UNDERSTANDING THE *NEW* AMERICANS WITH DISABILITIES ACT OF 1990

by

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I. THE AMERICANS WITH DISABILITIES ACT OF 1990 OVERVIEW

A. Which Employers Are Covered By The ADA?

The Americans With Disabilities Act of 1990 (42 U.S.C. § 12101, et seq.), or the "ADA," covers all state, local, and private employers, including labor unions and employment agencies, that employs **15 or more employees for 20 or more weeks in the current or previous year**. However, except for the employees of Congress, **federal employees** are not covered by the ADA. Federal employees must look to the Rehabilitation Act of 1973 (29 U.S.C. §§ 701, et seq.) for protection from disability discrimination.

Additionally, both disparate treatment theories and the theory of disparate impact are available to plaintiffs under the ADA. (42 U.S.C.§ 102(b)(6)) expressly prohibits the use of selection criteria that has a disparate impact against disabled persons.)

B. Discrimination and Harassment Prohibited

Just as under Title VII, it is unlawful to discriminate, harass or retaliate against any employee for opposing any act made unlawful under the ADA or for making a suggestion for change, testifying, assisting or participating in any manner in an investigation, proceeding or hearing to enforce any provision under the Act. It is also unlawful to coerce, intimidate, harass or interfere with any individual in the exercise or enjoyment of any right granted or protected under the ADA, or aiding others in doing the same.

The ADA also prohibits covered employers from limiting, segregating or classifying disabled job applicants or employees in any way that adversely effects their employment opportunities or terms, conditions or privileges of employment (29 C.F.R. § 1630.5).

Additionally, covered employers are prohibited from contracting or making other arrangements that have the effect of subjecting disabled individuals to unlawful discrimination (29 C.F.R. § 1630.6). In other words, a covered employer is not permitted to commit any illegal acts under the ADA through a contract or any other relationship. For instance, an employer would not be permitted to hire a training

company that does not permit equal access for disabled individuals at the facilities where these sessions are held.

C. Burden Of Proof

The burden of proof is the same for the ADA and the Rehabilitation Act as they are for Title VII claims. The burden of proof lies with the plaintiff.

II. WHO IS COVERED BY THE ADA OVERVIEW?

A. Definitions

In determining which individuals are truly "disabled," Section 3(2) of the ADA states that individuals are deemed to be disabled if they either:

1. **Have a physical or mental impairment which substantially limits one or more of that person's major life's activities, or**

2. **Has a record of having such a disability, or**

3. **Is generally regarded as having such an impairment.**

(These also happen to be the same protections given to employees under the Rehabilitation Act.)

In order to be covered by the ADA, the person must be **qualified for the position** for which she is applying. (i.e., education, skills, abilities, etc.) If so, then the person will be classified as being a "qualified individual with a disability." If the individual can then perform the essential functions of the job either with or without reasonable accommodation, then she will be protected under the ADA from discrimination based on her disability. Unlike the FMLA, it does not matter how long the employee has worked for the employer or even if the person works for the employer, since job applicants are covered by the ADA.

Then, that individual must be "disabled" under the meaning of the Act, which means the person must be **substantially limited in performing a major life activity, which is defined as caring for oneself, performing manual tasks, walking, seeing, hearing speaking, breathing, learning, working, the operation of major bodily functions, such as functions of the immune, respiratory, and neurological systems**. The employer must also be reasonably aware of this disability and the impairment cannot be temporary.

The ADA also protects those who associate with disabled persons, although an employer need not accommodate such individuals.

The ADA also protects those who may not ***actually*** be disabled under the Act but are **regarded** as being so, and those persons who have a previous **record** of being disabled.

The ADA protects disabled persons from discrimination in all aspects of their employment, which includes hiring, promotions, transfers, use of facilities, etc. Employers are also prohibited from segregating disabled employees from others.

Unless it would present an **undue hardship**, when considering the burden placed upon the employer financially or upon its operations, employers are required to reasonably accommodate a covered individual's disability.

It is also a defense to a charge of disability discrimination if the person presents a **direct threat** of substantial harm to herself or others that cannot be eliminated by reasonable accommodation.

An easier way to understand who is protected by the ADA is by reviewing the following flow chart that illustrates this definition step-by-step:

Who Is Protected Under The ADA?

1. **Qualified Individual**

   with a

2. **Physical or Mental Impairment**

   or a

3. **Record of a Disability**

   or is

4. **Regarded as Having a Disability**

   that

5. **Substantially Limits (Remember the "Categorical List" and new definition.)**

6. **A Major Life Activity (New Standard)**

   or

7. **The Individual Associates With A Person or Persons Who Meet This Definition**

   who with or without

8. **Reasonable Accommodation**

   that does not place an

9. **Undue Burden**

   on the employer and the individual can successfully perform the

10. **Essential Functions of the Job (MUST Be Documented)**

    without posing a

11. Direct Threat to Him/Herself or Others

One unique aspect of the ADA to keep in mind is that the focus of the Act is on **equal opportunity**, **not equal treatment**, unlike Title VII.

Under Title VII protected class persons must be treated equally, as a general rule.

However, under the ADA, certain accommodations may have to be made for disabled individuals that **would not be allowed** for other protected classes.

III. WHO IS DISABLED UNDER THE ADA AMENDMENTS ACT (ADAAA) of 2008 AND THE 2011 REGULATIONS?

A. Summary of the ADA's 2011 Regulations

On September 25, 2008, President George W. Bush signed the ADA Amendments Act of 2008 (ADAAA) (S. 3406) into law, which significantly amended the Americans with Disabilities Act of 1990 (ADA). The ADAAA

However, the ADAAA provided much broader protections for disabled workers and turned back the clock on Supreme Court rulings that Congress believed unduly restricted disabled employees' rights. As a result of these amendments, more employees will fall under the protection of the ADA.

On March 25, 2011, the Federal Register published the Equal Employment Opportunity Commission's ("EEOC's") final regulations to implement the ADAAA. These regulations became effective on May 24, 2011. The 2011 regulations now give much greater protection to individuals under the ADA.

Specifically, the Appendix to the new ADA regulations makes it very clear what the intent to the new law is going to be under the EEOC:

Appendix to Part 1630: Interpretive Guidance on Title I of the Americans With Disabilities Act

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

After the Court's decision in Toyota, lower courts used a very demanding standard for qualifying as being disabled that more often found that an individual's impairment did not constitute a disability. As a result, in too many cases, courts would never reach the question whether discrimination had occurred because they found the person not to be disabled under the ADA.

Congress concluded that these U.S. Supreme Court rulings imposed a greater degree of limitation and expressed a higher standard than it had originally intended, and coupled with the EEOC's 1991 ADA regulations which had defined the term "substantially limits" as "significantly restricted," **unduly precluded many individuals from being covered under the ADA**.

Consequently, Congress amended the ADA with the Americans with Disabilities Act Amendments Act of 2008. The ADAAA was signed into law on September 25, 2008, and became effective on January 1, 2009.

The express purposes of the ADAAA are, among other things:

(4) **To reject the standards** enunciated by the Supreme Court in Toyota that the terms "**substantially**" and "**major**" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," **and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives"**; **(REJECTED BY THE NEW REGULATIONS)**

(5) To convey congressional intent that the standard created by the Supreme Court in Toyota for "substantially limits," and applied by lower courts in numerous decisions, **has created an inappropriately high level of limitation necessary to obtain coverage under the ADA**;

Accordingly, the regulations provide that in determining other examples of major life activities, the term "**major" shall not be interpreted strictly to create a demanding standard for disability**. The regulations also **reject** the notion that to be substantially limited in performing a major life activity, an individual must have an impairment that prevents or severely restricts the individual from doing "**activities that are of central importance to most people's daily lives**."

Of course, impairments may substantially limit a variety of other major life activities in addition to those listed in the regulation. **For example, major depressive disorder may substantially limit major life activities such as thinking, concentrating, sleeping, and interacting with others**.

B. ADA Is To Be "Broadly Construed"

Like the ADAAA, the new 2011 regulations very clearly state that the primary purpose of the ADAAA is to cover more people as being disabled under the ADA.

Specifically, the new regulations state:

§1630.1 Purpose, applicability, and construction.

(4) ***Broad coverage***. **The *primary purpose* of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA**. Consistent with the Amendments Act's purpose of reinstating a broad scope of protection under the ADA, **the definition of "disability" in this part shall be construed broadly in favor of**

expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. **The question of whether an individual meets the definition of disability under this part should not demand extensive analysis**.

Therefore, the new emphasis by the EEOC is to grant much more expansive coverage under the ADA.

IV. WHO IS NOW "DISABLED" UNDER THE ADA?

A. Categorical Disabilities

In the proposed regulations, the EEOC claimed that if an individual contracted one of the conditions on this list, that person would "**automatically**" be covered by the ADA, thus killing the "**substantially limits a major life activity test**" for those conditions.

However, the final 2011 regulations no longer said that such impairments would **automatically** qualify the person as being disabled under the ADA. Instead, the final 2011 regulations state that all of these conditions will "**virtually always**" qualify as being disabilities under the ADA. The EEOC explained that given the inherent nature of these conditions, these impairments will:

1. Virtually always impose a substantial limitation on a major life activity and

2. Require an individualized assessment that is "particularly simple and straightforward."

Therefore, by characterizing these listed conditions as being "**virtually always**" covered by the ADA, the EEOC has in effect labeled tens of millions of Americans disabled by greatly limiting, if not virtually eliminating, the prior case-by-case approach analysis for these conditions.

So, employers should beware of all of these conditions when they arise under their ADA analysis.

The regulations specifically state:

> **"… it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated,"** which include:
>
> Deafness substantially limits hearing; **blindness substantially limits seeing**; an intellectual disability (formerly termed mental retardation) substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function;

> **autism** substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; **diabetes** substantially limits endocrine function; **epilepsy** substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; **multiple sclerosis** substantially limits neurological function; muscular dystrophy substantially limits neurological function; and **major depressive disorder**, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function.

The types of impairments described in this section may substantially limit additional major life activities not explicitly listed above.

B. Specific Conditions Excluded

Certain conditions are specifically excluded from coverage by the ADA. Section 508 of the ADA specifically excludes transvestites, while § 511 specifically excludes homosexuality, bisexuality, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments (so hermaphrodites *are* covered) and other sexual behavior disorders.

Section 511 also excludes compulsive gambling, kleptomania, pyromania, and chemical dependency disorders resulting from the current use of illegal drugs. However, if a user of illegal drugs is not a current user, has gone through or is currently in drug rehabilitation, § 104(a) of the ADA states that the individual is covered by the Act.

Other conditions that have been excluded from coverage under the ADA are cigarette smoking, which is considered to be voluntary and temporary, eye/hair color, poor judgment, quick temper, poverty, lack of education, prison record, advanced age, although its effects can be covered, such as osteoporosis or arthritis, height, weight, or muscle tone not within normal range, and not as the result of physiological disorder, or being characteristically predisposed to illness or disease (29 C.F.R. Pt. 1630.2(h), App.).

In interpreting these various exclusions under the ADA, if an employee is fired for making obscene phone calls from work, yet the employee enters a clinic for sexual disorders in order to receive assistance, can this employee argue that he is covered by the ADA? No. The ADA specifically excludes pedophilia, exhibitionism, and other sexual disorders.

But what if the employee claims that he was abused as a child? The employee is still not covered. The ADA's regulations state that "environmental, cultural, or economic disadvantages, such as poverty, lack of education, or a prison record are not impairments" under the Act (29 C.F.R. Pt. 1630.2(h), App.).

C. Temporary Impairments Are Protected

Rejecting the views of business organizations and employment attorneys, the EEOC has made it very clear that **any** impairment – **no matter how brief in duration** – can be a covered disability. This is a **major change** from the previous ADA analysis.

The 2011 regulations section 1630.2(j)(1)(ix) rejects **any minimum duration** that an impairment would "disable" an individual and explicitly provides that:

> "[t]he effects of an impairment **lasting or expected to last fewer than six months** can be substantially limiting within the meaning of this section."

This directly contradicts Congress's original intent in passing the ADAAA because Congress said nothing about short-term impairments being substantially limiting. It remains to be seen whether courts will uphold this regulation.

The regulations provide no guidance on what is to be considered a "minor" condition other than to state that it is an objective inquiry. They do, however, provide the following guidelines:

- The transitory and minor standard is a defense that must be proven by the employer.
- The defense applies only if the impairment **actually was** transitory and minor, regardless of whether the employer believed it was transitory and minor.
- The transitory nature of an impairment is not relevant to whether someone suffers from an actual disability. A person may be considered actually disabled even if the impairment lasts **less than six months**.

D. Episodic Impairments

The ADAAA extended coverage to individuals with episodic impairments or conditions in remission, if the impairment would substantially limit a major life activity in its active state. Likewise, the 2011 regulations in section 1630.2(j)(1)(vii) addresses episodic impairments, while new rule 1630.2(j)(3)(iii) provides a non-exhaustive list of examples, including epilepsy, multiple sclerosis, cancer, and psychiatric disabilities such as major depressive disorder, bipolar disorder, and post-traumatic stress disorder.

In the Appendix "Interpretive Guidance," other examples of episodic impairments are provided, such as hypertension and asthma, with remarks that:

> "[t]he fact that the periods during which an episodic impairment is active and substantially limits a major life activity may be brief or occur infrequently is no longer relevant to determining whether the impairment substantially limits a major life activity."

V. 2011 REGULATIONS CHANGE "MAJOR LIFE ACTIVITY" STANDARD

A. What Is A "Major Life Activity?"

Section 1630.2(i)(i) of the regulations defines "major life activities" as "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working."

Section 1630.2(i)(ii) of the regulations defines "major life activities" as being the "operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system."

Further, the regulations then state that determining whether something is a major life activity "**shall not**" be interpreted **strictly** to create a demanding standard for disability. Whether an activity is a "major life activity" is no longer determined by whether it is of "**central importance to daily life**."

Consideration of facts such as condition, manner, or duration may include, among other things:

1. Consideration of the difficulty, effort, or time required to perform a major life activity;

2. The level of pain experienced when performing a major life activity;

3. The length of time a major life activity can be performed; and/or

4. The way an impairment affects the operation of a major bodily function.

In addition, the negative side effects of any mitigating measures may be considered when determining whether an individual's impairment substantially limits a major life activity.

B. Eating Held To Be A "Major Life Activity"

In Fraser v. Goodale, No. 01-36018 (9th Cir. 2003), Rebecca Ann Fraser was employed as a senior account specialist for United States Bancorp in Oregon. Fraser suffered from type I insulin-dependent diabetes. Her condition was considered severe and life-threatening. As a result, Fraser had to repeatedly check her blood sugar level, take multiple injections of insulin, and carefully monitor her diet and activities.

In November 1998, Fraser's supervisor told her that she could no longer eat at her desk. When she later experienced an extreme drop in her blood sugar and became disoriented, she sought permission from her supervisor to eat at her desk. He allegedly told her to "come back when she had an intelligent question."

On one occasion, Fraser purchased candy from a vending machine, but her sugar levels were so low that the candy did not help. Fraser again sought permission from her supervisor to remedy the problem, but to no avail. Fraser eventually passed out in the lobby and required assistance from her husband and a co-worker to get home.

Later that month, Fraser complained to upper management about her supervisor's actions. The matter was investigated, but the supervisor wasn't disciplined. On March 12, 1999, the bank terminated Fraser's employment.

Fraser sued Bancorp for failing to accommodate her disability in violation of the ADA. The trial judge dismissed the suit, finding that she was not disabled under the Act. Fraser appealed to the Ninth Circuit.

The Ninth Circuit found for Fraser.

The Ninth Circuit reasoned that the ADA defines a disability as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual." The Ninth Circuit held that diabetes clearly is a "physical impairment" under the ADA.

The Ninth Circuit then decided whether or not eating is a "major life activity."

The EEOC has defined major life activities to include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. The Ninth Circuit noted that many other circuit courts have held that eating is a major life activity because it's "integral to [our] daily existence."

The Ninth Circuit cautioned, however, that "eating specific types of foods, or eating specific amounts of food, might or might not be a major life activity."

The Ninth Circuit further held that eating is a major life activity for Fraser because "[n]ot only must she not eat certain foods, but she must carefully assess her blood sugar before putting anything into her mouth." The court found that Fraser had in fact established that her diabetes "substantially limits" her major life activity of eating.

The Ninth Circuit then held:

Unlike a person with ordinary dietary restrictions, Fraser must monitor much more than what and how much she eats. Unlike a person with ordinary dietary restrictions, she does not enjoy a forgiving margin of error. While the typical person on a heart-healthy diet will not find himself in the emergency room if he eats too much at a meal or forgets his medication for a few hours, Fraser does not enjoy this luxury.

VI. WHAT IS A PHYSICAL OR MENTAL IMPAIRMENT?

As previously stated, in order to be classified as being "disabled" under the ADA, the individual must have a physical or mental impairment which "substantially limits one or more of that person's major life activities." Therefore, it is important to understand what is meant by the terms "**physical or mental impairment**" and "**substantially limits one or more**" "**major life activities**."

The ADA's regulations (29 C.F.R. § 1630.2(h)(1)(2)) define a "physical" or "mental impairment" as being:

a) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

b) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Therefore, the ADA very broadly defines the term "physical or mental impairment" for the purpose of covering individuals under the Act.

VII. 2011 REGULATIONS CHANGE "SUBSTANTIALLY LIMITS" STANDARD

In the past, the federal courts have consistently accepted employer arguments that the Plaintiff was not "**substantially limited**" in a major life activity, and was therefore not protected by the ADA. Employer motions for summary judgment were routinely granted on the ground that the Plaintiff was not disabled, thereby eliminating any questions of whether or not a "reasonable accommodation" would have enabled the Plaintiff to perform all "essential job functions" of the job.

