

Disability Rights Are Civil Rights

The Crisis Created by LACCD in Payan v. LACCD

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Caveat

This presentation and its associated materials are provided for informational purposes only and are not to be construed as legal advice.

I have not been retained by and do not speak for any of the parties in the *Payan* matter. My opinions and characterization about *Payan* are my own.

Welcome and Thank You

- Thank you to AHEAD, its leaders, for this free forum and for quickly recognizing the importance of today's issue
- Welcome to:
 - All the alumnae of Axelrod, Vance, and Grossman AHEAD webinars
 - CAPED & AHEAD members
 - The disability community including its advocates
 - To all the invited LACCD officials and counsel and all the CCC Systemwide officials and counsel

This is the Most Serious Matter
in Disability Law in 20 years

I. Three “Theories of Liability” (tools for proving discrimination) That Are Well-Accepted by the Courts, *For Now*

Disparate Treatment

Disparate Impact

Denial of an Accommodation

Tools for Proving Disability Discrimination

- These tools are variously called analytical paradigms, theories of proof, and theories of liability – all generally pertaining to the same concept
- The concept is that, in the law, by statute or court precedent, there are established ways to prove race/national origin/sex/disability discrimination

Why the Crises ⁽¹⁾

- In *Payan and Mason v. LACCD*, the Los Angeles Community College District, a public, taxpayer and Federally-funded, enormous institution, in 2019-20 had 5000 DSS students, 300 blind students, is currently planning to go to the Supreme Court of the United States and ask the High Court to terminate the ability of any private parties to bring disability discrimination claims under Section 504 or the ADA using the disparate impact theory of liability

Why this is a Crisis ⁽²⁾

- The Supreme Court has been anxious to take this issue on and readily granted *certiorari* in *CVS v Doe*, which raised the same issue – Doe was not heard because disability leaders persuaded it to withdraw its petition
- A number of legal scholars following a Title VI precedent in *Alexander v. Sandoval* believe that the conservative Supreme Court majority would hand LA a victory on this issue --- *Alexander v. Sandoval*, 532 U.S. 275 (2001) [English-only driver's license test]
- Such a decision would apply to every aspect of life: medical care, facilities access, shopping, entertainment, dining, transit etc. and could impact Title IX (sex discrimination) as well

In Overwhelming Numbers
and with Relentless Advocacy,
We Must Persuade LACCD to
Abandon Immediately this Tactic

A Quick Review of the Three Tools

1) Disparate Treatment ⁽¹⁾

- For the purpose of preventing intentional discrimination
- Similarly-situated individuals should be treated the same
 - If not, there is a rebuttable inference of intentional discrimination
 - The rebuttal cannot be something made up, just as an excuse, pretext, or cover-up for discrimination

1) Disparate Treatment ⁽²⁾

- Examples:
 - Denial of admission on the basis of disability
 - How were applicants with highly similar qualifications treated?
 - Discipline on pretextual or inconsistent grounds
 - A student with PTSD came back to housing drunk and broke a bathroom mirror and was expelled
 - How was a football player who had done the same thing three times treated?
 - Retaliation and hostile environment on the basis of disability also fall under this theory of liability

2) Disparate Impact ⁽¹⁾

- For the purpose of addressing “benign neglect” or the unintended disparate consequences to persons with disabilities
- This tool is hard to use successfully but is the most effective one for institutional/systemic reform as it incentivizes timely compliance and prophylactic actions
- This is particularly the way to address the discriminatory effects of selection standards, rules, policies, or recurring practices that are neutral on their face, but tend to injure persons with disabilities and do not have a good justification
- It is the best tool to address “ad hocism”

2) Disparate Impact ⁽²⁾

- Examples
 - The district develops and maintains websites that do not comply with WCAG 2.0
 - The district purchases software with no review of its accessibility
 - The district has a practice of never *requiring* its faculty to provide alternate media, or caption videos
 - The district's washrooms are not accessible

Disparate Treatment and/or Disparate Impact?

- An interesting question: if a school knows a widely-used piece of academic software is inaccessible to blind student but does nothing, doesn't look for and implement patches, doesn't figure out a work around, waits for a complaint to come in and complain --- does this constitute disparate impact discrimination or intentional discrimination or both?

