

## **ADA Compliance and Reasonable Accommodation in Crisis Management: A Suggested Action Plan for Employers**

by

Joan E. Camara\*

### **Introduction**

As seen by the events of September 11 and Hurricanes Katrina and Rita, crises come in varied forms and can occur with or without sufficient advance warning. Only with the passage of time will legal scholars be able to effectively assess the full impact of these emergencies upon domestic and international law. However, one related consequence is already apparent—increased litigation by disabled individuals seeking more expansive reasonable accommodation procedures during emergency evacuations.

While disability advocates continue to wait for what are, in their view, long-overdue government policies and emergency response plans that adequately address the unique needs of the disabled in emergency situations, individual disabled plaintiffs are resorting to the legal system to require private employers and places of public accommodation to address their needs. In doing so they have forced public and a few private entities to either establish or rewrite their emergency management procedures so as to include accommodations and practices which ensure safe and prompt evacuations during unexpected natural or man-made crises. Yet on the whole, employers have been slow to respond to such litigation; and it is not unforeseeable that this inactivity may ultimately result in civil discrimination judgments.

As both litigants and disability rights advocates point out, appropriate emergency response and management plans should include procedures which ensure that all individuals with disabilities are reasonably accommodated by ensuring that they can evacuate their physical area in a variety of threatening conditions, with or without assistance. Under the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 (ADA), the ultimate responsibility for ensuring a safe evacuation does not rely entirely upon the disabled individual himself, but must also be addressed by his government(s), his employer and whatever places of public accommodation that individual happens to be in at the time of the emergency.<sup>1</sup>

This article reviews recent legal actions undertaken, and those settlements and accommodations agreed upon, which deal with the safe and effective treatment of mobility,

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\* J.D., Lecturer of Legal Studies, Department of History & Social Studies, Bryant University.

<sup>1</sup> In reviewing disability claims, courts do not differentiate between those filed under the Rehabilitation Act of 1973, Pub. L. 93-112, or under the Americans with Disabilities Act of 1990 (ADA), as amended, 42 U.S.C. §§ 12101-12213 (2008), because “the substantive standards for determining liability are the same.” *Myers v. Hose*, 50 F.3d 278, 281 (4th Cir. 1995). *See also* 29 C.F.R. § 1614.203(b) (2008). The Rehabilitation Act prohibits the federal government from discriminating against an otherwise “qualified individual with a disability” (42 U.S.C. § 12132), while the ADA extends that prohibition to private companies and organizations; it prohibits a public entity or place of public accommodation from discriminating against an individual with a disability, because of that disability, in access to employment, program or services (42 U.S.C. § 12182). Both acts specify a number of actions that constitute discrimination, including “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.” 42 U.S.C. § 12112(b)(5)(A). Courts have adopted and applied the Title VII burdens of proof to disability discrimination. *See Norcross v. Sneed*, 755 F.2d 113, 119 (8th Cir. 1985); *Prewitt v. U.S. Postal Serv.*, 662 F.2d 292, 304 (5th Cir. 1981).

vision and hearing impaired individuals during a time of crisis. In addition, it reviews the recommendations put forth by those federal agencies currently engaged in establishing nationwide emergency management procedures. It then concludes by using such information to devise a model emergency response plan that companies might effectively use to discourage claims of disparate treatment by the disabled during times of danger.

It should be noted at the outset, however, that as there is a noticeable absence of appellate rulings, legislative efforts, scholarly research, or legal commentary on this particular issue. The recommendations contained herein are extrapolations from such limited history and are thus incomplete and most likely imperfect. They do, however, establish a starting point for additional debate over which attributes and characteristics would reasonably accommodate the needs of the disabled in an employer's emergency response program.

## Legal Underpinnings of Reasonable Accommodation

Providing reasonable accommodations to people with disabilities is a central concept of the Rehabilitation Act as well as the ADA. Title II of the ADA covers all activities of state and local governments, regardless of the entity's size or receipt of federal funding.<sup>2</sup> It provides that "no qualified individual with a disability" should be excluded from participation in or be denied the benefits of any services, programs or activities of a public entity,<sup>3</sup> and defines "public entity" to include any state or local government and any department, agency ...or other instrumentality of a State."<sup>4</sup>

Title III of the ADA covers all public accommodations, which are defined as including private entities who own, lease, lease to, or operate facilities such as restaurants, retail stores, hotels, movie theaters, private schools, convention centers, doctors' offices, homeless shelters, transportation depots, zoos, funeral homes, day care centers, and recreation facilities including sports stadiums and fitness clubs and nonprofit service providers who maintain public accommodations and transportation services.<sup>5</sup> Department of Justice guidelines regarding Title III indicate that existing facilities accommodate people with disabilities to the maximum extent feasible,<sup>6</sup> which, in turn, has been interpreted as making the public accommodation as safe for disabled occupants as it is for the non-disabled.<sup>7</sup>

Pursuant to Title III, all public accommodations must comply with basic nondiscrimination requirements that prohibit the exclusion, segregation and unequal treatment of the disabled. Such places must also comply with specific requirements related to architectural standards for new and altered buildings; reasonable modifications to policies, practices, and procedures concerning access; effective communication with people with hearing, vision, or speech disabilities; and other access requirements. Further, Title III public accommodations

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<sup>2</sup> 42 U.S.C. § 12131(1). See also U.S. DEPARTMENT OF JUSTICE, A GUIDE TO DISABILITY RIGHTS LAWS (2005), at <http://www.justice.gov/crt/ada/cguide.htm> (last visited Feb. 28, 2009).

<sup>3</sup> 42 U.S.C. § 12132.

<sup>4</sup> 42 U.S.C. § 12131(1).

<sup>5</sup> 42 U.S.C. § 12181(7).

<sup>6</sup> U.S. DEPARTMENT OF JUSTICE, A GUIDE TO DISABILITY RIGHTS, *supra* note 2; 28 C.F.R. § 36.402(a) (2008). See also *Campos v. S.F. State Univ.*, No. C-97-2326, 1998 U.S. Dist. LEXIS 22615, at \*22 (N.D. Cal. June 26, 1999); *Students of Cal. School for the Blind v. Honig*, 736 F.2d 538, 546 (9th Cir. 1984), *vacated and remanded*, 471 U.S. 148 (1985) (appealed issue moot); *Ferguson v. City of Phoenix*, 931 F. Supp. 688, 694 (D. Ariz. 1996), *aff'd*, 157 F.3d 668 (9th Cir. 1998), *cert. denied*, 526 U.S. 1159 (1999).

<sup>7</sup> *Honig*, 736 F.2d at 547.

must remove barriers in existing buildings where it is easy to do so without much difficulty or expense, given the public accommodation's resources.<sup>8</sup>

Congress incorporated into the ADA's provisions a "direct threat" affirmative defense that provides employers with a defense to a claim of illegal discrimination, whenever the employer reasonably believes that the employment of a disabled but otherwise qualified employee "poses a direct threat to the health or safety of others."<sup>9</sup> The ADA defines "direct threat" as a "significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."<sup>10</sup> An employer may legally have a qualification standard requiring that a disabled employee not pose a direct threat to the health and safety of other individuals in the workplace. Similarly, the Act's Title III provides that a place of public accommodation may deny access to a disabled individual based on a belief that the disabled individual "poses a direct threat to the health or safety of others" by virtue of his or her disability.<sup>11</sup>

The direct threat doctrine attempts to balance the interests of a disabled individual against any threat or risk of harm to others' health and safety. However, where events or conditions raise a legitimate concern over public safety in the workplace, the direct threat doctrine allows the employer to justify a denial of employment.<sup>12</sup> Any defense based on this doctrine cannot be justified solely by any prejudicial concern or speculation about the ability of the disabled individual to evacuate. Use of this defense requires the employer to: (1) conduct an individualized assessment of whether this disabled individual constitutes a direct threat to others; (2) show that the risk to others is significant; and (3) establish an undue financial or administrative hardship as a business necessity for the lack of accommodation.<sup>13</sup>

The Equal Employment Opportunity Commission (EEOC), through its implementing regulations, takes the broad view that the ADA was intended to prevent employers from acting on the basis of myths or stereotypes about the effects of disabilities instead of making individualized assessments. It has clearly signaled that the ADA forbids patronizing decisions based on what is perceived to be best for an individual with a disability or within his or her presumed capabilities. The regulations provide that once a plaintiff establishes a *prima facie* case that a protected group is disproportionately affected by a practice or policy, the burden of proof shifts to the employer-defendant to prove there exists a business necessity for that practice. Even if the employer meets this burden, the plaintiff may still argue the existence of an alternative practice that would meet business requirements yet impose a lesser burden on the protected class.<sup>14</sup> In short, it is clear that Congress had paternalism in its sights when it passed

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<sup>8</sup> *Id.* See generally *Campos*, 1998 U.S. Dist. LEXIS 22615, \*13-15.