However, in order to reverse this trend, the ADAAA also lowered the bar for ADA coverage by rejecting previous Supreme Court decisions and a current Equal Employment Opportunity Commission regulation that construed "**substantially limits**" to mean "**significantly or severely restricted**."

The new regulations now state:

§1630.1 Purpose, applicability, and construction.

(j) ***Substantially limits—***

(1) *Rules of construction.* The following rules of construction apply when determining whether an impairment ***substantially limits*** an individual in a major life activity:

(i) ***The term "substantially limits" shall be construed broadly in favor of expansive coverage***, to the maximum extent permitted by the terms of the ADA. "Substantially limits" **is not** meant to be a demanding standard.

(ii) An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as ***compared to most people in the general population***. ***An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting***. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(iii) The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, ***not whether an individual's impairment substantially limits a major life activity***. Accordingly, the threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis.

(iv) ***The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term "substantially limits" shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" applied prior to the ADAAA***.

Again, it clearly the goal of the EEOC to cover as many people as possible under the ADA as being disabled.

The 2011 regulations in sections 1630.1(c)(4) and 1630.2(j)(1)(iii) even further describe the ADAAA purpose as **shifting the focus of an ADA case from whether or not an individual meets the definition of being disabled to the question of whether the employer could have "reasonably accommodated" the individual under the ADA**.

Prior to the ADAAA, the term "substantially limits" had been interpreted as "**significantly restricts**," which resulted in many ADA claims being dismissed because the plaintiffs were simply unable to show that they were disabled under the ADA. This is no longer the case under the 2011 regulations. Asking whether or not an impairment "significantly restricts" an individual in a major life activity is no longer a pertinent consideration.

In drafting the 2011 regulations, the EEOC refused to define the term "substantially limits." Instead, the EEOC claimed that providing a new definition would lead to a greater focus on the threshold for coverage, which is whether or not the person is actually disabled under the ADA, than was intended by Congress.

Instead, the EEOC provided us with:

The Nine Rules of Construction In Determining Whether An Impairment Substantially Limits A Major Life Activity.

1. **Broad construction**. The term "substantially limits" is to be construed **broadly in favor of expansive coverage**, to the maximum extent permitted by the terms of the ADA. Therefore, whether or not someone is "substantially limited" under the ADA it is not meant to be a demanding standard.

2. **Comparison to general population**. An impairment is a disability within the meaning of the ADA if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.

3. **Primary issue is compliance, <u>not</u> substantial limitation.** The primary object of attention should be whether covered employers have complied with their obligations and whether discrimination occurred, which refers to whether or not the employer had tried to "reasonable accommodate" the individual and not whether an individual's impairment substantially limits a major life activity.

4. **Individualized assessment**. The determination of whether an impairment substantially limits a major life activity requires an individualized assessment.

5. **No requirement for scientific analysis**. The comparison of an individuals' performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis.

6. **No consideration of mitigating measures**. The determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures (except ordinary eyeglasses and contact lenses), and without regard to whether measures exist and the individual refuses to use them. The EEOC's final regulations also add psychotherapy, behavioral therapy, and physical therapy to the non-exhaustive list of mitigating measures that should not be considered in evaluating whether the individual has an impairment.

7. **Episodic impairments or conditions in remission**. An impairment that is episodic or in remission is still a disability if it is would substantially limit a major life activity when active.

8. **One substantial limitation is sufficient**. An impairment that substantially limits one major life activity need not substantially limit other ones in order to be considered a substantially limiting impairment.

9. **Transitory and minor impairments**. Transitory and minor impairments are significant **only** as to the "regarded-as" coverage and do not apply to the definition of disability under the "actual" or "record of" disability prongs.

VIII. MITIGATING MEASURES IGNORED

A. U.S. Supreme Court <u>Sutton</u> Case

In in <u>Sutton v. United Airlines, Inc</u>., 119 S. Ct. 2139 (1999), Karen Sutton and her twin sister Kimberly Hinton applied for jobs as commercial airline pilots with United Airlines. They met all of United Airlines' age, education, experience and FAA certification qualifications. Both were invited to come in to interview for these positions.

However, when the sisters arrived for their interviews, they were told that a mistake had been made. United Airlines requires its pilots have an uncorrected visual acuity in each eye of no worse than 20/100. Each of the sister's uncorrected vision was 20/200 or worse in the right eye and 20/400 or worse in the left eye. Since these minimum requirements were not met, the two sisters were no longer considered for these positions.

The sisters argued that they were disabled under the ADA because **without** their corrective lenses, they were substantially limited in the major life activity of seeing. Therefore, in determining whether they are covered by the ADA, their corrective measures (corrective lenses) should **not** be considered.

However, the sisters further argued that **with** corrective lenses, they each had 20/20 vision or better. Therefore, they claimed to be qualified individuals for these positions when they wore their lenses. As a result, the sisters claimed they were being illegally discriminated against due to their disability of seeing, but they were still qualified to perform the essential functions of these pilot positions.

The Court disagreed with the sisters. The Court held that in determining whether an individual meets the definition of "disability" under the ADA, the person's condition is to be considered **with any corrective measures** they may have at their disposal, such as glasses, insulin, hearing aids, and so on. In this case, the sisters' impairment is to be considered with the use of their corrective lenses.

As a result, they are not substantially limited in a major life activity since with their lenses they have 20/20 vision. Consequently, they are not covered by the ADA.

- **Must Be ACTUALLY Disabled**

  The Court then reiterated that the ADA very clearly states that only those individuals who are **"substantially limited"** are covered by the Act. Consequently, the person must be **currently and actually limited** in this manner…not potentially or hypothetically. Therefore, the Court held that a "disability" exists only where an impairment "substantially limits" a major life activity, **not where it "might" or "could" or "would"** be substantially limiting ***if corrective measures were not taken***.

- **Side Effects Of Medication May Qualify As Disability**

  The Court did mention, however, as part of this individualized inquiry, that if the ***side effects*** of a person's corrective measures were so severe that the person was substantially limited in a major life activity, then the person may be considered disabled under the ADA.

B. 2011 Regulations and Mitigating Measures

In the Appendix of the new regulations, the EEOC states that one of the primary purposes of the ADAAA was to overturn key aspects of the U.S. Supreme Court's decision in Sutton.

In short, the Appendix states as two of its primary objectives as follows:

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

(2) To reject the requirement enunciated in Sutton and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures.

The ADAAA and the 2011 regulations clearly state that determining whether an impairment "substantially limits a major life activity," thus indicating that it rises to the level of a disability, must be made ***without*** considering the effects of any corrective or mitigating measures.

Examples of mitigating measures include, but are not limited to:

1. Medication, medical supplies, equipment, or appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies;

2. Use of assistive technology;

3. Reasonable accommodations or "auxiliary aids or services"

4. Learned behavioral or adaptive neurological modifications; or

5. Psychotherapy, behavioral therapy, or physical therapy.

Employers are still allowed to consider **eyeglasses and contact lenses** in determining whether or not someone is disabled under the ADA.

Therefore, even though the key aspects of "corrective" or "mitigating" measures of the Sutton case were overturned by the ADAAA, the result in this case would likely remain the same because glasses and contact lenses are not covered by the new regulations.

IX. ESSENTIAL FUNCTIONS

A. Definition

Under the ADAAA and the 2011 regulations, more employers will be defending themselves based upon whether they "reasonably accommodated" an individual with a disability … not whether the person qualifies as being disabled under the ADA. However, in deciding which accommodations are reasonable, if any, employers are not required to restructure, reassign or adjust any of the **essential functions** of the job.

In other words, essential functions are "golden." They are untouchable.

Basically, "essential job functions" under the ADA have been defined as being those duties that are not of only marginal importance, but are **fundamental** to the performance of the position.

A job function may be considered essential for any of several reasons, including but not limited to the following:

1. **The position exists to perform these functions,**

2. **There are a limited number of employees available and able to perform those functions, so they cannot be distributed to others, or**

3. **The function is so highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.**

B. EEOC 7 Factors for Determining Essential Functions

In determining which job functions are deemed "essential" to the position, § 101(8) of the ADA specifically states that the courts are to give credence to the employer's judgment.

However, under the regulations, the EEOC lists the following seven factors as being critical in determining whether a particular function will be classified as "essential" to the job, but not limited to:

1. The employer's judgment as to which functions are essential;

2. Written job descriptions prepared ***before*** advertising or interviewing applicants for the job;

3. The amount of time spent on the job performing the function;

4. The consequences of not requiring the incumbent to perform the function;

5. The terms of a collective bargaining agreement;

6. The work experience of past incumbents in the job; and/or

7. The current work experience of incumbents in similar jobs.

The ADA's regulations specifically state that evidence of whether certain functions are essential include the **written job descriptions** employers have prepared for the positions in question **before** they began advertising or interviewing applicants. However, while such documentation as an employer's job description is very persuasive, it is not dispositive.

Further, while employers are certainly allowed to set the standards of performance they want, they must be consistent and apply this standard in reality … not just on paper.

For instance, if an employer requires its typists to be able to accurately type 75 words per minute, the employer will not be called upon to explain why a typing speed of 65 words per minute would not be adequate. However, if an employer does require that its typists be able to accurately type 75 words-per-minute, that employer will be

required to show that it actually enforces this requirement on its employees and does not artificially impose this standard on paper (29 C.F.R. Pt. 1630.2(n), App.).

Consequently, whatever requirements employers choose to adopt for their positions, they must exist in reality and not just on paper.

In Southeastern Community College v. Davis, 442 U.S. 397 (1979), Southwestern Community College denied Frances Davis admission to its nursing school because it contended that Davis' hearing loss prevented her from safely performing her duties in the program and as a nurse. Davis filed suit, alleging that she was discriminated against since she was an "otherwise qualified handicapped individual."

However, the Court held that § 504 of the Rehabilitation Act of 1973 does not prohibit professional schools from imposing physical qualifications for admission to their clinical training programs. An "otherwise qualified" person is anyone who is able to meet all of a program's requirements in spite of their handicap. In this case, the ability to hear is necessary for patient safety during the clinical phase of the program.

The Court held that in order to accommodate Davis, the college would have to endure major changes, which would place an undue hardship on the college. The Court also determined that the college's hearing requirement was reasonable. Therefore, finding that the ability to hear for the purpose of patient safety was an essential function of the student's role in this program, the Court held for the college.

C. Employer Must Be Able To Document Essential Functions

In Rorrer v. City of Stow, No. 13-3272 (6th Cir. Feb. 26, 2014) Rorrer worked actively as a firefighter for nine years until an accident blinded him in the right eye in 2008. While his personal doctor and the city's Department physician, Dr. Moten, cleared him to return to work without restrictions, Rorrer's chief, Chief Kalbaugh, disagreed.

Rorrer intended to return to work on September 28, 2008, his next scheduled work day, but Chief Kalbaugh was 'adamant' that Rorrer not return until October 1, 2008, so "this [could be] sorted out."

The Chief called Dr. Moten and got him to reverse the medical release, thus preventing Rorrer's return to duty. Later requests by Rorrer to be relieved of driving duty, or to be transferred to fire inspector duties, were denied and Rorrer was terminated.

According to the panel, "Chief Kalbaugh testified that the City terminated Rorrer because his monocular vision prevented him from performing an essential function of the firefighter position, National Fire Protection Association ('NFPA') guideline 1582-9.1.3(10):

> "Operating fire apparatus or other vehicles in an emergency mode with emergency lights and sirens' ('Job Task 10')."

However, there was apparently a dispute over what these guidelines required. Several witnesses, both union and fire officers alike, testified that the city had never adopted NFPA 1582. Actually, during Dr. Moten's testimony, he was unable to identify the NFPA regulation until after the defense lawyer took the deposition "off the record" and apparently reminded him of it.

A Department document, meanwhile, appeared to identify the ability to drive as discretionary, not essential.

The Sixth Circuit reversed the employer's summary judgment on the ADA and Ohio law disability-discrimination and reasonable accommodation claims.

It held that there was a genuine dispute of material fact regarding whether driving an emergency vehicle was an "essential function" of being a firefighter for the Stow, Ohio fire department.

The Sixth Circuit held:

> "[t]he record is ... replete with evidence that the Department never adopted NFPA guidelines and did not rely on them in determining that Rorrer was unfit to serve as a Stow firefighter. Multiple witnesses testified that the Department never adopted the NFPA guidelines. The Department did not execute the NFPA's implementation plan, and did not require the annual physicals mandated by the NFPA."

The Sixth Circuit further held that the district court erred in "giv[ing] deference to Stow's judgment regarding what the essential functions of the position were."

Under the relevant EEOC regulations interpreting "essential function," the panel holds that **"[t]he employer's determination about what functions are essential is certainly given weight, but it is one of seven factors the court should consider, including '[t]he amount of time spent on the job performing the function' and '[t]he consequences of not requiring the [employee] to perform the function.'"** 29 C.F.R. § 1630.2(n)(3)(iii), (iv).

"The district court appears not only to have given deference to the City's position, but to have considered ***only the City's position***, failing to consider all of the § 1630.2 factors while drawing all reasonable inferences in Rorrer's favor as required at the summary judgment stage," the Sixth Circuit held.

The Sixth Circuit also held that the district court placed too much weight on Rorrer's supposed admission that the Department could order him to drive an emergency vehicle as evidence that the driving task was "essential."

"An 'essential' task, however, is not any task that an employee would feel compelled to perform if ordered to perform it by his or her employer."

On the reasonable-accommodation claims, the Sixth Circuit held that "the City apparently never considered accommodating Rorrer. After Dr. Henderson initially cleared Rorrer to return to work, Chief Kalbaugh intervened to change the decision, at which point Dr. Moten reversed Dr. Henderson's decision without first examining Rorrer."

Moreover, "[e]ven if operating an apparatus during an emergency were an essential function of a Stow firefighter, the district court erred in finding that Rorrer's proposed accommodation of transfer to the FPB [Fire Prevention Board, as an inspector] was unreasonable." There was a dispute about whether there was a vacancy in the department at the time. Moreover, because fire inspectors do not make emergency calls, the city's suggestion that the ability to drive emergency equipment was an essential function for all "firefighters" lacked merit.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Employers must realize while their opinion of what constitutes an "essential function" carries weight, there are several facts that must be considered. More than ever, employers must be able to document that a function truly is essential to the job.

D. Listing Essential Functions On Job Descriptions Is Critical

In Henschel v. Clare County Road Comm'n, 737 F.3d 1017 (6th Cir. 2013), Wayne Henschel was employed by the Clare County (Michigan) Road Commission (CCRC) as an excavator operator. His duties included running an excavator, which digs ditches and trenches. Henshel was part of the union.

Henshel's machine was delivered to his worksites on a trailer that was pulled by a semitruck. Henschel hauled the excavator to his worksites approximately 70% of the time. The rest of the time, a driver or another qualified CCRC employee drove the truck. 90% of the time, the excavator stayed at a work site until the job was completed.

A few years after Henschel was hired, he was involved in a motorcycle accident that resulted in his left leg being amputated above the knee. He was fitted with a prosthetic leg. However, even with his prosthetic leg, Henshel was unable to operate a manual transmission. This affected his ability to haul the excavator to worksites because the CCRC's semitrucks had manual transmissions. Although the CCRC determined that hauling this equipment to and from the worksites was an essential function, it was not included in Henschel's written job description, although it was part of the written job description for semitruck drivers.

Consequently, the CCRC refused to restore Henschel to his excavator operator position because he was not able to haul the excavator around with a semitruck. The employer did not explore other ways of delivering the excavator, including asking a driver or another qualified employee to deliver it 100% of the time.

The CCRC tried to provide Henshel with a reasonable accommodation by reassigning him to another position driving a blade truck with an automatic transmission. However, there were no vacancies of this position at the time.

So, the CCRC asked for a volunteer who was willing to give up his position. The plan was initially approved by the union.

However, without advising the union or the volunteers, the CCRC said if someone agreed to give up his job for Henshel, then that person would be demoted to a laborer position, which was a violation of the CBA. Upon learning that a CBA violation might occur, the union withdrew its support, and the two employees who had volunteered changed their minds.

Henschel's employment was therefore terminated because he was unable to haul the excavator with a semitruck and the CCRC was unable to assign him to a blade truck driver position.

Henschel filed suit for ADA discrimination. The court granted summary judgment for the employer. The court relied on the employer's judgment that hauling of the excavating equipment was an essential job function.

Henschel appealed to the 6th Circuit.

The 6th Circuit focused on whether the hauling function was truly essential to the excavator operator position by considering the seven factors in the Americans with Disabilities Act's (ADA) regulations. Those factors include:

1. The employer's judgment on which functions are essential;

2. Written job descriptions that were prepared ***before*** advertising the job or interviewing applicants;

3. The amount of time spent performing the function;

4. The consequences of not requiring the employee to perform the function;

5. The terms of the CBA;

6. The experience of past incumbents in the job; and

7. The work experience of employees currently in similar jobs.

The court stressed that the CCRC's opinion that hauling the excavator was an essential function "carries weight but is only one factor to be considered." However, weighing against the CCRC's opinion was the fact that the excavator operator's job description failed to mention "hauling duties" at all. In addition, the court noted that the job description for semitruck drivers included the hauling duties the CCRC claimed were essential for excavator operators.

The excavator operator job description included a catch-all provision of "anything from any other [job] categories." However, the court noted, "Not every other duty under every other job category is an essential function of the excavator operator position. To reach that conclusion would make . . . job descriptions meaningless."

