
By Robert J. Wheeler III*

Title III of the Americans with Disabilities Act (“ADA”) provides that “no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation . . . .”\(^1\) In Matheis v. CSL Plasma, Inc.,\(^2\) the United

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\(^1\) 42 U.S.C. § 12182(a) (2019). \(^2\) See 42 U.S.C. § 12182(b)(2)(A)-(v). Discrimination includes the application of eligibility criteria screening out individuals with a disability from fully enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown necessary for the services being offered. \textit{Id.} Discrimination also includes:

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

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

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

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

\textit{Id.}
States Court of Appeals for the Third Circuit considered whether plasma donation centers are subject to the ADA as a service establishment, and whether a plasma center violates the ADA when it bars a donor who uses a service animal from donating plasma.\footnote{2} Notably, the Third Circuit held that a plasma center is a public accommodation under Title III of the ADA, and that CSL Plasma, Inc. violated the ADA by preventing the plaintiff from donating plasma without justification.\footnote{4}

George Matheis ("Matheis") is a retired police officer who was involved in a deadly shooting while on duty as a special weapons and tactics officer in 2000.\footnote{5} Following the incident, he was diagnosed with post-traumatic stress disorder.\footnote{6} Matheis experienced problems with socialization, and suffered panic attacks when he was in crowded or confined places.\footnote{7} CSL Plasma, Inc. ("CSL") owns and operates a plasma donation center in York, Pennsylvania.\footnote{8} Notably, CSL pays its donors cash for their plasma.\footnote{9} Each time a donor visits CSL, they must pass an individualized screening process.\footnote{10} In 2016, Matheis donated plasma at CSL approximately 90 times without incident.\footnote{11} Later in 2016, Matheis’s daughter enlisted in the Navy and purchased Matheis a service dog ("Odin") to help cope with his stress.\footnote{12}

The first time that Matheis brought Odin to CSL, he was referred to a CSL manager who explained that it was CSL policy to permit service animals for the blind, but not for people with anxiety.\footnote{13} Matheis explained that Odin was a service dog, but

\footnote{2} See Matheis v. CSL Plasma, 936 F.3d 171 (3rd Cir. 2019).
\footnote{3} See id. at 174 (stating the issues that the Third Circuit considered).
\footnote{4} See id. at 182. The Third Circuit reversed and remanded to the District Court’s grant of summary judgment in favor of CSL, instructing the District Court to either allow CSL to move for summary judgment on other grounds or conclude that CSL violated the ADA. \textit{Id.}
\footnote{5} See id. at 175 (noting that Matheis developed social issues after the incident).
\footnote{6} See id. “His condition sometimes causes him to suffer panic attacks when exposed to crowded or confined spaces, altercations, or helicopter noise.” \textit{Id.}
\footnote{7} See Matheis, 936 F.3d at 175.
\footnote{8} See id.
\footnote{9} See id. at 174-75. “Its business is collecting human blood plasma from the public and selling it to third parties.” \textit{Id.} “CSL pays its donors as much as several hundred dollars a month for their plasma.” \textit{Id.} at 175.
\footnote{10} See Matheis, 936 F.3d at 175. “This process includes a check of the donor’s blood pressure and protein levels, along with questions to see how the donor is feeling and to check that he or she has not engaged in risky activities.” \textit{Id.}
\footnote{11} See id.
\footnote{12} See id; see also Joan Farrell, \textit{Appendix II Federal Regulations}, ADA COMPLIANCE GUIDE DEC. 2016 SUPPLEMENT (2019). There are many benefits provided by an emotional support animal, including emotional support, comfort, therapy, companionship, therapeutic benefits, and the promotion of emotional well-being. \textit{See Joan Farrell, Appendix II Federal Regulations}, ADA COMPLIANCE GUIDE DEC. 2016 SUPPLEMENT (2019). Some individuals who require an emotional support animal may be disadvantaged and unable to participate in society without the support of the animal. \textit{Id.} Some current or former military service members have been prescribed animals for conditions such as Post Traumatic Stress Syndrome. \textit{Id.} Many current and former members of the military have disabilities that may require emotional support and could benefit from the use of an emotional support animal. \textit{Id.}
\footnote{13} See Matheis, 936 F.3d at 175 (noting Matheis was not individually assessed on this visit); see also PUBLIC ACCOM. UNDER ADA § 3:13 (2018). A Public Accommodation is obligated to modify its policies to permit the use of service animals by persons with disabilities. PUBLIC ACCOM. UNDER
offered to leave Odin in the car. CSL’s manager ultimately denied this request, and stated that Matheis could not donate until he presented a letter from his healthcare provider stating that he could safely donate plasma without a service animal. According to CSL, the concern of bringing a dog into the facility was not related to health concerns posed by the dog. Instead, CSL’s medical director stated a belief that donors with severe anxiety present a risk to themselves and other people at the facility. Unwavering, CSL reiterated to Matheis that he could not donate until he provided a letter from a healthcare provider saying he could “safely donate without Odin.”