<sup>9</sup> 42 U.S.C. § 12113(b).

<sup>10</sup> 42 U.S.C. § 12111(3).

<sup>11</sup> 42 U.S.C. § 12182(b)(3). See also 28 C.F.R. § 36.208(a) (2008). *But see* *Fielder v. Am. Multi-Cinema Inc.*, 871 F. Supp 35, 40 (D. D.C. 1994) (holding public accommodations must assess whether reasonable accommodations, including structural modifications, would be available to ameliorate or eliminate the dangers so posed).

<sup>12</sup> See, e.g., *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 284 (1987); *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998); *Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1265 (4th Cir. 1995).

<sup>13</sup> *Arline*, 480 U.S. at 287. See also 29 C.F.R. § 1630.15(b)(2) & (c) (2009) (articulating direct threat and business necessity defenses); 29 C.F.R. § 1630.15(d) (2009) (providing an undue hardship defense to providing reasonable accommodations); 45 C.F.R. § 84.12(c) (2009) (articulating factors to consider when evaluating whether an accommodation would pose an undue hardship).

<sup>14</sup> 29 C.F.R. § 1630.15(c). See also U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, at <http://www.eeoc.gov/policy/docs/accommodation.html#undue> (providing undue hardship guidelines); A

the ADA and recognized that “overprotective rules and policies” would constitute an explicit form of disability discrimination.<sup>15</sup> The Supreme Court has agreed, disallowing this approach as “sham protection”.<sup>16</sup>

## Reasonable Accommodation and Emergency Response Before September 11

Although it has been widely recognized for decades that the efficient movement of people during any emergency situation is critical, until the events of September 11, 2001, less attention had been paid to the unique challenges the disabled face in unanticipated situations. Policymakers in the area of emergency response often relied upon well-established firefighting protocols, or an assumption that a crisis would be predicated by sufficient advance warning, e.g., weather-related emergencies such as Hurricanes Katrina and Rita in 2005, that would adequately allow for the implementation of sufficient safety measures.

Prior to the 1993 World Trade Center (WTC) bombing, places of public accommodation relied upon local building code requirements and standard fire safety planning models to address evacuation issues. Most of these models did not include provisions that specifically spoke to the unique challenges facing the disabled during other unanticipated situations. After the WTC bombing, Congress held hearings to evaluate the issues brought to light by the bombing, and heard remarkable testimony from those providing assistance to disabled colleagues and strangers. A woman confined to a wheelchair was passed from person to person in the stairwell until reaching the street; a paralyzed man was carried down dozens of flights of stairs through thick smoke.<sup>17</sup>

As a result, disability advocates understandably anticipated that there would be a recognized need for emergency preparedness systems to address these special situations facing the disabled. Such was not the case, however. Particularly noteworthy is the volume of case decisions from the Second Circuit (which covers the WTC location) after 1993 and before September 2001, that deliberately distinguished between making reasonable accommodations to ensure access and providing different substantive benefits during periods of crisis, finding that only the former was required under the ADA.<sup>18</sup> Similar conclusions were reached in lawsuits reviewing evacuation measures unrelated to large, multi-level workplaces such as the WTC. For example, in 2000, the Fourth Circuit Court of Appeals essentially equated actual evacuation with evacuation procedures when it held that the ADA merely required access to safe evacuation procedures.<sup>19</sup> There, a severely mobility-impaired student was left alone in her middle school which had been evacuated due to a bomb threat. After her parents complained, the school board developed a plan that designated the middle school library as a “safe area” for disabled students. Thereafter, the same student was left alone in this “safe area” during an unscheduled fire drill, and her parents filed suit under the ADA claiming that the evacuation plan illegally discriminated against disabled students. The court held that because the school board had

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TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT III, 8 FEP Manual (BNA) 405:6981, 6998-7018 (1992).

<sup>15</sup> 42 U.S.C. § 12101(a)(5).

<sup>16</sup> *Chevron USA, Inc. v. Echazabal*, 536 U.S. 73, 85-86 (2002).

<sup>17</sup> 139 CONG. REC. H1159-01, 1160 (1993).

<sup>18</sup> *See Doe v. Pfrommer*, 148 F.3d 73, 83-84 (2d Cir. 1998); *Rodriguez v. City of N.Y.*, 197 F.3d 611, 618 (2d Cir. 1999); *Wright v. Guiliani*, 230 F.3d 543, 548 (2d Cir. 2000).

<sup>19</sup> *Shirey v. City of Alexandria School Bd.*, No. 99-1127, 2000 U.S. App. LEXIS 21236, at \*14 (4th Cir. Aug. 23, 2000) (unpublished decision), *cert. denied*, 531 U.S. 1122 (2001).

developed a “reasonable” evacuation plan for disabled children, the plaintiffs had not shown that they were excluded from safe evacuation procedures during an emergency.<sup>20</sup>

Ironically, nearly identical accounts to the ones reported after the 1993 WTC attack, describing the lack of available emergency procedures or safeguards for both able-bodied and disabled occupants, were also reported eight years later after the attacks on September 11, 2001. Two men racing down the WTC stairs stopped on the 68th floor to carry a woman in a wheelchair.<sup>21</sup> One worker on the 51<sup>st</sup> floor of the WTC reported that some of his co-workers opted to wait in their offices because of the crowded stairwells.<sup>22</sup> As one commentator noted “the evacuation of people with disabilities in the World Trade Center on September 11, 2001, was no better accomplished than it had been on February 26, 1993.”<sup>23</sup>

A recently concluded study, jointly undertaken by Columbia University’s Mailman School of Public Health and the Centers for Disease Control, noted the following factors as affecting the WTC evacuation during the September 11 attack: (1) occupants’ lack of familiarity with the evacuation protocol and egress points out of the building; (2) the decision to wait for instructions and directions; (3) concerns related to one’s ability (health and status) to descend multiple floors; and (4) problematic structural conditions such as stairwell width and locked doors on egress routes.<sup>24</sup> Moreover, after interviewing 1,435 evacuees (approximately 10% of the employees at work at the WTC that morning), Dr. Robyn R. M. Gershon, the study’s principal researcher, reported there was minimal or absent training on evacuation and emergency preparedness, reflected in the fact that: (1) more than 50% of respondents did not know that there were 3 stairwells located in each building; (2) 50% of respondents were unaware that the roof could not be used as emergency egress; (3) 74% of respondents stated that they were not provided with written or fire safety plans; and (4) of the 80% of respondents stating that they had participated in fire drills, only 10% stated that they had ever entered a stairwell as part of the drill.<sup>25</sup>

## Reasonable Accommodation and Emergency Response After September 11

Given the traumatic effects of September 11, 2001, it has become customary for American citizens to think “terrorism” when they hear the words “emergency” or “danger”. Since that historic date, governments have engaged in repeated efforts to focus its citizens’ individual and collective attention on the possibility of terrorism within this nation. It can also be convincingly argued that one of the lessons learned by governments from both September 11 and the 2005 hurricane season should be that disabled citizens need prompt and safe evacuation from both unexpected natural disasters and man-made emergencies.

<sup>20</sup> *Id.* See also William C. Hollis, *Rights of People with Disabilities to Emergency Evacuation Under the Americans with Disabilities Act*, 5 J. HEALTH CARE L. & POL’Y 524, 539-41 (2002).

<sup>21</sup> Editorial/Opinion, *Reflections on a Week of Terror*, USA TODAY, Sept. 13, 2001, at <http://www.usatoday.com/news/opinion/2001-09-14-nceditf.htm>.

<sup>22</sup> Ellen Wulforst, *World Trade Center Attacked, Towers Collapse*, REUTERS, Sept. 11, 2001, at [http://www.angelfire.com/nj3/skl/page\\_17.htm](http://www.angelfire.com/nj3/skl/page_17.htm).

<sup>23</sup> Hollis, *supra* note 20, at 525.