The 6th Circuit found that other factors weighed against the CCRC's opinion as well. The amount of time Henschel spent hauling the excavator appeared to be limited, there was evidence that asking other employees to haul the excavator would have had a minimal impact on the CCRC's operations, and other employees testified that they would have been willing to haul the excavator and had done so frequently in the past.

As a result, the 6th Circuit reversed the lower court's dismissal of Henschel's claims, finding there were factual issues about whether the hauling duty was essential. However, the court noted that the CCRC's attempt to accommodate Henschel's disability by creating a position and potentially violating the CBA was not required by the ADA.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Written job descriptions that accurately reflect essential job functions are critical to managing the reasonable accommodation process and defending against disability discrimination or failure-to-accommodate claims. Inconsistencies between job descriptions and the duties performed on a daily basis can undermine an employer's assertion that a function is essential.

Furthermore, "catch-all" provisions will not remedy an otherwise deficient job description. Job descriptions should be regularly reviewed by supervisors and employees to ensure accuracy and avoid battles about which functions are truly essential.

E. Criteria For Job Must Be Related To Essential Functions Of Job

The regulations also specifically state that an employer may not use selection criteria that tends to exclude a disabled person or a class of disabled persons because of disabilities that do not concern any essential functions of the job in question. Such criteria would be inconsistent with business necessity (29 C.F.R. Pt. § 1630.10, App.).

In Hamlin v. Township of Flint, No. 97-2105 (6th Cir. Jan. 8, 1999), Robert Hamlin was employed by the Flint Township in Michigan as assistant fire chief. When Hamlin suffered a heart attack, he missed five months from work. When he returned, Hamlin's physicians would not allow him to engage in frontline firefighting, believing it was too stressful for Hamlin's heart.

For the next 17 months, Hamlin performed the supervisory and non-firefighting duties of his assistant fire chief position in a satisfactory manner.

In mid 1994, Hamlin declined a promotion to fire chief. In July of 1994, this position was given to Greg Wright. Wright then ordered Hamlin to begin performing the duties of a frontline firefighter. Hamlin declined, citing his physical restrictions.

In September of 1994, Wright terminated Hamlin, claiming Hamlin was unable to perform the essential functions of the assistant fire chief position. Hamlin sued Flint Township for disability discrimination under the ADA.

Flint Township argued that it was Hamlin's burden to prove that being required to fight fires was not essential job function. In other words, if the township claimed that fighting fires was an essential job function, then it was Hamlin's burden to prove otherwise. The Sixth Circuit Court of Appeals disagreed.

The Sixth Circuit held that once an employee claims that a particular job requirement of function is **non-essential**, then it is the employer's burden to prove that the required duties are in fact essential to the successful performance of the job.

The township then argued that requiring Hamlin to be able to fight fires was essential to his job as assistant fire chief for reasons of safety. To support its position, the township stated that if a fire was in progress and firefighters inside the burning structure need help, the rule of the township is that only two firefighters at a time can go into a burning building. To let a firefighter go in alone is simply too dangerous.

If Hamlin is then standing outside the burning structure with one other firefighter, the firefighter cannot go in since Hamlin would be unable to assist.

The Sixth Circuit then stated that the township's reasoning was too speculative. An essential job function cannot be based on what **might** happen in certain situations. The court reasoned that such potential risk would only be considered when it poses a **"significant risk" and a high probability of substantial harm**. Mere speculation or the potential of a remote risk is insufficient to justify these job requirements as being "essential."

The court then upheld the jury verdict of $500,000 to Hamlin.

This case clearly demonstrates that employers cannot just classify any job functions they like as being essential…regardless of the employer's good intentions. In order to qualify as an essential job function, the duties must truly be an important part of the job and they must actually occur on the job. It is the employer's burden to prove that those duties classified as being essential meet these requirements.

F. Only Current Job Is Pertinent For Analysis

Only the essential functions of the current position in question may be considered in determining whether or not the disabled individual perform the duties of the job. Employers may not consider the person's ability to advance into other positions or the person's ability to perform any marginal duties.

G. Timely Attendance MAY NOT Be An Essential Function

Many courts have also held that since regular and timely attendance at work may be considered an essential function of a job, excessive absences by a protected employee may not warrant ADA protection.

In McMillan v. City of New York, No. 11-3932 (2nd Cir 03/04/2013), Rodney McMillan worked for ten years as a case manager for New York City's Human Resources Administration ('HRA'). In 1997, he assumed the role of a case manager for the HRA Community Alternative Systems Agency ('CASA'). McMillan's new duties included conducting annual home visits, processing social assessments, recertifying clients' Medicaid eligibility, making referrals to other social service agencies, and addressing client concerns. He also met with clients daily in the office.

McMillan also suffered from schizophrenia. However, he suffered drowsiness as a result of his anti-psychotic medication, which made it difficult for him to arrive at the office daily by 10 a.m. (or the 10:15 a.m. grace time allowed by agency rules.) While his agency tolerated McMillan's arrivals as late as 11 a.m. for a decade, this changed in 2008 when his supervisor Loshun Thornton, at her supervisor Jeanne Belthrop's direction, refused to approve any more of McMillan's late arrivals. Thornton explained that she 'wouldn't be doing [her] job if [she] continued to approve a lateness every single day.'

McMillan verified with two treating physicians that his medication schedule could not be altered, and twice requested as an accommodation that his work schedule be altered to allow him to work from 11 a.m. to 7 p.m., a request that was denied. "These requests were forwarded to Donald Lemons, the Deputy Director of HRA's Equal Employment Opportunity Office, for evaluation. After speaking with Thornton and others, but not with McMillan, Lemons determined that McMillan's request for a later flex start time could not be accommodated because there was no supervisor at the office after 6:00 p.m."

McMillan was allowed to continue working, but was placed on a 30-day suspension without pay for tardiness. He brought an action for discrimination and denial of reasonable accommodations under the ADA and the New York State Human Rights Law, and the New York City Human Rights Law.

The district court found for the employer on all claims, holding (among other things) that timely arrival at work was an "essential function" of McMillan's job.

However, McMillan appealed to the Second Circuit Court of Appeals. The Second Circuit Court of Appeals found for McMillan.

The Second Circuit Court of Appeals held that the employee's long, successful history with this accommodation of arriving late presented a genuine issue of material fact about whether timely attendance at work was an "essential function":

> "For many years prior to 2008, McMillan's late arrivals were explicitly or implicitly approved. Similarly, the fact that the City's flex-time policy permits all employees to arrive and leave within one-hour windows implies that punctuality and presence at precise times may not be essential. Interpreting these facts in McMillan's favor, along with his long work history, whether McMillan's late

> and varied arrival times substantially interfered with his ability to fulfill his responsibilities is a subject of reasonable dispute."

While other cases that had previously held that timeliness was an essential function, the Second Circuit Court of Appeals held that those cases involved situations that "***absolutely*** required plaintiffs' presence during specific business hours," such as when the employee was a supervisor, or the company had to meet timely deadlines, and so on. The Second Circuit Court of Appeals also noted that there was an important distinction between tardiness and absenteeism:

> "an absent employee does not complete his work, while a late employee who makes up time does."

While the agency objected that an 11 a.m. start time might mean that the plaintiff would be without supervision for up to an hour a day, which would be after 6 p.m., the Second Circuit noted that even unsupervised hours might be a reasonable accommodation:

> "McMillan's request to work unsupervised after 6:00 p.m. is not unlike a request to work from home. Both accommodations are potentially problematic because they are unsupervised. We have implied, however, that unsupervised work might, in some cases, constitute a reasonable accommodation. The majority of cases on this issue, however, find that requests to work without supervision are unreasonable. The question of whether McMillan can reasonably perform portions of his job without supervision, as he apparently has been permitted to do previously, should be considered on remand."

The Second Circuit remanded the issue of whether such a work arrangement might amount to an "**undue burden**" under the ADA, a defense upon which the employer bears the burden of proof, back to the district court.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

This case is a great example of the fact that employers cannot just classify some job duty or requirement as an "essential function" and leave it at that. There must be **reasons and documentation** to support such a classification.

H. Punctuality Is Not Necessarily an Essential Job Function

In Ward v. Massachusetts Health Research Institute, Inc., No. 99-1651 (1st Cir. 2000), employees were allowed to arrive at work anytime between 7 a.m. and 9 a.m. However, Michael Ward, a data entry worker, would usually arrive to work between 9:10 a.m. and 9:35 a.m. Sometimes, he would not arrive until noon. However, Ward always worked a full shift and completed his entries.

When Ward continued to be late for work, he was given a written warning. However, Ward told his supervisor that he had arthritis, and this condition caused him to be very stiff and sore in the morning. As a result, it took Ward a while to "loosen" up his joints and get into work. Ward then provided a note from his physician verifying his condition.

Ward then asked to modify his schedule further, but the Human Resource Director denied this request.

When Ward's tardiness continued, he was fired. Ward filed suit under the ADA. The court found for Ward.

The court first stated that an employer is not expected to hire anyone who cannot perform the essential functions of the job. The court also recognized that most courts have found that timely attendance is an essential function of most jobs. However, the court did not believe that timely attendance was an essential function in this case.

First, the court reasoned that Ward arose every morning at 5:00 a.m. In order to get out of bed, Ward would use a blow dryer for 45 minutes just to heat up his legs. Only then could he begin to move around enough to get ready to come to work.

Employers are expected to reasonably accommodate their disabled employees. In Ward's position, it did not matter if he completed his data entry assignments by 5:00 p.m. or by 11:00 p.m. All that really mattered was that they were completed by the start of business the next day. Therefore, allowing Ward to come to work as late as even 12:00 p.m. caused no real hardship for the employer…aside from altering its policy for Ward.

Therefore, since the employer could not show that timely attendance was an essential job function, and since employers are required to reasonably accommodate their disabled employees, Ward prevailed in this case.

X. EMPLOYER DEFENSES

A. Employer Defense: Undue Hardship

An accommodation will not be required if doing so would place an undue hardship on the employer, which is defined as being any accommodation that is significantly difficult or unreasonably expensive to implement and/or maintain, or one that would fundamentally alter the nature or operation of the employer's business. In making such a determination, the regulations cite several factors that may be considered, such as:

1. The overall size and financial resources of the employer, the number of employees and its facilities involved in the reasonable accommodation,

2. The type of operation involved,

3. The impact of the accommodation on the employer, and

4. The nature and cost of the accommodation.

It is also important to note that the "undue hardship" test of the ADA is much stricter than the "undue hardship" test used for religious discrimination under Title VII, which requires employers to incur only a "de minimus" (minimal) burden when "reasonably accommodating" their employees' religious needs, which is a very low standard to meet. The reason for the difference is that under the ADA, the courts do not have to worry about a conflict between church and state under the Establishment Clause of the First Amendment.

For instance, consider the situation of an individual who has a visual disability that makes it extremely difficult for that person to see in a dimly lit room. If this person applies for a job as a waiter in a nightclub and requests that the establishment be lit as brightly as possible as a reasonable accommodation, this accommodation need not be granted. Even though such an accommodation would enable the individual to perform the essential duties of the waiter position, and even though such an accommodation would be inexpensive, it would destroy the ambiance of the nightclub and/or make it difficult for the customers to see the stage show.

Therefore, the nightclub would not be required to fundamentally alter its nature or operation, which would be the result if such an accommodation was granted.

In Dexler v. Tisch, 660 F. Supp. 1418 (D. Conn. 1987), Ilan Dexler, who was a dwarf, was rejected for a job at the U.S. Post Office after it concluded that Dexler could not perform the essential functions of the job due to his height and that accommodating his handicap would require restructuring its entire operation, which would be an undue hardship. Dexler argued that the Post Office did not try to reasonably accommodate his disability since a portable step stool, a platform, or restructuring this job would have enabled him to perform the essential functions of this position by allowing him to reach the uppermost row of sorting slots or post office boxes.

However, the court held that a "reasonable accommodation" creates an undue hardship if it unduly interferes with an employer's operation. In this case, the type of operation and the nature and the cost of the accommodations were all implicated. Using a stool or platform was not considered to be a reasonable accommodation because of the safety problems it presented and its loss of efficiency. An employer is not required to adopt an accommodation that would reduce efficiency to an unacceptable level. Taken together, the hardships involved in accommodating Dexler's condition would have unduly interfered with the Post Office's operations. Consequently, the court found for the Post Office and against Dexler on his ADA claim.

B. Employer Defense: Employer Must Be Aware Of Disability

One defense to a charge of ADA discrimination is that the employer was unaware of the individual's disability.

In Landefeld v. Marion General Hospital, 994 F.2d 1178 (6th Cir. 1993), Marion General Hospital argued that it was not liable under the Act for discriminating against a physician's bipolar disorder when it fired the individual for mailbox pilferage since it was unaware of the doctor's condition. The Sixth Circuit agreed and found for the hospital. The court held that in order for an employer to be found liable under the ADA, the employer must be aware of the employee's disability.

C. Employer Defense: Direct Threat To Others

If an individual's disability poses a direct and high probability of an immediate threat of substantial harm to himself or others, which means that a reasonable probability of significant injury remains after reasonably accommodating the person's disability, then the individual will not be protected under the ADA (42 U.S.C. § 101(3)). Additionally, § 103(d)(1)(3) of the ADA provides that a food-handling position may be denied to a person with infectious or communicable diseases that may be transferred to others and cannot be eliminated by reasonable accommodation. However, the disease or condition must be one that has been identified by the Department of Health and Human Services (HHS).

The assessment of whether a "direct threat" of harm exists must be strictly based on valid medical analyses and/or other objective evidence. Specifically, the EEOC requires (29 C.F.R. § 1630.2(r)) that the direct threat determination be based upon a reasonable medical judgment considering such factors as the:

1. Duration of the risk,

2. The nature and severity of the potential harm,

3. The likelihood of potential harm, and

4. The imminence of potential harm.

In School Board of Nassau County v. Arline, 480 U.S. 273 (1987), Gene Arline was a teacher with tuberculosis who was discharged due to the danger her disease allegedly posed to others. The U.S. Supreme Court held that a person who poses a significant risk of communicating an infectious disease to others in the workplace will not be "otherwise qualified" for her job if reasonable accommodation will not eliminate that risk. The lower courts must make an individualized inquiry into the pertinent findings of fact based on medical judgment about the nature of the risk, its duration, and severity, and the probabilities the disease will be transmitted on a case-by-case basis in making such a determination.

In this case, however, Arline's disease had been in remission for years, so she posed no real threat to anyone. Common misconceptions and stereotypes regarding various conditions are exactly the types of myths the ADA is designed to eliminate, the Court reasoned. Therefore, the employer's direct threat defense was denied in this case.

D. Employer Defense: Direct Threat To Self

In Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73 (2002), Mario Echazabal applied for a job with Chevron. However, Mr. Echazabal suffered from Hepatitis C. As a result, Chevron decided not to hire Mr. Echazabal since working around the chemicals at Chevron could pose a direct threat to Mr. Echazabal's health.

Mr. Echazabal sued Chevron for violating the ADA. Mr. Echazabal claimed that it was not Chevron's concern whether these chemicals posed a direct threat to him.

Chevron relied on the "direct threat to one's self" defense established in the EEOC's regulations governing the ADA. Chevron contended that Mr. Echazabal was not qualified for the position in question since an essential function of this job was to be able to tolerate the working environment that included, among other things, "hydrocarbons liquids and vapors, petroleum, solvents and oils."

In June of 2002, the United States Supreme Court unanimously upheld the "direct threat to one's self" regulation issued by the Equal Employment Opportunity Commission, thus allowing employers to refuse to employ individuals with a disability that could endanger their own health or safety. With this ruling, the Court continues its approach to the ADA of focusing on the importance of **individualized assessment** and the use of objective and reliable medical opinions when making employment decisions with a minimum risk of liability.

Specifically, the Court addressed Chevron's legitimate business concerns over hiring an employee who poses a risk to his own health, which included lost sick time, excessive absenteeism, excessive turnover from medical retirement or death, and litigation under state tort law. The Court further reasoned that requiring employers to violate the federal Occupational Safety and Health Act was "enough to show that the regulation is entitled to survive."

Citing OSHA's general duty clause to provide all employees with a workplace free from recognized hazards, the Court noted that while it is "an open question whether an employer would be liable under OSHA for hiring an individual who knowingly consented to the particular dangers the job would pose to him . . . there is no denying the employer would be asking for trouble." The EEOC's regulation eliminates this conflict between the ADA and OSHA that otherwise would be left for the courts to resolve.

Addressing another concern about applying the threat-to-self defense raised by Chevron, the Court noted that the ADA was enacted, in part, to combat **paternalism**

based on "untested and pretextual stereotypes." Acknowledging a distinction between "a specifically demonstrated risk" and employment refusals based on stereotypes of classes of disabled people, the Court said the ADA only prohibits "generalities and misperceptions about disabilities." The threat-to-self analysis, however, is not based "on averages and group based predictions," the Court reasoned, but it requires an individualized risk assessment, which is the heart and soul of the ADA:

The direct threat defense must be "based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence," and upon an expressly "individualized assessment of the individual's present ability to safely perform the essential functions of the job," reached after considering, among other things, the imminence of the risk and the severity of the harm portended. 29 CFR §1630.2(r) (2001). (Opinion, p. 12)

The Court therefore endorsed the EEOC's differentiation between "workplace paternalism" and "ignoring specific and documented risks to the employee himself," finding the regulation in harmony with the ADA's focus on individualized assessment.

