your ability to work?

A. She never called me back, so no, I did not have the ability to do that.

Q. Why, you couldn't call her, you couldn't text her?

A. I called her.

Q. Did you tell her that -- did you call her and tell her that you were seeking a second opinion?

A. I called her and left a message for her to call me back.

Q. Why didn't you text her or e-mail her?

A. Called.

Q. No, why didn't you text her or e-mail her?

A. I picked up the phone and I called the shop. She was not in. I left a message for her.

Q. My question to you, ma'am, is why didn't you text or e-mail her?

# Brice Aff. Exhibit 3

**STATE OF NEW HAMPSHIRE**

**GRAFTON, SS** **SUPERIOR COURT**

**PATRICIA CROWE, )**
**Plaintiff, )**
**v. ) DOCKET NO.: 214-2019-cv-00159**
**APPALACHIAN STITCHING )**
**COMPANY, LLC, )**
**Defendant. )**
**_____)**

# ZOOM DEPOSITION OF MELODY DUMAIS

**THIS DEPOSITION REMOTELY TAKEN PURSUANT TO NOTICE ON WEDNESDAY, DECEMBER 16, 2020, COMMENCING AT 8:58 A.M.**

**DUFFY & MCKENNA COURT REPORTERS**
**P. O. Box 1658**
**Dover, New Hampshire 03821-1658**
**(603) 743-4949**
**(800) 600-1000**

because this was a position that was done while sitting?

A. No. That just happens to be in the photo. This is standing.

Q. This is a standing position? Okay. How long would people typically be at this station?

A. Again, it depends if you have a job with 20 pieces or 150. So, I mean, if you're there with 150 pieces, you could be there 30 minutes or more. Depends on how fast of a folder you are, whether the glue is dry and you have to stop to, you know, wipe off glue. When the glue -- once it's folded, if the glue is coming out, you might have to pull the glue. It really depends on the job.

Q. How are work stations assigned to the assemblers that were working on any given shift?

A. They're not necessarily assigned. You just use them as needed. Like, the white glue machine, come Monday, say we all had -- we're all starting new jobs, we would sign up. Because we have two white glue machines, so that would mean four people could stand on white glue, and then some of us have, like, covers that have inlays, so some would go to a tacky machine.

So, I mean, it's all, like, common courtesy. "Hey,

periods of time. Pay depending on experience."

What I want to ask, are these the qualifications that Appalachian Stitching is looking for in assemblers?

A. Yes.

Q. Are there any other qualifications that Appalachian Stitching is looking for in assemblers?

A. No. You want to be able to stand. You must have good attendance.

Q. Okay.

A. Yeah.

MR. BROCK: You can pull that down, Trevor.

BY MR. BROCK:

Q. I want to shift gears a little bit here, Ms. Dumais, and talk more specifically about Mrs. Crowe, okay?

So do you recall Mrs. Crowe being out because she was in the emergency room on May 8th of 2017?

A. Yes. She had said that her husband had fallen so she needed to take him to the ER.

Q. How did you learn about this?

A. From -- she -- when she came to work not the -- the day before, she had been absent. I don't ask questions, you know, why someone's not there. It's not my business.

But she had come in the next day. She had said that she had to take the day off because she was tired because her husband, Luther, had fallen and she had to take him to the ER the night before that, and that she was there all night 'til very late, so that's why she didn't come to work, you know, that next day.

Q. Was that a verbal conversation you had with Mrs. Crowe?

A. I did.

Q. Okay. Do you recall anything else that she said during that conversation?

A. This was right before -- right when she got in, and then we just made sure that she had everything that she needed for her job. That's all that she had said, that her husband had fallen. She took him to the ER. She was there late. And she was tired the next day. That's why she didn't come to work. That was that conversation that morning.

Q. Okay. Do you recall anything else that you said to Mrs. Crowe in response to this?

A. No.

Q. Okay. So you had this conversation with Mrs. Crowe that morning. Is there another conversation you recall having with Mrs. Crowe that day?

A. Yeah. Right before lunch, she just had said that she wanted to know if she could sit down for a while because her back was bothering her, and that while she was at the doctor's office with her husband, that the doctor had noticed that she was uncomfortable or that she was in pain, and that she had explained to him that she had hurt it when she was helping her husband up when he had fallen. And he had diagnosed her with sciatica, so she wanted to know if she could sit for a while. And I said, "That's fine." So it was right before lunch, so she went to go sit down.

So after lunch I went to check with Jodie just to be sure that, you know, everything was fine, and if she had any restrictions that I should be made aware of. Like, you know, should I have her sit for the rest of the day? You know, what was it that was expected of me with her telling me that?

Q. Do you recall what Ms. Wiggett said to you?

A. She said she was not aware of any doctor telling her she had sciatic nerve -- I mean, that she had sciatica or that she was having difficulty and that she had any -- she had any problems, you know, coming to work with, like, her back hurting. She had no idea.

conversation?
A. No.
Q. Okay. Did Mrs. Crowe return to work after this conversation?
A. She did.
Q. Did she perform her job responsibilities satisfactorily?
A. Yeah. She never asked for any special accommodations after that. She didn't mention having to sit. She didn't mention, you know, any other problems. She just continued to do her work.
Q. How long did Mrs. Crowe continue to do her work after this?
A. She had a couple more days before she left. I mean, she was there for maybe two -- two more days.
Q. During those two or so days that she was there, did she perform her work satisfactorily?
A. She did her work, yeah. She stood on her white glue machine. She folded. She did everything that you -- she would normally do.
Q. Did she, at any time, indicate that she could not do any task that was assigned to her?
A. She never mentioned anything to me.
Q. Okay. And, in fact, she was performing all the tasks

that were assigned to her?
A. Yes.
Q. At some point she stopped coming to work. What did you know about that?
A. I just knew that she had to provide a doctor's note.
Q. Did you ever see the doctor's note?
A. No. That's not something I would have asked to see. It's not my job.
Q. Did you -- sorry, go ahead.
A. No, I'm finished.
Q. Okay. Did you have any conversation with Ms. Wiggett regarding a doctor's note?
A. No. I was just made aware that she was waiting to provide a doctor's note. That's all I knew. That's all I asked. It wasn't my job to get personal.
Q. Did Ms. Wiggett ever tell you that she did, in fact, provide a doctor's note?
A. I never asked.
Q. Did you have any conversation with Ms. Wiggett about accommodations for Mrs. Crowe?
A. Pat never stated that she needed accommodations until she was gone because her doctor had excused her, I think it was a week. We found out days later that she was going

to be out. That's all I knew. And it never came up again after we knew she was going to be gone.
Q. Did Ms. Wiggett ever ask you whether Pat could do the job without lifting, bending, or stooping?
A. She did. And there's no way she could.
Q. When did she ask you that?
A. When Pat -- the day that Pat said that she had hurt her back. And I said she could, you know, sit for a little while that day, but she couldn't continue to work in small leather goods unless she was going to be able to do her job assigned to her, which standing, bending -- the same things that we went through on all the machines.
Q. So was this the same conversation that Mrs. Crowe was a part of before a doctor's note was provided, or is there a different conversation?
A. I don't remember.
Q. Okay. Did you ever discuss with Ms. Wiggett whether there was a way for Mrs. Crowe to do her job without bending, lifting, or stooping?
A. No, we didn't discuss it anymore.
Q. So you had one maybe -- you had at least one conversation with Mrs. Wiggett and you said you don't remember whether there was another one?

# Brice Aff. Exhibit 4

EXHIBIT
6
Wiggett | 12/16/2020 | SS

**Littleton Regional Healthcare**
**Patient Discharge Instructions**

Patient Name: **CROWE, PATRICIA A.**
Visit ID: MR Number: DOB:
Discharged: Attending: **CHRISTOPHER C CANTO DO**
Complaint: **Lower extremity pain**

## Discharge Instructions

| | |
|---|---|
| You Were Treated For | left sciatica |
| You Were Treated Today By : | Dr. Christopher C. Canto |
| Durable Medical Equipment | No |
| Completed Opioid Risk Tool (ORT) ? | No, Patient Not Prescribed Opioid Medication |
| Additional Instructions | NO LIFTING, BENDING, OR STOOPING FOR 1 WEEK. YOU MAY RETURN FOR ANY WEAKNESS OR INCONTINENCE. WARM PACKS. PLENTY OF FLUIDS. |
| Instructions for Your Follow Up Appointment | Keep Your Scheduled Appointment<br>See Your Primary Care Provider |
| IMPORTANT INFORMATION REGARDING YOUR VISIT | We Examined and Treated You Today On an Emergency Basis Only<br>This Is Not a Substitute For or an Effort to Provide Complete Medical Care<br>In Most Cases You Must Let Your Doctor Check You Again<br>Tell Your Doctor About any New or Lasting Problems<br><br>We Cannot Recognize and Treat All Injuries and Illnesses In One Emergency Visit<br>We Will Review any Special Tests, Xrays, or EKGs Again Within 24 Hours<br>We Will Call You With Any Concerns or Changes<br><br>Return to The Emergency Department With Any New, Persistant or Worsening Symptoms<br>Care Documents Are for Informational / Educational Purposes Only<br>Please Follow Doctor's Orders On PATIENT DISCHARGE INSTRUCTIONS<br>If You Have Any Questions about Your Discharge Instructions, Call 444-9300<br>We Are Always Looking for Ways to Improve the Care Provided in the Emergency Department.<br>You May Receive, in the Mail, a Paper Survey Regarding Your Visit. |

SIGNATURE/DATE

**Department:** _____ **Patient/Significant Other:** _____
**Caregiver:** _____ **Discharge Coordinator:** _____
**Physician:** _____

# Brice Aff. Exhibit 5

EXHIBIT
7
Wiggett | 12/16/2020 | SS

May 12, 2017

RE: Patricia Crowe
DOB:

To Appalachian Stitching:

The patient was seen today for non-work related back pain.

I have asked that she not work until she is seen back in follow up by me in one week.

She is currently under treatment for the same.

I will update you in one week.

Thank you.

Sincerely,

Jeffrey T. Reisert, D.O.
Littleton Regional Healthcare
Primary Care
603-444-7070
580 St. Johnsbury Rd.
Littleton, NH 03561

Jeffrey T. Reisert, DO
*North Country Primary Care – Rural Health Clinic*

# Brice Aff. Exhibit 6

EXHIBIT
10
Wiggett | 12/16/2020 | SS

LITTLETON REGIONAL HEALTHCARE

May 19, 2017

RE: Patricia Crowe
DOB:

To Appalachian Stitching:

Mrs. Crowe still cannot return to work due to NON-work related back problem. She remains under treatment.

I believe she is eligible for FMLA..Can you provide forms for me to sign for FMLA? You can fax to me (603-444-2769) include her name on form) OR she can hand carry to my office.

Thank you.

Jeffrey T. Reisert, D.O.
Littleton Regional Healthcare
Primary Care
603-444-7070
580 St. Johnsbury Rd.
Littleton, NH 03561

Sincerely,

Jeffrey T. Reisert, DO
*North Country Primary Care – Rural Health Clinic*

# Brice Aff. Exhibit 7

EXHIBIT
11
Wiggett | 12/16/2020 | SS

APPALACHIAN STITCHING COMPANY

tel. (603) 444-4422
fax (603) 444-7766
appalachianstitch@earthlink.net

**Appalachian Stitching Company, LLC**
90 Badger Street - Littleton, NH 03561
www.appalachianstitching.com

FAXED 5/22/17 2:33PM

May 22, 2017

RE: Patricia Crowe

To: Jeffrey T. Relsert, D.O.

Mrs. Crowe is not eligible for FMLA at this time. She has not been employed for 12 months with us, nor do we have 50 employees within 75 miles for Appalachian Stitching. We certainly encourage her to contact us when she is able and ready to come back to work and wish her a speedy recovery!

Best Regards,

Jodie Wiggett
Appalachian Stitching Co.

# Brice Aff. Exhibit 8

**STATE OF NEW HAMPSHIRE**

**GRAFTON, SS** **SUPERIOR COURT**

**PATRICIA CROWE, )**
**Plaintiff, )**
**v. ) DOCKET NO.: 214-2019-cv-00159**
**APPALACHIAN STITCHING )**
**COMPANY, LLC, )**
**Defendant. )**
**_____)**

# ZOOM DEPOSITION OF APPALACIAN STITCHING COMPANY

## BY SCOTT MANNING

**THIS DEPOSITION REMOTELY TAKEN PURSUANT TO NOTICE ON WEDNESDAY, DECEMBER 16, 2020, COMMENCING AT 9:57 A.M.**

**DUFFY & MCKENNA COURT REPORTERS**
**P. O. Box 1658**
**Dover, New Hampshire 03821-1658**
**(603) 743-4949**
**(800) 600-1000**

Mr. Manning.

THE WITNESS: I'm ready.

BY MR. BROCK:

Q. Have you ever seen this document before, Mr. Manning?

A. I saw it after. You know, when this case was established, it was pulled from the employee file for my review.

Q. This was after Mrs. Crowe had filed her charge of discrimination, or was this after something else?

A. No, after -- when we were pulling documents for this case. This is when I saw this message.

Q. Okay. Was it conveyed to you that Mrs. Crowe was not in on May 8th?

A. Every employee that is not in here is conveyed to me.

MR. BROCK: Okay. You can pull this down, Trevor.

BY MR. BROCK:

Q. Did you learn at some point that Mrs. Crowe had been diagnosed with sciatica?

A. I was told that situation on the 9th or 10th. I can't recall exactly -- by Jodie.

Q. Okay. And what did she tell you specifically?

A. That she was told by Melody Dumais that Pat had come to

Q. Okay. Is this the one that you saw first?
A. I believe so.
Q. And how was this note provided to you?
A. Jodie brought it to me for my review.
Q. And what -- did you guys have a conversation? What was said after she brought you this note?
A. That we needed to make sure that Pat didn't further injure herself.
Q. Were there any discussions of whether Mrs. Crowe would be able to continue at her position?
A. There was just a general discussion that she -- I can't see where she could do the job given this, you know, what the doctor's suggesting here, without possibly injuring herself, and that was basically the gist of that.
Q. Was there any follow-up conversation with Mrs. Crowe or Mrs. Crowe's doctor regarding exactly what was meant by "lift, bend, or stoop"?
A. I don't think it's legal for me to reach out to her doctor, number one. But, no, we were just -- Jodie was handling it and communicating with me. And Pat knew she could come to my office and discuss it with me if she wanted, as I've mentioned.
Q. Did Mrs. Crowe come to your office at any point?

A. Jodie brought it to me.
Q. Okay. Did you have any discussion with Jodie about this note?
A. Just that it let -- continued to let me know how she's doing. This is -- you know, I hope she gets better, and unfortunately, she is ineligible for FMLA, probably because we're a company of under 50 employees.
Q. Did you inquire as to how much longer Mrs. Crowe would be out?
A. That was, I would assume, Mrs. Crowe's responsibility to get back to us.
Q. Do you know if Ms. Wiggett inquired at all about how much longer Mrs. Crowe would be out for?
A. I do not.
Q. Do you know how long a period FMLA can cover?
A. I don't know the specifics.
Q. Are you aware it can be multiple weeks?
A. I don't know that.

MR. BROCK: You can pull down the exhibit, Trevor.

BY MR. BROCK:

Q. What was the next thing you recall hearing about Mrs. Crowe?

Q. To the extent -- I'm sorry, go ahead.
A. It was Pat's responsibility to communicate with us regarding where that situation was at.
Q. Okay.
A. So it was -- it was her responsibility to get back to us with a doctor's note clearing her so she could do the essential qualifications of her job, which were bending, standing for long periods of time, stooping, lifting, turning freely, all of those. So I was basically waiting for that.
Q. Did Mrs. Crowe ever convey to you or to anyone else, to your knowledge, that she couldn't do her job?
A. Mrs. Crowe didn't, but at this point, I was relying on professionals, which I -- I'm sure you can appreciate, being a professional yourself.
Q. That was based entirely off of the doctor's note that said "no bending, lifting, stooping for one week"?
A. Yes.
Q. Besides waiting to get a doctor's note clearing her of all of those restrictions, there was no other process to try to accommodate Mrs. Crowe?
A. No, because without that, we -- it wouldn't be safe to have her on the floor doing something that possibly could

injure her. I was relying on a professional to tell me when it was okay. With that in hand, then she would have been back here working for us.

Q. Do you believe it's unsafe for a person with sciatica to perform the functions of an assembler position?

A. Yes, per the doctor.

MR. BROCK: I'm just about done, Mr. Manning. I need a 10-minute break. We'll be back at 11:40, and just maybe one or two more questions after that. I should be good. Okay?

THE WITNESS: Thank you.

(Recess taken.)

BY MR. BROCK:

Q. So, Mr. Manning, is there any written policy regarding reasonable accommodation requests at Appalachian Stitching?

A. No, no formal policy here, as I've mentioned.

Q. Okay. I just wanted to make sure that there was nothing written down; is that correct?

A. Correct.

Q. And do you know if Mrs. Crowe was asked to return with a note clearing her of all of her restrictions?

A. As far as I know, yes.

# Brice Aff. Exhibit 9

●●○○○ Verizon 1:18 PM 76%

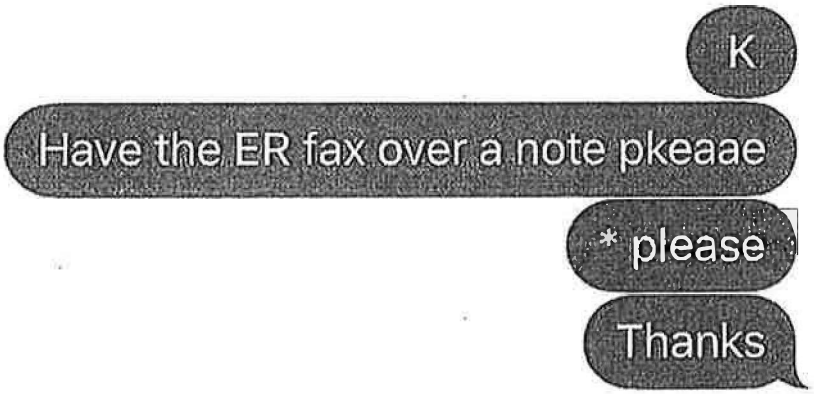
**New Message** Cancel

To: Pat Crowe

**Mon, May 8,** 4:29 AM

Was at WE with Luther most of the night, very little sleep and feel like crab so I'm not coming in ok?

Meant ER




Ok

EXHIBIT
4
Wiggett | 12/16/2020 | SS

**Certificate of Service**

I, Trevor Brice, hereby certify that the foregoing was served via filing through the Court's CM/ECF System, on Gary Burt, Esq., counsel for the Defendant, on January 27, 2021.

Dated: 1/27/2021__ */s/Trevor Brice*_____

Trevor Brice

STATE OF NEW HAMPSHIRE

GRAFTON COUNTY SUPERIOR COURT

DOCKET NO: 214-2019-CV-00159

PATRICIA CROWE,

Plaintiff

v.

APPALACHIAN STITCHING COMPANY, LLC

Defendant

## AFFIDAVIT OF PATRICIA CROWE

PATRICIA CROWE, being duly sworn and according to law, deposes and says:

1. I am a resident of New Hampshire, I am over 18, and I have personal knowledge of the facts stated in this affidavit.

2. On or around June 6, 2016, I became employed by the Defendant.

3. At all relevant times, I satisfactorily performed the responsibilities of my position. Indeed, I was never subjected to any progressive discipline.

4. I was hired by Jodie Wiggett (Defendant's Human Resources Representative, "Wiggett") as an assembler when I was employed at another Company.

5. The assembler position involved switching between workstations where I would either sit or stand to glue and assemble parts for leather goods.

6. I could perform the essential functions of my position alternating between sitting and standing, and I had discretion over which workstation to work at and how long to work at each workstation. Accordingly, it was never necessary to stand or sit for extended periods of time.

7. My job did not require lifting, bending and stooping because I was short enough to not have to bend or stoop to retrieve items and I did not have to lift items onto my workstation. Additionally, my job did not require me to turn freely, though at all relevant times I was capable of turning freely.

8. Indeed, there were wheeled carts I could use to transport items to and from work areas.

9. I could also ask for occasional minimal assistance from my co-workers or I could have potentially used a handheld grabbing device to pick up needed items.

10. On or around May 7, 2017, while at the Emergency Room with my husband, I was treated and diagnosed with sciatica.

11. My sciatica is a physical impairment that substantially limits one or more of my major life activities, including, but not limited to, sleeping and moving without pain during a flare up.