<sup>24</sup> CENTERS FOR DISEASE CONTROL, PRELIMINARY RESULTS FROM THE WORLD TRADE CENTER EVACUATION STUDY—NEW YORK CITY, 2003, Sept. 10, 2004, at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5335a3.htm> [hereinafter WTC Evacuation Study]. See also *WTC Evacuation Study Scientific Meeting: Translating Research into Practice*, Sept. 15, 2006, at <http://www.mailman.hs.columbia.edu/CPHP/wtc/documents/WTCslides.pdf>.

<sup>25</sup> *WTC Evacuation Study Scientific Meeting*, *supra* note 24.

Immediately after the September 11 attacks, the federal government required states to update their emergency response plans; thereafter such plans, for understandable reasons, focused on terrorism and bioterrorism. The large majority of restructured state plans did not focus on unexpected natural disasters such as tornados, floods, earthquakes, wildfires, landslides, power outages, or natural gas explosions; neither did they pay particular attention to the problem of evacuating people with special needs. However, such natural disasters can impact a disabled citizen in much the same manner as a terrorist attack; i.e., with no prior warning and with a need for immediate and speedy response.

To date, the federal government has failed to aggressively respond to the greater possibility that emergencies derive from unexpected but natural conditions. The Federal Emergency Management Administration (FEMA) is expressly charged with the responsibility of managing federal response and recovery efforts following any national incident. Yet its online publication, "Emergency Procedures for Employees with Disabilities in Office Occupancies,"<sup>26</sup> is a dated fire administration piece, which has not been modified since 1999 and which contains limited information concerning the specialized needs of the disabled when evacuating during various types of emergencies. Information provided on another FEMA web site entitled "Individuals with Special Needs: Preparing and Planning,"<sup>27</sup> clearly takes the approach that disabled individuals are solely responsible for ensuring their own safe evacuation and emergency response. Notwithstanding its title, the information provided on this site is staggeringly unpecific and vague. For example, the section entitled "Mobility Impaired" simply contains the suggestion, "May need special assistance to get to a shelter[.]" and the section entitled "Hearing Impaired" states, "May need to make special arrangements to receive warnings."<sup>28</sup> No further recommendations are provided.

Most state governments have been similarly lax. The Director of the Division of Disability and Health Policy at the University of New Mexico has characterized both state and federal government planning in emergency response for the disabled as "pretty bleak".<sup>29</sup> Indeed, even for emergency circumstances in which there is substantial advance warning, governmental efforts at emergency response have been abysmal. The aftermath of the 2005 hurricane season highlights this point. Post-Katrina reports indicate that state agencies responsible for people with disabilities lost complete track of thousands of individuals, and hundreds of the elderly and disabled were stranded in their homes. Those relocated were forced to endure crowded, unsanitary conditions, and deteriorating medical care when hospitals and nursing homes lost power.<sup>30</sup>

Even in those communities with established emergency procedures which provide for the unexpected evacuation of the disabled, confusion and disorganization may occur if the process is not fully understood and supplemented with employee training and organized leadership. A study conducted by Columbia University's Mailman School of Public Health, presented at the April 2006 National Occupational Research Agenda Symposium, questioned employees who were actually working at the WTC on September 11, 2001. Although the federal Occupational Safety and Health Administration (OSHA) had evacuation plans for the WTC in place, the

<sup>26</sup> <http://www.usfa.fema.gov/downloads/pdf/publications/fa-154.pdf> (last visited Feb. 28, 2009).

<sup>27</sup> <http://www.fema.gov/plan/prepare/specialplans.shtm> (last visited Feb. 28, 2009).

<sup>28</sup> *Id.*

<sup>29</sup> Staci Matlock, *Challenges Remain in Evacuating Disabled*, SANTA FE NEW MEXICAN, May 7, 2006, at C-1.

<sup>30</sup> *Id.* See also Martha T. Moore, *States Review Evacuation Plans for the Elderly, the Disabled*, USA TODAY, Dec. 30, 2005, at 4A.

researchers found that occupant companies were not following them. The researchers determined that among employers leasing space in the WTC, there was a lack of familiarity with the building, the fire stairs, the evacuation protocol and terminal egress points out of the building, as well as concerns relating to one's ability to descend multiple floors (health status).<sup>31</sup> The study's researchers reported that the WTC's evacuation was confusing and disorganized, with both able-bodied and disabled employees waiting for permission to leave, changing shoes, waiting for direction and more.<sup>32</sup> The researchers determined that an entire spectrum of emergency preparedness policies was lacking at the WTC,<sup>33</sup> notwithstanding the fact that seven years earlier these same buildings had been attacked. Among the study's many recommendations were preplanning for disabled individuals.<sup>34</sup>

Seven years after September 2001, periodic reports continue to highlight the need for enhanced evacuation procedures for the disabled. Similar to many government buildings in other states, the Des Moines, Iowa, statehouse is an ornate, historic structure built long before federal laws and state building codes mandated accessibility. And like many states, Iowa's emergency evacuation procedures fail to recognize that special considerations must be made when the disabled work in or visit such buildings. During a January 2006 fire alarm at the Iowa statehouse, State Representative Mark Kuhn, who uses a wheelchair and walker, was left stranded in the building. No elevators were available and Kuhn was unable, for obvious reasons, to utilize the stairs. Fire department procedures merely called for the building to be evacuated until firefighters could respond, but made no provisions for the evacuation of disabled occupants. Ironically, State officials subsequently blamed the Capitol's facility manager for not installing special devices that would have helped handicapped people evacuate the building; the Capitol had received five Evac-Chairs two years earlier, but the devices were in the attic when the fire alarm sounded.<sup>35</sup>

A District of Columbia case filed that same year involved the issue of whether assigned wheelchair seating in a movie theater violated the ADA because it relegated the disabled filmgoer to inferior seating at the back of the theater.<sup>36</sup> The theater contended that dispersing wheelchairs throughout the theater would amount to a direct threat to others during an emergency evacuation, because the only wheelchair accessible exits were located in the back of the theater and wheelchairs would, in some instances, be moving against the flow of traffic heading for nearer exits at the front of the theater.<sup>37</sup> The plaintiff argued that the theater's decision to locate its wheelchair area at the rear of the theater deprived him of full and equal enjoyment of the movie, and that he had the ability and strength to roll his wheelchair up the aisle in the event of an emergency. The court held that in conducting the "direct threat" individualized assessment required under the ADA, the theater had to consider whether other wheelchair users, not as physically capable as this plaintiff, would pose a direct threat to the health and safety of the other moviegoers. It defined an "individualized" assessment of one

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<sup>31</sup> *WTC Evacuation Study Scientific Meeting*, *supra* note 24.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* See also OCCUPATIONAL SAFETY AND HEALTH ADMIN., WTC STUDY CALLS FOR IMPROVED EVACUATION PLANS FOR HIGH RISES, 13 INSIDE OSHA, May 2006, No. 9.

<sup>34</sup> *WTC Evacuation Study Scientific Meeting*, *supra* note 24.

<sup>35</sup> *Debate Continues Over State Capitol Equipment for Disabled*, THE GAZETTE (Cedar Rapids-Iowa City), Jan. 21, 2006, at 5B.

<sup>36</sup> *Fielder v. Amer. Multi-Cinema Inc.*, 871 F. Supp 35 (D. D.C. 1994).

<sup>37</sup> *Id.* at 39.

disabled individual's ability to evacuate as one that included consideration of the ability of other, similarly-situated disabled individuals.<sup>38</sup>

In 2004, and with input from disability advocates and research institutions, the Justice Department issued "An ADA Guide for Local Governments" to assist local governments in identifying the needs of people with disabilities during an emergency.<sup>39</sup> The Guide offers suggestions for developing and implementing effective emergency management practices that address those needs.<sup>40</sup> Yet progress in this area has been slow, intermittent and often non-existent. The inability of local, state and federal governments to safely provide for their disabled citizens during the 2005 hurricane season provides ample evidence that further action is required.