3) Denial of an Accommodation

- Likely exclusive to disability
 - OCR recognizes it for some objectives under Title IX
- Usually to solve an individual issue on a student-by-student basis
- Nearly always, student will be registered with DSS and documented his/her disability
- There are regs for this including the ones calling for academic adjustments, auxiliary aids, equal communication, reasonable modifications to rules and policies
- Generally, denial of accommodation is easier to prove than claims under the other two forms of liability but the scope of the remedy likely will be considerably more limited
- Not the tool for addressing institutional/systemic noncompliance

Hypothetical

- A blind student wants to register for classes on-line, which at the time, is the only practical way to do so
 - The student quickly realizes that the website for course registration is not available to him using JAWS
 - He or she could go to DSS, prove his/her disability and ask for an accommodation
 - This would likely entail someone in DSS reading the entire range of courses available to him/her, one by one, over the phone
 - The student is likely to end up getting closed out of important classes because the inefficient accommodation process took too long
 - Same problem next semester; same problem for all other blind students
 - Or through the application of disparate impact, the registration system could get replaced/fixed, the student could register on time, DSS resources are used elsewhere, the student and all blind students are independent and self sufficient

*Payan and Mason v.
the Los Angeles Community
College District*

No.19-5611 (9th Cir., August 24, 2021)

Payan and Mason v. L.A. Comty. Col. Dist.

- Pre-pandemic, the LACCD had around 220,000 students, 5000 were registered with DSS, 300 were identified as blind
- Among the 300 students where Portia Mason and Roy Payan, represented by Patricia Barbosa and Counsel for the NFB (Joseph Espo of Brown, Goldstein & Levy)
- The claims of Payan and Mason were filed in Federal Central District of California (2017) and heard by Judge Hon. Stephen V. Wilson
- Counsel alleged intentional discrimination, denial of equal communication, denial of accommodation (but not disparate impact)

Summary of Claims ⁽¹⁾

- Inaccessible library research tools
- Syllabi not timely or ever converted to an accessible format (Braille or audio)
- Teacher-made textbooks that were not timely or ever converted to an accessible format
- In class handouts that were not timely or ever converted to an accessible format
- Textbooks, particularly in math, that were not timely or ever converted to an accessible format

Claims ⁽²⁾

- The selection of PeopleSoft as the base software system without any precontract investigation of its accessibility
- The selection of MyMathLab without any precontract investigation of its accessibility
- The failure to create prompt and effective “work-arounds” to PeopleSoft and MyMathLab and instead the provision of entirely ineffective ones like enlarged print for a totally blind student
- The redirection of blind students to avoid providing them accommodations for chosen to classes they found inappropriate, like a film
- Note: “ad hocism” runs through many of the examples

Claims ⁽³⁾

- Listen, please, to Roy Payan eloquently telling his own story
 - Now a Ph.D. student
 - 44 years old, not easily pushed around, fought hard but often didn't get what the law required
 - Got and paid for his own tutors; otherwise would never have advanced to a four year college
 - Observed that many other blind students will be stuck forever
- [Link to the interview](#) (audio and transcript)

A Complex Procedural History

- Judge Wilson issues ruling on multiple summary judgement proceedings, finding some violations and setting others for trial: April 23, 2019---mostly in plaintiff's favor
- Bench Trial Findings and Conclusions: 2019 WL 2185138 (C.D. Cal. May 21, 2019)---mostly in plaintiff's favor
- Jury Trial Verdict on damages: June 20, 2019 -- in favor of Payan for use of MyMathLab without any effective fix or alternative
- Permanent Injunction providing a wide range of remedies: 2019 WL 3298777 (C.D. Cal. July 21, 2019)
- District appealed to the 9th Circuit; plaintiff cross-appeal

Bottomline for the District Court

- On most issues and motions, the District lost before the judge and before the jury
- The District's own expert, Gaier Dietrich, affirmed many of the conclusions of the plaintiff's expert
- On June 21, 2020, the District Judge issued a very comprehensive and substantial remedial order
- Payan awarded \$40,000 in monetary damages plus interest

Appeal to the Ninth Circuit

- Payan, Mason, and the NFB v. LACCD, D.C. No. 2:17-cv-01697-SVW-SK (9th Cir. August 24, 2021) [three judge panel: Richard C. Tallman (opinion), Consuelo M. Callahan, and Kenneth K. Lee (dissenting)]
- I urge you to watch the oral argument <https://youtu.be/fosAUxuU474>
- Counsel:
 - David Urban for the District
 - For the plaintiffs, NFB, and NFB of California Jean Zachanasiewicz

What I Learned from Watching the 9th Cir. Hearing and Reading the Decision

- Mr. Urban, appellate counsel for the District made four basic arguments:
 - The district court's measure of compliance went beyond what the law requires affirmatively of recipients--- at least in higher education, case-by-case accommodation is appropriate to most circumstances
 - Equal educational opportunity does not require that students with disabilities get materials at the exact same moment as nondisabled students
 - Some of the remedies ordered by the district court go too far
 - Section 504 and the ADA do not authorize claims by private parties based on disparate impact --- the big issue