12. I informed lead floor person Melody Dumais ("Dumais"), my direct supervisor, that I had been treated for my sciatica disability while at the Emergency Room.

13. I also requested of Dumais the reasonable accommodation of being allowed to sit for a limited time after standing for a long period of time to be able to ease the pain from my sciatica disability. My job did not require bending, stooping, or lifting so I did not need to request accommodations related to that at that time (other than the request to sit after

prolonged standing).

14. Dumais granted this reasonable accommodation, and I was able to satisfactorily perform the essential functions of my position for several days. Notably, at all relevant times I was capable of performing all the essential functions of my position. In fact, I never said I could not do any part of my job.

15. Indeed, it was my doctor's opinion that I could work so long as I was granted minimal reasonable accommodations that were not an undue burden on the Defendant.

16. Dumais informed Wiggett of my disability and accommodation request and Defendant insisted that I provide a doctor's note verifying my disability. I did not promise I would bring in the note the next day, but did provide one on May 12, 2017,

17. I provided this doctor's note on May 12, 2017 to Wiggett. Notably, I had not spoken to Wiggett since I had returned from the Emergency Room until May 12, 2017.

18. On May 12, 2017, after I provided Wiggett with the requested doctor's note, Wiggett informed me that I could no longer work with my previously granted reasonable accommodation, insisting that I could only come back with a doctor's note that removed "all restrictions."

19. I protested this unjustified refusal to allow me to return to work and explained to Wiggett that I could perform all aspects of my job, especially if allowed minimal reasonable accommodations (such as the ability to switch periodically from standing to sitting when having a flare up of my sciatica). Wiggett continued to insist that I be cleared to return with "no restrictions." This amounted to an involuntary unpaid suspension and a revocation of

my previously granted accommodation request.

20. I went to my doctor, explaining that Wiggett would not let me return to work unless I had no restrictions. I did so because of Defendant's refusal to grant my initially requested reasonable accommodation.

21. In an effort to comply with this unnecessary and discriminatory request, my doctor took me out of work for one week in order to see if my sciatica symptoms would improve, even though my doctor believed that I could perform the essential functions of my job with the restrictions given and my doctor was only holding me out of work because the Company refused to let me return to work unless I could return with "no restrictions."

22. However, upon a follow-up visit to my doctor, he could not remove all restrictions as the Company was unnecessarily requiring.

23. I continued to ask Wiggett if she would let me come back to work, but she continued to insist that she would not let me return to work unless I had note from my doctor clearing me to return with "no restrictions." Indeed, there were many alternative accommodations that would have addressed both parties' concerns. I was willing to, and indeed tried to, engage Defendant in discussions regarding these alternative accommodations but they refused.

24. My doctor recommended that I apply for FMLA leave and told me that his office would handle that request. My doctor then sent Defendant a note requesting FMLA leave on my behalf. I did so because Defendant's discriminatory request that I return with "no restrictions" necessitated me going on an extended leave.

25. I received a letter dated May 22, 2017 from Wiggett denying my reque: for FMLA leave.

26. I attempted to contact Wiggett on May 23, 2017 or May 24, 2017, as I : ad been denied FMLA leave and wanted to return to work, but Wiggett did not return : y message.

27. I remained willing and capable of returning to work, as indeed I could : id had satisfactorily performed all essential functions of my position with my r : striction of no bending, lifting or stooping. Importantly, I could now do some bending, lifting, and stooping as my initial restriction of "no bending, lifting or stooping," ha : expired after 1 week. Further, if I had been allowed even the most minimal amount of : ave, I could have returned with no restrictions or in the very least, less burdensome restri : ons than my doctor initially requested. No one at Defendant ever spoke with me abc : t the extent of my disability or what I could or could not do, except to say I must return wi : hout "any restrictions."

28. Indeed, I had followed Defendant's policy for requesting accommodati : s by speaking to my supervisor, Dumais, and speaking with Human Resources Represer : tive, Wiggett.

29. Defendant's policy should have involved a meeting with Scott Manning the Executive Manager), but no meeting was scheduled, nor did he ever speak to me c : reach out to me about my accommodation requests.

30. Instead, on June 1, 2017, Defendant terminated my employment withou : having engaged in an interactive dialogue and only 3 weeks after I had been diagnosed wi : Sciatica and requested reasonable accommodations.

FURTHER AFFIANT SAYETH NOT.

atricia Crowe

Sworn to and subscribed before me this 26th day of January, 2021.

ELIZABETH J. STEVENS
STATE OF NEW HAMPSHIRE
-MY-
COMMISSION EXPIRES
NOVEMBER 6, 2024
NOTARY PUBLIC

Notary Public

My Commission Expires: 11/6/2024

**Certificate of Service**

I, Trevor Brice, hereby certify that the foregoing was served via filing through the Court's CM/ECF System, on Gary Burt, Esq., counsel for the Defendant, on January 27, 2021.

Dated: 1/27/2021__ */s/Trevor Brice*_____

Trevor Brice

STATE OF NEW HAMPSHIRE

GRAFTON COUNTY SUPERIOR COURT

DOCKET NO:
214-2019-CV-00159

PATRICIA CROWE,

Plaintiff

v.

APPALACHIAN STITCHING COMPANY, LLC

Defendant

**PLAINTIFF'S MEMORANDUM OF FACTS AND LAW IN OPPOSITION TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff Patricia Crowe ("Mrs. Crowe" or the "Plaintiff") submits this Memorandum of Facts and Law in support of the Plaintiff's Opposition to the Motion for Summary Judgment filed by Defendant Appalachian Stitching Company, LLC (the "Defendant" or the "Company"). The Plaintiff respectfully requests that this Court deny the Defendant's Motion for Summary Judgment because the evidence clearly demonstrates that Mrs. Crowe was a qualified disabled individual under New Hampshire law, that she was discriminated against and harassed because of her disability, and that she was terminated because of her disability and/or because Defendant unjustifiably refused to accommodate her disability or engage in an interactive dialogue regarding reasonable accommodations for her disability. In fact, the overwhelming weight of the evidence clearly demonstrates that Mrs. Crowe was subjected to adverse actions (including her termination and Defendant's failure to accommodate her disability or engage in an interactive

dialogue) in violation of RSA 354-A. Accordingly, the Defendant's Motion for Summary Judgment should be DENIED.

## BACKGROUND

On or around June 12, 2016, Mrs. Crowe began her employment with the Defendant as an assembler. Plaintiff's Response to Defendant's Statement of Material Fact, ¶ 1. On or around May 7, 2017, upon a visit to the hospital, Mrs. Crowe was diagnosed with sciatica, a physical impairment that limited one or more of Mrs. Crowe's major life activities, including, but not limited to, sleeping and moving without pain during a flare up. Crowe, Aff., ¶11. As such, Mrs. Crowe's sciatica was (and continues to be) a disability under New Hampshire law.

The day after Mrs. Crowe was diagnosed with sciatica, she revealed her sciatica disability to the Company, specifically to her floor supervisor Melody Dumais ("Dumais").[1] (Crowe, p. 16) (Brice Aff., Ex. 2). Mrs. Crowe also requested from Dumais the reasonable accommodation of being able to, after long periods of standing, periodically (and for a limited duration) sit to relieve the pain from her sciatica. (Crowe, p. 16) (Brice Aff., Ex. 2). Notably, this reasonable accommodation request was not an undue burden on the Company, as Mrs. Crowe could still perform all the essential functions of her position even while periodically sitting. Crowe, Aff., ¶14. Indeed, Mrs. Crowe's position involved regularly alternating between work stations that involved sitting and work stations that involved standing, and assemblers had discretion over what station to utilize (and for how long) at what time. (Dumais, p. 30) (Brice Aff., Ex. 3). Dumais granted this reasonable accommodation and Mrs. Crowe was able to perform the essential functions of her job satisfactorily even after she started to utilize her approved

[1] The Company did not have a policy stating to whom disabilities should be disclosed and/or from whom disability accommodations should be requested. Accordingly, Mrs. Crowe went to her direct supervisor, Dumais and disclosed her disability (and asked for reasonable accommodations), which was fully in keeping with Company policy. Crowe Aff., ¶¶ 28-29.

reasonable accommodation. (Dumais, p. 49) (Brice Aff., Ex. 3) (in reference to Mrs. Crowe utilizing her requested reasonable accommodation: "Q: Did she perform her job responsibilities satisfactorily? A: Yeah,…She just continued to do her work.").

After Dumais became aware of Mrs. Crowe's sciatica disability, Dumais informed Defendant's Human Resources Manager Jodie Wiggett ("Wiggett") of Mrs. Crowe's sciatica disability. Defendant demanded that Mrs. Crowe provide a note confirming her sciatica disability. Crowe, Aff., ¶16. Mrs. Crowe provided this medical note on May 12, 2017 confirming her disability to Wiggett, which also noted the restrictions of "NO LIFTING, BENDING OR STOOPING FOR 1 WEEK." Wiggett Ex. 6 (Wiggett p. 28) (Brice Aff., Exs. 1 & 4). Upon seeing the note, Wiggett unjustifiably declared that Mrs. Crowe could not return to work until she had "no restrictions." (Crowe, p. 17) (Brice Aff., Ex. 2). ("Q: What did Jody [Wiggett] say in response? A: She said, No, you have restrictions, you cannot work here...."). Mrs. Crowe protested Wiggett's denial, saying that she had been performing all the essential functions of her job for days with her requested reasonable accommodation. (Crowe, pp. 16-17) (Brice Aff., Ex. 2) ("Q: And what did you say in response to that? A: I told her that I had been doing it for a few days and it was working out fine with Melody [Dumais] letting me have the limited time to sit.").

Notably Mrs. Crowe's supervisor, Dumais, did not see any reason why Mrs. Crowe could not perform the essential functions of her job with her requested accommodations, saying that after she allowed Mrs. Crowe the reasonable accommodation of sitting periodically, Mrs. Crowe was able to perform her job satisfactorily. (Dumais, p. 49) (Brice Aff., Ex. 3) ("Q: Did she perform her job responsibilities satisfactorily? A: Yeah."). However, Wiggett refused to engage in an interactive dialogue with Mrs. Crowe and would not consider her reasonable

accommodation request, insisting that Mrs. Crowe had to return to work with "no restrictions." (Crowe, p. 17) (Brice Aff., Ex. 2); (Wiggett, p. 31) (Brice Aff., Ex. 1) ("Q: Did you tell Mrs. Crowe that she could not return unless her restrictions were lifted? A: I told her—correct."). Defendant thus revoked the reasonable accommodations Dumais had previously provided and forced Mrs. Crowe out on what amounted to an unpaid discriminatory suspension, even though she was still capable of performing the essential functions of her position. Crowe Aff. ¶19.

Indeed, although the Defendant claims to have a policy wherein reasonable accommodations are discussed between Scott Manning (Defendant's Executive Manager, "Manning") and the employee, (Wiggett, pp. 52-53) (Brice Aff., Ex. 1), the Defendant did not follow their own asserted policy in relation to Mrs. Crowe's reasonable accommodation request for her sciatica. Crowe, Aff., ¶¶28-29; (Wiggett, p. 53) (Brice Aff., Ex. 1) (In response to why the standard reasonable accommodation process was not followed for Mrs. Crowe: "Q: Okay. Why was that not done in Mrs. Crowe's situation? A: Because there was no request by Mrs. Crowe. Q: Did you not understand her doctor's note to be a request for a reasonable accommodation? A: I did not.").

Wiggett's assertion that Mrs. Crowe's doctor's note was not a request for a reasonable accommodation is absurd, as it noted Mrs. Crowe's sciatica disability and her restrictions. (Wiggett p. 28) (Brice Aff., Exs. 1 & 4). Additionally, Mrs. Crowe requested reasonable accommodations from Dumais and Dumais conveyed these requests to Wiggett. Crowe, Aff., ¶16. Wiggett declined to engage in any interactive dialogue with Mrs. Crowe, even though she was aware that Mrs. Crowe and her doctor were requesting reasonable accommodations, and thus seemed to be attempting to remain willfully ignorant of the reasonable accommodations requested by Mrs. Crowe. Crowe, Aff., ¶¶16-19. Therefore, Wiggett forced Mrs. Crowe out of

work while she tried to work with her doctor to get all restrictions that had been given to her lifted. (Crowe, p. 17) (Brice Aff., Ex. 2) ("A: She said, No, you have restrictions, you cannot work here. You know you have restrictions. No lifting, bending or stooping. Q: And in response to—A: She sent--, Q: Repeat that. She did what? A: She sent me home."); (Wiggett, p. 31) (Brice Aff., Ex. 1) ("Q: Did you tell Mrs. Crowe that she could not return unless her restrictions were lifted? A: I told her—correct."); (Manning, p. 47) (Brice Aff., Ex. 8) ("Q: And do you know if Mrs. Crowe was asked to return with a note clearing her of all restrictions? A: As far as I know, yes.").

Even though Mrs. Crowe's doctor and Mrs. Crowe believed that she could perform her assembler position so long as the accommodations were granted, Mrs. Crowe was forced to go back to her doctor. Crowe, Aff., ¶¶20-21. When Mrs. Crowe told her doctor that Defendant was refusing to grant any reasonable accommodations and were insisting that she could only work with no restrictions, her doctor gave her a note asking for a week out of work in order to see if her sciatica symptoms would improve enough for her to have no restrictions (even though this was not Mrs. Crowe's preferred reasonable accommodation and was merely a response to the Defendant's illegal refusal to grant Mrs. Crowe's initially requested reasonable accommodations). Crowe, Aff., ¶20. However, Mrs. Crowe's doctor was unable to fulfill Defendant's unnecessary and discriminatory requests that Mrs. Crowe be released without *any* restrictions prior to Defendant terminating Mrs. Crowe. Crowe Aff. ¶ 22.

Mrs. Crowe continued to follow up with Wiggett through her doctor, with her doctor sending a note requesting extended leave for Mrs. Crowe as a reasonable accommodation as an alternative to her previously requested reasonable accommodations. Crowe, Aff., ¶24. Her doctor continued to not be able to lift all restrictions as Defendant discriminatorily and

unnecessarily requested, even though Mrs. Crowe could do some lifting, bending or stooping after her doctor's initial restrictions on her sciatica disability expired after one week. Crowe, Aff., ¶27.

Mrs. Crowe therefore needed extended leave. Crowe, Aff., ¶24; Wiggett Ex. 11(Brice Aff., Ex. 7) Defendant denied Mrs. Crowe this reasonable accommodation of FMLA leave, due to the fact that there were not 50 employees working within 75 miles of the Defendant. (Manning, p. 39) (Brice Aff., Ex. 8); (Brice Aff., Ex. 7). Neither Wiggett nor Manning ever followed up with Mrs. Crowe after this denial, refusing to engage in an interactive dialogue around her requested reasonable accommodations, though they were not an undue burden on the Company and Mrs. Crowe could perform all the essential functions of her job. Crowe, Aff., ¶¶26-30; (Wiggett, p. 39) (Brice Aff., Ex. 1) ("Q: Did you follow up with Mrs. Crowe at all to ask her if or when she would return?" A: I did not."); (Manning, p. 39) (Brice Aff., Ex. 8).

Mrs. Crowe could have eventually returned with no restrictions or in the very least, less burdensome restrictions than her doctor initially requested if even the most minimal of leaves was granted. Crowe Aff. ¶ 27. However, after refusing to engage in an interactive dialogue around Mrs. Crowe's reasonable accommodations, and not inquiring with Mrs. Crowe as to how much leave she would need to meet the Company's discriminatory standard of no restrictions, Defendant terminated Mrs. Crowe on June 1, 2017, three weeks after Mrs. Crowe had first been diagnosed with sciatica and requested reasonable accommodations. Crowe, Aff., ¶30; (Crowe, pp. 26-27) (Brice Aff., Ex. 2).

## ARGUMENT

Summary judgment is appropriate only when the records shows that there is "no genuine issue to be tried." N.H Sup. Ct. Rule 12(g)(2)(a). The moving party bears the burden of

affirmatively demonstrating that there is no triable issue of fact and that it is entitled to judgment. *Granite State Mgmt. & Res. v. City of Concord*, 165 N.H. 277, 289, 75 A.3d 1112, 1121 (2013). All factual disputes in regard to summary judgment must be left to the jury. *Sabinson v. Trustees of Dartmouth Coll.*, 160 N.H. 452, 460, 999 A.2d 380, 387 (2010) ("When considering a motion for summary judgment, the trial court cannot weigh the contents of the parties' affidavits and resolve factual issues, but must determine whether a reasonable basis exists to dispute the facts claimed in the moving party's affidavits at trial; if so, the trial court must deny the motion for summary judgment.").

In deciding a motion for summary judgment, the Court must view the evidence in a light most favorable to the non-moving party and draw all reasonable inferences in her favor. *Iannelli v. Burger King Corp.*, 145 N.H. 190, 193, 761 A.2d 417, 419 (2000).

## I. Mrs. Crowe Has Alleged Sufficient Facts to Prevail on Her Disability Discrimination and Failure to Accommodate Claims

### a. Mrs. Crowe was capable of and did perform the essential functions of her position.

At all relevant times, Mrs. Crowe was capable of performing the essential functions of her position. (Crowe, p. 17) (Brice Aff., Ex. 2), Crowe Aff. ¶ 14. Indeed, once Mrs. Crowe received her sciatica diagnosis and requested, and was approved for, the reasonable accommodation of being able to, after long periods of standing, periodically (and for a limited duration) sit to relieve the pain from her sciatica, there were never any performance deficiencies or any indications that Mrs. Crowe could not do the essential functions of her position. (Dumais, p. 49) (Brice Aff., Ex. 3) ("Q: During those two or so days she was there, did she perform her work satisfactorily? A: She did her work, yeah. She stood on her white glue machine. She folded. She did everything that you--she would normally do"); Crowe Aff. ¶ 14.

Indeed, the fact that her doctor's note limited bending, stooping, and lifting is irrelevant as Mrs. Crowe was able to (and in fact did for several days) perform her job without bending, lifting, or stooping. (Crowe, p. 15) (Brice Aff., Ex. 2) ("The doctor indicates under instructions, additional instructions, no lifting, bending or stooping for one week….Q. And you understand that those were requirements in order to work at Appalachian Stitching; isn't that right? A. No, it was not. Q. You didn't have to bend, stoop or lift? A. No."). Notably, Mrs. Crowe never claimed that she could not do any essential function of her job, and the restrictions her doctor had given her lessened after the initial week and she was eventually able to do some lifting, bending and stooping. Crowe Aff, ¶ 27. Indeed, Mrs. Crowe' supervisor Dumais *admitted* that even when her requested accommodations were (briefly) granted that Mrs. Crowe was performing all the essential functions of her position (Dumais, pp. 50-51) (Brice Aff., Ex. 3) *see also* (Wiggett, p. 28) (Brice Aff., Ex. 1).

This dispute, regarding Mrs. Crowe's ability to perform the essential functions of her position, alone is enough to warrant denying Defendant's motion because a disputed factual question as to whether an individual was capable of performing the essential functions of a position is inappropriate for resolution at summary judgment. *Sensing v. Outback Steakhouse of Fla., LLC,* 575 F.3d 145 (1st Cir. 2009) (finding genuine issues of material fact existed as to whether restaurant employee with multiple sclerosis (MS) was able to perform the essential functions of her job handling customers' take-out orders and therefore precluding summary judgment); *Tobin v. Liberty Mut. Ins. Co.*, 433 F.3d 100 (1st Cir. 2005) (noting that there were sufficient issues of fact as to whether [employee] was able to perform essential functions of his job with reasonable accommodation thus precluding summary judgment).

However, it is worth taking time to address Defendant's completely unsubstantiated and untrue claims regards the essential functions of Mrs. Crowe's assembler position. Notably, Defendant admits that Mrs. Crowe had no problems with her job performance as an assembler even with the restrictions that her doctor had given her over the days she was allowed to work. (Dumais, p. 49) (Brice Aff., Ex. 3) ("Q: During those two or so days she was there, did she perform her work satisfactorily? A: She did her work, yeah. She stood on her white glue machine. She folded. She did everything that you--she would normally do"); *see also* (Wiggett, p. 28) (Brice Aff., Ex. 1). As such, the Defendant's assertion that Mrs. Crowe's job as an assembler involved lifting, bending or stooping is not substantiated, as Mrs. Crowe could perform her job satisfactorily while complying with her doctor's restrictions of no lifting, bending, or stooping. Crowe, Aff., ¶27.