Federal lawmakers have also taken up this issue. In 2004, the Department of Homeland Security (DHS) established an Interagency Coordinating Council on Emergency Preparedness and Individuals with Disabilities.<sup>41</sup> The Emergency Preparedness and Response for Individuals with Disabilities Act, initially proposed in December 2005 following the devastation wrought by Hurricanes Katrina and Rita, attempted to ensure that the needs of people with disabilities were met before, during and after a national disaster. The bill was subsequently incorporated into a larger homeland security bill, which resulted in the establishment of a Disability Coordinator at the DHS who is charged with providing guidance and coordination in emergency planning and relief efforts and a national study on the accessibility of emergency shelters.<sup>42</sup>

This history of limited success may explain why, in recent years, individual disabled litigants have turned to the legal system to force change in this area.<sup>43</sup> In a series of private cases beginning in 2002, disabled individuals began to assert that the failure of public accommodations to adequately address the challenges facing the disabled during emergency evacuations amounted to disparate treatment and failure of reasonable accommodation under the ADA. *Chevron U.S.A. Inc., v. Echazabal* concerned the issue of whether an employer may utilize the direct threat defense to justify its refusal to hire a disabled individual, where it believes the direct threat is to the future health of that person.<sup>44</sup> While working for an independent contractor at a Chevron oil refinery, Echazabal twice applied for a job directly with Chevron. The company offered to hire him if he could pass the company's physical examination. Echazabal's physical examination indicated a liver abnormality and condition which was eventually identified as Hepatitis C. Company doctors maintained that the liver condition would be aggravated by continued exposure to the toxins at the refinery, and the company withdrew its employment offer. When Echazabal filed suit under the ADA, Chevron utilized the "direct threat" affirmative defense. The Supreme Court upheld that position, finding that as long as Chevron conducted an individualized assessment of the job applicant's risk of harm, and could establish that its safety

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<sup>38</sup> *Id.* at 40.

<sup>39</sup> <http://www.ada.gov/emergencyprepguide.htm> (last visited Feb. 28, 2009).

<sup>40</sup> *Id.*

<sup>41</sup> See [http://www.dhs.gov/xprepresp/committees/editorial\\_0591.shtm](http://www.dhs.gov/xprepresp/committees/editorial_0591.shtm);  
[http://www.dhs.gov/xabout/structure/editorial\\_0842.shtm](http://www.dhs.gov/xabout/structure/editorial_0842.shtm).

<sup>42</sup> Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, 120 Stat. 1355, § 513.

<sup>43</sup> While the Department of Justice is authorized to bring a lawsuit wherever there is a pattern or practice of disability discrimination in violation of Title III, or where an act of discrimination raises an issue of general public importance, Title III may also be enforced through private lawsuits. 42 U.S.C. § 12117(a).

<sup>44</sup> 536 U.S. 73 (2002).

concerns were job-related and consistent with business necessity, the decision not to hire the disabled applicant was appropriate and not illegal.<sup>45</sup>

After *Echazabal*, disability advocates worried that its holding in favor of an employer's right to deny employment to a disabled job applicant, based on the belief that the employment might pose a direct threat to that applicant's health or safety, will result in employment denials over concerns about the emergency evacuation of the disabled applicant. Others argue that these worries are unfounded and that such denials would be interpreted as a return to the kind of workplace paternalism that the ADA was intended to outlaw. They note that the ADA was grounded in the integrationist approach found in civil rights laws, i.e., Title VII, and contend that such employer activity could never be justified under those disparate impact precedents that view equality as a matter of removing innocent structural barriers to group participation in the workplace.<sup>46</sup>

Another noteworthy case in this area is *Savage v. City Place Limited Partnership*.<sup>47</sup> Savage was shopping in a Marshalls store in a Silver Spring, Maryland mall when the mall fire alarm went off. The Marshalls manager used the store's intercom to direct all shoppers to evacuate by exiting the store and moving into the mall's interior atrium, one floor below ground level. Upon all shoppers' exit, store employees closed the store's entrance gate and left. As power to the mall escalator and elevator had been shut down, there were no other useable mall exits. Savage, in a wheelchair, was essentially trapped along with an elderly couple, a woman with a leg brace, a man using two canes, an obese woman who said climbing stairs made her breathless and a woman in a walker. The locked store gate behind them prevented them from re-entering in order to find another accessible exit. Neither the store nor mall personnel provided assistance or guidance. They waited in the interior mall area for approximately one hour, until an announcement was made that the fire alarm was a false one.

Six months later, Savage and the Disability Rights Council (DRC) of Greater Washington filed suit against both the mall and Marshalls, alleging that the store, as a public accommodation, had violated the ADA by its failure to develop and implement effective corporate-wide procedures for the same evacuation of its disabled customers. Marshalls sought summary judgment, alleging, *inter alia*, that the ADA did not apply to emergency evacuation procedures, and that if it did, it was the responsibility of the mall and not its individual stores to implement and oversee such procedures. Marshalls also argued that the ADA only requires the company to treat its disabled customers similarly to its nondisabled ones. It maintained that any obligation to incorporate the needs of people with disabilities in emergency evacuation procedures is limited to Title II entities, rather than to Title III public accommodations like Marshalls. Lastly, it asserted that because the federal government has not issued a detailed guidance spelling out precisely how Marshalls should have modified its emergency evacuation procedures, the retailer was not required to make any changes to its policies under the ADA.<sup>48</sup>

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<sup>45</sup> *Id.* at 86.

<sup>46</sup> Tory L. Lucas, *Disabling Complexity: The Americans with Disabilities Act of 1990 and its Interaction with Other Federal Laws*, 38 CREIGHTON L. REV. 871, 917 (2005). In addition, both *Haysman v. Food Lion Inc.*, 893 F. Supp. 1092, 1106 (S.D. Ga. 1995), and *EEOC v. E.I. DuPont de Nemours & Co.*, 406 F. Supp. 2d 645 (E.D. La. 2005), *aff'd in part, rev'd in part*, 480 F.3d 724 (5th Cir. 2007), expressly note the significance of Congress' use of Title VII language in the ADA.

<sup>47</sup> No. 240306, 2004 WL 3045404 (Md. Cir. Ct. Dec. 20, 2004).

<sup>48</sup> *Id.* at 8.

The Maryland Circuit Court denied Marshalls' motion for summary judgment, ruling Title III of the ADA applied to the facts in the case.<sup>49</sup> The ruling prompted the mall defendant, City Place Limited Partnership, to agree to rewrite its evacuation plan and make architectural modifications to the mall. Six months later, the remaining parties reached a settlement that required Marshalls to provide accessible evacuation routes for disabled shoppers in all of its 700 stores in 42 states and Puerto Rico.<sup>50</sup>

The Marshalls settlement is noteworthy in that it is the first major retailer to agree to accommodate its disabled customers in critical emergencies and to change its evacuation policies on a national scale. Moreover, the settlement agreement requires that Marshalls: (1) provide an accessible emergency exit or area of rescue assistance for people with disabilities in each of its stores; (2) develop written, corporate-wide evacuation policies for individuals with disabilities; (3) train all current and future employees to assist customers in locating and using a store's accessible emergency evacuation route; (4) institute signs in each store to direct people with disabilities to accessible emergency exits; (5) train all employees on its new emergency policies and procedures; (6) work with accessible design and emergency management consultants to implement its revised emergency evacuation procedures; and (7) review its evacuation policies once per year.<sup>51</sup>

With respect to the responsibility of public entities during emergencies, the case of *Gustafson v. Regents of the University of California* can also be instructive.<sup>52</sup> In 1997, three disabled University of California Berkeley students filed a civil class action lawsuit against the University challenging on-campus physical access barriers. Named plaintiff Kaaryn Gustafson was a doctoral and law student at Berkeley with a mobility impairment when this case was filed; the lawsuit's parameters were later expanded to include individuals with vision disabilities. In October 2004, after a lengthy litigation process that ultimately resulted in a far-reaching, arbitrated settlement, the Regents of the University of California agreed to provide the following minimum building evacuation and safety measures:

- Clearly identify a Designated Waiting Area on every floor of every building, to which persons with disabilities will be instructed to go in the event of an emergency;
- In buildings without automated sprinkler systems, to install accessible, two way communication systems for individuals in the Designated Waiting Area to contact emergency personnel;
- Develop and implement formal, campus-wide evacuation policies and procedures;
- Distribute evacuation policies and procedure, yearly, to individuals with disabilities through: (1) University Information Channels; (2) postings on each floor of each building; and (3) an information system which utilizes alternative Accessible formats, such as Braille, audiotape, digital media and tactile evacuation maps;
- Provide signage and maps in each building which indicate safe evacuation routes for people with disabilities;

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<sup>49</sup> *Id.* at 10.

<sup>50</sup> Disability Compliance Bulletin, LRP Publications, May 26, 2005, Vol. 30, No. 4; *See also* Washington Lawyers' Committee News Release, *Landmark Settlement Requires Accessible Evacuation Procedures at all Marshalls Stores Nationwide*, at <http://www.washlaw.org/news/releases/050405.htm>.