Response of the 9th Cir. to the District's Claims ⁽¹⁾

- Watching the oral argument, none of judges appear to believe that the District did not discriminate against Payan, Mason and other blind students
- The court notes that this is not a case about a district that has no policies or procedures in place, it is about how it does or does not implement and enforce them
- The court is disturbed that District had not filled an open position for someone, a Dean or Vice President, to act as a digital compliance coordinator
- The judges agree that, at least on the remedies pertaining to the library research resources, the district court went too far --- I agree
- In its opinion, the 9th Cir. faults the district court for conflating disparate impact with denial of accommodation and as a consequence placing an unnecessary burden on the plaintiffs and also denying them the opportunity to present facts pertinent to claims of denied accommodation such as how or when they had requested reasonable accommodations

LACCD Seeks to Invalidate Disparate Impact

Based on *Alexander v. Sandoval*, 532 U.S. 275 (2001)[challenge to Alabama's English only drivers license test], which held that Title VI of the Civil Rights Act of 1964 does not authorize a private right of action, the 9th Circuit should hold that the same is true under Section 504 and Title II of the ADA

- Title VI and Section 504 are often considered “companion statutes” as they share much statutory history, operative language and “derive remedies from each other”
- The 9th Circuit court recognizing this was an unsettled question called for supplementary briefs
- Distinguishing Title VI from the ADA and Section 504, 9th Circuit Justices Tallman and Callahan subsequently held that both Section 504 and the ADA authorize disparate impact as a viable theory of discrimination
- Justice Lee dissents in a strong opinion

The Rest of the Story

- The 9th Cir. ordered a remand back to the district court so that it will apply the proper paradigms and take additional evidence as necessary to those paradigms
- In the meantime, CVS, in *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204 (9th Cir. 2020)], successfully filed for certiorari but withdrew under pressure from the disability community
- LACCD gave notice that it intended to file for certiorari by March 3
- On December 19, 2021 the LACCD Board directed the District and its counsel to immediately seek settlement and to withdraw its petition for certiorari, ***if*** settlement is reached
- Now, the disability community is seeking to help LACCD to see the light in the same way as it did for CVS

Why No Settlement Already?

- My speculation
 - Counsel for the plaintiffs want a large amount of money for legal fees
 - LACCD would have to hold individual faculty accountable for compliance
 - LACCD doesn't yet understand the breadth of the opposition
 - In-house
 - Advocacy organizations
 - The United States Department of Justice
 - The Board appears to believe that it has reached a fair compromise position in proceeding only if no settlement is reached

The Board Has Chosen an Illegitimate Strategy!

It Must be Dropped, Immediately

The Board Has Chosen An Illegitimate Strategy ⁽¹⁾

- The Board may be receiving savvy legal advice but it must act as leaders and reject this strategy now in favor of what is ethical, moral, and democratic
- The District has a duty to represent everyone, included it faculty and students with disabilities, including the disability community that is taxed to support it
- Keeping open the option to go to the Supreme Court, while in mediation does not represent some kind of reasonable compromise
 - The District cannot honor our rights yesterday or tomorrow, but ignore them today
 - We are not expendable
 - The Board is dangling *our* rights over the head of the NFB
 - *Our rights are ours*, not a form of currency to be bargained with by others— our rights must not be held hostage for an ill-advised gain
 - *You cannot both teach students, tell them they matter and then barter away the tools necessary for them to achieve independence and self-sufficiency*

The Board Has Chosen An Illegitimate Strategy (2)

- The Board would not do this with anyone else's rights --- it does not seem to understand that disability rights, are civil rights
 - Our rights are based in the law
 - Our rights required courage and commitment to obtain
 - We will not depend on the mere kindness of faculty and administrators --- in the eyes of the district and appellate courts, LACCD has proven that that does not work
- This may not even serve the District's monetary interests
 - The District might end up paying both sides of the huge cost of Supreme Court litigation
 - Even if the District wins:
 - There is still a district court trial to be had on plaintiffs' theories of intentional discrimination and failure to accommodate noncompliance
 - There will still be a large array of remedies to be addressed
 - The 9th Circuit will not likely be supportive of the District should it appeal again

What We Must Do Right Now!

- In California organize yourselves for statewide pressure, lobbying the Governor's Office
- ***Go to DREDF.org to get more information and sign the DREDF petition***
 - The “explainer: <https://dredf.org/2021/12/16/payan-v-laccd-explainer/>
 - The petition (scroll down): “Back Off the Americans with Disabilities Act”
<https://form.jotform.com/220128109863150>
- Watch for announcements from AHEAD
- Organize through CAPED and AHEAD to petition the LACCD Board of Trustees
- Watch for announcements with regard to the LACCD agenda and show up
- Put pressure on the CCC Systemwide Board of Governors to tell LACCD “you can’t go there”