Indeed, Mrs. Crowe has testified under oath that she could perform the essential functions of her position without bending, lifting or stooping, which were the only restrictions that her doctor gave her when she was diagnosed with sciatica. (Crowe, p. 15) (Brice Aff., Ex. 2) ("Q: The doctor indicates under instructions, no lifting, bending or stooping for one week. Do you see that? A: Yes, I do. Q: And you understand that those were requirements in order to work at Appalachian Stitching, isn't that right? A: No, it was not. Q: You didn't have to bend, lift or stoop? A: No."); Crowe, Aff., ¶27. Even if retrieving items or doing tasks that normally would require bending, stooping, or lifting were required of the assembler position, there were accommodations that could have allowed Mrs. Crowe to perform these tasks, such as a handheld grabbing device, or a wheeled cart (which assemblers were allowed to use on an as-needed basis.). Crowe, Aff., ¶9. However, the Company refused to enter into an interactive dialogue with Mrs. Crowe to explore these accommodations, even though Mrs. Crowe's restrictions of no

lifting, bending or stooping would have loosened over time and she could do at least some lifting, bending or stooping. Crowe, Aff., ¶27. Instead, the Company fired her almost immediately even though Mrs. Crowe could perform the essential functions of her position. Crowe, Aff., ¶30.

The Defendant's testimony as to the essential functions of Mrs. Crowe's position are not uniform. Dumais (who assumedly knew the essential functions best since she was Mrs. Crowe's direct supervisor) testified that the ability to stand and good attendance were the only essential functions of the assembler positions. (Dumais, p. 45) (Brice Aff., Ex. 3) (Q: Are there any other qualifications that Appalachian Stitching is looking for in assemblers? A: No. You want to be able to stand. You must have good attendance.").[2] Wiggett insisted that bending, lifting and stooping were essential functions of the assembler position, but failed to provide any plausible explanation or written support for why she believed these were essential functions. (Wiggett, p. 54) (Brice Aff., Ex. 1). Indeed, Mrs. Crowe states that the essential functions of her position were to alternate between workstations where she would stand or sit to assemble and glue small leather goods. Crowe, Aff., ¶5. Mrs. Crowe could and did perform these functions alternating between sitting and standing. Crowe Aff. ¶¶ 5-6. As such, the essential functions of her position did not require her to lift, bend or stoop. Crowe Aff. ¶¶ 5-6.

The Defendant's insistence that Mrs. Crowe could not perform the essential functions of her position is baffling as Defendant never followed up with Mrs. Crowe or Mrs. Crowe's doctor after the end of the one-week period to see if Mrs. Crowe could perform any amount of bending,

[2] Dumais agreed that constant standing is not an essential function of Mrs. Crowe's position, since Mrs. Crowe was able to perform satisfactorily in her position while sometimes sitting, thus only standing part of the time was an essential function according to Dumais. (Dumais, p. 49) (Brice Aff., Ex. 3) ("Q: During those two or so days she was there, did she perform her work satisfactorily? A: She did her work, yeah. She stood on her white glue machine. She folded. She did everything -- she would normally do.").

lifting, or stooping. (Wiggett, p. 55) (Brice Aff., Ex. 1). Instead, Defendant insisted that she could not return to work until there were absolutely no restrictions at all. Crowe, Aff., ¶19. Similarly, Defendant never sought to explore with Mrs. Crowe or her doctor whether there were any alternative accommodations that would have addressed both party's concerns. Crowe, Aff., ¶¶7-8 ("Indeed, there were wheeled carts I could use to transport items to and from work areas. I could also ask for occasional minimal assistance from coworkers or I could have potentially used a handheld grabbing device to pick up needed items."). Indeed, Mrs. Crowe's testimony confirms that lifting, bending and stooping were not essential functions of her position. (Crowe, p. 15) (Brice Aff., Ex. 2) ("Q: The doctor indicates under instructions, no lifting, bending or stooping for one week. Do you see that? A: Yes, I do. Q: And you understand that those were requirements in order to work at Appalachian Stitching, isn't that right? A: No, it was not. Q: You didn't have to bend, lift or stoop? A: No."); Crowe Aff. ¶ 7.

Importantly, even if bending and lifting were sometimes involved in the work done by some assemblers, these were not essential functions and Mrs. Crowe could and did satisfactorily perform her work with reasonable accommodations that were not an undue burden on the Defendant. Crowe, Aff., ¶14. Dumais' testimony confirms that Mrs. Crowe performed her job satisfactorily even with these restrictions (i.e. reasonable accommodations) in place . (Dumais, p. 49) (Brice Aff., Ex. 3) ("Q: During those two or so days she was there, did she perform her work satisfactorily? A: She did her work, yeah. She stood on her white glue machine. She folded. She did everything that you--she would normally do"). Accordingly, it was clearly improper and discriminatory for the Company to suddenly revoke the previously granted accommodations and insist that Mrs. Crowe could not work if she needed any accommodations/restrictions.

Notably, Defendant's refusal to allow Mrs. Crowe the most limited of leaves to allow her to recover from her sciatica flare-up (and rushed termination thereafter without any valid non-discriminatory business justification) was itself an improper denial of a reasonable accommodation request, since a brief leave from the Company would not be an undue burden on the Defendant and likewise is evidence of the Defendant's bias against her sciatica disability. Indeed, it is clear that no interactive dialogue took place. (Manning, pp. 46-47) (Brice Aff., Ex. 8) ("Q: Besides waiting to get a doctor's note clearing her of all of those restrictions, there was no other process to try to accommodate Mrs. Crowe? A: No")

As described above, Mrs. Crowe's reasonable accommodation request would have allowed (and for several days did in fact allow) her to do all the essential functions of her position without issue. Crowe, Aff., ¶14. Further, Mrs. Crowe was willing to engage in an interactive dialogue regarding her requests if the Defendant asserted that it was an undue burden. Crowe., Aff., ¶23. As is described in detail below, the Defendant made no meaningful effort to engage in an interactive dialogue with Mrs. Crowe regarding her reasonable accommodation request or other potential alternative accommodations, and instead unjustifiably refused to allow her to return to work and eventually terminated her three weeks later after she was unable to satisfy Defendant's unnecessary and discriminatory request that she return with *no* restrictions, and despite the fact her restrictions may have reduced in scope over time. (Wiggett, p. 31) (Brice Aff., Ex. 1) ("Q: Did you tell Mrs. Crowe that she could not return unless her restrictions were lifted? A: I told her—correct."); (Wiggett, p. 30) (Brice Aff., Ex. 1) ("Q: Did you discuss at all any modifications that could be done to help Mrs. Crowe do her job without bending lifting or stooping? A: There---I don't see that there is any."); Crowe Aff. ¶23.

**b. <u>The Defendant Violated the Law by Refusing and Denying Mrs. Crowe's Reasonable Accommodation Requests and Failing to Engage in an Interactive Dialogue Related to Mrs. Crowe's Accommodation Requests.</u>**

New Hampshire law is clear that it is unlawful for an employer to deny a reasonable accommodation. N.H RSA 354-A:7, VII (a) (It shall be an unlawful discriminatory practice: "for any employer not to make reasonable accommodations for the known physical or mental limitations of a qualified individual with a disability who is an applicant or employee"). It is the Defendant's burden to prove that Mrs. Crowe's reasonable accommodations were an undue burden, a standard that they have not met, making this a question for the jury not ripe for summary judgment. *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 646–47 (1st Cir. 2000) ("...the statute also places the burden on the defendant to show that an accommodation would be an undue hardship.").

The Defendant unjustifiably refused to grant Mrs. Crowe's accommodation requests and completely failed to engage in an interactive dialogue with Mrs. Crowe regarding her accommodation requests. Indeed, the record in this case makes it abundantly clear that Mrs. Crowe could and did perform the essential functions of her job with the very restrictions that Defendant unjustifiably takes issue with. (Dumais, p. 49) (Brice Aff., Ex. 3) ("Q: During those two or so days she was there, did she perform her work satisfactorily? A: She did her work, yeah. She stood on her white glue machine. She folded. She did everything that you--she would normally do").

Despite this, after receiving her doctor's note on May 12, 2017, Defendant refused to allow Mrs. Crowe to return to work and no effort was taken to engage in an interactive dialogue about *any* reasonable accommodations. (Wiggett, pp. 52-53) (Brice Aff., Ex. 1) ("Q: Sure. So what I'm—what I am getting at, right, is what is the process in place? What is the procedures of

the company when a person with a disability asks for a reasonable accommodation? Does that include the interactive dialogue? And how does that start? A: Yes, it would, and it would be a discussion that we would sit down with Scott Manning. Q: Okay. Would you sit down with Scott Manning with that employee? A: Yes Q: Okay. Why was that not done in Mrs. Crowe's situation? A: Because there no was no request by Mrs. Crowe. Q: Did you not understand her doctor's note to be a request for a reasonable accommodation? A: I did not."); (Manning, p. 30) (Brice Aff., Ex. 8). ("Q: Was there any follow-up conversation with Mrs. Crowe or Mrs. Crowe's doctor regarding exactly what was meant by "lift, bend, or stoop"? A: I don't think it is legal for me to reach out to her doctor, number one. But, no...").

The question of whether specific reasonable accommodation requests were an undue burden is a factual question that should be left to a jury, as it the Defendant's burden to prove that the specific reasonable accommodation requests were an undue hardship for the Defendant. *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 646–47 (1st Cir. 2000) ("...the statute also places the burden on the defendant to show that an accommodation would be an undue hardship."); *see* 42 U.S.C. § 12112(b)(5)(A) (stating that the term "discriminate" includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an ... employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered identity").

Even if it were assumed that Mrs. Crowe's reasonable accommodation requests constituted an undue burden (they did not) or would have prevented Mrs. Crowe from performing the essential functions of her position (they did not), the Defendant still violated the law by failing to engage in an interactive dialogue with Mrs. Crowe following her

accommodation request to explore whether other alternative accommodations could have been provided. *Jacques v. Clean-Up Grp., Inc.*, 96 F.3d 506, 515 (1st Cir. 1996)("There may well be situations in which the employer's failure to engage in an informal interactive process would constitute a failure to provide reasonable accommodation that amounts to a violation of the ADA.").

Indeed, there was no effort to engage in an interactive dialogue once Mrs. Crowe asked for reasonable accommodations. (Wiggett, pp. 52-53) (Brice Aff., Ex. 1).[3] As such, it is abundantly clear that the Defendant unjustifiably failed to satisfy their obligation to engage Mrs. Crowe in an interactive dialogue related to Mrs. Crowe's accommodation requests.

## II. Mrs. Crowe Has Alleged Sufficient Facts to Justify a Finding that She was Illegally Retaliated Against in Violation of NH RSA 354-A.

As discussed above, Mrs. Crowe requested reasonable accommodations for her sciatica disability from the Defendant. Mrs. Crowe's reasonable accommodation requests are statutorily protected activity. *Kris v. Dusseault Family Revocable Tr. of 2017*, No. 18-CV-566-LM, 2019 WL 4647211, at *5 (D.N.H. Sept. 24, 2019) ("protected activity" includes a plaintiff's request for a reasonable accommodation.").

Mrs. Crowe engaged in protected activity by requesting reasonable accommodations from Dumais. (Dumais, pp. 46-47) (Brice Aff., Ex. 3) ("Q: Is there another conversation you recall having with Mrs. Crowe that day? A:Yeah, right before lunch, she just had she wanted to know if she could sit down a while because her back was bothering her."); (Crowe, p. 16) (Brice Aff., Ex. 2) ("Q: All right. Did you complain of any problems the next day? A: I talked to Melody Dumais. Q: And what did you tell her? A: I explained to her that I had been diagnosed with

[3] *See also* (Manning, p. 30) (Brice Aff., Ex. 8). ("Q: Was there any follow-up conversation with Mrs. Crowe or Mrs. Crowe's doctor regarding exactly what was meant by "lift, bend, or stoop"? A: I don't think it is legal for me to reach out to her doctor, number one. But, no.").

sciatica and that I could do my job standing and sitting, but in standing I would need to sit for a limited amount of time in order—until the pain relieved and then I could go back to my standing position."). The Defendant retaliated against Mrs. Crowe for requesting these reasonable accommodations by holding her to higher standard for returning to work than it would for other non-disabled employees, with Defendant insisting that there be no restrictions for Mrs. Crowe to return to work. (Wiggett, p. 31) (Brice Aff., Ex. 1) ("Q: Did you tell Mrs. Crowe that she could not return unless her restrictions were lifted? A: I told her—correct.").

Mrs. Crowe noted that this retaliatory request by Wiggett was not necessary, as she had been doing her job for days with reasonable accommodations approved by Dumais. Crowe, Aff., ¶19; (Crowe, p. 17) (Brice Aff., Ex. 2) ("A: I told her that I had been doing it for a few days and it was working out fine with Melody letting me have the limited time to sit."). Mrs. Crowe had proven (and the Defendant admits) that Mrs. Crowe was capable of performing the essential functions of her job with these restrictions. (Dumais, p. 49) (Brice Aff., Ex. 3) ("Q: During those two or so days she was there, did she perform her work satisfactorily? A: She did her work, yeah. She stood on her white glue machine. She folded. She did everything that you--she would normally do").

Indeed, it is notable that after Mrs. Crowe engaged in protected activity by disclosing her sciatica disability and by requesting a minimal accommodation from Dumais, she never claimed not to be able to do any of the functions of her position. (Dumais, p. 49) (Brice Aff., Ex. 3) (Q: Did she, at any time, indicate she could not do any task that was assigned to her? A: She never mentioned anything to me."). Instead, it was Defendant which unjustifiably asserted, despite no indication from Mrs. Crowe and with only a single vague sentence from her doctor, that Mrs. Crowe must return without *any* restrictions, a clear violation of the ADA and New Hampshire

law. *E.E.O.C. v. Yellow Freight Sys., Inc.*, No. 98 CIV. 2270(THK), 2002 WL 31011859, at *20 (S.D.N.Y. Sept. 9, 2002) (Courts have consistently found that policies prohibiting injured employees from returning to work unless they can do so "without restrictions" violate the ADA.); *see also MacGregor v. Nat'l R.R. Passenger Corp.* 187 F.3d 113, 116 (9th Cir. 1999) ("100% healed" or "fully healed" policy discriminates against qualified individuals with disabilities because such a policy permits employers to substitute a determination of whether a qualified individual is "100% healed" from their injury for the required individual assessment whether the qualified individual is able to perform the essential functions of his or her job either with or without accommodation.); (Wiggett, p. 31) (Brice Aff., Ex. 1) ("Q: Did you tell Mrs. Crowe that she could not return unless her restrictions were lifted? A: I told her—correct."); (Crowe, p. 17) (Brice Aff., Ex. 2). ("Q: What did Jody say in response? A: She said, No, you have restrictions, you cannot work here...."); (Manning, p. 30) (Brice Aff., Ex. 8). ("Q: Was there any follow-up conversation with Mrs. Crowe or Mrs. Crowe's doctor regarding exactly what was meant by "lift, bend, or stoop"? A: I don't think it is legal for me to reach out to her doctor, number one. But, no.").

Mrs. Crowe protested this denial of her reasonable accommodation requests, stating that she was capable of doing all the essential functions of her assembler position while utilizing her previously granted reasonable accommodation. (Crowe, pp. 16-17) (Brice Aff., Ex. 2). Mrs. Crowe continued to request to return to work or, in the alternative, take a disability related leave as a reasonable accommodation so she could meet the Defendant's unjustified and retaliatory return to work requirement that she be released with *no restrictions*. (Crowe, pp. 26-27) (Brice Aff., Ex. 2), ("Q: After your May 19th visit, did you ever contact anybody at Appalachian Stitching to advise of your status? A: By May 23rd or 24th , I called Ms. Wiggett telling her that I

was denied the FMLA and I wanted to come back to work, I never heard back from her."). However, the Defendant, as its ultimate retaliatory adverse action for Mrs. Crowe requesting reasonable accommodations and disclosing her disability, terminated her from her employment with the Defendant. Crowe Aff., ¶ 30.

The fact that Mrs. Crowe disclosed her sciatica disability and requested and utilized reasonable accommodations were the direct cause of her termination.[4] Notably, even assuming arguendo that Mrs. Crowe could not ultimately prove one or more of her discrimination claims, a jury must still be allowed to resolve the question of whether of any of the adverse actions taken against Mrs. Crowe were motivated by the provable protected activity she engaged in. *Mole v. Univ. of Massachusetts*, 442 Mass. 582, 592, 814 N.E.2d 329, 339 (2004) ("The fact that a complaint is later found to be unmeritorious does not preclude a retaliation claim based on the protected activity of pursuing that complaint.").

## CONCLUSION

For the aforementioned reasons, the Defendant is not entitled to judgement as a matter of law on any of the Plaintiff's counts and the Plaintiff respectfully requests this Court DENY Defendant's Motion of Summary Judgment.

[4] (Manning, p. 25) (Brice Aff., Ex. 8) ("Q: Did you learn at some point that Mrs. Crowe had been diagnosed with sciatica? A: I was told that situation on the 9th or 10th."); (Wiggett, p. 23) (Brice Aff., Ex. 1) ("Q: Okay. What happens on May 9th? A: I never saw her. I was preoccupied in the morning. Melody came to me and said, right after lunch, that Pat told her she was diagnosed with sciatica.")

Respectfully Submitted,

PATRICIA CROWE

By her attorneys,

THE LAW OFFICES OF WYATT
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Date: January 26, 2021

By: */s/Trevor Brice*_____

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**Certificate of Service**

I, Trevor Brice, hereby certify that the foregoing was served via filing through the Court's CM/ECF system, on Gary Burt, Esq., counsel for the Defendant, on January 26, 2021.

Dated: 1/26/2021__ */s/Trevor Brice*_____

Trevor Brice

# TITLE XXXI
# TRADE AND COMMERCE

## CHAPTER 354-A
## STATE COMMISSION FOR HUMAN RIGHTS

### Section 354-A:1

**354-A:1 Title and Purposes of Chapter. –** This chapter shall be known as the "Law Against Discrimination." It shall be deemed an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of this state, and in fulfillment of the provisions of the constitution of this state concerning civil rights. The general court hereby finds and declares that practices of discrimination against any of its inhabitants because of age, sex, gender identity, race, creed, color, marital status, familial status, physical or mental disability or national origin are a matter of state concern, that such discrimination not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants. A state agency is hereby created with power to eliminate and prevent discrimination in employment, in places of public accommodation and in housing accommodations because of age, sex, gender identity, race, creed, color, marital status, familial status, physical or mental disability or national origin as herein provided; and the commission established hereunder is hereby given general jurisdiction and power for such purposes. In addition, the agencies and councils so created shall exercise their authority to assure that no person be discriminated against on account of sexual orientation.