<sup>51</sup> Washington Lawyers' Committee News Release, *supra* note 50.

<sup>52</sup> Settlement and Release of Claims, No. C-97-4016 (N.D. Cal. Nov. 24, 2004), *available at* <http://www.drlegal.org/downloads/cases/gustafson/settlement.pdf> (last visited Feb. 28, 2009).

- Provide at least one evacuation chair for each building,<sup>53</sup> with additional chairs for the larger buildings;
- Implement a training and orientation program regarding evacuation for the disabled, such program to include training on the operation of evacuation chairs;
- Institute a “tracking system” in which individuals with disabilities who may need assistance in emergencies can notify emergency personnel of their whereabouts;
- Provide disabled individuals with the option of being paired with two other trained people (faculty members or other employees) termed “buddies”, who would assist them in an emergency;
- Within the first month of each semester, establish a plan to ensure that a disabled student will be able to safely evacuate from each class, his or her dorm room, and other locations where the student spends significant time;
- Ensure that there are sufficient volunteers, in each building, to act as “floor wardens” and “roll takers” who will assist in the safe evacuation of people with mobility and/or vision disabilities; and
- Conduct periodic reviews and drills (announced or surprise) on disability-specific evacuation procedures.<sup>54</sup>

As in *Savage*, disability rights advocates quickly took the position that the *Gustafson* settlement should serve as a model for future emergency evacuation measures, policies or procedures. This stance seems to be borne out by the recommendations of the DHS discussed below.<sup>55</sup>

The pivotal case of *Tennessee v. Lane* deals with the issue of what accommodation must be afforded to the disabled in state-owned public accommodations.<sup>56</sup> In 1996, a defendant paraplegic was summonsed to appear at a county courthouse in Tennessee on criminal charges. His initial appearance was assigned to a second floor courtroom, but as there was no elevator in the building, resulting in his not being able to use his wheelchair and having to crawl up two flights of stairs. In subsequent appearances, his lawyers ran up and down between the floors, while he remained on the ground floor. The case was brought by amputees and paraplegics confined to wheelchairs, claiming they were denied access to those Tennessee courthouses lacking ramps or elevators.<sup>57</sup>

A divided Supreme Court ruled that Congress did not exceed its authority under the ADA when it subjected states to private lawsuits by people with disabilities challenging barriers to access. It held that Title II of the ADA barred discrimination in state government services, programs and activities, and that a state may be sued for failing to provide access under that

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<sup>53</sup> An evacuation chair is a controlled descent device. Similar products are platform-based devices and slides/chutes. The International Center for Disability Information at West Virginia University has developed Project Safe EV-AC, an effort to improve emergency evacuation from buildings, vehicles and other settings by providing training materials on the evacuation and accommodation of people with disabilities. For a complete list of such items, see <http://evac.icdi.wvu.edu/accomm/index.htm>. In addition, a comprehensive list of evacuation devices and their technical standards can be found at the web site of the American Society for Testing and Materials, ASTM International, at <http://www.astm.org>.

<sup>54</sup> *Savage*, Settlement and Release of Claims, *supra* note 52.

<sup>55</sup> See *infra* notes 73-82 and accompanying text.

<sup>56</sup> 541 U.S. 509 (2004).

<sup>57</sup> *Id.* at 513-514.

portion of the ADA that requires a public entity to be accessible to the disabled.<sup>58</sup> The majority viewed enforcement of Title II as the claimants' "constitutional right of access to the courts" and "against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivation of fundamental rights" to the disabled.<sup>59</sup> It held that Title II's requirement that public entities be accessible to the public was "congruent and proportional to [the] object of enforcing the right of access to the courts."<sup>60</sup> The opinion referenced the "long history" of disparate treatment of disabled individuals in the administration of judicial services, and held that Title II constituted a valid attempt to overcome this "difficult and intractable problem" and warranted "added prophylactic measures in response."<sup>61</sup>

Disability advocates concerned over *Echazabal*<sup>62</sup> may take some comfort in *Lane*. As emergency response procedures customarily fall within the purview and responsibility of state and local governments, *Lane* might be cited as support for allowing private actions by disabled individuals who are not reasonably accommodated by evacuation procedures developed and implemented under state emergency management programs.

Moreover, using the *Lane* holding as support, it is possible to envision a disabled plaintiff making a convincing argument that, given the 14<sup>th</sup> Amendment's longstanding constitutional assurances against a state depriving its citizens of life and/or the equal protection of the laws, state and local emergency rescue procedures which fail to effectively accommodate the disabled constitute a deprivation of a fundamental right as equally important as that of access to its court systems. It is not insignificant that two years later, in *United States v. Georgia*,<sup>63</sup> where a paraplegic prisoner confined to a wheelchair challenged some of the conditions of his confinement in a Georgia prison under the ADA's Title II, the Supreme Court recognized that there exists a "constellation of basic constitutional guarantees that the ADA's Title II seeks to enforce."<sup>64</sup>

In *Dilworth v. City of Detroit*,<sup>65</sup> it was the Department of Justice's position that Title II requires that the policies and procedures of a city-owned public transportation service be modified to include people with disabilities. In a lawsuit filed against the City of Detroit, the disabled plaintiffs alleged that the City's fixed route public bus system violated Title II and section 504 of the Rehabilitation Act because the City failed to maintain operable wheelchair lifts on its public buses and failed to provide a level of service to persons with disabilities which was equal to that afforded to non-disabled persons.<sup>66</sup> In a 2005 settlement agreement between the parties, the City agreed to enact procedures and community evacuation plans enabling those who with mobility, vision, and hearing impairments, cognitive disabilities, mental illness, or other disabilities to safely self-evacuate or be evacuated by others. Under the terms of the agreement, also signed by the Department of Justice, the City agreed to: (1) bring all of its buses into compliance with the ADA; (2) maintain and repair wheelchair lifts promptly; (3) provide

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<sup>58</sup> *Id.* at 531. The Court also found that the state could be sued under Title II because of its violation of the due process rights of the disabled citizens denied access to the courts. *Id.* at 533-34.

<sup>59</sup> *Id.* at 524.

<sup>60</sup> *Id.* at 531.

<sup>61</sup> *Id.* (quoting *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 737 (2003)).

<sup>62</sup> See *supra* notes 44-45 and accompanying text.

<sup>63</sup> 546 U.S. 151 (2006).

<sup>64</sup> *Id.* at 161.

<sup>65</sup> Settlement Order, No. 2:04-cv-73152 (E.D. Mich. Nov. 3, 2005), available at <http://www.ada.gov/detroittransit05.htm>.

<sup>66</sup> *Id.* at para. 1.

alternative transportation when wheelchair lifts were temporarily inoperable; (4) train drivers on how to operate the lifts, assist passengers with disabilities, and promptly obtain alternative transportation when needed; (5) appoint an ADA coordinator and implement a complaint system to ensure that ADA-related complaints are promptly addressed and resolved; and (6) hire an independent monitor to evaluate the city's compliance with the settlement.<sup>67</sup>

The *Dilworth* settlement is relevant because local and state evacuation plans commonly utilize public transportation systems to relocate able-bodied and disabled individuals caught in the midst of an emergency. Such plans should recognize that customary and accessible modes of public transportation, e.g., buses, subways, streets, and subway path lines, may be disrupted due to overcrowding or the absence of a functioning system resulting from power outages.