XI. REASONABLE ACCOMMODATION

A. In General What Is A "Reasonable Accommodation"?

A "reasonable accommodation" under the ADA is an effective modification an employer is able to make to its application process, the manner in which the tasks of a job are performed or how the work area is arranged in order to provide a qualified individual with a disability an opportunity to adequately perform the essential functions of a job.

An employer's duty to reasonably accommodate an individual occurs when:

1. An individual is a qualified person with a disability,

2. The individual requires an accommodation in order to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability,

3. An accommodation exists that will meet the individual's needs without placing an undue hardship on the employer, and

4. The employer knows or should know of the individual's need for an accommodation (42 U.S.C. § 102(b)(5)).

B. What ***More Specifically*** Is A "Reasonable Accommodation"?

Since the ADAAA and the 2011 regulations have clearly shifted the focus of ADA cases from determining whether or not someone is disabled under the law to whether or not the employer attempted to reasonably accommodate the person's disability, it is critical that employers understand what is meant by the term "reasonable

accommodation."

First, employers are required to make "reasonable accommodations" to all aspects of employment, including the job application process, employer-provided services, employer programs, employer-provided restrooms, employer-provided cafeterias, the company's lounges, recreation facilities, and so on.

The ADA's regulations define the term "reasonable accommodation" to include:

1. Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

2. Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

3. Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

The ADA and its regulations also cite to some specific examples of types of reasonable accommodations that employers are expected to provide to employees that are not seen as imposing an undue hardship (42 U.S.C.§ 101(9)). These types of reasonable accommodations include:

1. Providing readily available access to the work area and usability of its various facilities (i.e., restrooms, water fountains, etc.),

2. Restructuring of job duties, modifying work schedules, or permitting part-time work,

3. Reassigning an employee with a disability to a vacant position for which the employee is qualified and able to perform. (The employee's salary can be adjusted if the employer would routinely also do so for nondisabled individual.),

4. Restructuring the **nonessential functions** of the job,

5. Modification of equipment or devices required to perform the essential duties of the position in order to enjoy the equal benefits and privileges of employment, as well as any necessary modifications to the job application process,

6. Adjustment of examinations, training materials, or policies,

7. Providing qualified readers or interpreters and other similar accommodations or

8. Other similar accommodations for individuals with disabilities, but not to the point where the person providing the assistance is actually the one performing the job.

C. EEOC Guidance On Requesting A Reasonable Accommodation

1. How specific must an individual be when requesting a reasonable accommodation?

To request an accommodation, an individual need only use "***plain English***" and need not mention the ADA or use the phrase "reasonable accommodation."

For example, consider the example of an employee who asks for time off because he is "depressed and stressed." The employee has sufficiently communicated a request for a change at work, which is time off, for a reason related to a medical condition, which is being "depressed and stressed." Such a request will be viewed as asking for a reasonable accommodation in "plain English."

However, if the employee's need for accommodation is not obvious, the employer is entitled to ask for reasonable documentation concerning the employee's disability and functional limitations.

It is also permissible if a family member, friend, health professional or other representative requests a reasonable accommodation on behalf of the individual. The EEOC also does not require any requests for reasonable accommodation to be in writing. Such request may be made at the beginning of employment or at any time thereafter.

2. May an employer require an employee to go to a health care professional of the employer's choice for the purpose of documenting the need for accommodation and disability?

Employers are entitled to require an employee to go to an appropriate health professional of the employer's choice if the employee initially provides insufficient information to substantiate that he has an ADA disability and needs a reasonable accommodation. Of course, any examination must be job-related and consistent with business necessity. Moreover, the employer must pay all costs associated with such visits.

D. Requesting A Reasonable Accommodation: Employee ONLY Needs to Ask For An Adjustment Or Change Due To A Medical Condition

Under the ADA, an individual must request an accommodation. The EEOC has stated that, "it is the responsibility of the individual with a disability to inform the employer than an accommodation is needed." Appendix to 29 C.F.R. § 1630.9; EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at "General Principles" and Question 40.

So … what ***exactly*** does an employee have to say to his/her supervisor in order to qualify as asking for an accommodation?

In the past, the EEOC stated that, "if an employee requests time off for a reason related or possibly related to a disability (e.g., **"**I need six weeks off to get treatment for a back problem**"**), the employer should consider this **to be a** request for ADA reasonable accommodation as well as FMLA leave." See EEOC Fact Sheet: "The FMLA, the ADA, and Title VII of the Civil Rights Act of 1964" at p. 8 (question 16). (www.eeoc.gov)

However, more recently, the EEOC has stated that when an individual informs an employer that an **adjustment or change** is needed at work simply **because of "a medical condition,"** that is enough to qualify as a reasonable accommodation request. (EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA, No. 915.002 (10/17/02) at Question 1.)

For example, in Matilde M v. Colvin (SSA), 2017 EEOPUB LEXIS 113 (EEOC 2017), the EEOC held that the employee, a Social Security Service Representative, had triggered the interactive process by r**equesting a new supervisor because of her mental illness**, even though this would not be a required accommodation.

In Agnus W. v. Brennan (USPS), 2016 EEOPUB LEXIS 795 (EEOC 2016), the EEOC held that the employee triggered the interactive process when she told her supervisor that **requiring her to continuously print placards, even in her "limited duty" job, caused her hands to ache**.

In Adina P v. Brennan (USPS), 2016 EEOPUB LEXIS 336 (EEOC 2016), the EEOC noted that "generally, an individual with a disability must request a reasonable accommodation by letting the agency know the individual needs an **adjustment or change at work for a reason related to a medical condition**." In this case, the EEOC assumed that the employee's doctor's note returning her to work on **light lifting duty was enough to trigger the interactive process**.

In Complainant v. Lynch (FBI), 2015 WL 6459920 (EEOC 2015), the EEOC reiterated this standard, finding that the employee had adequately triggered the accommodation process by **informing the employer that, because of her mobility issues, she needed to use an elevator during an upcoming fire drill**.

In Complainant v. Donahoe (USPS), 2014 EEOPUB LEXIS 1968 (EEOC 2014), the EEOC noted that the employee triggered the accommodation process when **she asked for leave because of her neck and back condition.**

In Johnson-Morgan v. Department of Labor, 2013 EEOPUB LEXIS 50 (EEOC 2013), the EEOC held that the employee adequately requested a reasonable accommodation by **telling her Area Director that she needed a different computer monitor because her monitor was hurting her eyes and causing headaches**.

In Feder v. Department of Justice, 2013 EEOPUB LEXIS 1349 (EEOC 2013), the EEOC held that the employee triggered the reasonable accommodation process by,

among other things, **asking to be moved to a quieter office area because of his noise sensitivity, which resulted from his experience as a Holocaust survivor.**

In Yinger v. Postal Presort, 2017 U.S. App. LEXIS 10184 (10th Cir. 2017) (unpublished), the court held that where the employee told the employer he needed an **extra week of leave for his heart-related infection**, that "constituted an adequate request" for reasonable accommodation.

In Lawler v. Peoria School District No. 150, 837 F.3d 779 (7th Cir. 2016), the court held that the employee, a special education school teacher who had been attacked by a student and developed PTSD, adequately sparked the interactive process when she **brought in a doctor's note stating that she needed to be transferred to a different job where she would not be required to work with students who had behavioral/emotional disorders**. In this case, the court noted that the "school district simply sat on its hands instead of following-up… or asking for more information."

In Foster v. Mountain Coal Co., 830 F. 3d 1178 (10th Cir. 2016), the court held when the employee told his manager that he needed time to go to his doctor to schedule neck surgery, that triggered the interactive process. The court rejected the employer's argument that the process had not been triggered because the employee did not state that he had already scheduled the surgery or state how many days of leave he would need.

E. What Is NOT A Request For A Reasonable Accommodation?

In Murray v. Warren Pumps, LLC, 2016 U.S. App. LEXIS 7471 (1st Cir. 2016), although the employee claimed that the employer already "knew" of his limitations, the employee had "agreed to self-monitor whether certain tasks were stressing his physical abilities, and to make appropriate adjustments himself or request accommodation." The court held that the employer did not violate the ADA where the employee did not make it clear that he needed a reasonable accommodation. The court noted that an employee "will not be protected under the law when he fails to alert his employer that a particular task requested of him conflicts with a medical restriction."

In another case, Walz v. Ameriprise Financial, Inc., 779 F.3d 842 (8th Cir. 2015), the employee claimed that the employer should have known that her erratic behavior was caused by a mental disability and should have forced her to take leave as an accommodation. The court held that where the employee did not request accommodation for her bipolar disorder, which the court said was not "open, obvious, and apparent to the employer," the employer did not violate the law. The court noted that an employer does not have "a duty to guess" that an employee has a disability.

In Keeler v. Florida Dept. of Health, 2009 U.S. App. LEXIS 8880 (11th Cir. 2009)(unpublished), the court held that where the employee admitted that "nobody knew" of her disabilities when she asked for a job transfer, the employer was not liable for failure to accommodate. The court rejected the employee's argument that the employer "should have known" of her disability because she "took lots of notes, cried while speaking" to her employer and told the employer that her job was "stressful and overwhelming."

In McCarroll v. Somerby of Mobile, 2014 U.S. App. LEXIS 23356 (11th Cir. 2014) (unpublished), the court held that a shuttle bus driver telling his supervisor that he was "too sore" to report to work was not enough to trigger the reasonable accommodation process.

In Parsons v. Auto Club Group, 2014 U.S. App. LEXIS 8374 (6th Cir. 2014) (unpublished), the court held the employee had not said enough to request an accommodation by telling his supervisor that his sleep apnea "was coming back again" and he was having trouble getting his insurance company to pay for his medical device. In fact, the plaintiff stated that he told his supervisor that "there was nothing he could do about it."

Similarly, in Lanier v. University of Texas Southwestern Medical Center, 2013 U.S. App. LEXIS 11836 (5th Cir. 2013) (unpublished), the court held that the employer was not liable for failure to provide reasonable accommodation where the employee never tied her request for an alternate on-call rotation to insomnia or a sleeping disorder of any kind; at most, she complained of being sleep deprived. The court stated that this could not be construed as a request for a reasonable accommodation.

In EEOC v. C.R. England, Inc., 644 F.3d 1028 (10th Cir. 2011), the court held that the employee did not technically trigger the reasonable accommodation process where he simply asked for "home time" or "family time," but did not say this was needed because of his HIV status, even though the employer had been on notice earlier that the employee had HIV.

F. No "Magic Words" Required

The courts do not require the employee to use any "magic" language, or even use the term "reasonable accommodation" in making their requests.

For example, in Kowitz v. Trinity Health, 839 F.3d 742 (8th Cir. 2016), the court noted that an employee is not required to use "the magic words 'reasonable accommodation'" for a statement to be considered a request for accommodation.

In EEOC v. Chevron, 570 F.3d 606 (5th Cir. 2009), the court held that where a disability, the limitations and the necessary accommodations are not "open, obvious, and apparent to the employer," an "employee who needs an accommodation because of a disability has the responsibility of informing her employer, the employee does not need to mention the ADA "or use the phrase 'reasonable accommodation.'" The court noted that "plain English will suffice," and the employee must simply "**explain that the adjustment in working conditions or duties she is seeking is for a medical condition-related reason.**"

G. Request For FMLA Leave Could Likely Qualify As A Request For A Reasonable Accommodation Under The ADA?

In Complainant v. Donahoe (USPS), 2014 EEOPUB LEXIS 2159 (EEOC 2014), the EEOC suggested that the employee triggered the accommodation process by requesting FMLA leave for her medical condition.

Also, in Capps v. Global, LLC, 847 F.3d 144 (3d Cir. 2017), the court recognized that a request for FMLA leave may qualify, under certain circumstances, as a request for a reasonable accommodation under the ADA. In this case, however, the court concluded that an employee's request for FMLA intermittent leave also triggered the ADA.

H. The Accommodation Need Only Be "Reasonable" … It Need Not Be The *BEST*

Like the "reasonable accommodation" requirement of religious discrimination, the ADA does not require employers to use the "best" accommodation available. Rather, the accommodation need only be sufficient to meet the job-related needs of the individual.

I. Employee Who Declines A Reasonable Accommodation Loses ADA Coverage

The regulations also state that if an employer offers a reasonable accommodation to a disabled employee, and the employee declines the accommodation, the employee will lose his protections under the ADA. The employer may then treat the employee as a nondisabled individual (29 C.F.R. § 1630.8(d)).

In Hankins v. The Gap, Inc., 84 F.3d 797 (6th Cir. 1996), where a disabled employee refused a reasonable accommodation offered to her by her employer, the Sixth Circuit held that the employee could no longer claim to be classified as a qualified individual with a disability.

J. EEOC Comments On Telecommuting

The Equal Employment Opportunity Commission (EEOC) released a fact sheet for employers examining the use in deciding if "telecommuting" is a reasonable accommodation under the ADA for their workplaces. According to EEOC Chair Cari M. Dominguez: "Advances in technology are making telecommuting an increasingly important option for employers who want to attract and retain a productive workforce. For some people with disabilities, telecommuting may actually be the difference between having the opportunity to be among an employer's best and brightest workers and not working at all."

In its 1999 *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA,* the EEOC concluded that allowing an individual with a disability to work at home may be a form of reasonable accommodation. The fact sheet notes that employers can use existing telecommuting programs to meet that obligation, though the employer may have to waive certain eligibility requirements or otherwise modify the program for someone with a disability. Employers that do not

have telecommuting programs may still need to allow a disabled employee to telecommute as a reasonable accommodation, the EEOC states, unless doing so would create an undue hardship for the employer.

The fact sheet reminds us that after an employee requests the right to telecommute, the employer and employee should discuss why the employee needs to telecommute and whether all or some of the job tasks can be performed from home. (That is referred to as the "**Interactive Process**.")

There are several difficult issues that must be considered for a telecommuting program, which the fact sheet acknowledges. Some of those include:

- Supervising an employee who works at home;
- Replacing face-to-face interaction with telephone, fax, and e-mail communications; and
- Providing immediate access to documents or other information generally located only in the workplace.

To review the EEOC's report on telecommuting, go to the EEOC's website at www.eeoc.gov.

Another useful resource for employers exploring their reasonable accommodation obligation is the Job Accommodation Network (JAN). JAN is a free service that offers ideas and suggestions on providing effective accommodations. The program's counselors perform individualized searches for workplace accommodations based on a job's requirements, the functional limitations of the individual, environmental factors, and other pertinent information. JAN can be reached at (800) 526-7234 or www.jan.wvu.edu/soar.

K. Circuit Court Rules Telecommuting ***IS*** A Reasonable Accommodation Consideration

In EEOC v. Ford Motor Co., No. 12-2484 (6th Cir. 2014), Jane Harris was employed by Ford Motor Company as a resale buyer. Her job required her to serve as an intermediary between steel suppliers and the companies that use steel to produce parts for Ford to ensure there were no gaps in the steel supply.

Harris suffered from IBS, an illness that causes fecal incontinence. On particularly bad days, she was unable to drive to work or stand up from her desk without soiling herself. She used intermittent Family and Medical Leave Act (FMLA) leave when her symptoms were severe. Eventually, she asked to telecommute on an as-needed basis as an accommodation for her disability.

Although Ford had a policy that authorized employees to telecommute up to four days per week, the company initially denied Harris' request to telecommute on an as-needed basis.

According to Ford, "The essence of the job was problem-solving, which required that a [resale] buyer be available to interact with members of the resale team, suppliers, and others in the Ford system when problems arose." Ford determined that the position required face-to-face meetings and that e-mail and teleconferencing were poor substitutes for in-person problem solving.

Ford offered Harris two alternative accommodations:

- She could move her office closer to a restroom, or
- The company could transfer her to a position that was more suitable for telecommuting.

Harris rejected both proposals.

Harris felt that her supervisor began harassing her because of her absences. She filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC). Shortly after she filed this charge, her supervisor began having weekly coaching sessions with her. These sessions involved reviewing her performance problems that stemmed from her disability-related absences.

Additionally, in her next performance evaluation, Harris was rated as a "lower achiever," and Ford placed her on a performance enhancement plan (PEP). The PEP was designed to help employees improve their performance by establishing concrete objectives they could easily achieve in 30 days. At the end of the 30-day period, Ford determined that Harris failed to meet any of the objectives and terminated her employment.

After investigating Harris' discrimination charge, the EEOC found probable cause that she was discriminated against because of her disability. It then filed this lawsuit against Ford on her behalf. The EEOC alleged that Ford failed to accommodate Harris' disability under the Americans with Disabilities Act (ADA), asserting that the company should have permitted her to telecommute four days per week.

The agency also alleged that Ford **retaliated against Harris by placing her on a PEP** and **terminating her shortly after she filed her discrimination charge**. The district court granted Ford's motion for summary judgment, finding that Harris was not a "qualified" individual on the basis of her excessive absenteeism.

The EEOC appealed to the 6th Circuit.

In a 2-1 decision, the 6th Circuit reversed the district court's award of summary judgment. The 6th Circuit found that there were significant issues in Ford's failure-to-accommodate and retaliation claims.

In the failure-to-accommodate claim, the 6th Circuit **reversed its past decisions on "telecommuting" as a reasonable accommodation**. The court reasoned that technological advances have now made telecommuting a "viable reasonable accommodation."

The majority stated:

> Technology has advanced in the intervening decades, and [as] an ever- greater number of employers and employees utilize remote work arrangements, attendance at the workplace can no longer be assumed to mean attendance at the employer's physical location. Instead, the law must respond to the advance of technology in the employment context, as it has in other areas of modern life, and recognize that the "workplace" is anywhere that an employee can perform her job duties.