**Source.** 1992, 224:1. 1997, 108:8, eff. Jan. 1, 1998. 2018, 176:1, eff. July 8, 2018.

### Section 354-A:2

**354-A:2 Definitions. –**
In this chapter:
I. "Commercial structure" means any building, structure, or portion thereof which is continuously or intermittently occupied or intended for occupancy by a commercial or recreational enterprise, whether operated for profit or not, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.
II. "Commission," unless a different meaning clearly appears from the context, means the state commission for human rights created by this chapter.
III. "Covered multifamily dwellings" means:
(a) Buildings consisting of 4 or more units if such buildings have one or more elevators; and
(b) Ground floor units in other buildings consisting of 4 or more units.
IV. "Disability" means, with respect to a person:
(a) A physical or mental impairment which substantially limits one or more of such person's major life activities;
(b) A record of having such an impairment; or
(c) Being regarded as having such an impairment.
Provided, that "disability" does not include current, illegal use of or addiction to a controlled substance as defined in the Controlled Substances Act (21 U.S.C. 802 sec. 102).
V. "Dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.
VI. "Employee" does not include any individual employed by a parent, spouse or child, or any individual in the domestic service of any person.
VII. "Employer" does not include any employer with fewer than 6 persons in its employ, an exclusively social club, or a fraternal or religious association or corporation, if such club, association, or corporation is not organized for private profit, as evidenced by declarations filed with the Internal Revenue Service or for those not recognized by the Internal Revenue Service, those organizations recognized by the New Hampshire secretary of state. Entities claiming to be religious organizations, including religious educational entities, may file a good faith declaration with the human rights commission that the organization is an organization affiliated with, or its operations are in accordance with the doctrine and teaching of a recognized and organized religion to provide evidence of their religious status. "Employer" shall include the state and all

political subdivisions, boards, departments, and commissions thereof.
VIII. "Employment agency" includes any person undertaking to procure employees or opportunities to work.
IX. "Familial status" means one or more individuals, who have not attained the age of 18 years of age, and are domiciled with:
(a) A parent, grandparent or another person having legal custody of such individual or individuals; or
(b) The designee of such parent or other person having such custody, with the written permission of such parent or other person.
"Familial status" also means any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.
X. "Labor organization" includes any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection in connection with employment.
XI. "Multiple dwelling" means 2 or more dwellings, as defined in paragraph V, occupied by families living independently of each other.
XII. "National origin" includes ancestry.
XIII. "Person" includes one or more individuals, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, trustees in bankruptcy, receivers, and the state and all political subdivisions, boards, and commissions thereof.
XIV. "Place of public accommodation" includes any inn, tavern or hotel, whether conducted for entertainment, the housing or lodging of transient guests, or for the benefit, use or accommodations of those seeking health, recreation or rest, any restaurant, eating house, public conveyance on land or water, bathhouse, barbershop, theater, golf course, sports arena, health care provider, and music or other public hall, store or other establishment which caters or offers its services or facilities or goods to the general public. "Public accommodation" shall not include any institution or club which is in its nature distinctly private.
XIV-a. "Qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this chapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.
XIV-b. "Reasonable accommodation" may include:
(a) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities.
(b) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.
XIV-c. "Sexual orientation" means having or being perceived as having an orientation for heterosexuality, bisexuality, or homosexuality. This definition is intended to describe the status of persons and does not render lawful any conduct prohibited by the criminal laws of this state or impose any duty on a religious organization. This definition does not confer legislative approval of such status, but is intended to assure basic rights afforded under this chapter.
XIV-d. "Undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in this paragraph. In determining whether an accommodation would impose an undue hardship on an employer, factors to be considered include:
(a) The nature and cost of the accommodation needed under this chapter.
(b) The overall financial resources of the facility involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility.
(c) The overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; and the number, type, and location of its facilities.
(d) The type of operation or operations of the employer, including the composition, structure, and functions of the workforce of such employer; the geographic separateness, administrative, or fiscal relationship of the facility in question to the employer.
XIV-e. "Gender identity" means a person's gender-related identity, appearance, or behavior, whether or not that gender-related identity, appearance, or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth. Gender-related identity may be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity, or any other evidence that the gender-related identity is sincerely held as part of a person's core identity provided, however, that gender-related identity shall not be asserted for any improper purpose.
XV. "Unlawful discriminatory practice" includes:

(a) Practices prohibited by RSA 354-A;

(b) Practices prohibited by the federal Civil Rights Act of 1964, as amended (PL 88-352);
(c) Practices prohibited by Title VIII of the Civil Rights Act of 1968, as amended (42 U.S.C. Â§Â§ 3601-3619);
(d) Aiding, abetting, inciting, compelling or coercing another or attempting to aid, abet, incite, compel or coerce another to commit an unlawful discriminatory practice or obstructing or preventing any person from complying with this chapter or any order issued under the authority of this chapter.

**Source.** 1992, 224:1. 1997, 108:9. 2006, 181:1, eff. Jan. 1, 2007; 274:1, eff. July 1, 2006. 2018, 176:2, eff. July 8, 2018.

## Section 354-A:3

**354-A:3 State Commission for Human Rights. –**
I. There is hereby created a commission to be known as the New Hampshire commission for human rights, which shall be administratively attached to the department of justice pursuant to RSA 21-G:10. Such commission shall consist of 7 members, who shall be appointed by the governor, with the consent of the council, and one of whom shall be designated as chair by the governor. The term of office of each member of the commission shall be for 5 years.
II. Any member chosen to fill a vacancy occurring otherwise than by expiration of term shall be appointed for the unexpired term of the member who is to be succeeded. Four members of the commission shall constitute a quorum for the purpose of conducting the commission's business, with the exception of hearings conducted pursuant to RSA 354-A:21, II(b). A vacancy in the commission shall not impair the right of the remaining members to exercise all the powers of the commission. Each member of the commission shall be entitled to expenses actually and necessarily incurred by the member in the performance of the member's duties.
III. Any member of the commission may be removed by the governor and council for inefficiency, neglect of duty, misconduct or malfeasance in office, after being given a written statement of the charges and an opportunity to be heard.

**Source.** 1992, 224:1. 2000, 277:1, eff. June 16, 2000. 2019, 346:54, eff. July 1, 2019.

## Section 354-A:4

**354-A:4 General Powers and Duties of the Chair. –** The chair shall serve as the chief executive officer of the commission. The chair shall promote the efficient transaction of its business and the orderly handling of complaints and other matters before the commission. The chair shall designate commissioners to investigate and commissioners to hold hearings pursuant to RSA 354-A:21 and shall fix the times and places of public hearings. In the event of the chair's absence or inability to act, the vice-chair, or if no vice-chair has been designated, a commissioner designated by the chair shall act in the chair's stead. Otherwise a commissioner shall be designated by the governor to act as chair.

**Source.** 1992, 224:1, eff. May 13, 1992.

## Section 354-A:5

**354-A:5 General Powers and Duties of the Commission. –**
The commission shall have the following functions, powers and duties:
I. To establish and maintain its principal office in the city of Concord, and such other offices within the state as it may deem necessary.
II. To meet and function any place within the state.
III. To appoint such attorneys, clerks, and other employees and agents as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.
IV. To obtain upon request and utilize the services of all governmental departments and agencies.
V. To adopt rules, under RSA 541-A, suitable to carry out the provisions of this chapter, and the policies and practices of the commission in connection therewith.
VI. To receive, investigate and pass upon complaints alleging violations of this chapter.
VII. To hold hearings, subpoena witnesses, compel their attendance, administer oaths, take the testimony of persons under oath, and, in connection therewith, require the production for examination of any books or papers relating to any matter under investigation or in question before the commission. The commission may make rules as to the issuance of subpoenas by individual commissioners. No person shall be excused from attending and testifying or from producing books, records, correspondence, documents or other evidence in obedience to the subpoena of the commission, on the ground that the testimony or evidence required may tend to incriminate or subject such person to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which such person is compelled, after having claimed the privilege against self-incrimination, to testify or produce evidence,

except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.
VIII. To create such advisory agencies and conciliation councils, local, regional or statewide, as in its judgment will aid in effectuating the purpose of this chapter, and the commission may empower them to study the problems of discrimination in all or specific fields of human relationships or in specific instances of discrimination, because of age, sex, gender identity, race, color, sexual orientation, marital status, familial status, or physical or mental disability, religious creed or national origin, in order to foster, through community effort or otherwise, good will, cooperation and conciliation among the groups and elements of the population of the state, and make recommendations to the commission for the development of policies and procedures in general and in specific instances, and for programs of formal and informal education which the commission may recommend to the appropriate state agency. Such advisory agencies and conciliation councils shall be composed of representative citizens, serving without pay, but with reimbursement for actual and necessary traveling expenses; and the commission may make provision for technical clerical assistance to such agencies and councils and for the expenses of such assistance.
IX. To issue such publications and such results of investigations and research as in its judgment will tend to promote good will and minimize or eliminate discrimination because of age, sex, gender identity, race, color, marital status, familial status, physical or mental disability, religious creed or national origin, and on account of sexual orientation.
X. To render biennially to the governor and council a full written report of its activities and of its recommendations.
XI. To adopt an official seal.
XII. To accept and utilize for its purposes, functions and duties as set forth in this chapter public and private grants, gifts, donations and contributions of money and other assets and properties, real and personal, of all types and kinds, without limitations.
XIII. To formulate policies to effectuate the purposes of this chapter and make recommendations to agencies and officers of the state or its political subdivisions in aid of such policies and purposes.
XIV. To utilize the services of the department of justice to obtain injunctive relief in state and federal courts.
XV. To charge reasonable fees for educational services, programs, publications, and other written materials.

**Source.** 1992, 224:1. 1997, 108:10. 2000, 277:2, eff. June 16, 2000. 2018, 176:3, eff. July 8, 2018.

# Equal Employment Opportunity

## Section 354-A:6

**354-A:6 Opportunity for Employment Without Discrimination a Civil Right. –** The opportunity to obtain employment without discrimination because of age, sex, gender identity, race, creed, color, marital status, physical or mental disability or national origin is hereby recognized and declared to be a civil right. In addition, no person shall be denied the benefits of the rights afforded by this section on account of that person's sexual orientation.

**Source.** 1992, 224:1. 1997, 108:11, eff. Jan. 1, 1998. 2018, 176:4, eff. July 8, 2018.

## Section 354-A:7

**354-A:7 Unlawful Discriminatory Practices. –**
It shall be an unlawful discriminatory practice:
I. For an employer, because of the age, sex, gender identity, race, color, marital status, physical or mental disability, religious creed, or national origin of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification. In addition, no person shall be denied the benefit of the rights afforded by this paragraph on account of that person's sexual orientation.
II. For a labor organization, because of the age, sex, gender identity, race, color, marital status, physical or mental disability, creed, or national origin of any individual, to exclude from full membership rights or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer, unless based upon a bona fide occupational qualification. In addition, no person shall be denied the benefit of the rights afforded by this paragraph on account of that person's sexual orientation.
III. For any employer or employment agency to print or circulate or to cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry or record in connection with employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to age, sex, gender identity, race, color, marital status, physical or mental disability, religious creed or national origin or any

intent to make any such limitation, specification or discrimination in any way on the ground of age, sex, gender identity, race, color, marital status, physical or mental disability, religious creed or national origin, unless based upon a bona fide occupational qualification; provided, however, that nothing in this chapter shall limit an employer after the offer of hire of an individual from inquiring into and keeping records of any existing or pre-existing physical or mental conditions. In addition, no person shall be denied the benefit of the rights afforded by this paragraph on account of that person's sexual orientation.

IV. For any employee to be required, as a condition of employment, to retire upon or before reaching a specified predetermined chronological age, or after completion of a specified number of years of service unless such employee was elected or appointed for a specified term or required to retire pursuant to Pt. II, Art. 78 of the constitution of New Hampshire. It shall not be unlawful for an employer to:

(a) Establish a normal retirement age, based on chronological age or length of service or both, which may be used to govern eligibility for and accrual of pension or other retirement benefits; provided that such normal retirement age shall not be used to justify retirement of or failure to hire any individual; or

(b) Require any individual employee to retire on the basis of a finding that the employee can no longer meet such bona fide, reasonable standards of job performance as the employer may have established.

V. Harassment on the basis of sex constitutes unlawful sex discrimination. Unwelcome sexual advances, requests for sexual favors, and other verbal, non-verbal or physical conduct of a sexual nature constitutes sexual harassment when:

(a) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

(b) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

(c) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

VI. (a) For the purposes of this chapter, the word "sex" includes pregnancy and medical conditions which result from pregnancy.

(b) An employer shall permit a female employee to take leave of absence for the period of temporary physical disability resulting from pregnancy, childbirth or related medical conditions. When the employee is physically able to return to work, her original job or a comparable position shall be made available to her by the employer unless business necessity makes this impossible or unreasonable.

(c) For all other employment related purposes, including receipt of benefits under fringe benefit programs, pregnancy, childbirth, and related medical conditions shall be considered temporary disabilities, and a female employee affected by pregnancy, childbirth, or related medical conditions shall be treated in the same manner as any employee affected by any other temporary disability.

VII. (a) For any employer not to make reasonable accommodations for the known physical or mental limitations of a qualified individual with a disability who is an applicant or employee, unless such employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employer.

(b) For any employer to deny employment opportunities, compensation, terms, conditions, or privileges of employment to a job applicant or employee who is a qualified individual with a disability, if such denial is based on the need of such employer to make reasonable accommodation to the physical or mental impairments of the applicant or employee.

**Source.** 1992, 224:1. 1997, 108:12. 2006, 181:2, eff. Jan. 1, 2007. 2018, 176:5, eff. July 8, 2018. 2019, 332:22, eff. Oct. 15, 2019.

# Fair Housing

## Section 354-A:8

**354-A:8 Equal Housing Opportunity Without Discrimination a Civil Right. –** The opportunity to obtain housing without discrimination because of age, sex, gender identity, race, creed, color, marital status, familial status, physical or mental disability or national origin is hereby recognized and declared a civil right. In addition, no person shall be denied the benefit of the rights afforded by this section on account of that person's sexual orientation.

**Source.** 1992, 224:1. 1997, 108:13, eff. Jan. 1, 1998. 2018, 176:6, eff. July 8, 2018.

## Section 354-A:9

**354-A:9 Definitions. –**

For the purposes of this subdivision:

I. "Business of selling or renting dwellings" means:
(a) Participation, within the preceding 12 months, as principal in 3 or more transactions involving the sale or rental of any dwelling or commercial structure or any interest therein;
(b) Participation, within the preceding 12 months, as agent, other than in the sale of one's own personal residence, in providing sales or rental facilities or sales or rental services in 2 or more transactions involving the sale or rental of any dwelling or commercial structure or any interest therein; or
(c) Ownership of any dwelling designed or intended for occupancy by, or occupied by, 3 or more families.
II. "Residential real estate-related transaction" means any of the following:
(a) The making or purchasing of loans secured by residential real estate or providing other financial assistance for purchasing, constructing, improving, repairing, or maintaining a dwelling.
(b) The selling, brokering, or appraising of residential real property.

**Source.** 1992, 224:1, eff. May 13, 1992.

## Section 354-A:10

**354-A:10 Unlawful Discriminatory Practices. –**
It shall be an unlawful discriminatory practice for any person, being the owner, lessee, sublessee, assignee, managing agent or other person having the right to rent or lease a dwelling or commercial structure or being in the business of selling or renting dwellings or commercial structures:
I. To refuse to sell or rent after the receipt of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling or commercial structure to any person because of age, sex, gender identity, race, color, marital status, familial status, physical or mental disability, religion or national origin. In addition, no person shall be denied the benefit of the rights afforded by this paragraph on account of that person's sexual orientation.
II. Discriminate against any person in the terms, conditions, or privilege of sale or rental of a dwelling or commercial structure, or in the provision of services or facilities in connection therewith, because of age, sex, gender identity, race, color, marital status, familial status, physical or mental disability, religion or national origin. In addition, no person shall be denied the benefit of the rights afforded by this paragraph on account of that person's sexual orientation.
III. To make, print or publish, or cause to be made, printed or published, any notice, statement or advertisement, with respect to the sale or rental of a dwelling or commercial structure that indicates any preference, limitation, or discrimination based on age, sex, gender identity, race, color, marital status, familial status, physical or mental disability, religion or national origin, or an intention to make any such preference, limitation or discrimination. In addition, no person shall be denied the benefit of the rights afforded by this paragraph on account of that person's sexual orientation.
IV. To represent to any person because of age, sex, gender identity, race, color, marital status, familial status, physical or mental disability, religion or national origin that any dwelling or commercial structure is not available for inspection, sale, or rental when such dwelling is in fact so available. In addition, no person shall be denied the benefit of the rights afforded by this paragraph on account of that person's sexual orientation.
V. For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular age, sex, gender identity, race, color, marital status, familial status, physical or mental disability, religion or national origin. In addition, no person shall be denied the benefit of the rights afforded by this paragraph on account of that person's sexual orientation.
VI. To evict a tenant solely on the grounds that the person has acquired immune deficiency syndrome (AIDS) or is regarded to have acquired immune deficiency syndrome.
VII. For any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of age, race, color, religion, sex, gender identity, disability, familial status, marital status, or national origin. In addition, no person shall be denied the benefit of the rights afforded by this paragraph on account of that person's sexual orientation.
VIII. To deny any person access to, or membership or participation in, any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against that person in the terms or conditions of such access, membership, or participation, on account of age, familial status, sex, gender identity, race, color, creed, disability, national origin, marital status, or sexual orientation.

**Source.** 1992, 224:1. 1997, 108:14. 2006, 126:1, eff. July 1, 2006. 2018, 176:7, eff. July 8, 2018.

## Section 354-A:11

**354-A:11 Interference, Coercion or Intimidation. –** It shall be an unlawful discriminatory act to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of having exercised or enjoyed, or on account of having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this chapter.

**Source.** 1992, 224:1, eff. May 13, 1992.

## Section 354-A:12

**354-A:12 Unlawful Housing Discrimination on the Basis of Disability. –**
It shall be unlawful:
I. To discriminate in the sale or rental, or to otherwise make unavailable or deny a dwelling to any buyer or renter because of a disability of:
(a) That buyer or renter.
(b) A person residing in or intending to reside in that dwelling after it is so sold, rented, or made available.
(c) Any person associated with that buyer or renter.
II. To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a disability of:
(a) That person.
(b) A person residing in or intending to reside in that dwelling after it is so sold, rented, or made available.
(c) Any person associated with that person.
III. For purposes of this section, "discrimination" includes:
(a) A refusal to permit, at the expense of the person with a disability, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises, except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.
(b) A refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.
(c) In connection with the design and construction of covered multifamily dwellings for first occupancy after March 13, 1991, a failure to design and construct those dwellings in such a manner that:
(1) The public use and common use portions of such dwellings are readily accessible to and usable by persons with disabilities;
(2) All the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by disabled persons in wheelchairs; and
(3) All premises within such dwellings contain the features of adaptive design, including: an accessible route into and through the dwelling; light switches, electrical outlets, thermostats, and other environmental controls in accessible locations; reinforcements in bathroom walls to allow later installation of grab bars; and usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.
IV. Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically disabled people (commonly cited as "ANSI A117.1") suffices to satisfy the requirements of subparagraph III(c)(3).
V. Nothing in this section requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

**Source.** 1992, 224:1. 2006, 126:2, eff. July 1, 2006.

## Section 354-A:13

**354-A:13 Exemptions. –**
I. The provisions relating to unlawful housing discrimination shall not apply:
(a) To the sale or rental of any single-family house sold or rented by the owner, if such owner does not own more than one such single-family house at any one time, if such house is sold or rented:
(1) Without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person; and
(2) Without the publication, posting or mailing, after notice, of any advertising or written notice in violation of RSA 354-

A:10, III above; but nothing in this paragraph shall prohibit the use of attorneys, escrow agents, abstracters, title companies, and other such professional assistance as necessary to perfect or transfer the title; or
(b) To the rental of a housing accommodation in a building which contains housing accommodations for not more than 3 families living independently of each other, if the owner or members of his family reside in one of such housing accommodations; or
(c) To the rental of a room or rooms in a housing accommodation with not more than 5 such rooms, if such rental is by the occupant of the housing accommodation or by the owner of the housing accommodation and the owner or members of the owner's family reside in such housing accommodation.
II. Nothing in this chapter shall prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin.
III. Nothing in this chapter shall prohibit a private club not in fact open to the public, which as an incident to its primary purpose or purposes provides lodging which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members.

**Source.** 1992, 224:1, eff. May 13, 1992.

## Section 354-A:14

**354-A:14 Number of Occupants. –** Nothing in this chapter limits the applicability of any reasonable local, state or federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.

**Source.** 1992, 224:1, eff. May 13, 1992.

## Section 354-A:15

**354-A:15 Housing for Older Persons. –**
No provisions in this chapter regarding familial status or age apply with respect to housing for older persons. Housing for older persons means housing:
I. Provided under any state or federal program that the Secretary of the United States Department of Housing and Urban Development determines is specifically designed and operated to assist elderly persons as defined in the state or federal program;
II. Intended for, and solely occupied by, persons 62 years of age or older; or
III. Intended and operated for occupancy by at least one person 55 years or older per unit.
IV. In determining whether housing qualifies as housing for persons 55 years or older, the commission shall adopt rules which require at least the following factors:
(a) The existence of significant facilities and services specifically designed to meet the physical or social needs of older persons, or if the provision of such facilities and service is not practicable, that such housing is necessary to provide important housing opportunities for older persons;
(b) That at least 80 percent of the units are occupied by at least one person 55 years of age or older per unit; and
(c) The publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older.
V. Housing shall not fail to meet the requirements for housing for older persons by reason of:
(a) Persons residing in such housing as of September 13, 1988, who do not meet the age requirements of paragraphs II or III, provided, that new occupants of such housing meet the age requirements of paragraph II or III.
(b) Unoccupied units, provided, that such units are reserved for occupancy by persons who meet the age requirements of paragraph II or III.
VI. Any rule concerning the exemption available under this section shall be consistent with federal law. In adopting such rules, the commission shall be guided by applicable federal regulations and interpretations concerning housing for older persons under 42 U.S.C. section 3607(b).
VII. Housing for older persons as defined in this section shall comply with the provisions of RSA 161-M.