Matheis sued CSL alleging discrimination for failure to accommodate his condition. To establish a claim, Matheis was required to show the following: (1) he is disabled; (2) CSL is a “public accommodation” under Title III of the ADA; and (3) he was unlawfully discriminated against on the basis of his disability by CSL’s failure to make a reasonable accommodation that was necessary to accommodate his disability.

The District Court ruled that the ADA covered CSL as a public accommodation, “but that the company did not unlawfully discriminate because it had a legitimate, non-discriminatory reason for refusing to allow Matheis to donate plasma.” The District Court found that CSL’s legitimate reason for refusal was its concern that Matheis had severe anxiety.

On review, the Third Circuit affirmed that CSL is a public accommodation under the ADA. However, the Court reversed the District Court’s holding of summary judgment in favor of CSL, remanding the case for the District Court to determine whether CSL violated the ADA by refusing to allow the plaintiff to donate plasma.

ADA § 3:13 (2018). This obligation includes an accommodation of such animals unless doing so would result in a fundamental alteration or would jeopardize the safe operation of the entity. "Covered entities may ask an individual to remove a service animal if: (1) it is out of control and the handler does not take action to control it; or (2) the animal is not housebroken." Id. Entitles may not ask about the nature or extent of a person's disability but may ask: (1) if the animal is required because of a disability; and (2) what work or tasks the animal is trained to perform. However, an entity may not require documentation and may not make these inquiries when the animal's training is readily apparent.

Id. See Matheis, 936 F.3d at 175.

15 See id. (explaining Matheis has not returned to CSL to donate since this visit).


18 See Matheis, 936 F.3d at 182.
Ultimately, the Third Circuit held that CSL did not have a valid justification for the denial of services.\textsuperscript{25}

Title III of the ADA states that “no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”\textsuperscript{26} This section provides examples of public accommodations, including a laundromat, dry-cleaner, bank, barber shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment.\textsuperscript{27} The United States Court of Appeals for the Tenth Circuit held that plasma centers are service establishments and are therefore public accommodations subject to the protections of the ADA.\textsuperscript{28}

Discrimination under the ADA includes the following:

“a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.”\textsuperscript{29}

It is not necessary for discrimination to be intentional in order for it to be in violation of the ADA.\textsuperscript{30} Failure to make a reasonable accommodation is based on a standard of

\textsuperscript{25}See id.
\textsuperscript{26}See 42 U.S.C.S. § 12182 (LexisNexis 2019).
\textsuperscript{27}See 42 U.S.C.S. § 12181 (LexisNexis 2019).
\textsuperscript{28}See Levorsen v. Octapharma Plasma, Inc., 828 F.3d 1227, 1235-36 (10th Cir. 2016) (Holmes, J., dissenting).

With the foregoing considerations in mind, it becomes clear that plasma-donation centers are not service establishments within the meaning of subsection (7) (F). First, plasma-donation centers do not receive a fee from members of the public in exchange for any services that they provide. Second, to the extent that plasma-donation centers provide services to the public, they do not do so for the public’s use in achieving a desired end; instead, they provide them for the centers’ use in achieving a desired end—the collection of plasma for sale to pharmaceutical companies. For these two principal reasons, plasma-donation centers are fundamentally unlike the service establishments listed in 42 U.S.C. § 12181(7)(F), and I would conclude that they do not fall within the scope of that statute. Consequently, plasma-donation centers do not qualify as public accommodations under Title III of the ADA, and the district court therefore did not err in dismissing Mr. Levorsen’s complaint.

Id. But see Silguero v. CSL Plasma, Inc., 907 F.3d 323, 332 (5th Cir. 2018) (arguing individuals donating plasma receive no benefit).
\textsuperscript{29}See 42 U.S.C.S. § 12182 (LexisNexis 2019).
\textsuperscript{30}See Lentini v. Cal. Ctr. for the Arts, 370 F.3d 837, 847 (9th Cir. 2004).
reasonableness, and whether the requested accommodation was necessary for access, along with a consideration of whether the accommodation would fundamentally alter a program.\(^{31}\) In an ADA discrimination lawsuit, the burden is on the plaintiff to establish that a requested accommodation is reasonable and necessary, while the defendant has the burden of showing that the requested accommodation would fundamentally alter the program.\(^{32}\)