The majority reasoned that telecommuting is no longer reserved for "extraordinary" or "unusual" cases and has become common. Therefore, there was a genuine dispute over whether telecommuting was a reasonable accommodation for Harris' disability, and a jury would have to resolve the dispute.

As for Harris' retaliation claim, the 6th Circuit found sufficient evidence that the **reasons given for her termination were pretextual and warranted a trial.** According to the court, a reasonable jury could infer that there was a pretextual reason for her termination because **"although many of Harris' performance deficiencies were ongoing problems, they prompted a negative review *only* after [she] filed her EEOC charge."**

The 6th Circuit also determined that one of the goals Ford set for Harris in her PEP was impossible to satisfy, thus setting her up to fail.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

For quite some time now, the EEOC has held that it considers telecommuting to be a reasonable accommodation worthy of consideration. The 6th Circuit is just the latest in a long line of courts that have adopted telecommuting as a possible reasonable accommodation.

XII. LEAVE OF ABSENCE AS A REASONABLE ACCOMMODATION

A. Leave Of Absence *IS* A Reasonable Accommodation Consideration

The courts have also tended to hold that granting a leave of absence to a disabled employee may be a reasonable accommodation under the ADA. In Hankins v. The Gap, Inc., 84 F.3d 797 (6th Cir. 1996), the Sixth Circuit specifically held that making a leave of absence available to an employee was a reasonable accommodation under the ADA.

On the other hand, in Monette v. Electronic Data Systems Corp., 90 F.3d 1173 (6th Cir. 1996), the Sixth Circuit also held that an employer is not required to maintain the employee's leave of absence indefinitely. Further, in Myers v. Hose, 50 F.3d 278 (4th Cir. 1995), the Fourth Circuit held that an employer need not "wait indefinitely for an employee's disability to be corrected."

B. Indefinite Leave of Absence Is *Not* A Reasonable Accommodation

In Boykin v. ATC/Vancom of Colorado, No. 00-1318 (10th Cir. 2001), Fred Boykin was a bus driver for the company when he suffered a mini-stroke. As a result, his CDL license was revoked. Boykin asked to be reassigned to another position, but none were available that did not conflict with his school schedule. Boykin therefore refused the position. The company therefore terminated Boykin.

Six months later, a job became available that Boykin was qualified to perform. Vancom invited Boykin to apply for the job, which he did. However, Vancom decided to hire someone else for the job.

Boykin then sued Vancom for disability discrimination under the ADA. Specifically, Boykin contended that he should have been given an indefinite leave of absence in order to reasonably accommodate his disability. As a result, he should not have had to reapply for the position that came available.

The court disagreed. The court held that it is not reasonable to require an employer to place an employee on an indefinite leave of absence. Each situation must turn on its own circumstances, so determining what becomes an undue hardship may vary from one instance to the next. However, it is simply not reasonable to require indefinite leaves.

Also, in Monette v. Electronic Data Systems Corp., 90 F.3d 1173 (6th Cir. 1996), the Sixth Circuit also held that an employer is not required to maintain the employee's leave of absence **indefinitely**.

Further, in Myers v. Hose, 50 F.3d 278 (4th Cir. 1995), the Fourth Circuit held that an employer need not "wait indefinitely for an employee's disability to be corrected."

C. Repeated Requests For Extended Leaves of Absence Under The ADA

The courts tend to view repeated extensions of leave requests as an indefinite leave, which are not permitted under the ADA.

For example, in Whitaker v. Wisconsin Department of Health Services, 849 F.3d 681 (7th Cir. 2017), the court stated that although unpaid leave could be a reasonable accommodation, the employee must be able to show that s/he "likely would have been able to return to work on a regular basis." In this case, the employee could not make this showing where she "repeatedly requested additional medical leave when her leave was about to expire," and she did not explain how additional "treatment" would be effective at enabling "her to return to work regularly."

In Williams v. AT&T Mobility Services, LLC, 847 F.3d 384 (6th Cir. 2017), the court noted that although additional leave is an accommodation, it is "unreasonable" to require an employer to keep a job open indefinitely. In this case, the customer service representative's history of repeatedly needing extensive periods of leave, and in some cases, many months, and often failing to

return to work on the dates estimated by her health care providers, demonstrated that future leave requests were indefinite.

Similarly, in Gardner v. School District of Philadelphia, 2015 U.S. App. LEXIS 21941 (3d Cir. 2015) (unpublished), the court held that even though granting a leave of absence from work is a reasonable accommodation, the plaintiff was not "qualified" where, after extensive FMLA and other absences, he wanted to continue extending his leave by using his "sick leave and wage continuation benefits." In this case, the court held that although "the School District has authorized in abundance" sick leave benefits, **there was no evidence that the employee would be able to perform his job functions "in the near future**."

The court stated that an employer "is under no obligation to maintain the employment of a plaintiff whose proposed accommodation for a disability is 'clearly ineffective.'"

In Brannon v. Luco Mop Co., 521 F.3d 843 (8th Cir. 2008), the court held that an employee's third request for additional leave was not a request for "reasonable accommodation that would permit her to perform the essential function of regular work attendance," where each request "further postponed her return-to-work date." The court noted that although leave is a possible accommodation, an employer is not required to provide "an unlimited absentee policy."

In Tubbs v. Formica Corp., 2004 U.S. App. LEXIS 16467 (6th Cir. 2004) (unpublished), the court noted that reasonable accommodation does not include indefinite leave. The court held that the employee's "repeated medical leaves of absence are not reasonable" in light of the fact that she had taken 14 medical leaves in her 23 years of employment, and had worked no longer than seven months before needing another leave.

The EEOC seems to generally agree with this approach.

For example, in a "Fact Sheet" on "Conduct" issues, the EEOC has noted that when an employee has sought a second six- week extension of leave, after being granted an initial 12-week leave), the employer may ask the doctor about **"why the doctor's earlier predictions on return turned out to be wrong,"** and for **"a clear description of the employee's current condition"** and **the basis for the doctor's conclusion that only another six weeks of leave are required."** (EEOC Fact Sheet "Applying Performance and Conduct Standards to Employees with Disabilities" (2008) at Example 39.)

The EEOC stated that if the doctor "states that the employee's current condition does not permit a clear answer as to when he will be able to return to work," then this **"supports a conclusion that the employee's request has become one for indefinite leave."**

Importantly, the EEOC concluded that "this poses an undue hardship and therefore the employer may deny the request."

In the Commission's Employer-Provided Leave and the Americans with Disabilities Act (EEOC 2016 "Resource Document"), the EEOC stated that, "employers are allowed to have leave policies that establish the maximum amount of leave an employer will provide or permit," ***but*** "they may have to grant leave beyond this amount as a reasonable accommodation."

Importantly, the EEOC did not say that the policy itself must explicitly state that exceptions will be provided as a reasonable accommodation. In fact, the EEOC stated only that employers who use "form letters" to "instruct an employee to return to work by a certain date or face termination may want to modify them to let employees know that if an employee needs additional unpaid leave as a reasonable accommodation for a disability, the employee should ask for it as soon as possible so that the employer may consider whether it can grant an extension without causing undue hardship."

D. Length Of Leave Of Absence

Of course, the next question to ask is how long of a leave of absence is "reasonable?" In Dockery v. North Shore Medical Center, 909 F. Supp. 1550 (S.D Fla. 1995), the district court held that an employer's policy which terminated an individual's employment after being on leave for one year would not violate the ADA.

Similarly, in Gantt v. Wilson Sporting Goods Company, 143 F.3d 1042 (6th Cir. 1998), on January 10, 1992, Una Aline Gantt, who became disabled due to a shoulder injury, began a leave of absence from work. Wilson Sporting Goods, Gantt's employer, had a policy that allowed employees to take a maximum of one-year leave of absence. At the end of this leave, if the employee had not yet returned, the employee would be terminated.

In January of 1993, the company contacted Gantt and asked her when she would be returning to work. Gantt replied that she had no idea. Pursuant to Wilson's policy, Gantt was terminated. Gantt filed suit against the company, alleging that her rights under the ADA had been violated.

The court then looked to the ADA's regulations, which state that "Leave policies or benefit plans that are uniformly applied do not violate this part simply because they do not address the special needs of every individual with a disability." 29 C.F.R. App. §1630.5. The Sixth Circuit therefore held that since the company's policy did not distinguish between disabled and non-disabled individuals and it was applied in a uniform manner, that the policy did not violate the ADA.

It is important to note that the Sixth Circuit in Gantt ***did not*** establish a "bright-line" rule regarding how long of a leave of absence must be given in order to reasonably accommodate disabled employees. Instead, the court left this determination as to the duration of a "reasonable" leave up to the facts and circumstances of each case, which includes considering what policies the employer has in place, if they are uniformly applied and ***if the application of the policy appears to be reasonable***. In this case, the court was satisfied that leave of absence for one year was reasonable.

E. Rigidly Following A Leave Of Absence Policy Is A "Per Se" ("By Itself") Violation Of The ADA

In Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638 (1st Cir. 2000), Ms. Garcia-Ayala was employed as the only clerical worker in Lederle's Validation Department. In March 1995, Ms. Garcia-Ayala had surgery for recurring breast cancer. Ms. Garcia-Ayala had additional surgery in November 1995. Her physicians certified Ms. Garcia-Ayala as not being able to return to work until July 30, 1996.

During Ms. Garcia-Ayala's leave, the company used temporary employees to replace her. The company also had a policy that allowed employees only one-year leave of absence. In June 1996, Ms. Garcia-Ayala was terminated from her employed.

Ms. Garcia-Ayala claimed that the company failed to reasonably accommodate her disability under the ADA by failing to provide her with the additional leave she needed. She filed suit under the ADA.

The company defended itself by claiming that it had reasonably accommodated Ms. Garcia-Ayala by giving her one-year leave of absence in accordance with its leave of absence policy. The company contended that providing an employee with any more leave than one year would place an undue hardship on its operations.

The court disagreed with the employer and found for Ms. Garcia-Ayala. Specifically, the court examined:

1. Whether extending the leave created any financial burden on the employer, which includes considering:

    a. Whether the employee is to be paid for the time off under the employer's policies and programs,

    b. Whether the temporary or replacement workers cost more to retain than the employee, and

    c. Whether the temporary or replacement employees are performing the employee's duties as effectively as the disabled employee.

2. Whether the essential functions of the employee's job could be performed by others, which includes the use of temporary or replacement workers.

In reaching this holding, the court reasoned that the employer produced no evidence that it would have placed any additional burden on its operations to have extended Ms. Garcia-Ayala's leave. The temporary employees did just as good of a job as Ms. Garcia-Ayala and these temporary employees did not cost any more to retain than Ms. Garcia-Ayala.

The court then went onto reason that the ADA requires employers to evaluate every situation involving a disabled worker to determine whether it would be an undue hardship to provide further extended leave. Since rigidly enforcing a leave of absence

policy ignores these considerations, "blindly" enforcing a strict leave of absence policy under the ADA, and thus denying leave to a disabled employee is a "per se" ("by itself") violation of the ADA.

Therefore, regardless of what leave of absence policies an employer has in place and uniformly enforces, the definite trend in the law to enter into this undue burden analysis before terminating an employee protected by the ADA for taking too much leave.

XIII. "REASONABLE ACCOMMODATION" MUST BE TIMELY and EMPLOYERS CANNOT FORCE EMPLOYEES TO TAKE A LEAVE OF ABSENCE WHEN ANOTHER ACCOMMODATION IS AVAILABLE

In Denese G. v. Dep't. of the Treasury, EEOC Appeal No. 0120141118 (Dec. 29, 2016), Denese G. worked as a Revenue Officer at the U.S. Department of Treasury. Denese G. had Type 1 Diabetes and used an indwelling insulin pump that required her to frequently check her glucose levels and make adjustments, which would likely include eating.

Denese G. told her supervisor (S1) that she had diabetes when she joined her Group in 2006.

Denese G. told her employer that she must be able to adjust her pump and eat when necessary in order to avoid high and low blood sugar. The form she submitted to her employer had a section completed by Denese G.'s physician (Dr.). Denese G's Dr. stated that Denese G. must be able to "indefinitely" check her blood sugar, adjust her insulin pump settings, and consume food because of her diabetes.

On December 6, 2011, S1 gave Denese G. a written warning for discourtesy and unprofessional behavior during a November 17, 2011 group meeting regarding her text messaging. However, Denese G. was not texting anyone, but was instead programming her insulin pump. This was an unfounded accusation that caused her to disclose her medical condition to others.

After Denese G. receiving this written warning, she requested that she be transferred out of Collection Group 1300, but her second-level supervisor (S2) denied her request.

On February 29, 2012, Denese G. again asked the Treasury if she could to excuse herself "from meetings . . . to adjust pump, check my blood sugar, eat if necessary to avoid a hypo or hyperglycemic reaction."

When her reasonable accommodation request was denied, Denese G. applied to take a leave of absence under the FMLA. On March 20, 2012, S1 approved her sick and annual leave requests and asked her to provide medical justification for her FMLA request.

In late August 2012, Denese G.'s attorney wrote a letter to the employer again requesting that she be granted use of a private area and time to check her blood sugar levels as needed, along with the ability to leave meetings, discussions, conferences, events in order to do the same; time to adjust her insulin pump or inject insulin as needed, as well as the ability to leave meetings and events to do the same; and the ability to eat as necessary during meetings, discussions, conferences, events so that she could avoid hypoglycemic or hyperglycemic reactions. The attorney's letter was accompanied by an August 27, 2012 statement from Dr, who asserted that in order for Denese G. to perform her work duties upon return to work, she must be allowed to

check her blood sugar when needed up to seven or more times per day; eat when she needs to; and to adjust her insulin pump or inject insulin as needed.

Denese G.'s attorney also pointed out that there had been no response to her earlier requests to be able to use a private area and time to check her blood sugar; to use a private area and be allowed some time to adjust her insulin pump or inject insulin and the ability to leave meetings whenever she needed. She had also asked to be able to eat whenever she needed to during meetings.

Her attorney also pointed out that as of August 27, 2012, management failed to respond to these reasonable accommodation requests.

On September 4, 2012, S2 responded, stating that there were already various places in the office for Denese G. to use for medical purposes, such as the ladies' bathroom, which has a couch, and the nurse's station, which has a room used for nursing mothers.

S3 further stated that employees were always allowed to bring food into meetings.

S1 stated that "all employees" are given breaks and lunchtime as part of a normal tour of duty and during group meetings; a place to rest if needed; a break room equipped with refrigerators, ovens, and microwaves; modified work schedules; large screen computer monitors or other assistive devices; and a private area to administer medication upon request. S1 concluded that by saying that these accommodations were always available to Denese G.

On September 14, 2012, Denese G. filed an EEO complaint in which she alleged that the Treasury harassed and discriminated against her on the bases of disability, and in reprisal for prior protected EEO activity when:

The initial EEOC decision concluded that Denese G. failed to prove that she was denied a reasonable accommodation for her disability.

Denese G. appealed this decision internally through the EEOC's appeal process.

On appeal, Denese G. reiterated her allegation that the Treasury denied her requests for reasonable accommodations by delaying the provision of the accommodations. Denese G. maintained that instead of immediately providing her with effective accommodations, the Treasury failed to engage in the interactive process in good faith, which deprived her of a reasonable accommodation that would have allowed her to perform the essential functions of her job.

To support her claim, Denese G. pointed out that as of August 27, 2012, Denese G. was still asking the Treasury to allow her to use a private area and to have time to check her blood sugar levels as needed, along with the ability to leave meetings, discussions, conferences, events in order to do the same; to have time to adjust her insulin pump or inject insulin as needed as well as the ability to leave meetings and events to do the same; and to eat as necessary during meetings, discussions, conferences, events so that she could avoid hypoglycemic or hyperglycemic reactions.

Upon review, the Commission noted that providing employees with private areas to test blood sugar areas or to administer insulin injections and granting them breaks to eat, drink, or test blood sugar levels as types of accommodations employees with diabetes often need. Equal

Employment Opportunity Commission, Questions and Answers About Diabetes in the Workplace and the Americans with Disabilities Act (ADA), Question 10 (Oct. 29, 2003).

Denese G.'s requests were consistent with these types of accommodations. The Treasury had not provided any evidence that the requested accommodations constituted an undue burden on the Treasury.

As a result, the Commission found that Denese G.'s requested accommodations did not impose an undue burden on the Treasury's operations.

The Treasury claimed that it accommodated these requests on April 17, 2012 when it told her that she could take breaks and lunch during her normal work hours and that the Treasury would provide a private location for her to administer medication.

However, the Commission reasoned that when it reviewed S1's April 17, 2012 correspondence with Denese G., which was S1's response to Denese G.'s requests, the Commission found that the Treasury denied Denese G. a reasonable accommodation because tis response took well over a month and a half to deliver. By then, she was forced to take a leave of absence in order to manage her condition.

In so finding, we note that Denese G.'s February 2012 medical documentation indicated that failure to provide the accommodations could result in Denese G. experiencing severe medical consequences, including hypoglycemic or hyperglycemic reactions. As such, Denese G.'s request revealed that she needed the requested accommodations immediately and without significant delay.

In fact, the necessity of immediately responding to these requests for reasonable accommodations is underscored by the fact that the Treasury's inaction or delay had a negative impact on Denese G., which forced her to take a leave of absence.

Also, the Commission found that the assurances S1 gave to Denese G. on April 17, 2012 did not provide her with an effective reasonable accommodation because S1 was merely allowing Denese G. to use accommodations that were already provided to all employees, such as breaks and lunch, a resting place, a break room with refrigerators, ovens, and microwaves, modified work schedules, and a private area to administer medication.