**Source.** 1992, 224:1. 2003, 58:1, eff. Jan. 1, 2004. 2014, 203:4, eff. Jan. 1, 2015.

## Section 354-A:16

**354-A:16 Equal Access to Public Accommodations a Civil Right. –** The opportunity for every individual to have equal access to places of public accommodation without discrimination because of age, sex, gender identity, race, creed, color, marital status, physical or mental disability or national origin is hereby recognized and declared to be a civil right. In addition, no person shall be denied the benefit of the rights afforded by this section on account of that person's sexual orientation.

**Source.** 1992, 224:1. 1997, 108:15, eff. Jan. 1, 1998. 2018, 176:8, eff. July 8, 2018.

## Section 354-A:17

**354-A:17 Unlawful Discriminatory Practices in Public Accommodations. –** It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, because of the age, sex, gender identity, race, creed, color, marital status, physical or mental disability or national origin of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof; or, directly or indirectly, to publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of age, sex, gender identity, race, creed, color, marital status, physical or mental disability or national origin; or that the patronage or custom thereat of any person belonging to or purporting to be of any particular age, sex, gender identity, race, creed, color, marital status, physical or mental disability or national origin is unwelcome, objectionable or acceptable, desired or solicited. In addition, no person shall be denied the benefit of the rights afforded by this section on account of that person's sexual orientation.

**Source.** 1992, 224:1. 1997, 108:15, eff. Jan. 1, 1998. 2018, 176:9, eff. July 8, 2018. 2019, 332:2, eff. Oct. 15, 2019.

# Exemption

## Section 354-A:18

**354-A:18 Exemption for Religious Organizations. –** Nothing contained in this chapter shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.

**Source.** 1992, 224:1, eff. May 13, 1992.

# Retaliation

## Section 354-A:19

**354-A:19 Retaliation and Required Records. –** It shall be an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to discharge, expel, or otherwise retaliate or discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under this chapter.

**Source.** 1992, 224:1, eff. May 13, 1992.

# Records

## Section 354-A:20

**354-A:20 Required Records. –** It shall not be an unlawful discriminatory practice to record any data required by law, or by the rules and regulations of any state or federal agency, provided such records are kept in good faith for the purpose of complying with law, and are not used for the purpose of discrimination in violation of this chapter.

**Source.** 1992, 224:1, eff. May 13, 1992.

# Complaint Procedures and Review

## Section 354-A:21

**354-A:21 Procedure on Complaints. –**

I. (a) Any person claiming to be aggrieved by an unlawful discriminatory practice may make, sign and file with the commission a verified complaint in writing which shall state the name and address of the person, employer, labor organization, employment agency or public accommodation alleged to have committed the unlawful discriminatory practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the commission. The attorney general or one of the commissioners may, in like manner, make, sign, and file such complaint.

(b) In connection with the filing of such complaint, the attorney general is authorized to take proof, issue subpoenas and administer oaths in the manner provided in the civil practice law and rules. Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this chapter, may file with the commission a verified complaint asking for assistance by conciliation or other remedial action.

II. (a) After the filing of any complaint, one of the commissioners designated by the chair shall make, with the assistance of the commission's staff, prompt investigation in connection therewith; during the course of the investigation, the commission shall encourage the parties to resolve their differences through settlement negotiations; and if such commissioner shall determine after such investigation that probable cause exists for crediting the allegations of the complaint, the commissioner shall immediately endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation and persuasion. The members of the commission and its staff shall not disclose what has occurred in the course of such endeavors, provided that the commission may publish the facts in the case of any complaint which has been dismissed, and the terms of conciliation when the complaint has been so disposed of. When the investigating commissioner finds no probable cause to credit the allegations in the complaint, the complaint shall be dismissed, subject to a right of appeal to superior court. To prevail on appeal, the moving party shall establish that the commission decision is unlawful or unreasonable by a clear preponderance of the evidence. The findings of the investigating commissioner upon questions of fact shall be upheld as long as the record contains credible evidence to support them. If it reverses the finding of the investigating commissioner, the superior court shall remand the case for further proceedings in accordance with RSA 354-A:21, II, unless the complainant or respondent elects to proceed with a hearing in superior court pursuant to RSA 354-A:21-a.

(b) In case of failure to eliminate an unlawful discriminatory practice complained of, or in advance thereof, if, in the judgment of the commissioner making the investigation, circumstances so warrant, the commissioner shall cause to be issued and served in the name of the commission, a written notice, together with a copy of such complaint, as the same may have been amended, requiring the person, employer, labor organization or employment agency named in such complaint, hereinafter referred to as respondent, to answer charges of such complaint at a hearing before 3 members of the commission, designated by the chair and sitting as the commission, at a time and place to be fixed by the chair and specified in such notice. The place of any such hearing shall be the office of the commission or such other place as may be designated by it.

(c) The case in support of the complaint may be presented before the commission by the complainant or complainant's representative and the commissioner who shall have previously made the investigation and caused the notice to be issued shall not participate in the hearing except as a witness, nor shall he participate in the subsequent deliberation of the commission in such case; and the aforesaid endeavors at conciliation shall not be received in evidence. The respondent shall file a written verified answer to the complaint and appear at such hearing in person or otherwise, with or without counsel, and submit testimony. The commission or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent shall have like power to amend his other answer. The commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and transcribed at the request of any party. The cost of transcription shall be borne by the party requesting the transcript unless the party is indigent, in which case the commission shall pay the cost.

(d) If, upon all the evidence at the hearing, the commission shall find that a respondent has engaged in any unlawful discriminatory practice as defined in this chapter, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, restoration to membership in any respondent labor organization, or the extension of full, equal and

unsegregated accommodations, advantages, facilities and privileges to all persons, as in the judgment of the commission, will effectuate the purpose of this chapter and including a requirement for report of the manner of compliance. Such cease and desist orders for affirmative relief may be issued to operate prospectively. The commission may also order compensatory damages to be paid to the complainant by the respondent and, in order to vindicate the public interest, order the respondent to pay an administrative fine. The administrative fine shall be deposited in the general fund. The amount of the administrative fine shall not exceed:
(1) $10,000 if the respondent has not been adjudged to have committed any prior discriminatory practice in any administrative hearing or civil action.
(2) $25,000 if the respondent has been adjudged to have committed a prior discriminatory practice in any administrative hearing or civil action and the adjudication was made no more than 5 years prior to the date of filing the current charge.
(3) $50,000 if the respondent has been adjudged to have committed 2 or more discriminatory practices in any administrative hearings or civil actions and the adjudications were made during the 7-year period preceding the date of filing of the charge.
(e) When issuing an order awarding back pay, the commission shall calculate the back pay award by determining the amount the complainant would have earned but for the unlawful discriminatory practice. The commission shall subtract from that amount any unemployment compensation or interim earnings received by the complainant for the time period covered by the back pay award.
(f) If upon all the evidence the commission shall find that a respondent has not engaged in any such unlawful discriminatory practice, the commission shall state its findings of fact and shall issue and cause to be served on the complainant an order dismissing the said complaint as to such respondent. A copy of its order shall be delivered in all cases to the attorney general, and such other public officers as the commission deems relevant or proper. The commission shall establish rules of practice to govern, expedite, and effectuate the foregoing procedure and its own actions thereunder.
III. Any complaint filed pursuant to this section by an aggrieved person must be filed within 180 days after the alleged act of discrimination. Any complaint filed pursuant to this section by the attorney general or one of the commissioners must be so filed within 180 days after the alleged unlawful discriminatory practice.
IV. In administering this section, the commission shall be exempt from the provisions of RSA 541-A:29, II, but shall close each case or commence adjudicative proceedings on such case under RSA 354-A:21 within 24 months after the filing date of the complaint.

**Source.** 1992, 224:1-3. 1994, 251:3; 412:44. 2000, 277:3, 4, 5. 2006, 126:3, 4, eff. July 1, 2006.

## Section 354-A:21-a

**354-A:21-a Choice of Forum. –**
I. Any party alleging to be aggrieved by any practice made unlawful under this chapter may, at the expiration of 180 days after the timely filing of a complaint with the commission, or sooner if the commission assents in writing, but not later than 3 years after the alleged unlawful practice occurred, bring a civil action for damages or injunctive relief or both, in the superior court for the county in which the alleged unlawful practice occurred or in the county of residence of the party. Any party alleged to have committed any practice made unlawful under this chapter may, in any case in which a determination of probable cause has been made by the investigating commissioner, remove said complaint to superior court for trial. A court in cases so removed may award all damages and relief which could have been awarded by the commission, except that in lieu of an administrative fine, enhanced compensatory damages may be awarded when the court finds the respondent's discriminatory conduct to have been taken with willful or reckless disregard of the charging party's rights under this chapter. A superior court trial shall not be available to any party if a hearing before the commission has begun or has concluded pursuant to RSA 354-A:21, II(b), or to a complainant whose charge has been dismissed as lacking in probable cause who has not prevailed on an appeal to superior court pursuant to RSA 354-A:21, II(a). In superior court, either party is entitled to a trial by jury on any issue of fact in an action for damages regardless of whether the complaining party seeks affirmative relief.
II. The charging party shall notify the commission of the filing of any superior court action, and the respondent shall notify the commission of the removal to superior court after a finding of probable cause. After such notice, the commission shall dismiss the complaint without prejudice. A party electing to file a civil action with the superior court under paragraph I shall be barred from bringing any subsequent complaint before the commission based upon the same alleged unlawful discriminatory practice.
III. The commission may, after a finding of probable cause, bring suit in superior court at its own expense on behalf of an aggrieved person in housing discrimination cases.

**Source.** 2000, 277:6. 2006, 126:5, 6, eff. July 1, 2006.



## Section 354-A:22

**354-A:22 Judicial Review and Enforcement. –**
I. Any complainant, respondent or other person aggrieved by such order of the commission may obtain judicial review of the order, and the commission or any interested person may obtain an order of court for its enforcement, in a proceeding as provided in this section. Such proceeding shall be brought in the superior court of the state within any county in which the unlawful practice which is the subject of the commission's order occurs or in which any person required in the order to cease and desist from an unlawful practice or to take other affirmative action resides or transacts business.
II. Such proceeding shall be initiated by the filing of a petition in such court, together with a written transcript of the record upon the hearing before the commission in the case of a petition for judicial review, and issuance and service of a summons as in proceedings in equity. The court shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript an order or decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the commission, with full power to issue injunctions against any respondent and to punish for contempt of court. No objection that has not been urged before the commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. In petitions to enforce commission orders, the court may, in its discretion, award the complaining party reasonable attorney's fees and costs.
III. Any party may move the court to remit the case to the commission in the interests of justice for the purpose of adducing additional specified and material evidence and seeking findings thereon, or in the alternative to move the court to accept such additional evidence itself, provided he shows reasonable grounds for the failure to adduce such evidence before the commission. The superior court shall have the authority to make all rulings of law, findings of fact and determinations of damages and fines, if any, notwithstanding any such rulings, findings or determinations made by the commission. All such proceedings shall be heard and determined by the court as expeditiously as possible and shall take precedence over all other matters before it, except matters of like nature. The jurisdiction of the superior court shall be exclusive and its final order or decree shall be subject to review by the supreme court in the same manner and form and with the same effect as in appeals from a final order or decree in proceedings in equity.
IV. The commission's copy of the testimony shall be available at all reasonable times to all parties for examination and for the purposes of judicial review of the order of the commission. The review shall be heard on the record without requirement of printing. The commission may appear in court by one of its attorneys. A proceeding under this section when instituted by any complainant, respondent or other person aggrieved must be instituted within 30 days after the service of the order of the commission.
V. If the complainant brings an action in federal court arising out of the same claims of discrimination which formed the basis of an order or decision of the commission, such order or decision shall be vacated and any appeal therefrom pending in any state court shall be dismissed.

**Source.** 1992, 224:1, 4, 5. 2000, 277:7, eff. June 16, 2000. 2014, 204:12, eff. July 11, 2014.

# Miscellaneous Provisions

## Section 354-A:23

**354-A:23 Posting of Commission Notices. –** Every person, employer, employment agency, labor union, real estate agency and rental office subject to this chapter shall post in a conspicuous place or places on his premises a notice to be prepared or approved by the commission, which shall set forth excerpts of this chapter and such other relevant information which the commission deems necessary to explain the chapter. Any employer, employment agency, real estate agency, rental office or labor union refusing to comply with the provisions of this section shall be guilty of a violation if a natural person, or guilty of a misdemeanor if any other person.

**Source.** 1992, 224:1, eff. May 13, 1992.

## Section 354-A:24

**354-A:24 Criminal Penalty. –** Any person, employer, labor organization or employment agency, who or which shall willfully resist, prevent, impede or interfere with the commission or any of its members or representatives in the performance of duty under RSA 354-A, or shall willfully violate an order of the commission, shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person. Procedure for the review of the order shall not be deemed to be such willful conduct.



**Source.** 1992, 224:1, eff. May 13, 1992.

## Section 354-A:25

**354-A:25 Construction. –** No provision of this chapter shall be deemed to supersede any other provision of law for the protection of minors or for the regulation of the employment of minors. The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this chapter shall be deemed to repeal any of the provisions of the civil rights law or any other law of this state relating to discrimination because of age, sex, gender identity, race, creed, color, marital status, physical or mental disability or national origin; but, as to acts declared unlawful by this chapter the procedure provided in this chapter shall, while pending, be exclusive and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the individual concerned. If such individual institutes any action based on such grievance without resorting to the procedure provided in this chapter, such person may not subsequently resort to the procedure in this chapter, provided, however, that nothing in this section shall prevent any individual from applying for or receiving unemployment compensation while the procedure provided for in this chapter is pending or after the procedure provided in this chapter has been concluded. This section shall not prevent the commission for human rights from investigating and acting upon a complaint of discrimination when the complainant has also filed a claim for unemployment compensation in which the issue of illegal discrimination is raised.

**Source.** 1992, 224:1, eff. May 13, 1992. 2018, 176:10, eff. July 8, 2018.

## Section 354-A:26

**354-A:26 Severability. –** If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the chapter which can be given effect without the invalid provisions or applications, and to this end the provisions of this chapter are severable.

**Source.** 1992, 224:1, eff. May 13, 1992.

# Opportunity for Public Education Without Discrimination a Civil Right

## Section 354-A:27

**354-A:27 Opportunity for Public Education Without Discrimination a Civil Right. –** No person shall be excluded from participation in, denied the benefits of, or be subjected to discrimination in public schools because of their age, sex, gender identity, sexual orientation, race, color, marital status, familial status, disability, religion or national origin, all as defined in this chapter.

**Source.** 2019, 282:2, eff. Sept. 17, 2019.

## Section 354-A:28

**354-A:28 Procedure on Public School Complaints. –**

I. Any person claiming to be aggrieved by a discriminatory practice prohibited under RSA 354-A:27 may initiate a civil action in superior court against a school or school district for legal or equitable relief, or file a complaint with the commission as provided in RSA 354-A:21. The attorney general may also initiate such a civil action in superior court or by complaint with the commission.

II. Any complaint filed with the commission pursuant to paragraph I shall comply with and be subject to the procedures outlined in this chapter, with the exception that such complaints may be removed to superior court at any time in compliance with RSA 508:4.

**Source.** 2019, 282:2, eff. Sept. 17, 2019.

AMERICANS WITH DISABILITIES ACT OF 1990, AS AMENDED

Following is the current text of the Americans with Disabilities Act of 1990 (ADA), including changes made by the ADA Amendments Act of 2008 (P.L. 110-325), which became effective on January 1, 2009. The ADA was originally enacted in public law format and later rearranged and published in the United States Code. The United States Code is divided into titles and chapters that classify laws according to their subject matter. Titles I, II, III, and V of the original law are codified in Title 42, chapter 126, of the United States Code beginning at section 12101. Title IV of the original law is codified in Title 47, chapter 5, of the United States Code. Since this codification resulted in changes in the numbering system, the Table of Contents provides the section numbers of the ADA as originally enacted in brackets after the codified section numbers and headings.

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TITLE 42 - THE PUBLIC HEALTH AND WELFARE

CHAPTER 126 - EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

Sec. 12101. Findings and purpose

(a) Findings. The Congress finds that

(1) physical or mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, 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;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose. It is the purpose of this chapter

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Sec. 12101 note: Findings and Purposes of ADA Amendments Act of 2008, Pub. L. 110-325, § 2, Sept. 25, 2008, 122 Stat. 3553, provided that:

(a) Findings. Congress finds that

(1) in enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” and provide broad coverage;

(2) in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;

(3) while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled;

(4) the holdings of the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;

(5) the holding of the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;

(6) as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities;

(7) in particular, the Supreme Court, in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), interpreted the term "substantially limits" to require a greater degree of limitation than was intended by Congress; and

(8) Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term "substantially limits" as "significantly restricted" are inconsistent with congressional intent, by expressing too high a standard.

(b) Purposes. The purposes of this Act are

(1) to carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection to be available under the ADA;

(2) to reject the requirement enunciated by the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;

(3) to reject the Supreme Court's reasoning in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;

(4) to reject the standards enunciated by the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives";

(5) to convey congressional intent that the standard created by the Supreme Court in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) for "substantially limits", and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and

(6) to express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with this Act, including the amendments made by this Act.

Sec. 12102. Definition of disability

As used in this chapter:

(1) Disability. The term "disability" means, with respect to an individual

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

(2) Major Life Activities

(A) In general. For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions. For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(3) Regarded as having such an impairment. For purposes of paragraph (1)(C):

(A) An individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

(4) Rules of construction regarding the definition of disability. The definition of “disability” in paragraph (1) shall be construed in accordance with the following:

(A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.

(B) The term “substantially limits” shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E) (i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(iii) As used in this subparagraph

(I) the term “ordinary eyeglasses or contact lenses” means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

(II) the term “low-vision devices” means devices that magnify, enhance, or otherwise augment a visual image.

Sec. 12103. Additional definitions. As used in this chapter

(1) Auxiliary aids and services. The term “auxiliary aids and services” includes

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) State. The term “State” means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands of the United States, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

SUBCHAPTER I - EMPLOYMENT

Sec. 12111. Definitions

As used in this subchapter:

(1) Commission. The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity. The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee. The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general. The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions. The term "employer" does not include

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.

(6) Illegal use of drugs

(A) In general. The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs. The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C. 812].

(7) Person, etc. The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual. The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation. The term "reasonable accommodation" may include

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified

readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general. The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include

(i) the nature and cost of the accommodation needed under this chapter;

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

(iii) 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

(iv) 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.

Sec. 12112. Discrimination

(a) General rule. No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction. As used in subsection (a) of this section, the term “discriminate against a qualified individual on the basis of disability” includes

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration

(A) that have the effect of discrimination on the basis of disability;

(B) that perpetuates the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a

relationship or association;

(5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In general. It shall not be unlawful under this section for a covered entity to take any action that constitute discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation

(A) Presumption. If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception. This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination. For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general. The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry. Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry. A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination. A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries. A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries. A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement. Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

Sec. 12113. Defenses

(a) In general. It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards. The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) Qualification standards and tests related to uncorrected vision. Notwithstanding section 12102(4)(E)(ii), a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and consistent with business necessity.

(d) Religious entities

(1) In general. This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement. Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(e) List of infectious and communicable diseases

(1) In general. The Secretary of Health and Human Services, not later than 6 months after July 26, 1990, shall

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissibility to the general public.

Such list shall be updated annually.

(2) Applications. In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) Construction. Nothing in this chapter shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissibility published by the Secretary of Health and Human Services.

Sec. 12114. Illegal use of drugs and alcohol

(a) Qualified individual with a disability. For purposes of this subchapter, a qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction. Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) Authority of covered entity. A covered entity

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) Drug testing

(1) In general. For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction. Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) Transportation employees. Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c) of this section.

Sec. 12115. Posting notices

Every employer, employment agency, labor organization, or joint labor-management committee covered under this subchapter shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this chapter, in the manner prescribed by section 2000e-10 of this title.

Sec. 12116. Regulations

Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of title 5.

Sec. 12117. Enforcement

(a) Powers, remedies, and procedures. The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) Coordination. The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C. 701 et seq.] shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.