Disability advocates worried about the *Echazabal* ruling's application to emergency evacuation procedures were somewhat relieved by the District Court's 2005 ruling in *E.E.O.C. v. E.I. DuPont de Nemours & Co.*,<sup>68</sup> which concerned a DuPont lab clerk who suffered from severe scoliosis of the lumbar spine, lumbar disc disease, cervical spondylosis and other back conditions, and who had difficulty walking but did not use a wheelchair or other assistive device while at work. The clerk was able to walk in her lab, down the hallway to a printer and copier, and on an evacuation route. Two years after ordering a functional capacity evaluation on the employee, DuPont banned her from walking anywhere on its chemical plant site, and placed her on total and permanent disability. When the EEOC filed suit alleging that the company had violated the ADA by essentially terminating the employee, DuPont maintained that the ability to evacuate by walking was an essential function of and qualification for the employee's job, and claimed that her inability to walk posed a direct threat to herself and other employees in an emergency.<sup>69</sup> In denying the company's motion for summary judgment, the court determined that material issues of fact existed because DuPont: (1) may have treated other employees with walking difficulties differently; (2) did not immediately respond to the evaluation; and (3) did not include evacuation in the lab clerk's job description. The court also decided that the employee's walking difficulties might be addressed by reasonable accommodation.<sup>70</sup> At trial, the plaintiff produced evidence that DuPont had refused to consider possible reasonable accommodations in lieu of termination, and she was able to climb the five steps leading to her home and walk five city blocks without difficulty.<sup>71</sup> The jury found DuPont liable and awarded one million dollars in punitive damages, plus actual damages of back and front pay; the judge reduced the monetary award to \$300,000.<sup>72</sup>

These and other cases clearly indicate that the courts will continue to be required to decide, on a case-by-case basis, whether disabled individuals were afforded reasonable accommodation, not only in the planning and preparedness for emergencies, but also in the actual implementation of emergency response plans. Population growth in coastal areas vulnerable to hurricanes or fierce storms, the expanded development of formerly rural regions subject to flooding, and the aging of our population and increasing numbers of elderly and/or medically ailing people, are all variables that will impact emergency response plans at the local,

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<sup>67</sup> *Id.* at para. 3.

<sup>68</sup> 406 F. Supp. 2d 645 (E.D. La. 2005), *aff'd in part, rev'd in part*, 480 F.3d 724 (5th Cir. 2007).

<sup>69</sup> *Id.* at 655.

<sup>70</sup> *Id.* at 668.

<sup>71</sup> *Id.* at 656.

<sup>72</sup> *Id.* at 670.

state and federal levels. The following section recounts the efforts, to date, of those federal agencies who have issued guidelines and recommendations on this issue.

## Federal Guidelines

In the aftermath of Hurricanes Katrina and Rita, the DHS developed guidelines for state and local governments concerning emergency warning and notification methods that accommodate the needs of the disabled.<sup>73</sup> These guidelines are significant not only for their content, but because they also provide a sufficient model and foundation for the development of emergency evacuation procedures by private entities who maintain public areas and accommodations where disabled citizens work, study, shop, or live.

The DHS guidelines recognize that traditional visual or audible alerts and warnings, e.g., sirens or flashing lights, may be insufficient for those vision- and hearing-impaired individuals who are unable to rely upon traditional orientation and navigation methods, such as audible or visual cues, for emergency egress.<sup>74</sup> Hearing-impaired individuals find themselves at a considerable disadvantage because of their inability to hear alarms, sirens or other audible warnings; or because their only ability to communicate with anyone relies on a voice communication device whose power source may be disrupted. Electronic written warnings, such as notices on computers, TV screens, or digital boards, may cause disabled employees to be disadvantaged through the loss of power to sustain such equipment, or through the inability to rely upon customary navigation pathways in the public area or workplace.

The DHS recommends that several forms of notification be utilized to inform occupants of an impending crisis or danger and resulting need for evacuation, and expressly note that using a combination of methods could be more effective than relying on one method alone, because combining visual and audible alerts will reach a greater audience than either method would by itself.<sup>75</sup> These methods might include the use of telephone calls, auto-dialed TTY (teletypewriter) messages, text messaging, e-mails, direct door-to-door contact with pre-registered individuals, and open-captioning on local TV stations.<sup>76</sup> Other lower-tech options may be incorporated into such procedures, such as utilizing qualified sign language interpreters to assist in broadcasting emergency information provided to the media.<sup>77</sup>

In addition, the DHS guidelines call attention to the fact that persons with mobility impairments, e.g., those requiring canes, walkers, or wheelchairs or those temporarily disabled by casts on broken ankles, feet or legs, face foreseeable problems that arise when the power to working elevators is slashed and stairs are left as the only available exits.<sup>78</sup> Reliance on the assistance of others, while helpful, is not the only answer, as a successful building evacuation decreases if multiple people are required to assist each disabled evacuee. The use of evacuation or other controlled descent devices is strongly recommended for companies with offices spanning more than one floor.<sup>79</sup> Such devices contain controlled speed limitations regardless of

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<sup>73</sup> ADA Guide for Local Governments, *supra* note 39.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* For example, an “evacuation chair” is an emergency device designed to move mobility-impaired individuals down stairs; its rubber tracks grip the stairs, and its safety brake can stop the unit on the stairs if necessary to allow stairway traffic to pass, or to clear an obstruction. *See supra* note 53.

the environmental conditions, and are designed so that the disabled passenger can be secured safely regardless of his or her physical condition. Emergency preparedness policies should regularly require that these descent devices be present in sufficient numbers on or above the floor from which the building evacuation would take place.

The DHS further recommends advance identification of the evacuation/transportation needs of those individuals who use canes, walkers, wheelchairs, scooters or other mobility aids. Accessible modes of transportation should be identified, as both public and private transportation may be disrupted due to overcrowding of hallways and stairways, blocked streets and sidewalks, or the absence of any functioning transportation system.<sup>80</sup> It also recommends the establishment and maintenance of voluntary and confidential registries or databases of those with disabilities who need individualized evacuation assistance or notification. If such a database is established, it should rely upon those needing assistance to self-identify prior to any emergency, and the entity controlling the database should be required to have procedures in place that ensure its volition and confidentiality, and provide frequent updates of all information therein.<sup>81</sup>

In developing their emergency response and evacuation plans, the DHS suggests that employers (i) utilize input from disabled employees in developing emergency procedures, and (ii) ensure widespread publicity and distribution of the emergency plan so that all employees, both disabled and able-bodied, know what is expected of them.<sup>82</sup>

One of the most detailed set of guidelines and recommendations has been developed by the Department of Labor's Office of Disability Employment Policy (ODEP). ODEP's framework of emergency preparedness guidelines are intended to be used as a "launching point" for other agencies' emergency response plans.<sup>83</sup> ODEP expressly acknowledges that all disabled employees are entitled to the same level of safety and security in their communities and work environments as the non-disabled. It reminds federal agencies that they must have an Occupant Emergency Plan (OEP) that complies with Occupational Safety and Health Administration requirements and suggests what should be included in an OEP. Its guidelines reflect the agency's intent to encourage other entities to develop effective practices and policies that can be modified for use by state and local governments, nonprofit organizations and the business community.<sup>84</sup> The guidelines include the following recommendations:

(1) *Tailoring emergency access and egress routes to each facility and its occupants.* Not only must an agency's emergency plan establish procedures for safeguarding lives and property in the short-term, but it should also tailor security, shelter-in-place, and evacuation procedures to each facility. Variables such as building location, proximity to prominent landmarks or buildings, design features and the varied missions of building occupants will likely impact which security and safety measures are necessary. Entities sharing building space with others must consider how another plan (or lack thereof) will affect its own. Such plans should take into account the personnel and visitors in the building on an average day, including those regularly

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<sup>80</sup> *ADA Guide for Local Governments*, *supra* note 39.

<sup>81</sup> *Id.* But note that the Agency's suggestions concerning the maintenance of registries or call lists do not address the likelihood that a computerized database would also fall victim to a power outage and thereafter be unavailable.

<sup>82</sup> *Id.*

<sup>83</sup> DEPARTMENT OF LABOR, PREPARING THE WORKPLACE FOR EVERYONE: ACCOUNTING FOR THE NEEDS OF PEOPLE WITH DISABILITIES, July 2005, at [http://www.dol.gov/odep/pubs/ep/preparing/Workplace\\_Final.pdf](http://www.dol.gov/odep/pubs/ep/preparing/Workplace_Final.pdf) [hereinafter PREPARING THE WORKPLACE FOR EVERYONE].