Also, S1's response did not address the specific needs of Denese G. that were revealed in her request for reasonable accommodation. S1's generic assurance that all employees can take break and lunch during work hour and meetings does not address the distinct need for Denese G. to regularly monitor and control her blood sugar during meetings and other work events, or to excuse herself from meetings and work events for medical care. Specifically, S1 did not provide any assurance that Denese G. could leave meetings as needed to monitor and regulate her blood sugar.

In fact, in Denese G.'s midyear 2012 evaluation, S1 stated that "the group meeting's agenda provides the anticipated time for breaks and lunch," which reflects that Denese G. would only be allowed to take breaks that were scheduled for all employees during meetings, not as she needed them.

Denese G. had specific medical needs that the Treasury should have addressed with individualized accommodations, instead of generic responses about amenities provided to all

employees. Consequently, then Commission found that S1's response did not provide Denese G. with an effective reasonable accommodation.

The Treasury also claimed that it accommodated Denese G. by allowing her to take an approved leave through the FMLA.

However, the Commission has held that failure to respond to a request for accommodation in a timely manner may result in a finding of discrimination. See Shealy v. EEOC, EEOC Appeal No. 0120070356 (April 18, 2011); Villanueva v. Department of Homeland Security, EEOC Appeal No. 01A34968 (August 10, 2006).

In this case, the Commission held that the Treasury's inaction and delay drove Denese G. out of the workplace for a significant period of time. After all, she had not received the requested reasonable accommodations from the Treasury, and the Treasury's inaction was negatively impacting her health. Faced with negative impacts on her health, Denese G. had no recourse but to ask for leave.

Further, the Treasury had an opportunity to mitigate this negative impact on Denese G. through its own Reasonable Accommodation Coordinator, but instead, used Denese G.'s leave status as an excuse to halt the interactive process that could have provided her with reasonable accommodations at work.

The Commission therefore held that Denese G.'s need to take a leave of absence was a foreseeable consequence of the Treasury's failure to expeditiously provide her with a reasonable accommodation. As such, the Treasury cannot credit itself for providing her with leave that Denese G. likely would not have needed if it had promptly and appropriately responded to her reasonable accommodation request.

Additionally, the Commission also held that, absent undue hardship, the Treasury needed to provide reasonable accommodations that allowed the employee to keep working rather than choosing to put the employee on leave. In so finding, the Commission noted that 29 C.F.R. § 1630.1 provides that the primary purpose of Title I of the ADA, as amended by the ADAA, is to provide equal employment opportunities for individuals with disabilities. To the contrary, leave removes an employee from the workplace and therefore denies the employee the opportunity to keep working with reasonable accommodation.

Next, the Commission noted that a reasonable accommodation must be effective. If a reasonable accommodation -- such as breaks to test blood sugar levels and address any fluctuations -- permits an employee to perform the essential functions of her position, then that accommodation is effective. Leave is not effective in permitting immediate performance of essential functions of a position.

While an employer may choose between effective accommodations, forcing an employee to take leave when another accommodation would permit an employee to continue working is not an effective accommodation. See Mamola v. Group Mfg. Services, Inc., 2010 WL 1433491 (D. Ariz. April 9, 2010) (unpaid leave may not be a reasonable accommodation when an employee specifically requests another accommodation that would allow him or her to perform the essential functions of the position without missing work); Woodson v. Int'l Bus. Machines, Inc., 2007 WL 4170560, at 5 (N.D. Cal. Nov. 19, 2007) (leave is sufficient as a reasonable accommodation only if other accommodations in a job would be ineffective).

Therefore, in this case, the Treasury failed to provide Denese G. with requested accommodations that would have allowed her to continue working. Consequently, Denese G. was forced to take leave, much of it unpaid.

XIV. OTHER TYPES OF REASONABLE ACCOMMODATIONS

A. Flextime As An Accommodation

In Johnson v. Sullivan, 824 F. Supp. 1146 (D. Md. 1991), rev'd, 991 F. 2d 126 (4th Cir. 1993), Sharon Johnson, an employee of the National Institutes of Health (NIH), requested flextime in order to accommodate her sleep disorder. Because of her satisfactory performance at NIH, she was deemed to be an "otherwise qualified handicapped individual." Her supervisor suggested she join a car pool. This was the only "accommodation" offered by NIH. Johnson sued, claiming handicap discrimination under the Rehabilitation Act.

The Fourth Circuit held that the requirement of reasonably accommodating an individual under the Rehabilitation Act may compel an employer to take steps for handicapped individuals that it would not take for other employees. The Handbook on Reasonable Accommodation, published by the U.S. Office of Personnel Management, specifically lists flexible working hours as being a type of reasonable accommodation.

In this case, the court held that Johnson was not provided with a reasonable accommodation. Johnson explored every avenue for obtaining a small amount of flexibility in her starting and ending hours, but no one at NIH took any action to accommodate her in a way that was adequate to meet her needs. Therefore, the employer has failed to reasonably accommodate Johnson in violation of the Rehabilitation Act.

B. Work Breaks As A Reasonable Accommodation

In Workman v. Frito-Lay, Inc., No. 97-2105 (6th Cir.1999), Joyce Workman worked for Frito-Lay packing and inspecting cookies, sweeping the work areas, checked the metal detectors, and replaced packers on the line.

Workman also suffered from irritable bowel syndrome. As a result of gall bladder surgery, this condition was irritated. Consequently, Workman would need to use the bathroom more often than other employees when she returned to work.

The company feared that Workman would need to use the bathroom several times an hour, so it denied her request, fearing this would disrupt the production line. The company's response to Workman was that she wear sanitary undergarments to work. Workman did not view this as a reasonable accommodation and asked for a different solution.

When discussions seemed to be going nowhere, Workman filed a charge of disability discrimination with the Equal Employment Opportunity Commission, or the "EEOC." This act irritated Workman's manager, so he fired her.

Workman then sued under the ADA for disability discrimination and retaliation.

Frito-Lay argued that Workman's condition did not substantially limit her in a major life activity. Therefore, she was not covered by the ADA and was not entitled to its protections.

The court disagreed. The court held that normal bowel control could be considered a major life activity by a jury. Therefore, since Workman was in fact substantially limited in this major life activity, Frito-Lay was required to reasonably accommodate her condition.

The court also therefore upheld the jury's determination that Frito-Lay failed to reasonably accommodate Workman. The jury also held against Frito-Lay for retaliating against Workman for filing a charge of discrimination with the EEOC.

Allowing disabled workers more frequent bathroom breaks is certainly an accommodation employers must consider. Frito-Lay, on the other hand, did not attempt to accommodate Workman's condition by reasoning that she could simply wear sanitary undergarments. Employers are required to put forth more effort is accommodating disabled employees.

Of course, at some point it would become an undue burden on the employer in allowing too many bathroom breaks. However, in this case, Frito-Lay only speculated that it may have to grant too many breaks. It did not know that these breaks would in fact become excessive and lead to an undue burden.

C. Reassignment As A Reasonable Accommodation

As for the reassignment of current employees, such reassignment does not generally include transferring an employee to **another facility**. The reasonable accommodation provision of the ADA has generally been interpreted as limiting the reassignment to the same facility in which the employee is currently working. Of course, **if the employer has a practice to the contrary, then such reassignment may be required**.

The question regarding reassignment as a reasonable accommodation also arises in the context of "light duty" assignments. There is disagreement between the courts as to whether light duty reassignments are required as reasonable accommodations.

In Champ v. Baltimore County Maryland, 884 F.Supp 991 (D. Md. 1994), aff'd, 91 F.3d 129 (4th Cir. 1996), Nguyen v. IBP, Inc., 905 F. Supp. 1471 (D. Kan. 1995), and Vaughn v. Harvard Industries, 926 F. Supp. 1340 (W.D. Tenn. 1996), the courts reasoned that since the ADA requires employees to be able to perform the **essential functions** of their jobs in order to be covered by the Act, employers may not be required to reassign disabled employees to light duty jobs.

However, other courts have held differently. In Monette v. Electronic Data Systems, 90 F.3d 1173 (6th Cir. 1996), the court held that "it is true that employers may be required, as a reasonable accommodation, to transfer a disabled employee to a vacant position for which he or she is qualified."

Other courts have taken a different stance on this issue altogether. In Howell v. Michelin Tire Corp., 860 F. Supp. 1988 (M.D. Ala. 1994), the court held that reassigning a disabled employee to a light duty position would be required as a reasonable accommodation, but only for a temporary period.

If a disabled employee objects to a reassignment, employers may still be permitted to make such a reasonable accommodation if no equivalent position exists which the employee would be qualified to perform either with or without a reasonable accommodation within a reasonable period of time, and no reasonable accommodation exists that would enable the disabled employee to perform the essential functions of his current position. Such reassignment may therefore be to a position that is in a lower grade.

In Bradley v. University of Texas M.D. Anderson Cancer Center, 3 F.3d 922 (5th Cir. 1993), a surgical technician tested positive for HIV. The employer then transferred the employee to a clerical job, reasoning that the employee was not otherwise qualified to perform the essential functions of his position in the operating room. The court found for the employer based upon the fact that the nature of a surgical technician's job presented some risk of transmitting the virus to others.

Specifically, the court relied on the fact that the employee worked in the sterile field within which surgeries were performed, the employee often came within inches of open wounds and he would place his hands into a patient's body cavity approximately once every day. According to the employee's own testimony, despite taking precautionary measures and exercising due care, accidents occur. The court reasoned that although the risk of transmitting the virus was small, it was not so low as to eliminate the catastrophic consequences of an accident.

D. Employee Must Be Qualified For Reassignment To Another Position

Providing a reasonable accommodation also does not include giving a disabled employee a job that he is not qualified to perform, lowering the quality standards of the position, or providing the individual with personal use items, such as glasses or hearing aids.

XV. ADA AND THE "INTERACTIVE PROCESS"

A. "Reasonable Accommodation" And The Interactive Process

To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, **interactive process** with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

It has become an affirmative duty on the part of employers to sit down with employees covered by the Americans With Disabilities Act and engage in the "Interactive Process" in order to determine which, if any, reasonable accommodations may be necessary.

The following is a checklist that can be used to help ensure that an organization is complying with the ADA by engaging in this Interactive Process.

THE INTERACTIVE PROCESS

- ♣ Identify the essential functions of the job. Include a review of any applicable job descriptions or memorandums indicating or describing the duties and responsibilities. In order to fully understand the scope of the job, be sure to make note of any marginal or "nonessential" job functions.

- ♣ Obtain from the employee's health care provider a listing of the employee's work-related limitations. Identify each restriction or limitation of the employee that may affect his/her ability to perform the essential functions of this job in question.

- ♣ Meet with the employee. Review and confirm the limitations stated by the health care provider in relation to the job's essential functions. Assess and discuss with the employee his/her limitations and discuss and identify reasonable accommodations, if any, that would allow him/her to perform all of the essential job functions. This discussion with the employee should, of course, be documented.

- ♣ If the employee doesn't agree with the limitations, he/she needs to obtain clarification from his/her physician. If your company wants a second opinion, follow the applicable provisions of the ADA.

- ♣ Review each accommodation proposed by either side for feasibility and effectiveness. Document the entire conversation by listing each proposed accommodation and indicating its viability. Both parties should be involved in this "problem-solving" exchange.

- ♣ If an accommodation is not feasible due to the undue hardship it will place on your company, you need to fully document why the accommodation will not work.

Consider the employee's preference, and select and implement the accommodation most appropriate for your company and the employee.

Conclude the interactive process by documenting a plan for implementing the selected accommodation. Confirm with the employee in writing that the agreed-on plan adequately addresses his/her limitations and details the accommodations that will be implemented.

Monitor the plan going forward. Are the accommodations working? Are adjustments necessary?

(Derived in part from 29 C.F.R. Pt. 1630.9, App.).

B. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: Final Rule on ADA and "Interactive Process"

Effective Date: June 20, 2002.

The Commission agrees with the public comment that, under ADA standards, a request for reasonable accommodation and the informal "interactive process" are two distinct steps.

First, the individual must request a reasonable accommodation in all but the most limited circumstances.

Second, the employer must engage in the "interactive process" if the disability or the type of accommodation needed is not obvious.

Under ADA standards, employers must make a reasonable effort to identify an effective accommodation that does not pose an undue hardship on the employer.

See 29 CFR part 1630 app. 1630.9.

C. Inquiries Of Reasonable Accommodations And The Interactive Process

In general, it is a good idea for employers to ask their disabled employees what accommodations they require for a few reasons. First, such persons have probably been dealing with this disability their entire lives so they more than likely know how to best accommodate their needs, often in a very economic manner.

But secondly, asking disabled employees how to accommodate their disabilities may help the employer avoid punitive damages later on should the situation culminate in judicial proceedings since such inquiries demonstrate that the employer was not intentionally discriminating against the individual. (§ 1981(a)(3) of Civil Rights Act of 1991.)

D. Failure To Participate in "Interactive Process" Costs Employee Her Case

In Davis v. The Guardian Life Ins. Co. of Am., No. 98-5209 (E.D. Pa. 2000), Denise Davis worked for Guardian Life Insurance Company as an underwriter. When she contracted Crohn's Disease in 1989, she began missing a great deal of work. In 1994, in cooperation with her supervisor, she began telecommuting part-time. She was to work at home three days a week and in the office two days a week. Guardian then set Davis up with all of the equipment she would need to work from home, such as a fax machine, computer, telephone line, etc. Davis was allowed to "switch" the days she was in the office and at home depending on her condition and medical appointments.

By April 1997, Davis' condition worsened. She then asked to work exclusively at home. Guardian sent a letter to Davis denying this request. Guardian claimed that Davis needed to be in the office two days a week, although these two days could vary from week to week. If she could not be in the office two days a week, her sick time account would be charged. Guardian then informed Davis that it needed to have a response to its letter and that she needed to designate which two days she would be in the office for the following week.

Davis never responded to Guardian's letter, nor did she ever attempt to return to work after her request was denied. Instead, she filed an ADA claim against Guardian.

The jury awarded Davis **1.5 million dollars**. However, the court overturned the jury's verdict and the award.

The court reasoned that **both the employer and the employee equally** bear the responsibility of determining what reasonable accommodations are appropriate. The

court held that in this case, Davis refused to engage in this "**interactive process**" after she received Guardian's letter. Since Davis failed to engage in this interactive process, she was not entitled to prevail.

In 2001, this same reasoning was used in the Sixth Circuit in Brown v. Chase Brass & Copper Co., Inc., 2001 WL 814931 (6th Cir. 2001) in an unpublished opinion.

E. Continuing Duty To Accommodate

In Humphrey v. Memorial Hospitals Assoc., No. 98-15404 (9th Cir. 2001), Carolyn Humphrey was a medical transcriptionist for Memorial Hospitals Association, or MHA, when she was diagnosed with obsessive-compulsive disorder. To accommodate her condition, MHA allowed Humphrey to work a flexible work schedule.

However, Humphrey continued to miss work due to her condition. She then asked MHA if she could work from home, since other medical transcriptionists were allowed to "telecommute." MHA refused, claiming that it had already accommodated Humphrey's condition. MHA also claimed that its policy did not allow employees who had attendance problems to work from home. However, MHA reasoned that if Humphrey's attendance improved, then she would be allowed to work from home under its current policy.

Still, Humphrey's attendance worsened and she was terminated. Humphrey sued MHA for disability discrimination under the ADA.

The court found for Humphrey. Specifically, the court held that even though MHA had already made one accommodation for Humphrey, it was "abundantly clear" that the flexible schedule was insufficient in this situation. Since MHA had already demonstrated that allowing medical transcriptionists work from their homes was not an undue hardship, since it had employees currently working from their homes in these roles, such an accommodation should have been made for Ms. Humphrey. Humphrey should have been allowed to work from her home not under the requirements of the current policy, but as a reasonable accommodation under the ADA.

F. Circuit Courts' Treatment of the Interactive Process

The Circuits Courts have supported the use of the Interactive Process in recent years. As an example, the 6th Circuit Court of Appeals has been very clear on what it requires under the "Interactive Process."

First, the duty to engage in this process is ***mandatory***.

> "The duty to engage in the interactive process with a disabled employee is mandatory…" Keith v. County of Oakland, 703 F.3d 918, 929 (6th Cir. 2013); Kleiber v. Honda of Am. Mfg., 485 F.3d 862, 871 (6th Cir.2007); see also 29 C.F.R. § 1630.2(o)(3). "

The 6th Circuit then specifically held that the law:

> " … requires communication and ***good-faith exploration of possible accommodations.***" Keith, 703 F.3d at 929 (6th Cir. 2013); Kleiber, 485 F.3d at 871 (6th Cir.2007); see also 29 C.F.R. § 1630.2(o)(3). "

The 6th Circuit has also held:

> "The purpose of this process is to ' ***identify the precise limitations resulting from the disability and potential reasonable accommodations*** that could overcome those limitations.' " Keith, 703 F.3d at 929; Kleiber, 485 F.3d at 871 (quoting 29 C.F.R. § 1630.2(o)(3)).
>
> Where the employee requests a reasonable accommodation from the employer, the ADA mandates that the employer engage in an ***individualized inquiry into that employee's specific condition and needs***. Failing to do so is failing to engage in the interactive process. Keith, 703 F.3d at 930
>
> "More pointedly, ADA regulations anticipate that an employee may not be in the position to know what a reasonable accommodation to his condition is; they require that the employee and the employer engage in an interactive process with the end of jointly determining what accommodations are ***possible and adequate***. Jakubowski v. The Christ Hospital, Inc. 627 F.3d 195, 205 (6th Cir. 2010); Kleiber, 485 F.3d at 871 (quoting 29 C.F.R. § 1630.2(o) (3)). Holding otherwise would undermine the force of this mandatory interactive process by incentivizing employers to withhold potential accommodations in the hopes that the employee will be held to his initial and legally inadequate accommodation in subsequent litigation. Jakubowski, 627 F.3d at 205

The 6th Circuit absolutely requires that all of these elements be included in the interactive process ... or the interaction fails to qualify as being a real interactive process under the law. Otherwise, the court reasoned that it would be "incentivizing employers to withhold potential accommodations." Jakubowski, 627 F.3d at 205

In short, employers are required to engage in a "***good-faith exploration of possible accommodations***" that are "***possible and adequate***" by making an "***individualized inquiry***" into the employee's "***specific condition and needs.***"

In order to determine the appropriate reasonable accommodation for an employee, it is necessary for the covered entity to initiate an informal, **interactive process** with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

It has become an affirmative duty on the part of employers to sit down with employees covered by the Americans With Disabilities Act and engage in the "Interactive Process" in order to determine which, if any, reasonable accommodations may be necessary.