SUBCHAPTER II - PUBLIC SERVICES

Part A - Prohibition Against Discrimination and Other Generally Applicable Provisions

Sec. 12131. Definitions

As used in this subchapter:

(1) Public entity. The term "public entity" means

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of title 49).

(2) Qualified individual with a disability. The term "qualified individual with a disability" means an individual who, 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, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Sec. 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Sec. 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

Sec. 12134. Regulations

(a) In general. Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations. Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under section 794 of title 29.

(c) Standards. Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers

Compliance Board in accordance with section 12204(a) of this title.

Part B - Actions Applicable to Public Transportation Provided by Public Entities Considered Discriminatory

Subpart I - Public Transportation Other than by Aircraft or Certain Rail Operations

Sec. 12141. Definitions

As used in this subpart:

(1) Demand responsive system. The term "demand responsive system" means any system of providing designated public transportation which is not a fixed route system.

(2) Designated public transportation. The term "designated public transportation" means transportation (other than public school transportation) by bus, rail, or any other conveyance (other than transportation by aircraft or intercity or commuter rail transportation (as defined in section 12161 of this title)) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

(3) Fixed route system. The term "fixed route system" means a system of providing designated public transportation on which a vehicle is operated along a prescribed route according to a fixed schedule.

(4) Operates. The term "operates", as used with respect to a fixed route system or demand responsive system, includes operation of such system by a person under a contractual or other arrangement or relationship with a public entity.

(5) Public school transportation. The term "public school transportation" means transportation by school bus vehicles of schoolchildren, personnel, and equipment to and from a public elementary or secondary school and school-related activities.

(6) Secretary. The term "Secretary" means the Secretary of Transportation.

Sec. 12142. Public entities operating fixed route systems

(a) Purchase and lease of new vehicles. It shall be considered discrimination for purposes of section which operates a fixed route system to purchase or lease a new bus, a new rapid rail vehicle, a new light rail vehicle, or any other new vehicle to be used on such system, if the solicitation for such purchase or lease is made after the 30th day following July 26, 1990, and if such bus, rail vehicle, or other vehicle is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(b) Purchase and lease of used vehicles. Subject to subsection (c)(1) of this section, it shall be considered discrimination for purposes of section 12132 of this title and section 794 of title 29 for a public entity which operates a fixed route system to purchase or lease, after the 30th day following July 26, 1990, a used vehicle for use on such system unless such entity makes demonstrated good faith efforts to purchase or lease a used vehicle for use on such system that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(c) Remanufactured vehicles

(1) General rule. Except as provided in paragraph (2), it shall be considered discrimination for purposes of section 12132 of this title and section 794 of title 29 for a public entity which operates a fixed route system

(A) to remanufacture a vehicle for use on such system so as to extend its usable life for 5 years or more, which remanufacture begins (or for which the solicitation is made) after the 30th day following July 26, 1990; or

(B) to purchase or lease for use on such system a remanufactured vehicle which has been remanufactured so as to extend its usable life for 5 years or more, which purchase or lease occurs after such 30th day and during the period in which the usable life is extended; unless, after remanufacture, the vehicle is, to the maximum extent feasible, readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) Exception for historic vehicles

(A) General rule. If a public entity operates a fixed route system any segment of which is included on the National Register of Historic Places and if making a vehicle of historic character to be used solely on such segment readily accessible to and usable by individuals with disabilities would significantly alter the historic character of such vehicle, the public entity only has to make (or to purchase or lease a remanufactured vehicle with) those modifications which are necessary to meet the requirements of paragraph (1) and which do not significantly alter the historic character of such vehicle.

(B) Vehicles of historic character defined by regulations. For purposes of this paragraph and section 12148(a) of this title, a vehicle of historic character shall be defined by the regulations issued by the Secretary to carry out this subsection.

Sec. 12143. Paratransit as a complement to fixed route service

(a) General rule. It shall be considered discrimination for purposes of section 12132 of this title and section 794 of title 29 for a public entity which operates a fixed route system (other than a system which provides solely commuter bus service) to fail to provide with respect to the operations of its fixed route system, in accordance with this section, paratransit and other special transportation services to individuals with disabilities, including individuals who use wheelchairs that are sufficient to provide to such individuals a level of service

(1) which is comparable to the level of designated public transportation services provided to individuals without disabilities using such system; or

(2) in the case of response time, which is comparable, to the extent practicable, to the level of designated public transportation services provided to individuals without disabilities using such system.

(b) Issuance of regulations. Not later than 1 year after July 26, 1990, the Secretary shall issue final regulations to carry out this section.

(c) Required contents of regulations

(1) Eligible recipients of service. The regulations issued under this section shall require each public entity which operates a fixed route system to provide the paratransit and other special transportation services required under this section

(A) (i) to any individual with a disability who is unable, as a result of a physical or mental impairment (including a vision impairment) and without the assistance of another individual (except an operator of a wheelchair lift or other boarding assistance device), to board, ride, or disembark from any vehicle on the system which is readily accessible to and usable by individuals with disabilities;

(ii) to any individual with a disability who needs the assistance of a wheelchair lift or other boarding assistance device (and is able with such assistance) to board, ride, and disembark from any vehicle which is readily accessible to and usable by individuals with disabilities if the individual wants to travel on a route on the system during the hours of operation of the system at a time (or within a reasonable period of such time) when such a vehicle is not being used to provide designated public transportation on the route; and

(iii) to any individual with a disability who has a specific impairment-related condition which prevents such individual from traveling to a boarding location or from a disembarking location on such system;

(B) to one other individual accompanying the individual with the disability; and

(C) to other individuals, in addition to the one individual described in subparagraph (a), accompanying the individual with a disability provided that space for these additional individuals are available on the paratransit vehicle carrying the individual with a disability and that the transportation of such additional individuals will not result in a denial of service to individuals with disabilities.

For purposes of clauses (i) and (ii) of subparagraph (A), boarding or disembarking from a vehicle does not include travel to the boarding location or from the disembarking location.

(2) Service area. The regulations issued under this section shall require the provision of paratransit and special transportation services required under this section in the service area of each public entity which operates a fixed route system, other than any portion of the service area in which the public entity solely provides commuter bus service.

(3) Service criteria. Subject to paragraphs (1) and (2), the regulations issued under this section shall establish minimum service criteria for determining the level of services to be required under this section.

(4) Undue financial burden limitation. The regulations issued under this section shall provide that, if the public entity is able to demonstrate to the satisfaction of the Secretary that the provision of paratransit and other special transportation services otherwise required under this section would impose an undue financial burden on the public entity, the public entity, notwithstanding any other provision of this section (other than paragraph (5)), shall only be required to provide such services to the extent that providing such services would not impose such a burden.

(5) Additional services. The regulations issued under this section shall establish circumstances under which the Secretary may require a public entity to provide, notwithstanding paragraph (4), paratransit and other special transportation services under this section beyond the level of paratransit and other special transportation services which would otherwise be required under paragraph (4).

(6) Public participation. The regulations issued under this section shall require that each public entity which operates a fixed route system hold a public hearing, provide an opportunity for public comment, and consult with individuals with disabilities in preparing its plan under paragraph (7).

(7) Plans. The regulations issued under this section shall require that each public entity which operates a fixed route system

(A) within 18 months after July 26, 1990, submit to the Secretary, and commence implementation of, a plan for providing paratransit and other special transportation

services which meets the requirements of this section; and

(B) on an annual basis thereafter, submit to the Secretary, and commence implementation of, a plan for providing such services.

(8) Provision of services by others. The regulations issued under this section shall

(A) require that a public entity submitting a plan to the Secretary under this section identify in the plan any person or other public entity which is providing a paratransit or other special transportation service for individuals with disabilities in the service area to which the plan applies; and

(B) provide that the public entity submitting the plan does not have to provide under the plan such service for individuals with disabilities.

(9) Other provisions. The regulations issued under this section shall include such other provisions and requirements as the Secretary determines are necessary to carry out the objectives of this section.

(d) Review of plan

(1) General rule. The Secretary shall review a plan submitted under this section for the purpose of determining whether or not such plan meets the requirements of this section, including the regulations issued under this section.

(2) Disapproval. If the Secretary determines that a plan reviewed under this subsection fails to meet the requirements of this section, the Secretary shall disapprove the plan and notify the public entity which submitted the plan of such disapproval and the reasons therefor.

(3) Modification of disapproved plan. Not later than 90 days after the date of disapproval of a plan under this subsection, the public entity which submitted the plan shall modify the plan to meet the requirements of this section and shall submit to the Secretary, and commence implementation of, such modified plan.

(e) "Discrimination" defined. As used in subsection (a) of this section, the term "discrimination" includes

(1) a failure of a public entity to which the regulations issued under this section apply to submit, or commence implementation of, a plan in accordance with subsections (c)(6) and (c)(7) of this section;

(2) a failure of such entity to submit, or commence implementation of, a modified plan in accordance with subsection (d) (3) of this section;

(3) submission to the Secretary of a modified plan under subsection (d)(3) of this section which does not meet the requirements of this section; or

(4) a failure of such entity to provide paratransit or other special transportation services in accordance with the plan or modified plan the public entity submitted to the Secretary under this section.

(f) Statutory construction. Nothing in this section shall be construed as preventing a public entity

(1) from providing paratransit or other special transportation services at a level which is greater than the level of such services which are required by this section,

(2) from providing paratransit or other special transportation services in addition to those paratransit and special transportation services required by this section, or

(3) from providing such services to individuals in addition to those individuals to whom such services are required to be provided by this section.

Sec. 12144. Public entity operating a demand responsive system

If a public entity operates a demand responsive system, it shall be considered discrimination, for purposes of section 12132 of this title and section 794 of title 29, for such entity to purchase or lease a new vehicle for use on such system, for which a solicitation is made after the 30th day following July 26, 1990, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless such system, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service such system provides to individuals without disabilities.

Sec. 12145. Temporary relief where lifts are unavailable

(a) Granting. With respect to the purchase of new buses, a public entity may apply for, and the Secretary may temporarily relieve such public entity from the obligation under section 12142(a) or 12144 of this title to purchase new buses that are readily accessible to and usable by individuals with disabilities if such public entity demonstrates to the satisfaction of the Secretary

(1) that the initial solicitation for new buses made by the public entity specified that all new buses were to be lift-equipped and were to be otherwise accessible to and usable by individuals with disabilities;

(2) the unavailability from any qualified manufacturer of hydraulic, electromechanical, or other lifts for such new buses;

(3) that the public entity seeking temporary relief has made good faith efforts to locate a qualified manufacturer to supply the lifts to the manufacturer of such buses in sufficient time to comply with such solicitation; and

(4) that any further delay in purchasing new buses necessary to obtain such lifts would significantly impair transportation services in the community served by the public entity.

(b) Duration and notice to Congress. Any relief granted under subsection (a) of this section shall be limited in duration by a specified date, and the appropriate committees of Congress shall be notified of any such relief granted.

(c) Fraudulent application. If, at any time, the Secretary has reasonable cause to believe that any relief granted under subsection (a) of this section was fraudulently applied for, the Secretary shall

(1) cancel such relief if such relief is still in effect; and

(2) take such other action as the Secretary considers appropriate.

Sec. 12146. New facilities

For purposes of section 12132 of this title and section 794 of title 29, it shall be considered discrimination for a public entity to construct a new facility to be used in the provision of designated public transportation services unless such facility is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

Sec. 12147. Alterations of existing facilities

(a) General rule. With respect to alterations of an existing facility or part thereof used in the provision of designated public transportation services that affect or could affect the usability of the facility or part thereof, it shall be considered discrimination, for purposes of section 12132 of this title and section 794 of title 29, for a public entity to fail to make such alterations (or to ensure that the alterations are made) in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations. Where the public entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations, where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(b) Special rule for stations

(1) General rule. For purposes of section 12132 of this title and section 794 of title 29, it shall be considered discrimination for a public entity that provides designated public transportation to fail, in accordance with the provisions of this subsection, to make key stations (as determined under criteria established by the Secretary by regulation) in rapid rail and light rail systems readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) Rapid rail and light rail key stations

(A) Accessibility. Except as otherwise provided in this paragraph, all key stations (as determined under criteria established by the Secretary by regulation] in rapid rail and light rail systems shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than the last day of the 3-year period beginning on July 26, 1990.

(B) Extension for extraordinarily expensive structural changes. The Secretary may extend the 3-year period under subparagraph (A) up to a 30-year period for key stations in a rapid rail or light rail system which stations need extraordinarily expensive structural changes to, or replacement of, existing facilities; except that by the last day of the 20th year following July 26, 1990, at least 2/3 of such key stations must be readily accessible to and usable by individuals with disabilities.

(3) Plans and milestones. The Secretary shall require the appropriate public entity to develop and submit to the Secretary a plan for compliance with this subsection

(A) that reflects consultation with individuals with disabilities affected by such plan and the results of a public hearing and public comments on such plan, and

(B) that establishes milestones for achievement of the requirements of this subsection.

Sec. 12148. Public transportation programs and activities in existing facilities and one car per train rule

(a) Public transportation programs and activities in existing facilities

(1) In general. With respect to existing facilities used in the provision of designated public transportation services, it shall be considered discrimination, for purposes of section 12132 of

this title and section 794 of title 29, for a public entity to fail to operate a designated public transportation program or activity conducted in such facilities so that, when viewed in the entirety, the program or activity is readily accessible to and usable by individuals with disabilities.

(2) Exception. Paragraph (1) shall not require a public entity to make structural changes to existing facilities in order to make such facilities accessible to individuals who use wheelchairs, unless and to the extent required by section 12147(a) of this title (relating to alterations) or section 12147(a) of this title (relating to key stations).

(3) Utilization. Paragraph (1) shall not require a public entity to which paragraph (2) applies, to provide to individuals who use wheelchairs services made available to the general public at such facilities when such individuals could not utilize or benefit from such services provided at such facilities.

(b) One car per train rule

(1) General rule. Subject to paragraph (2), with respect to 2 or more vehicles operated as a train by a light or rapid rail system, for purposes of section 12132 of this title and section 794 of title 29, it shall be considered discrimination for a public entity to fail to have at least 1 vehicle per train that is accessible to individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than the last day of the 5-year period beginning on the effective date of this section.

(2) Historic trains. In order to comply with paragraph (1) with respect to the remanufacture of a vehicle of historic character which is to be used on a segment of a light or rapid rail system which is included on the National Register of Historic Places, if making such vehicle readily accessible to and usable by individuals with disabilities would significantly alter the historic character of such vehicle, the public entity which operates such system only has to make (or to purchase or lease a remanufactured vehicle with) those modifications which are necessary to meet the requirements of section 12142(c)(1) of this title and which do not significantly alter the historic character of such vehicle.

Sec. 12149. Regulations

(a) In general. Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations, in an accessible format, necessary for carrying out this subpart (other than section 12143 of this title).

(b) Standards. The regulations issued under this section and section 12143 of this title shall include standards applicable to facilities and vehicles covered by this part. The standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204 of this title.

Sec. 12150. Interim accessibility requirements

If final regulations have not been issued pursuant to section 12149 of this title, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under such section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities as required under sections 12146 and 12147 of this title, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 12204(a) of this title, compliance with such supplemental minimum guidelines shall be

necessary to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

Subpart II - Public Transportation by Intercity and Commuter Rail

Sec. 12161. Definitions

As used in this subpart:

(1) Commuter authority. The term "commuter authority" has the meaning given such term in section 24102(4) of title 49.

(2) Commuter rail transportation. The term "commuter rail transportation" has the meaning given the term "commuter rail passenger transportation" in section 24102(5) of title 49.

(3) Intercity rail transportation. The term "intercity rail transportation" means transportation provided by the National Railroad Passenger Corporation.

(4) Rail passenger car. The term "rail passenger car" means, with respect to intercity rail transportation, single-level and bi-level coach cars, single-level and bi-level dining cars, single- level and bi-level sleeping cars, single-level and bi-level lounge cars, and food service cars.

(5) Responsible person. The term "responsible person" means

(A) in the case of a station more than 50 percent of which is owned by a public entity, such public entity;

(B) in the case of a station more than 50 percent of which is owned by a private party, the persons providing intercity or commuter rail transportation to such station, as allocated on an equitable basis by regulation by the Secretary of Transportation; and

(C) in a case where no party owns more than 50 percent of a station, the persons providing intercity or commuter rail transportation to such station and the owners of the station, other than private party owners, as allocated on an equitable basis by regulation by the Secretary of Transportation.

(6) Station. The term "station" means the portion of a property located appurtenant to a right-of-way on which intercity or commuter rail transportation is operated, where such portion is used by the general public and is related to the provision of such transportation, including passenger platforms, designated waiting areas, ticketing areas, restrooms, and, where a public entity providing rail transportation owns the property, concession areas, to the extent that such public entity exercises control over the selection, design, construction, or alteration of the property, but such term does not include flag stops.

Sec. 12162. Intercity and commuter rail actions considered discriminatory

(a) Intercity rail transportation

(1) One car per train rule. It shall be considered discrimination for purposes of section 12132 of this title and section 794 of title 29 for a person who provides intercity rail transportation to fail to have at least one passenger car per train that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, in accordance with regulations issued under section 12164 of this title, as soon as practicable, but in no event later than 5 years after July 26, 1990.

(2) New intercity cars

(A) General rule. Except as otherwise provided in this subsection with respect to individuals who use wheelchairs, it shall be considered discrimination for purposes of section 12132 of this title and section 794 of title 29 for a person to purchase or lease any new rail passenger cars for use in intercity rail transportation, and for which a solicitation is made later than 30 days after July 26, 1990, unless all such rail cars are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(B) Special rule for single-level passenger coaches for individuals who use wheelchairs. Single-level passenger coaches shall be required to

(i) be able to be entered by an individual who uses a wheelchair;

(ii) have space to park and secure a wheelchair;

(iii) have a seat to which a passenger in a wheelchair can transfer, and a space to fold and store such passenger's wheelchair; and

(iv) have a restroom usable by an individual who uses a wheelchair, only to the extent provided in paragraph (3).

(C) Special rule for single-level dining cars for individuals who use wheelchairs. Single-level dining cars shall not be required to

(i) be able to be entered from the station platform by an individual who uses a wheelchair; or

(ii) have a restroom usable by an individual who uses a wheelchair if no restroom is provided in such car for any passenger.

(D) Special rule for bi-level dining cars for individuals who use wheelchairs. Bi-level dining cars shall not be required to

(i) be able to be entered by an individual who uses a wheelchair;

(ii) have space to park and secure a wheelchair;

(iii) have a seat to which a passenger in a wheelchair can transfer, or a space to fold and store such passenger's wheelchair; or

(iv) have a restroom usable by an individual who uses a wheelchair.

(3) Accessibility of single-level coaches

(A) General rule. It shall be considered discrimination for purposes of section 12132 of this title and section 794 of title 29 for a person who provides intercity rail transportation to fail to have on each train which includes one or more single-level rail passenger coaches

(i) a number of spaces

(I) to park and secure wheelchairs (to accommodate individuals who wish to remain in their wheelchairs) equal to not less than one-half of the number of single-level rail passenger coaches in such train; and

(II) to fold and store wheelchairs (to accommodate individuals who wish to transfer to coach seats) equal to not less than one-half of the number of single-level rail passenger coaches in such train, as soon as practicable, but in no event later than 5 years after July 26, 1990; and

(ii) a number of spaces

(I) to park and secure wheelchairs (to accommodate individuals who wish to remain in their wheelchairs) equal to not less than the total number of single-level rail passenger coaches in such train; and

(II) to fold and store wheelchairs (to accommodate individuals who wish to transfer to coach seats) equal to not less than the total number of single-level rail passenger coaches in such train, as soon as practicable, but in no event later than 10 years after July 26, 1990.

(B) Location. Spaces required by subparagraph (A) shall be located in single-level rail passenger coaches or food service cars.

(C) Limitation. Of the number of spaces required on a train by subparagraph (A), not more than two spaces to park and secure wheelchairs nor more than two spaces to fold and store wheelchairs shall be located in any one coach or food service car.

(D) Other accessibility features. Single-level rail passenger coaches and food service cars on which the spaces required by subparagraph (a) are located shall have a restroom usable by an individual who uses a wheelchair and shall be able to be entered from the station platform by an individual who uses a wheelchair.