Public accommodations entailing the modification of policies and procedures to allow the use of service animals for individuals with disabilities are generally required under the ADA.\(^{33}\) Unless there is an exception, a disabled individual’s requested accommodation to use a service animal is reasonable under the ADA as a matter of law.\(^{34}\) This means that the service establishment must make this accommodation unless they can prove that the requested modification would fundamentally alter the public accommodation.\(^{35}\)

Furthermore, a public accommodation is not permitted to ask about the nature or extent of an individual’s disability.\(^{36}\) A public accommodation is not required to permit an individual to benefit from services, facilities, and accommodations when that individual poses a direct threat to health or safety of others.\(^{37}\) Additionally, a public accommodation may impose legitimate safety requirements necessary for safe operation, but these requirements “must be based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities.”\(^{38}\)

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\(^{32}\) See id. at 120 (finding requested accommodation of service animal reasonable as a matter of law).

\(^{33}\) See 28 C.F.R. § 36.302 (2016). The public accommodation may ask that the animal be removed from the facility if the animal is out of control or the animal is not housebroken. Id.

\(^{34}\) See Berardelli, 900 F.3d at 119.

\(^{35}\) See Johnson v. Gambrinus Co., 116 F.3d 1052, 1059 (5th Cir. 1997).

\(^{36}\) See 28 C.F.R. § 36.302(c)(6) (2019). Generally, a public accommodation may not make inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability. Id.

\(^{37}\) See 28 C.F.R. § 36.208 (2019). Determining whether an individual poses a direct threat involves making an individualized assessment using reasonable judgment, relying on objective current medical evidence to ascertain the severity of the risk. Id. This assessment also involves evaluating the potential of whether injury will occur and whether reasonable modifications will eliminate this risk. Id.

\(^{38}\) See 28 C.F.R. § 36.301(b) (2019).
To prove discrimination, an individual is not required to prove that he or she poses no risk. Instead, the defendant must prove that the individual is a direct threat, meaning that the defendant must demonstrate that the individual poses a significant risk to the health and safety of others. In order to satisfy this heavy burden and defeat a summary judgment, the defendant must present objective medical evidence to establish a reasonable assessment of a direct threat.

In Matheis, the Third Circuit affirmed the District Court’s ruling that CSL is a public accommodation and that the ADA applies to CSL, but reversed the District Court’s holding that CSL had complied with the ADA. The Court held that CSL is a service establishment subject to the ADA. The court reasoned that a plasma center offers a service to the public and supplies an important product to healthcare providers, therefore meeting the broad and common definition of a service establishment.

In reversing the District Court’s holding that CSL complied with the ADA, the Third Circuit first disagreed with the burden shifting test applied by the District Court. The District Court applied the McDonnell Douglas test, which shifts the burden to an employer to articulate a legitimate, nondiscriminatory reason for an adverse action against an employee. The Court instead applied the Berardelli framework, because Matheis did not need to show intentional discrimination to prove a violation of the ADA.

The Third Circuit concluded that CSL violated the ADA by barring the plaintiff from donating plasma without having a valid justification for the denial of services. The Court reasoned that CSL failed to present any medical evidence showing that their policy was based on “actual risk and not speculation, generalizations or stereotypes.” CSL’s main argument stems from its divisional medical director, stating that “donors with severe anxiety may be unable to follow directions, cause disturbances, impact the

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39 See Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 220 (2nd Cir. 2001). An employee could not drive because she had epilepsy and was denied accommodations from her employer. Id. It was not shown that the accommodations created an undue hardship. Id.; see also Emerson v. N. States Power Co., 256 F.3d 506, 514 (7th Cir. 2001). Factors are considered when determining a direct threat, including (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and (4) the imminence of potential harm. See Emerson, 256 F.3d at 514.
40 See Lockett v. Catalina Channel Express, Inc., 496 F.3d 1061, 1066 (9th Cir. 2007). The regulations state that a direct threat means that the significant risk to the health or safety of others cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services. Id.
41 See Bragdon v. Abbott, 524 U.S. 624, 653 (1998). Scientific evidence and expert testimony must have a traceable, analytical basis in objective fact before it may be considered on summary judgement. Id.
42 See Matheis v. CSL Plasma, Inc., 936 F.3d 171, 182 (3rd Cir. 2019).
43 See id. at 177.
44 See id. at 177-78.
45 See id. at 179.
46 See id.
47 See id.
48 See Matheis, 936 F.3d at 182.
49 See id.
The medical director also stated a belief that “donors with severe anxiety present serious health and safety risks to themselves, medical staff, and other donors.” The Court concluded that this evidence was speculative, and inadequately proved that CSL’s policy was based on actual risk.