<sup>84</sup> *Id.* at ii.

present in the building, e.g., children in a daycare center, cafeteria workers, contractors, sales representatives, etc.<sup>85</sup>

(2) *Shelter in place (SIP) plans.* SIP plans require occupants to immediately seek refuge and remain there rather than evacuating. Depending on the type of hazardous event, SIP may be the preferred method of safe rescue whenever an evacuation would place the disabled individual at greater risk. The disadvantage of SIP is that this rescue option is usually only a temporary one; e.g., the ability to shelter-in-place because of a hazardous airborne substance will only last a few hours. SIP plans customarily call for shutting down a building's ventilation system as quickly as possible, closing and securing all exits and entrances, and turning off the elevators. There must be multiple and redundant means of notifying occupants of the need to remain in the facility, and communicating with them during the emergency. SIP occupants need to be notified, in advance, to store any specific personal supplies, such as medicines, supplies for service animals, and assistive devices in their desks or nearby, in advance of the need to shelter in place.<sup>86</sup>

(3) *Buddy systems.* A buddy system is a standard component of most emergency response programs; people pair up as partners to assist each other. While a buddy can help ensure that a disabled employee is informed about and appropriately responds to an emergency, a buddy system should only be a supplemental means of emergency notification and response. Reliance on a single buddy can put the employee who needs assistance at risk, especially when the buddy is not present in his office or the facility, or able to assist, during an emergency. Any buddy system that is exclusively person- or location-dependent will not be effective.<sup>87</sup>

(4) *Mobility devices.* Under certain conditions physically carrying a disabled person can be cumbersome and dangerous. Many fire departments have ladders that cannot reach the entire height of a multiple story building.<sup>88</sup> The ODEP guidelines recommend that evacuation descent devices, such as evacuation chairs, be mounted in or near every emergency stairwell above the first floor, and both able-bodied monitors and employees needing these devices are regularly trained in their use. By having evacuation devices available, disabled individuals can be moved to an area or floor where emergency response personnel or their equipment can reach and assist them. An effective emergency plan will also include a provision that provides for the evacuation of mobility devices, such as wheelchairs, as well. Evacuating mobility devices will enable a smoother transition for employees who use them, since otherwise such employees would be essentially helpless once they have left the emergency event.<sup>89</sup>

(5) *Elevator Policies.* Perhaps one of the most noteworthy consequences of the September 11 attacks has been a renewed interest in and re-consideration of the customary thinking regarding elevator use. Historically, elevator use has been seen as a dangerous method of emergency egress for evacuees and has been almost universally prohibited in emergency situations. Recently, however, fire experts have been advocating elevator use in high rises as a viable method not only for taking firefighters to the blaze, but also for evacuating the building's occupants.<sup>90</sup> ODEP guidelines expressly note that under current standards, some elevators are

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<sup>85</sup> *Id.* at 4.

<sup>86</sup> *Id.* at 23-25.

<sup>87</sup> *Id.* at 27.

<sup>88</sup> *Id.* at 41. The rule of thumb is usually that such equipment can reach up to the seventh story, assuming the area below the room's window is perfectly level and has a solid footing. *Id.*

<sup>89</sup> *Id.* at 28.

<sup>90</sup> *Id.* at 44. See also *Developing Elevators that Function During Fires*, SCIENCE DAILY, Oct. 24, 2003, at <http://www.sciencedaily.com/releases/2003/10/031024062746.htm>.

operable in certain crisis situations. Following an emergency in which an alarm is activated, elevators usually automatically move to the main floor (or floor exiting to the outside) and lock down. Once fire personnel arrive and ensure that the elevators are safe to use, authorized personnel can operate them manually. Most new elevators have buttons marked with a red fire hat that flash when they are unsafe for use. In October 2003, the National Institute of Standards and Technology (NIST) began working with the elevator industry to develop and test more reliable emergency power systems and waterproof components. Under consideration are software and sensing systems that adapt to changing smoke and heat conditions, helping to maintain safe elevator operation during fire emergencies. Such changes could also allow the remote operation of the elevators during fires, thus freeing firefighters to assist in other ways.<sup>91</sup>

(6) *Service animals.* ODEP guidelines recommend that evacuation plans should also include the service animals of handicapped occupants and visitors, as the disabled individual and his/her animal are a well-trained, personal support team that should not be separated. The service animals of employees should be included in practice evacuations and drills.<sup>92</sup>

(7) *Notification and communication systems.* Like the DHS guidelines, ODEP guidelines strongly emphasize the use of multiple and redundant communication systems, particularly for hearing and visually impaired occupants. Hearing-disabled individuals can be afforded assisted listening devices, transliterators and qualified sign language interpreters. Information distributed through the agency's web site or intranet should be accessible to blind/low-vision employees who use screen readers, as well as those who use speech recognition technology. Strategies also need to be developed to address problems inherent in communicating with individuals away from their desk/office, or outside of the building, and to afford those with speech or other communication difficulties the capacity to convey information quickly to those who need to know.<sup>93</sup>

Formal written evacuation plans or emergency planning manuals should hold information specific to people who are hearing-impaired; while simple language and formatting techniques should be used to highlight key points and make the document more reader-friendly for the vision-impaired. All written instructions should be located in prominent places throughout the building, as well as on the agency's intranet. If an agency uses hard copy formats to communicate emergency preparedness and response information, the documents should also be made available electronically, in a word processing application, plain text, through email, disk or CD. Text descriptions should be provided for images, graphics, and charts.<sup>94</sup>

## Amending the ADA

Although this particular issue merits greater discussion than can be accomplished within the confines of this article, there is not yet any indication that Congress is amenable to including the matter of emergency evacuation of the disabled by amending and/or expanding the ADA. After considerable delay, recent bipartisan effort in Congress resulted in a 2008 amendment to the ADA which merely expands existing statutory protections to individuals through the statute's

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<sup>91</sup> Richard Bukowski, *Emergency Egress Strategies for Buildings*, NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY, NIST BUILDING AND FIRE RESEARCH LABORATORY, at <http://fire.nist.gov/bfrlpubs/fire07/PDF/f07018.pdf>. See also AMERICAN SOCIETY OF MECHANICAL ENGINEERS, HANDBOOK ON SAFETY CODE FOR ELEVATORS AND ESCALATORS, § A17.1-3.

<sup>92</sup> PREPARING THE WORKPLACE FOR EVERYONE, *supra* note 83, at 29-31.

<sup>93</sup> *Id.* at 50-51.

<sup>94</sup> *Id.* at 34.

definition of “disability” by expressly including workers who suffer from episodic impairments or conditions, or use medicines and prosthetic devices.<sup>95</sup> While the 2008 amendments will require judges to read the ADA more broadly than before, this author suggests that the precise parameters of this interpretation may be further contested when the numbers of disabled swell to include injured veterans returning from Afghanistan and Iraq.

Notwithstanding the 2008 amendments, there has been noticeable reluctance on the part of federal lawmakers to consider the particularized needs of the disabled during emergency management with the ADA’s statutory construction. As a result, some legal scholars have even questioned whether the ADA is an appropriate vehicle for resolving this issue, or whether a due process approach would be more advisable.<sup>96</sup> One recent piece suggests that the courts’ historical interpretations of equal protection and due process claims are inadequate to establish any precedential value that can be relied upon by disability rights advocates.<sup>97</sup> Rather than encouraging a statutory amendment process, the author recommends use of a substantive due process perspective to shift the crux of the argument to whether a disabled individual is entitled to a fundamental right to egress in the context of an emergency.<sup>98</sup> She suggests that the courts employ a logical, common sense view that access includes egress, and thus the right to egress is a mirror image of the fundamental right to access, already well-established in disability law.<sup>99</sup> Such a stance would place squarely within judicial determination the issue of whether the existence of facially discriminatory evacuation policies, such as rescue in place procedures, are unsupported on a constitutional basis.<sup>100</sup>

## Recommendations

Those companies anticipating the possible need for emergency evacuation of customers and staff should carefully review both the *Savage* and *Gustafson* settlements,<sup>101</sup> as well as current DHS and ODEP guidelines, for practical and cost-effective suggestions in establishing emergency response procedures that will accommodate the needs of the disabled and avoid potential liability. The following requirements should be seriously considered in developing such plans:

(1) A company should begin its emergency response and accommodation planning by recognizing that not only employees, but customers and temporary visitors may require accommodation for their individual disabilities during threatening circumstances. Moreover, for

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<sup>95</sup> Americans With Disabilities Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; Mark A. Hoffman, *ADA Changes Spark Concerns Over Employment Practices; Amendment Expands Number of Workers Listed as Disabled*, BUS. INS., Oct. 6, 2008, at 4.

<sup>96</sup> See, e.g., Sharona Hoffman, *Responders’ Responsibility: Liability and Immunity in Public Health Emergencies*, 96 GEO. L.J. 1913 (2008); Dayna Bowen Matthew, *Disastrous Disasters: Restoring Civil Rights Protections for Victims of the State in Natural Disasters*, 2 J. HEALTH & BIOMED. L. 213 (2006).

<sup>97</sup> Jessica L. Roberts, *An Area of Refuge: Due Process Analysis and Emergency Evacuation for People with Disabilities*, 13 VA. J. SOC. POL’Y & L. 127, 152 (2005).

<sup>98</sup> *Id.* at 160.

<sup>99</sup> *Id.* at 160-161.