(4) Food service

(A) Single-level dining cars. On any train in which a single-level dining car is used to provide food service

(i) if such single-level dining car was purchased after July 26, 1990, table service in such car shall be provided to a passenger who uses a wheelchair if

(I) the car adjacent to the end of the dining car through which a wheelchair may enter is itself accessible to a wheelchair;

(II) such passenger can exit to the platform from the car such passenger occupies, move down the platform, and enter the adjacent accessible car described in subclause (I) without the necessity of the train being moved within the station; and

(III) space to park and secure a wheelchair is available in the dining car at the time such passenger wishes to eat (if such passenger wishes to remain in a wheelchair), or space to store and fold a wheelchair is available in the dining car at the time such passenger wishes to eat (if such passenger wishes to transfer to a dining car seat); and

(ii) appropriate auxiliary aids and services, including a hard surface on which to eat, shall be provided to ensure that other equivalent food service is available to individuals with disabilities, including individuals who use wheelchairs, and to passengers traveling with such individuals. Unless not practicable, a person providing intercity rail transportation shall place an accessible car adjacent to the end of a dining car described in clause (I) through which an individual who uses a wheelchair

may enter.

(B) Bi-level dining cars. On any train in which a bi-level dining car is used to provide food service

(i) if such train includes a bi-level lounge car purchased after July 26, 1990, table service in such lounge car shall be provided to individuals who use wheelchairs and to other passengers; and

(ii) appropriate auxiliary aids and services, including a hard surface on which to eat, shall be provided to ensure that other equivalent food service is available to individuals with disabilities, including individuals who use wheelchairs, and to passengers traveling with such individuals.

(b) Commuter rail transportation

(1) One car per train rule. It shall be considered discrimination for purposes of section 12132 of this title and section 794 of title 29 for a person who provides commuter rail transportation to fail to have at least one passenger car per train that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, in accordance with regulations issued under section 12164 of this title, as soon as practicable, but in no event later than 5 years after July 26, 1990.

(2) New commuter rail cars

(A) General rule. It shall be considered discrimination for purposes of section 12132 of this title and section 794 of title 29 for a person to purchase or lease any new rail passenger cars for use in commuter rail transportation, and for which a solicitation is made later than 30 days after July 26, 1990, unless all such rail cars are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(B) Accessibility. For purposes of section 12132 of this title and section 794 of title 29, a requirement that a rail passenger car used in commuter rail transportation be accessible to or readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, shall not be construed to require

(i) a restroom usable by an individual who uses a wheelchair if no restroom is provided in such car for any passenger;

(ii) space to fold and store a wheelchair; or

(iii) a seat to which a passenger who uses a wheelchair can transfer.

(c) Used rail cars. It shall be considered discrimination for purposes of section 1132 of this title and section 794 of title 29 for a person to purchase or lease a used rail passenger car for use in intercity or commuter rail transportation, unless such person makes demonstrated good faith efforts to purchase or lease a used rail car that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(d) Remanufactured rail cars

(1) Remanufacturing. It shall be considered discrimination for purposes of section 12132 of this title and section 794 of title 29 for a person to remanufacture a rail passenger car for use

in intercity or commuter rail transportation so as to extend its usable life for 10 years or more, unless the rail car, to the maximum extent feasible, is made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(2) Purchase or lease. It shall be considered discrimination for purposes of section 12132 of this title and section 794 of title 29 for a person to purchase or lease a remanufactured rail passenger car for use in intercity or commuter rail transportation unless such car was remanufactured in accordance with paragraph (1).

(e) Stations

(1) New stations. It shall be considered discrimination for purposes of section 12132 of this title and section 794 of title 29 for a person to build a new station for use in intercity or commuter rail transportation that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(2) Existing stations

(A) Failure to make readily accessible

(i) General rule. It shall be considered discrimination for purposes of section 12132 of this title and section 794 of title 29 for a responsible person to fail to make existing stations in the intercity rail transportation system, and existing key stations in commuter rail transportation systems, readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(ii) Period for compliance

(I) Intercity rail. All stations in the intercity rail transportation system shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable, but in no event later than 20 years after July 26, 1990.

(II) Commuter rail. Key stations in commuter rail transportation systems shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than 3 years after July 26, 1990, except that the time limit may be extended by the Secretary of Transportation up to 20 years after July 26, 1990, in a case where the raising of the entire passenger platform is the only means available of attaining accessibility or where other extraordinarily expensive structural changes are necessary to attain accessibility.

(iii) Designation of key stations. Each commuter authority shall designate the key stations in its commuter rail transportation system, in consultation with individuals with disabilities and organizations representing such individuals, taking into consideration such factors as high ridership and whether such station serves as a transfer or feeder station. Before the final designation of key stations under this clause, a commuter authority shall hold a public hearing.

(iv) Plans and milestones. The Secretary of Transportation shall require the appropriate person to develop a plan for carrying out this subparagraph that reflects consultation with individuals with disabilities affected by such plan and that establishes milestones for achievement of the requirements of this subparagraph.

(B) Requirement when making alterations

(i) General rule. It shall be considered discrimination, for purposes of section 12132 of this title and section 794 of title 29, with respect to alterations of an existing station or part thereof in the intercity or commuter rail transportation systems that affect or could affect the usability of the station or part thereof, for the responsible person, owner, or person in control of the station to fail to make the alterations in such a manner that, to the maximum extent feasible, the altered portions of the station are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations.

(ii) Alterations to a primary function area. It shall be considered discrimination, for purposes of section 12132 of this title and section 794 of title 29, with respect to alterations that affect or could affect the usability of or access to an area of the station containing a primary function, for the responsible person, owner, or person in control of the station to fail to make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area, and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations, where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(C) Required cooperation. It shall be considered discrimination for purposes of section 12132 of this title and section 794 of title 29 for an owner, or person in control, of a station governed by subparagraph (a) or (b) to fail to provide reasonable cooperation to a responsible person with respect to such station in that responsible person's efforts to comply with such subparagraph. An owner, or person in control, of a station shall be liable to a responsible person for any failure to provide reasonable cooperation as required by this subparagraph. Failure to receive reasonable cooperation required by this subparagraph shall not be a defense to a claim of discrimination under this chapter.

Sec. 12163. Conformance of accessibility standards

Accessibility standards included in regulations issued under this subpart shall be consistent with the minimum guidelines issued by the Architectural and Transportation Barriers Compliance Board under section 504(a) of this title.

Sec. 12164. Regulations

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations, in an accessible format, necessary for carrying out this subpart.

Sec. 12165. Interim accessibility requirements

(a) Stations. If final regulations have not been issued pursuant to section 12164 of this title, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under such section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that stations be readily accessible to and usable by persons with disabilities as required under section 12162(e) of this title, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 12204(a) of this title, compliance

with such supplemental minimum guidelines shall be necessary to satisfy the requirement that stations be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

(b) Rail passenger cars. If final regulations have not been issued pursuant to section 12164 of this title, a person shall be considered to have complied with the requirements of section 12162(a) through (d) of this title that a rail passenger car be readily accessible to and usable by individuals with disabilities, if the design for such car complies with the laws and regulations (including the Minimum Guidelines and Requirements for Accessible Design and such supplemental minimum guidelines as are issued under section 12204(a) of this title) governing accessibility of such cars, to the extent that such laws and regulations are not inconsistent with this subpart and are in effect at the time such design is substantially completed.

SUBCHAPTER III - PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

Sec. 12181. Definitions

As used in this subchapter:

(1) Commerce. The term "commerce" means travel, trade, traffic, commerce, transportation, or communications

(A) among the several States;

(B) between any foreign country or any territory or possession and any State; or

(C) between points in the same State but through another State or foreign country.

(2) Commercial facilities. The term "commercial facilities" means facilities

(A) that are intended for nonresidential use; and

(B) whose operations will affect commerce.

Such term shall not include railroad locomotives, railroad freight cars, railroad cabooses, railroad cars described in section 12162 of this title or covered under this subchapter, railroad rights-of-way, or facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968 (42 U.S.C. 3601 et seq.).

(3) Demand responsive system. The term "demand responsive system" means any system of providing transportation of individuals by a vehicle, other than a system which is a fixed route system.

(4) Fixed route system. The term "fixed route system" means a system of providing transportation of individuals (other than by aircraft) on which a vehicle is operated along a prescribed route according to a fixed schedule.

(5) Over-the-road bus. The term "over-the-road bus" means a bus characterized by an elevated passenger deck located over a baggage compartment.

(6) Private entity. The term "private entity" means any entity other than a public entity (as defined in section 12131(1) of this title).

(7) Public accommodation. The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect

commerce

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

(8) Rail and railroad. The terms "rail" and "railroad" have the meaning given the term "railroad" in section 20102[1] of title 49.

(9) Readily achievable. The term "readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include

(A) the nature and cost of the action needed under this chapter;

(B) 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;

(C) 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

(D) 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.

(10) Specified public transportation. The term "specified public transportation" means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

(11) Vehicle. The term "vehicle" does not include a rail passenger car, railroad locomotive, railroad freight car, railroad caboose, or a railroad car described in section 12162 of this title or covered under this subchapter.

Sec. 12182. Prohibition of discrimination by public accommodations

(a) 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.

(b) Construction

(1) General prohibition

(A) Activities

(i) Denial of participation. It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(ii) Participation in unequal benefit. It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

(iii) Separate benefit. It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(iv) Individual or class of individuals. For purposes of clauses (i) through (iii) of this subparagraph, the term "individual or class of individuals" refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

(B) Integrated settings. 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.

(C) Opportunity to participate. Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities

that are not separate or different.

(D) 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.

(E) Association. It shall be discriminatory to 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.

(2) Specific prohibitions

(A) Discrimination. For purposes of subsection (a) of this section, discrimination includes

(i) the imposition or application of 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, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

(iii) a failure to take such steps as 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, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

(B) Fixed route system

(i) Accessibility. It shall be considered discrimination for a private entity which operates a fixed route system and which is not subject to section 12184 of this title to

purchase or lease a vehicle with a seating capacity in excess of 16 passengers (including the driver) for use on such system, for which a solicitation is made after the 30th day following the effective date of this subparagraph, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(ii) Equivalent service. If a private entity which operates a fixed route system and which is not subject to section 12184 of this title purchases or leases a vehicle with a seating capacity of 16 passengers or less (including the driver) for use on such system after the effective date of this subparagraph that is not readily accessible to or usable by individuals with disabilities, it shall be considered discrimination for such entity to fail to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities.

(C) Demand responsive system. For purposes of subsection (a) of this section, discrimination includes

(i) a failure of a private entity which operates a demand responsive system and which is not subject to section 12184 of this title to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities; and

(ii) the purchase or lease by such entity for use on such system of a vehicle with a seating capacity in excess of 16 passengers (including the driver), for which solicitations are made after the 30th day following the effective date of this subparagraph, that is not readily accessible to and usable by individuals with disabilities (including individuals who use wheelchairs) unless such entity can demonstrate that such system, when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to that provided to individuals without disabilities.

(D) Over-the-road buses

(i) Limitation on applicability. Subparagraphs (B) and (C) do not apply to over-the-road buses.

(ii) Accessibility requirements. For purposes of subsection (a) of this section, discrimination includes

(I) the purchase or lease of an over-the-road bus which does not comply with the regulations issued under section 12186(a)(2) of this title by a private entity which provides transportation of individuals and which is not primarily engaged in the business of transporting people, and

(II) any other failure of such entity to comply with such regulations.

(3) Specific construction. Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others. 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.

Sec. 12183. New construction and alterations in public accommodations and commercial facilities

(a) Application of term. Except as provided in subsection (b) of this section, as applied to public accommodations and commercial facilities, discrimination for purposes of section 12182(a) of this title includes

(1) a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this subchapter; and

(2) with respect to a facility or part thereof that is altered by, on behalf of, or for the use of an establishment in a manner that affects or could affect the usability of the facility or part thereof, a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. Where the entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(b) Elevator. Subsection (a) of this section shall not be construed to require the installation of an elevator for facilities that are less than three stories or have less than 3,000 square feet per story unless the building is a shopping center, a shopping mall, or the professional office of a health care provider or unless the Attorney General determines that a particular category of such facilities requires the installation of elevators based on the usage of such facilities.

Sec. 12184. Prohibition of discrimination in specified public transportation services provided by private entities

(a) General rule. No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce.

(b) Construction. For purposes of subsection (a) of this section, discrimination includes

(1) the imposition or application by an entity described in subsection (a) of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully enjoying the specified public transportation services provided by the entity, unless such criteria can be shown to be necessary for the provision of the services being offered;

(2) the failure of such entity to

(A) make reasonable modifications consistent with those required under section 12182(b)(2)(A)(ii) of this title;

(B) provide auxiliary aids and services consistent with the requirements of section 12182(b)(2)(A)(iii) of this title; and

(C) remove barriers consistent with the requirements of section 12182(b)(2)(A) of this title

and with the requirements of section 12183(a)(2) of this title;

(3) the purchase or lease by such entity of a new vehicle (other than an automobile, a van with a seating capacity of less than 8 passengers, including the driver, or an over- the-road bus) which is to be used to provide specified public transportation and for which a solicitation is made after the 30th day following the effective date of this section, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs; except that the new vehicle need not be readily accessible to and usable by such individuals if the new vehicle is to be used solely in a demand responsive system and if the entity can demonstrate that such system, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service provided to the general public;

(4) (A) the purchase or lease by such entity of an over-the-road bus which does not comply with the regulations issued under section 12186(a)(2) of this title; and

(B) any other failure of such entity to comply with such regulations; and

(5) the purchase or lease by such entity of a new van with a seating capacity of less than 8 passengers, including the driver, which is to be used to provide specified public transportation and for which a solicitation is made after the 30th day following the effective date of this section that is not readily accessible to or usable by individuals with disabilities, including individuals who use wheelchairs; except that the new van need not be readily accessible to and usable by such individuals if the entity can demonstrate that the system for which the van is being purchased or leased, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service provided to the general public;

(6) the purchase or lease by such entity of a new rail passenger car that is to be used to provide specified public transportation, and for which a solicitation is made later than 30 days after the effective date of this paragraph, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs; and

(7) the remanufacture by such entity of a rail passenger car that is to be used to provide specified public transportation so as to extend its usable life for 10 years or more, or the purchase or lease by such entity of such a rail car, unless the rail car, to the maximum extent feasible, is made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(c) Historical or antiquated cars

(1) Exception. To the extent that compliance with subsection (a)(2)© or (a)(7)of this section would significantly alter the historic or antiquated character of a historical or antiquated rail passenger car, or a rail station served exclusively by such cars, or would result in violation of any rule, regulation, standard, or order issued by the Secretary of Transportation under the Federal Railroad Safety Act of 1970, such compliance shall not be required.

(2) Definition. As used in this subsection, the term "historical or antiquated rail passenger car" means a rail passenger car

(A) which is not less than 30 years old at the time of its use for transporting individuals;

(B) the manufacturer of which is no longer in the business of manufacturing rail passenger cars; and

(C) which

(i) has a consequential association with events or persons significant to the past; or

(ii) embodies, or is being restored to embody, the distinctive characteristics of a type of rail passenger car used in the past, or to represent a time period which has passed.

Sec. 12185. Study

(a) Purposes. The Office of Technology Assessment shall undertake a study to determine

(1) the access needs of individuals with disabilities to over-the-road buses and over-the- road bus service; and

(2) the most cost-effective methods for providing access to over-the-road buses and over-the-road bus service to individuals with disabilities, particularly individuals who use wheelchairs, through all forms of boarding options.

(b) Contents. The study shall include, at a minimum, an analysis of the following:

(1) The anticipated demand by individuals with disabilities for accessible over-the-road buses and over-the-road bus service.

(2) The degree to which such buses and service, including any service required under sections 12184(a)(4) and 12186(a)(2) of this title, are readily accessible to and usable by individuals with disabilities.

(3) The effectiveness of various methods of providing accessibility to such buses and service to individuals with disabilities.

(4) The cost of providing accessible over-the-road buses and bus service to individuals with disabilities, including consideration of recent technological and cost saving developments in equipment and devices.

(5) Possible design changes in over-the-road buses that could enhance accessibility, including the installation of accessible restrooms which do not result in a loss of seating capacity.

(6) The impact of accessibility requirements on the continuation of over-the-road bus service, with particular consideration of the impact of such requirements on such service to rural communities.

(c) Advisory committee. In conducting the study required by subsection (a) of this section, the Office of Technology Assessment shall establish an advisory committee, which shall consist of

(1) members selected from among private operators and manufacturers of over-the-road buses;

(2) members selected from among individuals with disabilities, particularly individuals who use wheelchairs, who are potential riders of such buses; and

(3) members selected for their technical expertise on issues included in the study, including manufacturers of boarding assistance equipment and devices.

The number of members selected under each of paragraphs (1) and (2) shall be equal, and the total number of members selected under paragraphs (1) and (2) shall exceed the number of members selected under paragraph (3).

(d) Deadline. The study required by subsection (a) of this section, along with recommendations by the Office of Technology Assessment, including any policy options for legislative action, shall

be submitted to the President and Congress within 36 months after July 26, 1990. If the President determines that compliance with the regulations issued pursuant to section 12186(a)(2)(B) of this title on or before the applicable deadlines specified in section 12186(a)(2)(B) of this title will result in a significant reduction in intercity over-the-road bus service, the President shall extend each such deadline by 1 year.

(e) Review. In developing the study required by subsection (a) of this section, the Office of Technology Assessment shall provide a preliminary draft of such study to the Architectural and Transportation Barriers Compliance Board established under section 792 of title 29. The Board shall have an opportunity to comment on such draft study, and any such comments by the Board made in writing within 120 days after the Board's receipt of the draft study shall be incorporated as part of the final study required to be submitted under subsection (d) of this section.

Sec. 12186. Regulations

(a) Transportation provisions

(1) General rule. Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations in an accessible format to carry out sections12182 (b)(2)(B) and (C) of this title and to carry out section 12184 of this title (other than subsection (a)(4)).

(2) Special rules for providing access to over-the-road buses

(A) Interim requirements

(i) Issuance. Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations in an accessible format to carry out sections 12184(b)(4) and 12182(b)(2)(D)(ii) of this title that require each private entity which uses an over-the-road bus to provide transportation of individuals to provide accessibility to such bus; except that such regulations shall not require any structural changes in over-the-road buses in order to provide access to individuals who use wheelchairs during the effective period of such regulations and shall not require the purchase of boarding assistance devices to provide access to such individuals.

(ii)Effective period. The regulations issued pursuant to this subparagraph shall be effective until the effective date of the regulations issued under subparagraph (a).

(B) Final requirement

(i) Review of study and interim requirements. The Secretary shall review the study submitted under section 12185 of this title and the regulations issued pursuant to subparagraph (A).

(ii)Issuance. Not later than 1 year after the date of the submission of the study under section 12185 of this title, the Secretary shall issue in an accessible format new regulations to carry out sections 12184(b)(4) and 12182(b)(2)(D)(ii) of this title that require, taking into account the purposes of the study under section 12185 of this title and any recommendations resulting from such study, each private entity which uses an over-the-road bus to provide transportation to individuals to provide accessibility to such bus to individuals with disabilities, including individuals who use wheelchairs.

(iii) Effective period. Subject to section 12185(d) of this title, the regulations issued pursuant to this subparagraph shall take effect

(I) with respect to small providers of transportation (as defined by the Secretary), 3 years after the date of issuance of final regulations under clause (ii); and

(II) with respect to other providers of transportation, 2 years after the date of issuance of such final regulations.

(C) Limitation on requiring installation of accessible restrooms. The regulations issued pursuant to this paragraph shall not require the installation of accessible restrooms in over-the-road buses if such installation would result in a loss of seating capacity.

(3) Standards. The regulations issued pursuant to this subsection shall include standards applicable to facilities and vehicles covered by sections 12182(b) (2) and 12184 of this title.

(b) Other provisions. Not later than 1 year after July 26, 1990, the Attorney General shall issue regulations in an accessible format to carry out the provisions of this subchapter not referred to in subsection (a) of this section that include standards applicable to facilities and vehicles covered under section 12182 of this title.

(c) Consistency with ATBCB guidelines. Standards included in regulations issued under subsections (a) and (b) of this section shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204 of this title.