XVI. OTHER TYPES OF ADA COVERAGE

A. "Regarded As Being" Disabled

In order to be covered by the ADA, an individual need not actually be disabled under the Act. Instead, if an individual is regarded or is treated as having an impairment that substantially limits a major life activity, that person is protected under the ADA.

For instance, if an individual has high blood pressure that does not substantially limit a major life activity, but that person's employer regards his high blood pressure as being a disability and reassigns the person to a less strenuous position based on unsubstantiated fears, then this individual will in fact be protected under the ADA since he is now regarded as being substantially limited in a major life activity (29 C.F.R. Pt. 1630.2(l), App.).

Under the 2011 regulations, an individual is "regarded" as having an impairment under the ADA if the individual is subjected to a prohibited action because of an **actual or perceived** physical or mental impairment, regardless of whether or not that impairment substantially limits, or is perceived to substantially limit a major life activity. Prohibited actions include but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment

Therefore, an individual is regarded as having such an impairment under the ADA any time a covered entity takes a prohibited action against the individual because of an actual or perceived impairment.

However, establishing that an individual is regarded as having an impairment under the ADA does not, by itself, establish liability. Liability is established under the ADA only when individuals prove that a covered entity discriminated against them on the basis of their disability.

This means, for example, that a minor lifting restriction which might not rise to the level of an actual disability (under the major life activity of working or otherwise) could nonetheless be the basis of a "regarded as" claim. In a cryptic passage, the new regulations take this a step further by stating that an employer "regards" someone as disabled by taking action based on any real or perceived impairment, "even if the entity asserts, or may or does ultimately establish, a defense to such action."

Under the 2011 regulation 1630.2(l), proof that an individual was denied employment because of an impairment suffices to establish coverage under the ADA, "whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity."

Under the old interpretation, an employee had to prove that an employer regarded the employee as being substantially limited in a major life activity because of a **qualified disability**.

Under the new regulations, the employee only has to show that the ***employer believed*** he or she had a mental or physical impairment.

As a result, it will be critical for employers to establish policies and procedures for supervisors in handling situations that might be related to a disability. Training managers in this area will be critical.

However, there is actually some good news in this area for employers. "Regarded as disabled" ***does not*** include employees with a "minor" impairment, or a "transitory" impairment defined as lasting 6 months or less. In addition, an employee who says he or she is being regarded as disabled is not entitled to a reasonable accommodation.

The EEOC also clarified that individuals who claim that an employer is regarding them as being disabled under the ADA must **still** establish the other elements of a claim, which includes:

1. The employee is qualified for the position in question and that

2. The employee was subjected to a prohibited action because the employer regarded him or her as being disabled.

Likewise, the employer may still raise any defenses to a claim that it regarded an individual as being disabled, such as that the employee posed a direct threat to himself or others.

B. "Regarding" An Employee As Being Disabled: Requiring Rehabilitation

In Miners v. Cargill Communications Inc., 113 F.3d 820 (8th Cir. 1997), the promotions director of a radio station was suspected of drinking and driving while on the job, which violated the company's policy of prohibiting the consumption of alcohol while on company time. Further, the promotions director routinely drove the company van as part of her job.

In order to either confirm or disprove these rumors, the company president hired a private investigator to see if the promotions director was in fact engaging in this activity. The investigator confirmed that the rumors were true and that she was in fact drinking and driving on the job.

The president then called the promotions director to his office and gave her the choice of either entering a chemical dependency rehabilitation program or being terminated.

The employee chose instead to sue her employer for violating the ADA and regarding her as being a disabled person. The court agreed with the employee.

Specifically, the court reasoned that the employer's actions indicated that the president did in fact regard the employee as an alcoholic who was eligible to enter a rehabilitation program, which is a disability protected by the ADA.

Then, instead of exploring avenues of a reasonable accommodation with the employee, the employer simply ordered her into rehabilitation. The court did not consider rehabilitation as being a reasonable accommodation in this instance.

And finally, when the employee refused rehabilitation, she was terminated for being an alcoholic, or so the employer thought.

Consequently, the employer regarded the promotion director as being a disabled person, which entitles her to the protections of the ADA, then offered her an unreasonable accommodation. When the employee rejected this unreasonable accommodation, she was terminated in violation of the ADA.

In retrospect, what the employer should have done was discuss the situation with the employee and determine employee's true problem. She may have been drinking on the job, but that does not automatically make her an alcoholic. The president simply jumped to that conclusion without the benefit of any medical support.

What the president could have done was require the employee to go for assessment to diagnose her problems. Alcoholism is only one of many different issues that arise in employee's lives.

This case illustrates a common problem among managers…they attempt to diagnose their employee's conditions. Unless these managers have a Ph.D. in psychology or are licensed by the state as a physician, they should NEVER diagnose their employees.

To presume to have such expertise without the benefit of a state license is a recipe for disaster.

Recently, some employers have been found to violate the ADA when their managers refer employees whom they suspect of having alcohol or substance abuse problems to rehabilitation. By referring the employee to rehabilitation, the employer may be seen as regarding the employee as being disabled when no such problem may exist at all. Unless the manager has the medical or Ph.D. credentials to back up such a claim, a violation of the ADA could easily erupt.

Instead of referring an employee to rehabilitation, such employees should be referred for assessment, such as through the company's Employee Assistance Program, or EAP. This way, no such unqualified allegations are made regarding the employee.

In Sullivan v. River Valley School District, No. 97-00054 (6th Cir. Nov. 29, 1999), Sullivan was a school teacher in the River Valley School District when he suddenly began demonstrating disruptive and abusive outbursts. Sullivan threatened school board members and he disclosed confidential information relating to a student's grades.

The school district's superintendent had a psychologist informally review Sullivan's behavior. The psychologist reviewed grievances filed against Sullivan, letters written about him and other selected materials. The psychologist concluded that while Sullivan was not dangerous, he did feel that Sullivan might have a psychiatric disorder that would require more formal assessment.

On April 27, 1995, the superintendent suspended Sullivan with pay until the school board could vote on the superintendent's recommendation that Sullivan obtain a mental and physical fit-for-duty examination.

The school board accepted the superintendent's recommendation. Sullivan refused to comply with this directive. Sullivan also refused to turn over his grade book and lesson plan book, as directed.

Sullivan's employment was then terminated. Sullivan sued the school district, claiming it regarded him as being disabled.

The Sixth Circuit ruled that requiring Sullivan to undergo an examination was not enough to show that he was regarded as being disabled. The court reasoned that requiring an employee to undergo a medical or psychological examination is legal under the ADA.

However, an examination cannot be required just because an employee is annoying. Such examinations can be ordered when there is a "genuine reason to doubt whether that employee can perform job-related functions."

The court then concluded that the school district had reason to doubt Sullivan's ability to perform the essential functions of his job. Sullivan's disruptive behavior certainly interfered with his ability to do his job.

Further, as a practical matter, it is important to note that the superintendent did not act as an expert in medicine or psychology. Before he made his recommendation to the board, he obtained the opinion of a trained professional before proceeding. Such action on the part of the superintendent showed great prudence…unlike the president in the Miners, supra, case.

Additionally, in the Miners case, no evidence existed that the promotions director was not performing her job in a satisfactory manner…unlike Sullivan's situation as a school teacher.

The court also reasoned that Sullivan was not terminated because he was regarded as being disabled and unable to perform his job. Instead, he was terminated for his misconduct and for insubordination (refusing to comply with the school boards requirements, which included the examinations and surrendering his grade book and lesson plans.)

Therefore, the court held for the school district.

C. Harassment Of Co-Workers "Regarded" As Being Disabled

In Lanni v. NJDEP, No. 96-3116 (AET) (1999), Carl Bosch was a radio dispatcher for Ames Armored Car Services who suffered from dyslexia and dysgraphia, two learning disabilities. As a result, many of the armored car drivers would frequently make fun of him.

These drivers would consistently call Bosch "dummy," "stupid," and "ignorant" and they would often refer to him directly as "the dummy."

On one occasion, six of the armored car drivers drew their guns and pointed them at Bosch saying that he was so dumb, they should just go ahead and shoot him.

On another occasion, Bosch's co-workers chased him down the hallway and sprayed him with pepper spray.

Bosch's co-workers later freely admitted that they "picked on" him because "it was so easy."

Bosch complained about this abuse to his supervisor. However, his supervisor only told Bosch that he should stand up to his harassers since that was the only way they would respect him.

Bosch then retained counsel and sued the company for violating the ADA.

In defending itself, the company argued that Bosch was not covered by the ADA since he was not really "substantially limited in a major life activity." The company also argued that this harassment was not unwelcome since Bosch also participated in these activities, that some of these actions were just "jokes" and not harassment and that any harassment Bosch did receive was because he was different, not because he was disabled.

The court rejected all of these defenses.

The court first held that considered in their totality, even simple jokes can contribute to a hostile environment when accompanied by such vicious behavior. Bosch's co-workers knew of his impairment and ridiculed him because of his condition.

The court then reasoned that not only could Bosch show that he was disabled under the ADA, but that he was also the victim of negative stereotyping ("regarding" Bosch as being disabled.). Both of these classifications entitled Bosch to the protections of the ADA. And finally, the court completely rejected the company's contention that Bosch welcomed such behavior, especially since he complained about it.

The court then awarded Bosch $70,930.00 in back pay and $156,100.00 in noneconomic damages.

D. "Regarding" Employees As Being Disabled: 100% Return To Work Policy

In Henderson v. Ardco, Inc., 247 F.3d 645 (6th Cir. 2001), Dana Henderson was a welder for Ardco when she injured her back. A few months later, Henderson's physician released her to return to work, but gave her a lifting restriction:

Henderson was not permitted to lift more than 25 pounds.

When she presented her work restrictions to the plant manager, Ed Bauman, she was told that the company did not allow employees to return to work on light duty assignments. In short, either employees returned to work at 100% capacity or not at all. Ardco's "100% Healed Rule" had been consistently applied for years.

Henderson therefore lost her job at Ardco. Henderson then sued Ardco for disability discrimination under the ADA, claiming that the company "regarded" her as being disabled and discriminated against her on that basis.

The 6th Circuit sided with Henderson. In short, the court found that adopting a 100% Healed Rule in effect disqualifies workers from performing a broad classification of jobs. When an employer views an employee as being unable to perform a wide range of jobs, that employer is regarding that employee as being substantially limited in the major life activity or working, which entitles them to protection under the ADA. At that point, employers are required to attempt to "reasonably accommodate" these employees.

Ardco failed to enter into any interactive process with Henderson in order to examine what other jobs may be available, what accommodations could be made to her position as a welder, and so on.

E. "Record" Of A Substantially Limiting Condition

An individual may also be found to be disabled under the ADA if he has a record of having a previous impairment that substantially limits a major life activity. The purpose of this provision is to protect those individuals with a history of being disabled from discrimination based on their prior medical history, such as former cancer patients.

However, the impairment on record must be one that would qualify as a disability under the ADA (29 C.F.R. Pt. 1630.2(k), App.).

XVII. MEDICAL INFORMATION AND EXAMINATIONS

A. Pre-Employment Examinations

Section 102(c)(1), (2), (3) and (4) of the ADA states that employers **may not** require their job applicants to undergo a medical and/or psychiatric examination **before** extending to them an offer of employment. Such examinations, however, may be given **after** an offer is made and the offer may be conditioned on the results of the exam. Therefore, post-employment offer medical examinations are allowed under the

ADA.

B. Drug and Alcohol Tests

Section 104(d)(1) of the ADA further states that a drug test is **not** classified as being a medical examination. Therefore, under the ADA, employers are permitted to perform pre-employment offer drug testing. However, an alcohol test **is** classified as being a medical examination, so no pre-employment offer testing is allowed.

C. Requiring Current Employees To Undergo Medical Examinations

If an employee presents his employer with a physician's certification indicating that the person has a disability under the ADA, the employer may request that the individual undergo a second or even a third opinion, is necessary. If such second or third opinions are requested, the employer must pay all of the reasonable expenses the individual incurs as a result of undergoing such examinations, such as for their time, travel, etc. However, unlike the Family and Medical Leave Act of 1993, or "FMLA," no restrictions are placed upon employers regarding the selection or location of the physicians they choose to conduct these examinations.

Under the ADA, employers may require their current employees to undergo a medical examination when:

1. There is a business need to determine whether the employee is still physically and/or mentally able to perform the essential functions of his job,

2. The examination is necessary in order to determine whether a reasonable accommodation is necessary or would be feasible,

3. The examination is required by applicable local, state or federal law, it is job related and it is consistent with business necessity or

4. If the examination is somehow otherwise job related and is consistent with business necessity.

In EEOC v. Prevo's Family Market, Inc., 135 F.3d 1089 (6th Cir. 1998), a produce clerk at a small grocery store informed his employer that he had tested positive for HIV. Part of this employee's regular job duties included the use of knifes, which were routinely shared with other employees. Cuts and scratches among these produce clerks were very common.

The employee was then asked by the store's owner to provide a medical confirmation of this diagnosis or, in the alternative, to submit to a medical examination paid for by the grocery store. The employer felt such a confirmation was necessary to confirm whether this employee presented a risk to his co-workers or to the store's customers.

The employee refused to submit to such an examination or to provide such medical confirmation.

The court recognized that the ADA allows employers to require its current employees to submit to job-related medical examinations whenever such examinations are consistent with business necessity. In this case, the court found that the employer's request was in fact related to the employee's job and consistent with business necessity, which was the safety of others.

The court then specifically stated that an employer is not required to just "take the employee's word for it" that he has a certain condition that may require an accommodation. Employers should have the right to either confirm or disprove such an employee's claim. If not, then every employee could claim to have some type of disability that requires a special accommodation while denying the employer the opportunity to realize the truth.

D. Contacting Individual's Physician

Unlike the FMLA, the ADA places no restrictions upon employers regarding their ability to contact an individual's physician.

E. Keeping Medical Files Separate

Additionally, employers are required to keep the medical records of their employees separate from the employees' other files. Such information may be released on a need-to-know basis to the employee's supervisors, to first aid and safety personnel and whenever necessary to remain in compliance with a government investigation (29 C.F.R. § 1630.14).

Such information may include Industrial Commission check sheets listing an employee's various medical conditions, benefits form, workers' compensation forms, accident forms and so on.

F. "Return-To-Work" Or "Fit For Duty" Certificate Requirements

Oftentimes, employers require those employees who have missed a certain amount of work due to an illness or injury to present a "return-to-work" or a "fit-for-duty" certificate before being allowed to return. Employers may require their employees who are disabled under the ADA to also present a return-to-work or fit for duty certificate before allowing them to return to work when:

1. The employer needs to determine whether an employee is still able to perform the essential functions of the job,

2. The certification is necessary in order to determine whether a reasonable accommodation is needed,

3. The certification is required under local, state or federal law, it is job related and it is consistent with business necessity or

4. The certification is somehow otherwise job related and is consistent with business necessity.

XVIII. THE ADA & PREVIOUS DRUG ABUSE

A. Prior Drug Use As A Bar To Employment

In Raytheon Co. v. Hernandez, 2003 WL 396696, No. 02-749 (2003), Joel Hernandez, a 25 year employee of Hughes Missile Defense, a subsidiary of the Raytheon Company, tested positive for cocaine use. As a result, he was forced to resign for violating the company's work rules.

Hernandez then went through a drug treatment program. Two years later, he then re-applied for a job with Raytheon.

Hernandez stated on his application that Raytheon had previously employed him. He attached letters from both his pastor about his active church participation and from an Alcoholics Anonymous counselor about his regular attendance at meetings and his recovery. The employee at Raytheon who reviewed and rejected Hernandez's application testified that Raytheon has a policy against rehiring employees who are terminated for workplace misconduct. The Raytheon employee further testified that she did not know Hernandez was a former drug addict when she rejected his application.

Hernandez filed a lawsuit claiming that he had been discriminated against in violation of the Americans with Disabilities Act of 1990 (ADA). Hernandez claimed that Raytheon rejected his application because of his record of drug addition and/or because he was regarded as being a drug addict.

Hernandez also argued that even if Raytheon applied a neutral no-rehire policy in this case, it still violated the ADA because of that policy's disparate impact against former drug users. (This claim was dismissed for not being filed in a timely manner.)

The U.S. Supreme Court first held that Raytheon rejected his application because he had been terminated previously for violating company rules. The Court rejected Hernandez' contention that his record of drug addition played any role in Raytheon's decision not to rehire him. The Court also rejected the contention that Raytheon regarded Hernandez as being disabled. The Court therefore rejected Hernandez' disparate treatment claim.