<sup>100</sup> *Id.* at 174.

<sup>101</sup> *Savage v. City Place Limited Partnership*, No. 240306, 2004 WL 3045404 (Md. Cir. Ct. Dec. 20, 2004). See *supra* notes 47-51 and accompanying text. *Gustafson v. Regents of the University of California, Settlement and Release of Claims*, No. C-97-4016 (N.D. Cal. Nov. 24, 2004), available at <http://www.drlegal.org/downloads/cases/gustafson/settlement.pdf> (last visited Feb. 28, 2009). See *supra* notes 52-54 and accompanying text.

such policy purposes, it should be recognized that a disability might not be a permanent one; an otherwise-abled employee or visitor with a broken leg, for example, is one that might still need reasonable accommodation should an emergency arise during his/her temporary, disabled status.

To avoid liability, the concept of disability might also need to be broadened considerably beyond already established ADA definitions; for example, senior citizens may need assistance in those instances where, due to power outages, stairwells are the only available means of egress.

(2) Every company should develop/implement formal evacuation policies and procedures which include disability accommodation practices, and distribute them periodically to all employees. These policies should be (i) provided to new employees at the time of hire, (ii) posted in each office and hallway within the building, and (iii) electronically available through the company web site. Emergency procedures should also be published through an information system which utilizes alternative accessible formats, such as Braille, audiotape, digital media and tactile signage and maps which display disability-specific emergency exits and routes.

(3) Companies should regularly train employees for safe evacuation. This training program should include both announced and surprise drills on disability-specific procedures for the safe movement of employees and visitors, the proper use of building elevators, and of evacuation devices utilized in stairwells. In buildings with multiple floors, companies should consider providing at least one mobility/evacuation device for each building, with additional devices available in larger buildings. Printed notices concerning the non-use of elevators during fires or other specific situations should be posted immediately next to elevator doors.

(4) At the onset of a crisis situation, a reasonable accommodation process that utilizes different notification systems to communicate the nature of the emergency, and how occupants should respond, is just as critical as established physical evacuation methods and routes. Reasonable accommodation is not simply a matter of physical relocation; it includes appropriate communication of the crisis situation to those individuals with and without disabilities. Thus, alarms or flashing lights cannot be singularly employed; there must also be alternative warning and information systems, such as electronics and office-by-office announcements, that expressly address the needs of visually or hearing-impaired individuals, and will continue to operate in the event of power failures. Along these same lines, the company should consider instituting a "tracking system" in which those individuals with disabilities who may need assistance in emergencies may notify emergency personnel of their whereabouts onsite.

(5) If the company implements a shelter-in-place process, that procedure must clearly identify a designated waiting area on every floor of every building, to which persons with disabilities will go in the event of an emergency. This waiting area should include an accessible two way communication system, not dependent on the existing power supply, so that individuals therein can communicate with emergency personnel.

(6) Companies should consider establishing a list, database or other information system that identifies, in advance, those individuals needing accommodation during an emergency. If such an information system is established, its contributions should be entirely voluntary and all information contained therein must be maintained in a limited access and confidential nature. Companies that establish electronic databases should also recognize the likely unavailability of such information if power outages occur.

(7) Companies should also provide disabled individuals with the option of being paired with one or two other trained people termed "buddies", who would assist them in an emergency. Companies must also ensure that there are sufficient volunteers, in each building, to act as "floor

wardens” and “roll takers” who will assist in the safe evacuation of people with mobility and/or vision or hearing disabilities.

## Conclusion

Neither the ADA nor its implementing regulations, nor case precedent, have yet to specifically address the rights of the disabled to safe evacuation during emergencies. A convincing argument can be made that the traditional equal protection and Title VII models are insufficient to ensure that disability discrimination in emergency evacuations is constitutionally prohibited. Lawmakers should focus their efforts on establishing policies and procedures that do not place disabled individuals at unnecessary risk, and “give the disabled an equal chance at staying alive.”<sup>102</sup> Such efforts would require that accessibility standards in building codes, as well as established fire safety procedures, be updated and reconfigured. In 2007, the National Fire Protection Association published its online Emergency Evacuation Planning Guide for People With Disabilities.<sup>103</sup> At the same time, there is the troubling possibility that more widespread recognition of the risks faced by the disabled during emergencies will lead some employers to conclude that the mere presence of a disabled employee in a public or private location where emergency egress is difficult, must be avoided. This is one of the questions raised by the *Echazabal* ruling,<sup>104</sup> and it, too, needs to be expressly addressed by lawmakers.

Disability advocates have noted that more than a decade ago some communities attempted to implement protective ordinances that prescribed and limited the conditions under which the disabled may be housed.<sup>105</sup> Similarly extreme proposals appeared immediately after September 11, 2001; for example, one newspaper commentator described the “protective” step that could be taken to restrict access to high-rises and the upper levels of skyscrapers for people with disabilities, apparently without regard for the extensive litigation that would result when job applicants in wheelchairs were denied employment because their offices would be located on upper levels.<sup>106</sup> This suggestion also failed to recognize that high-rises pose evacuation challenges for the able-bodied as well as for the disabled. Obviously, employees working in a high-rise assume a greater risk than those who work in a two-level building, yet for someone disabled, an earthquake or fire in a two-story building can be just as deadly as in a high rise.

Additional questions have been posed that require resolution. Do individuals have a fundamental freedom of choice to live, work in and visit whichever environments they select, despite the existence of potentially unsafe conditions? Does the presence of a disabled person in a public accommodation actually pose additional risks to others during an emergency? How should policymakers and employers manage emergency situations and risk, so as to balance competing issues concerning citizens’ safety and free choice? Should the disabled be required to

<sup>102</sup> Barbara McKee, *Local Comment: Don’t Leave the Disabled Behind*, DETROIT FREE PRESS, Oct. 18, 2001, at [http://www.chairgrrl.com/Bridges\\_2001-02/Freep\\_101801.htm](http://www.chairgrrl.com/Bridges_2001-02/Freep_101801.htm).

<sup>103</sup> <http://www.nfpa.org/assets/files/PDF/Forms/EvacuationGuide.pdf>. Additionally, many existing municipal fire codes include provisions that rely upon horizontal, not vertical, exits for the disabled. In horizontal exits, people evacuate the danger area by moving to a safe location on the same floor level. There s/he can remain in relative safety for a period of time sufficient for a rescue team to reach the refuge. See also, U.S. FIRE ADMIN., REMOVING THE BARRIERS: A FIRE SAFETY FACTSHEET FOR PEOPLE WITH DISABILITIES AND THEIR CAREGIVERS, at <http://www.usfa.dhs.gov/downloads/pdf/fswy22.pdf>.

<sup>104</sup> *Chevron U.S.A. Inc., v. Echazabal*, 536 U.S. 73 (2002). See *supra* notes 44-45 and accompanying text.

<sup>105</sup> See, e.g., *Potomac Group Home Corp. v. Montgomery County, Md.*, 823 F. Supp. 1285, 1294 (D. Md. 1993).

<sup>106</sup> Albert R. Hunt, *Those Suffering Special Stress*, WALL. ST. J., Oct. 18, 2001, at A27.

self-identify in order to receive emergency accommodations? If disabled employees are reluctant to self-identify, may employers legitimately and periodically survey employees to determine whether they might require assistance in an emergency? What is required of employers who have employees or visitors with cognitive, psychological or development disabilities? Might able-bodied persons who voluntarily assist a disabled individual during an emergency create any liability for employers or places of public accommodation?<sup>107</sup>

The events of September 11, 2001 can be instructive to all efforts to resolve these and other related questions. There are challenging, complex issues involved in developing and implementing emergency response procedures that will safely evacuate the disabled from a workplace or public area. The settlement agreements in the *Savage*, *Gustafson* and *Dilworth* lawsuits, along with the recommendations made by the Departments of Labor and Homeland Security provide sufficiently detailed templates for the types of policies that lawmakers could undertake promptly, before the next natural or man-made crisis.

It is difficult to envision how any private defendant would be able to successfully argue, as Marshalls attempted to in the *Savage* case, that the absence of emergency guidelines should absolve it from legal responsibility and protect it from claim of disparate treatment. Companies must become proactive in ensuring that their emergency response plans adequately address the needs of disabled employees and visitors. Their failure to do so will likely expose them to lengthy and expensive private causes of action under disparate treatment, due process or equal protection claims.

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<sup>107</sup> Hollis, *supra* 20, at 555-556.