(d) Interim accessibility standards

(1) Facilities. If final regulations have not been issued pursuant to this section, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under this section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities as required under section 12183 of this title, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 12204(a) of this title, compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

(2) Vehicles and rail passenger cars. If final regulations have not been issued pursuant to this section, a private entity shall be considered to have complied with the requirements of this subchapter, if any, that a vehicle or rail passenger car be readily accessible to and usable by individuals with disabilities, if the design for such vehicle or car complies with the laws and regulations (including the Minimum Guidelines and Requirements for Accessible Design and such supplemental minimum guidelines as are issued under section 12204(a) of this title) governing accessibility of such vehicles or cars, to the extent that such laws and regulations are not inconsistent with this subchapter and are in effect at the time such design is substantially completed.

Sec. 12187. Exemptions for private clubs and religious organizations

The provisions of this subchapter shall not apply to private clubs or establishments exempted from coverage under title II of the Civil Rights Act of 1964 (42 U.S.C. 2000-a(e)) or to religious organizations or entities controlled by religious organizations, including places of worship.

Sec. 12188. Enforcement

(a) In general

(1) Availability of remedies and procedures. The remedies and procedures set forth in section 2000a-3(a) of this title are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 12183 of this title. Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions.

(2) Injunctive relief. In the case of violations of sections 12182(b)(2)(A)(iv) and Section 12183(a) of this title, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this subchapter. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this subchapter.

(b) Enforcement by Attorney General

(1) Denial of rights

(A) Duty to investigate

(i) In general. The Attorney General shall investigate alleged violations of this subchapter, and shall undertake periodic reviews of compliance of covered entities under this subchapter.

(ii) Attorney General certification. On the application of a State or local government, the Attorney General may, in consultation with the Architectural and Transportation Barriers Compliance Board, and after prior notice and a public hearing at which persons, including individuals with disabilities, are provided an opportunity to testify against such certification, certify that a State law or local building code or similar ordinance that establishes accessibility requirements meets or exceeds the minimum requirements of this chapter for the accessibility and usability of covered facilities under this subchapter. At any enforcement proceeding under this section, such certification by the Attorney General shall be rebuttable evidence that such State law or local ordinance does meet or exceed the minimum requirements of this chapter.

(B) Potential violation. If the Attorney General has reasonable cause to believe that

(i) any person or group of persons is engaged in a pattern or practice of discrimination under this subchapter; or

(ii) any person or group of persons has been discriminated against under this subchapter and such discrimination raises an issue of general public importance,

the Attorney General may commence a civil action in any appropriate United States district court.

(2) Authority of court. In a civil action under paragraph (1) (B), the court

(A) may grant any equitable relief that such court considers to be appropriate, including, to the extent required by this subchapter

(i) granting temporary, preliminary, or permanent relief;

(ii) providing an auxiliary aid or service, modification of policy, practice, or procedure,

or alternative method; and

(iii) making facilities readily accessible to and usable by individuals with disabilities;

(B) may award such other relief as the court considers to be appropriate, including monetary damages to persons aggrieved when requested by the Attorney General; and

(C) may, to vindicate the public interest, assess a civil penalty against the entity in an amount

(i) not exceeding $50,000 for a first violation; and

(ii) not exceeding $100,000 for any subsequent violation.

(3) Single violation. For purposes of paragraph (2) (C), in determining whether a first or subsequent violation has occurred, a determination in a single action, by judgment or settlement, that the covered entity has engaged in more than one discriminatory act shall be counted as a single violation.

(4) Punitive damages. For purposes of subsection (b) (2) (B) of this section, the term "monetary damages" and "such other relief" does not include punitive damages.

(5) Judicial consideration. In a civil action under paragraph (1)(B), the court, when considering what amount of civil penalty, if any, is appropriate, shall give consideration to any good faith effort or attempt to comply with this chapter by the entity. In evaluating good faith, the court shall consider, among other factors it deems relevant, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability.

Sec. 12189. Examinations and courses

Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

SUBCHAPTER IV - MISCELLANEOUS PROVISIONS

Sec. 12201. Construction

(a) In general. Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

(b) Relationship to other laws. Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter. Nothing in this chapter shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by subchapter I of this chapter, in transportation covered by subchapter II or III of this chapter, or in places of public accommodation covered by subchapter III of this chapter.

(c) Insurance. Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter I and III of this chapter.

(d) Accommodations and services. Nothing in this chapter shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.

(e) Benefits under State worker's compensation laws. Nothing in this chapter alters the standards for determining eligibility for benefits under State worker's compensation laws or under State and Federal disability benefit programs.

(f) Fundamental alteration. Nothing in this chapter alters the provision of section 12182(b)(2)(A)(ii), specifying that reasonable modifications in policies, practices, or procedures shall be required, unless an entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved.

(g) Claims of no disability. Nothing in this chapter shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability.

(h) Reasonable accommodations and modifications. A covered entity under subchapter I, a public entity under subchapter II, and any person who owns, leases (or leases to), or operates a place of public accommodation under subchapter III, need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 12102(1) solely under subparagraph (C) of such section.

Sec. 12202. State immunity

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

Sec. 12203. Prohibition against retaliation and coercion

(a) Retaliation. No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation. It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(c) Remedies and procedures. The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III of this chapter, respectively.

Sec. 12204. Regulations by Architectural and Transportation Barriers Compliance Board

(a) Issuance of guidelines. Not later than 9 months after July 26, 1990, the Architectural and Transportation Barriers Compliance Board shall issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of subchapters II and III of this chapter.

(b) Contents of guidelines. The supplemental guidelines issued under subsection (a) of this section shall establish additional requirements, consistent with this chapter, to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities.

(c) Qualified historic properties

(1) In general. The supplemental guidelines issued under subsection (a) of this section shall include procedures and requirements for alterations that will threaten or destroy the historic significance of qualified historic buildings and facilities as defined in 4.1.7(1)(a) of the Uniform Federal Accessibility Standards.

(2) Sites eligible for listing in National Register. With respect to alterations of buildings or facilities that are eligible for listing in the National Register of Historic Places under the National Historic Preservation Act (16 U.S.C. 470 et seq.), the guidelines described in paragraph (1) shall, at a minimum, maintain the procedures and requirements established in 4.1.7(1) and (2) of the Uniform Federal Accessibility Standards.

(3) Other sites. With respect to alterations of buildings or facilities designated as historic under State or local law, the guidelines described in paragraph (1) shall establish procedures equivalent to those established by 4.1.7(1)(b) and (c) of the Uniform Federal Accessibility Standards, and shall require, at a minimum, compliance with the requirements established in 4.1.7(2) of such standards.

Sec. 12205. Attorney's fees

In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

Sec. 12205a. Rule of Construction Regarding Regulatory Authority

The authority to issue regulations granted to the Equal Employment Opportunity Commission, the Attorney General, and the Secretary of Transportation under this chapter includes the authority to issue regulations implementing the definitions of disability in section 12102 (including rules of construction) and the definitions in section 12103, consistent with the ADA Amendments Act of 2008.

Sec. 12206. Technical assistance

(a) Plan for assistance

(1) In general. Not later than 180 days after July 26, 1990, the Attorney General, in consultation with the Chair of the Equal Employment Opportunity Commission, the Secretary of Transportation, the Chair of the Architectural and Transportation Barriers Compliance Board, and the Chairman of the Federal Communications Commission, shall develop a plan to assist entities covered under this chapter, and other Federal agencies, in understanding the responsibility of such entities and agencies under this chapter.

(2) Publication of plan. The Attorney General shall publish the plan referred to in paragraph (1) for public comment in accordance with subchapter II of chapter 5 of title 5 (commonly known as the Administrative Procedure Act).

(b) Agency and public assistance. The Attorney General may obtain the assistance of other Federal agencies in carrying out subsection (a) of this section, including the National Council on Disability, the President's Committee on Employment of People with Disabilities, the Small Business Administration, and the Department of Commerce.

(c) Implementation

(1) Rendering assistance. Each Federal agency that has responsibility under paragraph (2) for implementing this chapter may render technical assistance to individuals and institutions that have rights or duties under the respective subchapter or subchapters of this chapter for which such agency has responsibility.

(2) Implementation of subchapters

(A) Subchapter I. The Equal Employment Opportunity Commission and the Attorney General shall implement the plan for assistance developed under subsection (a) of this section, for subchapter I of this chapter.

(B) Subchapter II

(i) Part A. The Attorney General shall implement such plan for assistance for part A of subchapter II of this chapter.

(ii) Part B. The Secretary of Transportation shall implement such plan for assistance for part B of subchapter II of this chapter.

(C) Subchapter III. The Attorney General, in coordination with the Secretary of Transportation and the Chair of the Architectural Transportation Barriers Compliance Board, shall implement such plan for assistance for subchapter III of this chapter, except for section 12184 of this title, the plan for assistance for which shall be implemented by the Secretary of Transportation.

(D) Title IV. The Chairman of the Federal Communications Commission, in coordination with the Attorney General, shall implement such plan for assistance for title IV.

(3) Technical assistance manuals. Each Federal agency that has responsibility under paragraph (2) for implementing this chapter shall, as part of its implementation responsibilities, ensure the availability and provision of appropriate technical assistance manuals to individuals or entities with rights or duties under this chapter no later than six months after applicable final regulations are published under subchapters I, II, and III of this chapter and title IV.

(d) Grants and contracts

(1) In general. Each Federal agency that has responsibility under subsection (2) of this section for implementing this chapter may make grants or award contracts to effectuate the purposes of this section, subject to the availability of appropriations. Such grants and contracts may be awarded to individuals, institutions not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual (including educational institutions), and associations representing individuals who have rights or duties under this chapter. Contracts may be awarded to entities organized for profit, but such entities may not be the recipients or grants described in this paragraph.

(2) Dissemination of information. Such grants and contracts, among other uses, may be designed to ensure wide dissemination of information about the rights and duties established by this chapter and to provide information and technical assistance about techniques for effective compliance with this chapter.

(e) Failure to receive assistance. An employer, public accommodation, or other entity covered under this chapter shall not be excused from compliance with the requirements of this chapter because of any failure to receive technical assistance under this section, including any failure in the development or dissemination of any technical assistance manual authorized by this section.

Sec. 12207. Federal wilderness areas

(a) Study. The National Council on Disability shall conduct a study and report on the effect that wilderness designations and wilderness land management practices have on the ability of individuals with disabilities to use and enjoy the National Wilderness Preservation System as established under the Wilderness Act (16 U.S.C. 1131 et seq.).

(b) Submission of report. Not later than 1 year after July 26, 1990, the National Council on Disability shall submit the report required under subsection (a) of this section to Congress.

(c) Specific wilderness access

(1) In general. Congress reaffirms that nothing in the Wilderness Act (16 U.S.C. 1131 et seq.) is to be construed as prohibiting the use of a wheelchair in a wilderness area by an individual whose disability requires use of a wheelchair, and consistent with the Wilderness Act no agency is required to provide any form of special treatment or accommodation, or to construct any facilities or modify any conditions of lands within a wilderness area in order to facilitate such use.

(2) "Wheelchair" defined. For purposes of paragraph (1), the term "wheelchair" means a device designed solely for use by a mobility-impaired person for locomotion, that is suitable for use in an indoor pedestrian area.

Sec. 12208. Transvestites

For the purposes of this chapter, the term "disabled" or "disability" shall not apply to an individual solely because that individual is a transvestite.

Sec. 12209. Instrumentalities of Congress

The General Accounting Office, the Government Printing Office, and the Library of Congress shall be covered as follows:

(1) In general. The rights and protections under this chapter shall, subject to paragraph (2), apply with respect to the conduct of each instrumentality of the Congress.

(2) Establishment of remedies and procedures by instrumentalities. The chief official of each

instrumentality of the Congress shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to paragraph (1).

(3) Report to Congress. The chief official of each instrumentality of the Congress shall, after establishing remedies and procedures for purposes of paragraph (2), submit to the Congress a report describing the remedies and procedures.

(4) Definition of instrumentalities. For purposes of this section, the term "instrumentality of the Congress" means the following: the General Accounting Office, the Government Printing Office, and the Library of Congress.

(5) Enforcement of employment rights. The remedies and procedures set forth in section 2000e -16 of this title shall be available to any employee of an instrumentality of the Congress who alleges a violation of the rights and protections under sections 12112 through 12114 of this title that are made applicable by this section, except that the authorities of the Equal Employment Opportunity Commission shall be exercised by the chief official of the instrumentality of the Congress.

(6) Enforcement of rights to public services and accommodations. The remedies and procedures set forth in section 2000e -16 of this title shall be available to any qualified person with a disability who is a visitor, guest, or patron of an instrumentality of Congress and who alleges a violation of the rights and protections under sections 12131 through 12150 of this title or section 12182 or 12183 of this title that are made applicable by this section, except that the authorities of the Equal Employment Opportunity Commission shall be exercised by the chief official of the instrumentality of the Congress.

(7) Construction. Nothing in this section shall alter the enforcement procedures for individuals with disabilities provided in the General Accounting Office Personnel Act of 1980 and regulations promulgated pursuant to that Act.

Sec. 12210. Illegal use of drugs

(a) In general. For purposes of this chapter, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction. Nothing in subsection (a) of this section shall be construed to exclude as an individual with a disability an individual who

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs; however, nothing in this section shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

(c) Health and other services. Notwithstanding subsection (a) of this section and section 12211(b)(3) of this subchapter, an individual shall not be denied health services, or services

provided in connection with drug rehabilitation, on the basis of the current illegal use of drugs if the individual is otherwise entitled to such services.

(d) "Illegal use of drugs" defined

(1) In general. The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 801 et seq.). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(2) Drugs. The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

Sec. 12211. Definitions

(a) Homosexuality and bisexuality. For purposes of the definition of "disability" in section 12102(2) of this title, homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter.

(b) Certain conditions. Under this chapter, the term "disability" shall not include

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

Sec. 12212. Alternative means of dispute resolution

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.

Sec. 12213. Severability

Should any provision in this chapter be found to be unconstitutional by a court of law, such provision shall be severed from the remainder of the chapter, and such action shall not affect the enforceability of the remaining provisions of the chapter.

TITLE 47 - TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

CHAPTER 5 - WIRE OR RADIO COMMUNICATION

SUBCHAPTER II - COMMON CARRIERS

Part I - Common Carrier Regulation

Sec. 225. Telecommunications services for hearing-impaired and speech-impaired individuals

(a) Definitions. As used in this section

(1) Common carrier or carrier. The term "common carrier" or "carrier" includes any common carrier engaged in interstate communication by wire or radio as defined in section 153 of this

title and any common carrier engaged in intrastate communication by wire or radio, notwithstanding sections 152(a) and 221(a) of this title.

(2) TDD. The term "TDD" means a Telecommunications Device for the Deaf which is a machine that employs graphic communication in the transmission of coded signals through a wire or radio communication system.

(3) Telecommunications relay services. The term "telecommunications relay services" means telephone transmission services that provide the ability for an individual who has a hearing impairment or speech impairment to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice communication services by wire or radio. Such term includes services that enable two-way communication between an individual who uses a TDD or other nonvoice terminal device and an individual who does not use such a device.

(b) Availability of telecommunications relay services

(1) In general. In order to carry out the purposes established under section 151 of this title, to make available to all individuals in the United States a rapid, efficient nationwide communication service, and to increase the utility of the telephone system of the Nation, the Commission shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.

(2) Use of general authority and remedies. For the purposes of administering and enforcing the provisions of this section and the regulations prescribed thereunder, the Commission shall have the same authority, power, and functions with respect to common carriers engaged in intrastate communication as the Commission has in administering and enforcing the provisions of this subchapter with respect to any common carrier engaged in interstate communication. Any violation of this section by any common carrier engaged in intrastate communication shall be subject to the same remedies, penalties, and procedures as are applicable to a violation of this chapter by a common carrier engaged in interstate communication.

(c) Provision of services. Each common carrier providing telephone voice transmission services shall, not later than 3 years after July 26, 1990, provide in compliance with the regulations prescribed under this section, throughout the area in which it offers service, telecommunications relay services, individually, through designees, through a competitively selected vendor, or in concert with other carriers. A common carrier shall be considered to be in compliance with such regulations

(1) with respect to intrastate telecommunications relay services in any State that does not have a certified program under subsection (f) of this section and with respect to interstate telecommunications relay services, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with the Commission's regulations under subsection (d) of this section; or

(2) with respect to intrastate telecommunications relay services in any State that has a certified program under subsection (f) of this section for such State, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with the program certified under subsection (f) of this section for such State.

(d) Regulations

(1) In general. The Commission shall, not later than 1 year after July 26, 1990, prescribe

regulations to implement this section, including regulations that

(A) establish functional requirements, guidelines, and operations procedures for telecommunications relay services;

(B) establish minimum standards that shall be met in carrying out subsection (c) of this section;

(C) require that telecommunications relay services operate every day for 24 hours per day;

(D) require that users of telecommunications relay services pay rates no greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day, and the distance from point of origination to point of termination;

(E) prohibit relay operators from failing to fulfill the obligations of common carriers by refusing calls or limiting the length of calls that use telecommunications relay services;

(F) prohibit relay operators from disclosing the content of any relayed conversation and from keeping records of the content of any such conversation beyond the duration of the call; and

(G) prohibit relay operators from intentionally altering a relayed conversation.

(2) Technology. The Commission shall ensure that regulations prescribed to implement this section encourage, consistent with section 157(a) of this title, the use of existing technology and do not discourage or impair the development of improved technology.

(3) Jurisdictional separation of costs

(A) In general. Consistent with the provisions of section 410 of this title, the Commission shall prescribe regulations governing the jurisdictional separation of costs for the services provided pursuant to this section.

(B) Recovering costs. Such regulations shall generally provide that costs caused by interstate telecommunications relay services shall be recovered from all subscribers for every interstate service and costs caused by intrastate telecommunications relay services shall be recovered from the intrastate jurisdiction. In a State that has a certified program under subsection (f) of this section, a State commission shall permit a common carrier to recover the costs incurred in providing intrastate telecommunications relay services by a method consistent with the requirements of this section.

(e) Enforcement

(1) In general. Subject to subsections (f) and (g) of this section, the Commission shall enforce this section.

(2) Complaint. The Commission shall resolve, by final order, a complaint alleging a violation of this section within 180 days after the date such complaint is filed.

(f) Certification

(1) State documentation. Any State desiring to establish a State program under this section shall submit documentation to the Commission that describes the program of such State for implementing intrastate telecommunications relay services and the procedures and remedies

available for enforcing any requirements imposed by the State program.

(2) Requirements for certification. After review of such documentation, the Commission shall certify the State program if the Commission determines that

(A) the program makes available to hearing-impaired and speech-impaired individuals, either directly, through designees, through a competitively selected vendor, or through regulation of intrastate common carriers, intrastate telecommunications relay services in such State in a manner that meets or exceeds the requirements of regulations prescribed by the Commission under subsection (d) of this section; and

(B) the program makes available adequate procedures and remedies for enforcing the requirements of the State program.

(3) Method of funding. Except as provided in subsection (d) of this section, the Commission shall not refuse to certify a State program based solely on the method such State will implement for funding intrastate telecommunication relay services.

(4) Suspension or revocation of certification. The Commission may suspend or revoke such certification if, after notice and opportunity for hearing, the Commission determines that such certification is no longer warranted. In a State whose program has been suspended or revoked, the Commission shall take such steps as may be necessary, consistent with this section, to ensure continuity of telecommunications relay services.

(g) Complaint

(1) Referral of complaint. If a complaint to the Commission alleges a violation of this section with respect to intrastate telecommunications relay services within a State and certification of the program of such State under subsection (f) of this section is in effect, the Commission shall refer such complaint to such State.

(2) Jurisdiction of Commission. After referring a complaint to a State under paragraph (1), the Commission shall exercise jurisdiction over such complaint only if

(A) final action under such State program has not been taken on such complaint by such State

(i) within 180 days after the complaint is filed with such State; or

(ii) within a shorter period as prescribed by the regulations of such State; or

(B) the Commission determines that such State program is no longer qualified for certification under subsection (f) of this section.

TITLE 47 - TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

CHAPTER 5 - WIRE OR RADIO COMMUNICATION

SUBCHAPTER VI - MISCELLANEOUS PROVISIONS

Sec. 611. Closed-captioning of public service announcements

Any television public service announcement that is produced or funded in whole or in part by any agency or instrumentality of Federal Government shall include closed captioning of the verbal content of such announcement. A television broadcast station licensee

(1) shall not be required to supply closed captioning for any such announcement that fails to include it; and

(2) shall not be liable for broadcasting any such announcement without transmitting a closed caption unless the licensee intentionally fails to transmit the closed caption that was included with the announcement.