The Third Circuit could have held differently on the issue of whether a plasma center is a public accommodation under Title III of the ADA. The dissent in *Levorsen v. Octapharma Plasma, Inc.*, a Ninth Circuit decision, believed that plasma donation centers do not constitute service establishments, and are not subject to the ADA. Justice Holmes argued that plasma centers should not be treated as service centers under the ADA, because plasma centers do not offer services in exchange for money or offer the public a “service.” The Third Circuit followed the majority opinion, likening plasma centers to banks, in that “[b]anks and their customers exchanged sources of economic value that do not always fit into a simple ‘money for service’ model.”

The Third Circuit also could have followed the opinion of the Fifth Circuit in *Silguero v. Octapharma Plasma, Inc.*, where the court also did not consider plasma donation centers to be service establishments. The Fifth Circuit reasoned that service establishments provide a “benefit,” and that plasma donation centers do not provide a benefit to individuals who donate plasma. The Fifth Circuit also reasoned that plasma donation centers do not provide a service to the public in exchange for money. The Third Circuit disagreed with the Fifth Circuit’s reasoning, stating “at least here no support exists for the Fifth Circuit’s statement that donors ‘do not benefit’ from the act of donating. The record is unequivocal that Matheis and other donors receive money, a clear benefit, to donate plasma.” Ultimately, the Third Circuit disagreed with the Fifth Circuit and the dissent in *Levorsen*, holding that plasma centers fall under the definition of a service center.

The Third Circuit correctly held that CSL’s policy was not based on actual risk, and the court’s decision is well supported by case law. Similar to *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, where the court held that in order to prove discrimination, an individual is not required to prove that he or she poses no risk, the Third Circuit

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50 See id.
51 See id.
52 See id.
53 See Levorsen v. Octapharma Plasma, Inc., 828 F.3d 1227, 1234 (10th Cir. 2016) (Holmes, J., dissenting); see also Silguero v. CSL Plasma, Inc., 907 F.3d 323, 332 (5th Cir. 2018).
54 See Levorsen, 828 F.3d at 1235-36.
55 See id.
56 See Matheis, 936 F.3d at 178.
57 See Silguero, 907 F.3d at 332.
58 See id. at 329 (explaining how the labor is not “useful” to the donor, but rather to the establishment).
59 See id. at 331-32 (stating payment is highly relevant in determining a service establishment).
60 See Matheis, 936 F.3d at 177.
61 See id. at 177-78.
62 See Bragdon v. Abbott, 524 U.S. 624, 653 (1998); see also Lockett v. Catalina Channel Express, Inc., 496 F.3d 1061, 1066 (9th Cir. 2007); see also Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d. 208, 220 (2nd Cir. 2001).
correctly placed the burden on CSL to prove that their policy was based on actual risk. Also, like in Lockett v. Catalina Channel Express, Inc., where the Ninth Circuit imposed a heavy burden of demonstrating a significant risk to assert a direct threat, the Third circuit applied a similar burden.

Clearly, the court analyzed this issue correctly under C.F.R. § 36.302 and C.F.R. § 36.208, where public accommodations are required to allow the use of service animals unless the modification would fundamentally alter the facility or pose a direct threat. CSL failed to meet their burden of proving that the use of a service dog posed a direct threat to the facility. The court correctly disagreed with CSL’s medical director who stated that donors with severe anxiety present serious health risks to themselves, staff, and other donors. The Third Circuit properly concluded, “These statements don’t get the job done. Indeed, they seem clearly speculative and to generalize widely about individuals who use psychiatric service animals, all of whom CSL apparently views as people with “severe anxiety.” Furthermore, donating plasma is beneficial to society, and it would send the wrong message to the public to permit biased and unsupported restrictions on individuals with disabilities who require the use of a service animal.

In Matheis v. CSL Plasma, Inc., the Third Circuit determined that a plasma center is a public accommodation under Title III of the ADA, and that CSL Plasma Inc. violated the ADA by preventing the plaintiff from donating plasma without a valid justification for the denial of services. The court’s holding is properly supported by existing law, and sends a message to the public that discrimination against individuals who require service animals will not be permitted.

63 See Matheis, 936 F.3d at 181; see also Lovejoy-Wilson, 263 F.3d at 220.
64 See Matheis, 936 F.3d at 181; see also Lockett, 496 F.3d at 220.
66 See Matheis, 936 F.3d at 181. The Court reasoned that “Dr. Nelson does not connect the dots by attesting that using a service animal indicates ‘severe anxiety.’” Id.
67 See id. The Court argued that CSL showed no medical or scientific evidence in furtherance of their argument.
68 See id.
69 See id.