Instead, the Court held that Raytheon had provided a **legitimate, nondiscriminatory reason** for refusing to rehire Hernandez. In short, it had a policy in place of not rehiring employees who violate workplace rules.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Make certain that employees who test positive for drug and/or alcohol use are terminated for violating company policy and not using drugs or alcohol. Human Resources should also make sure that supervisors are trained in taking notes regarding why certain applicants are hired over others.

B. Last Chance Agreements While In Rehab

In DePalma v. Lima, 155 Ohio App.3d 81 (2003), for more than two decades, Anthony DePalma was employed by the Lima Fire Department. During his career, DePalma received very high scores on his exams and received numerous awards for valor and dutiful service. In 2000, DePalma was promoted to assistant chief. In December of 2000, DePalma developed kidney stones and was prescribed various narcotic pain medications. DePalma then became addicted to these medications.

When the medications were no longer available from his treating physicians, DePalma began to purchase them illegally and eventually began taking heroin. Realizing he had a drug addiction, DePalma voluntarily checked himself into Shepherd Hill, a nationally known addiction-treatment center at the beginning of October, 2001. On October 5, 2001, DePalma was visited by the fire chief, who informed DePalma that he had to sign a last-chance agreement ("LCA") or his employment would be terminated. The agreement required DePalma to (1) complete treatment at Shepherd Hill, (2) abide by all recommendations or he would be terminated, (3) submit to quarterly performance appraisals, and (4) submit to random drug and alcohol testing.

The purpose of the LCA, according to the testimony, was to treat DePalma like Robinson. The first indication the department had of DePalma's drug addiction was his seeking treatment. No incidents had previously occurred to indicate DePalma's drug use.

On March 17, 2002, DePalma was taken to the hospital to be treated for a kidney stone. At the hospital, DePalma was given a full 30-day prescription for Vicodin. When the pain progressed, DePalma returned to the hospital and was scheduled for surgery. DePalma was given Demerol while awaiting surgery. The hospital was aware that DePalma was an addict, but no follow-up was arranged to prevent further addiction to the pain killers, which DePalma received for approximately two weeks. DePalma was off work until March 30, 2002, because of treatment for the kidney stones.

On April 1, 2002, DePalma returned to work and was required to submit to a drug test. The test revealed the presence of pain killers in DePalma's system, and his employment was terminated pursuant to the LCA. DePalma appealed the termination to the board. The board found that the termination had not been appropriate and reversed the termination.

The board then reinstated DePalma and suspended him without pay for 14 days. On July 26, 2002, the city of Lima appealed the board's decision to the Court of Common Pleas of Allen County. On January 17, 2003, the trial court, after reviewing the record of the board's proceedings, reversed the decision of the board and affirmed the termination. The trial court made the following findings:

> "At the time Mr. DePalma was presented with the [LCA] at Shephard [sic] Hill, in light of the content of the [LCA] and the fact

> that he had admitted himself to Shephard [sic] Hill for treatment for drug addiction, it would have been obvious to him what the allegations were against him. Thus, the notice requirement was fulfilled."
>
> "The very fact that Mr. DePalma was at Shephard [sic] Hill for treatment for drug addiction was a substantial portion of the City's evidence which surely would have needed no further explanation."

DePalma appealed the court's decision. The Third District Court of Appeals ordered DePalma's reinstatement.

The court reasoned that the city should not have been permitted to use his voluntary act of seeking treatment as the basis for changing the terms of his employment. An employer is prohibited from changing the terms of employment for a person with a disability just because of that disability. Section 12112(a), Title 42, U.S. Code. A qualified individual with a disability does not include an employee currently engaging in the illegal use of drugs. Section 12114(a), Title 42, U.S. Code.

However, an individual is considered to be a qualified individual with a disability if he or she "is participating in a supervised rehabilitation program and is no longer engaging in such use." Section 12114(b)(2), Title 42, U.S. Code. The purpose behind these statutes is to encourage drug addicts to seek treatment without worrying that doing so will cost them their jobs.

The mayor and the fire chief both testified that prior to DePalma's entering the treatment program at Shepherd Hill, there was nothing to indicate that DePalma had violated any rules of work. His performance and behavior at work were excellent. However, once DePalma voluntarily entered the treatment program, the city became aware of his drug addiction and immediately changed the terms of DePalma's employment by having him sign the LCA.

The city argued that this was a permissible action because the LCA was not discipline. The city claims that the LCA is not discipline because it did not adversely affect DePalma at the time he signed it.

However, a written reprimand is discipline if it is placed in an employee's file and the implications of the writing continue beyond the placement in the file. The court did not see any difference between the LCA and a written warning that is placed in one's file. Neither action adversely affects the subject at the time made. However, both actions can provide the basis for further action at a later time, including termination. Thus, the LCA is a form of discipline.

The LCA was signed while DePalma was actively seeking treatment at a rehabilitation center and was no longer using the substance to which he is addicted. Thus, DePalma was a disabled individual under federal law when he was presented with the LCA.

The fire chief, the union representative, and a substance abuse counselor arrived and told DePalma to either sign the document or be terminated. This, in effect, was a disciplinary action for being a drug addict in recovery.

(It is also important to note that DePalma's Loudermill rights were also violated.)

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Employees who voluntarily check themselves into Drug/Alcohol Rehabilitation Programs are protected under the ADA. If no performance issue lead to the testing, and the employees takes the imitative on his/her own, then a Last Chance Agreement should not be used.

XIX. THE REGULATIONS & PRE-EMPLOYMENT INQUIRIES

Section 1630.14 of the regulations state that a covered employer may make pre-employment inquiries into the ability of an applicant to perform job-related functions. Covered employers may also ask applicants to describe or to demonstrate how either with or without reasonable accommodation they would be able to perform the essential functions of the job.

Covered employers may not ask applicants if they are disabled; they may only ask applicants questions relating to their ability to perform the essential functions of the job.

XX. EEOC GUIDANCE ON THE DISCLOSURE OF A DISABILITY

A. May an employer ask questions on a job application about the history of treatment of mental illness or the existence of a mental, emotional, or psychiatric condition?

No. The employer may not ask questions that are likely to elicit information about a disability before making an offer of employment. However, if the applicant asks for a reasonable accommodation as part of the hiring process and the individual's disability is not obvious, an employer may ask the applicant if he or she requires a reasonable documentation regarding his or her disability.

Still, the employer should make it clear to the applicant why it is requesting such information, which would be to verify the existence of the disability and the need for the accommodation. The employer may request only information necessary to accomplish these limited purposes.

Also, if the employer could reasonably believe before making an offer of employment that the applicant will need a reasonable accommodation to perform the essential functions of the job, the employer may then ask certain limited questions, which specifically include:

1. Whether the applicant needs a reasonable accommodation, and

2. What type of reasonable accommodation the individual would need to perform the essential functions of the job.

After an offer of employment is made, the employer may require a post-offer, pre-employment medical/psychiatric examination if the employer subjects all employees entering into the same job category to the same inquiries or examinations regardless of disability.

During an individual's employment, an employer may require an employee to undergo a medical/psychiatric examination if the employer has a reasonable belief based on objective evidence that:

1. The employee's ability to perform the essential functions of the job is impaired by a medical/psychiatric condition, or

2. The employee will impose a direct threat to himself or others due to a medical/psychiatric condition.

B. Do the ADA's confidentiality requirements apply to information regarding an employee's or job applicant's psychiatric disability that is disclosed to an employer?

Yes. Employers must keep all information concerning the medical and psychiatric conditions or history of its applicants or employees confidential under the ADA. There are limited exceptions to the ADA confidentiality requirements, which specifically include:

1. Supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations,

2. First-aid and safety personnel may be told if the disability might require emergency treatment, and

3. Government officials investigating compliance with the ADA must be given all relevant information upon request.

Employers are also not permitted to disclose any information regarding an individual's medical or psychiatric conditions to co-workers. When responding to co-worker inquiries, employers may explain that they are acting for legitimate business reasons or in compliance with federal law.

XXI. EEOC's SPECIFIC GUIDANCE ON PRE-EMPLOYMENT INQUIRIES UNDER THE ADA

When a disability is known to a potential employer, the interviewer may describe or demonstrate the job function and inquire whether or not the applicant can perform that function with or without reasonable accommodation.

For example, an employer may explain that the job requires assembling small parts and ask if the individual will be able to perform that function, with or without reasonable accommodation.

An employer may also ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions. Such a request may be made of all applicants in the same job category regardless of disability. Such a request may also be made of an applicant whose known disability may interfere with

or prevent the performance of a job-related function, whether or not the employer routinely makes such a request of all applicants in the job category.

For example, an employer may ask an individual with one leg who applies for a position as a home washing machine repairman to demonstrate or to explain how, with or without reasonable accommodation, he would be able to transport himself and his tools down basement stairs. However, the employer may not inquire as to the nature or severity of the disability. Therefore, for example, the employer cannot ask how the individual lost the leg or whether the loss of the leg is indicative of an underlying impairment.

On the other hand, if the known disability of an applicant will not interfere with or prevent the performance of a job-related function, the employer may only request a description or demonstration by the applicant if it routinely makes such a request of all applicants in the same job category.

For example, an employer would not be allowed to ask an applicant with one leg demonstrate his ability to assemble small parts while seated at a table, if the employer does not routinely request that all applicants provide such a demonstration.

An employer that requires an applicant with a disability to demonstrate how he or she will perform a job-related function must either provide the reasonable accommodation the applicant needs to perform the function or permit the applicant to explain how, with the accommodation, he or she will perform the function.

If the job-related function is not an essential function, the employer may not exclude the applicant with a disability because of the applicant's inability to perform that function. Instead, the employer must, as a reasonable accommodation, either provide an accommodation that will enable the individual to perform the function, transfer the function to another position, or exchange the function for one the applicant is able to perform.

The EEOC offers an exhaustive list of questions the Commission considers to be “disability-related inquiries” and are therefore illegal for employers to ask a potential job candidate until after a conditional employment offer has been made.

Under the EEOC's guidelines, an employer may *not* ask whether an applicant has a disability or ask the applicant to detail his Workers’ Compensation claims history. Instead, all questions must be job related. Therefore, an employer *may* ask whether the applicant can perform the essential functions of the job.

The following examples are inquiries which *are not* disability-related according to the EEOC:

1. Can you perform the functions of this job (essential and/or marginal), with or without reasonable accommodation?

2. Please describe/demonstrate how you would perform these functions (essential and/or marginal)?

3. Can you meet the attendance requirements of this job? How many days of leave did you take last year?

4. Do you illegally use drugs? Have you used illegal drugs in the last two years?

5. Do you have the required licenses to perform this job?

On the other hand, the following are examples of disability-related inquiries according to the EEOC:

1. Do you have AIDS? Do you have asthma?

2. Do you have a disability that would interfere with your ability to perform the job?

3. How many days were you sick last year?

4. Have you ever filed for Workers' Compensation? Have you ever been injured on the job?

5. How much alcohol do you drink each week? Have you ever been treated for alcohol problems?

6. What prescription drugs are you currently taking?

Other thoughts?

1. All managers should be trained in appropriate interviewing techniques, including the legality of asking various questions. (Managers should also be trained in the importance of documenting their actions and statements, the actions and statements of their employees and job applicants, and the basis for making various employment decisions, such as who to hire, transfer, fire, promote, etc.)

2. Employers may not ask their job applicants about their current or previous physical or mental conditions, disabilities or defects, their record of hospitalizations, what prescription or over-the-counter drugs they are taking, if they have ever received any treatment for chemical dependency, or their Workers' Compensation history.

3. Employers are also not permitted to seek reference information regarding any of these areas either. Employers may ask about the duties the applicant performed with a former employer, the quality and quantity of the applicant's work, and the applicant's attendance record.

4. Employers are permitted to describe the essential functions of the job to their applicants, including any attendance requirements that may exist. Employers may then ask their applicants if they are able to meet these requirements either with or without reasonable accommodation.

5. Applicants may also be asked to describe, or to even demonstrate, how they would perform the essential functions of the job. However, employers must ask this question or require such a demonstration of <u>all</u> its applicants for this position. If an

applicant is unable to perform any of these essential functions, it is permissible to ask the applicant if any reasonable accommodations exist that would enable him/her to perform these functions.

XXII. ADA MEDICAL TESTING & "NO HARM NO FOUL" DEFENSE REJECTED

In EEOC v. Grane Healthcare Company, 2014 U.S. Dist. LEXIS 28477 & 2014 U.S. Dist. LEXIS 91544, Grane subjected more than 300 applicants to pre-employment medical examinations without first making them an offer of employment contingent on passing these exams.

The EEOC filed suit on behalf of all these employees.

Under the ADA, once an offer of employment is made, a prospective employee may be asked to undergo a medical examination if all entering employees are subject to such an exam regardless of disability, if the confidentiality requirements are met, and if the results are "used only in accordance with" the ADA's anti-discrimination provision.

The district court granted an injunction to the EEOC to stop this practice.

However, Grane argued that the only plaintiffs who should be eligible to receive any damages were the 26 who were not hired. Basically, Grane argued that those employees who were hired suffered "no foul."

The basis for Grane's claim was a Third Circuit Court ruling in Tice v. Centre Area Transportation Authority, 247 F.3d 506 (2001). In Tice, the plaintiff argued, among other things, that his medical records were not properly safeguarded. The CATA conceded that confidential medical records were improperly comingled with nonconfidential files. However, CATA won on summary judgment on the grounds that Tice failed to establish that he suffered any injury as a result of this comingling of files.

Grane used the same argument regarding illegal pre-employment medical exams it gave to those people who were hired and therefore suffered no injury.

However, the court rejected Grane's argument. Relying on the Tice decision, the court held that there was no definition of "injury" in that case.

> [T]he Third Circuit emphasized that it was not defining the "injury" that a plaintiff must suffer to maintain a ***cognizable*** claim under Section 12112(d). ... Because the Third Circuit declined to specify the type of injury that was needed to implicate one's rights under the ADA, this Court cannot accept the Defendants' assertion that Tice recognizes the loss of a job opportunity as the ***only*** injury that is capable of remedy under Title I.

The court went onto explain that the "injury" required under the ADA need not be "economic or tangible" but can consist of "**an invasion of a legally protected interest**." Here, the court held this requirement was met when the unlawful medical exams were conducted.

The court further ruled that the EEOC has established "numerous statutory violations" sufficient for injunctive relief, and that it is possible under such circumstances that Grane could be subject to **punitive damages** for engaging in "a discriminatory practice or

discriminatory practices with "malice or with reckless indifference" to the federally protected rights of an aggrieved individual."

Another issue that the EEOC raised in this case was Grane's drug testing practice. Four of Grane's applicants were denied positions because their drug tests had yielded "positive" results, though they claimed the results were due to the use of legal medications.

Grane argued that the drug tests conducted on the urine specimens were not "medical examinations" under Section 12112(d), even if they detected legally prescribed medicine.

However, the EEOC argued that the legislative history of the ADA allows employers to use a pre-offer "**test to determine the illegal use of drugs.**" This was ***not*** intended to allow an employer to use a drug test to detect ***both legal and illegal drugs***.

In this case, since the employer used the drug test to screen for both legal and illegal drugs, these that the tests were "medical examinations."

In the court's view, there might be times when "narrowly tailored drug tests do not constitute 'medical examinations' even though they have the incidental effect of detecting evidence of legal drug use. However, that was not the case here.

In this case, each applicant's ***physical*** included a urinalysis and each sample was tested for both medical and drug-use purposes. Since the examinations and inquiries were designed to elicit medical information extending far beyond illegal drug use, the tests on the urine specimens did not fall within the ADA's exception permitting tests to determine the illegal use of drugs.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

This case gives employers two clear messages:

1. Employers can be held liable for damages if they violate the ADA's pre-employment regulations even if the applicant is hired by the organization and

2. Employers should confine themselves to ***ONLY*** testing for illegal drugs and to keep their drugs tests separate from their medical tests.

XXIII. ANGER ISSUES AND THE ADA

In Calef v. Gillette Co., No. 02-1444 (1st Cir. 2003), Fred Calef worked as a production mechanic for Gillette. Calef had several physical or verbal confrontations with co-workers that led his supervisors to issue written warnings to Calef. In one incident, Calef threatened a 60-year-old female employee who asked him for help with a machine she was using. He allegedly pointed his finger in her face, raised his hand, made a fist, and stated, "Stop calling me or I'll punch you in the face."

Following that incident, Gillette issued Calef a final warning that "any single infraction of [company] policy in the future will result in termination." He was also referred to Gillette's employee assistance program, although he chose instead to receive treatment from an outside therapist.

Shortly thereafter, Calef was diagnosed with attention deficit hyperactivity disorder (ADHD) and was prescribed Ritalin. According to his doctor, the ADHD did not cause him to become angry. Instead, his condition caused him to deal with anger more impulsively. As a result, Calef may not respond as well as others when faced with highly stressful situations.

Calef continued to work at Gillette for a year without any further incidents. Following a disagreement with a supervisor, he began acting "irrational and increasingly erratic." The supervisor feared for his safety. Within days, the company fired Calef.

Calef sued Gillette, claiming that he was fired in violation of the ADA. The trial judge dismissed the suit. Calef appealed the decision to the First Circuit.

The First Circuit held that Calef's history of physical altercations with co-workers was enough to lose the protection of the ADA. The court said, "Put simply, the ADA does not require that an employee whose unacceptable behavior threatens the safety of others be retained, even if the behavior stems from a mental disability," the court wrote.

In Koshko v. General Electric Co., No. 01-C-5069, (N.D. Ill. 2003), Gary Koshko was employed by General Electric Company (GE) in Bridgeview, Illinois. Beginning in 1998, he began to experience severe mood swings, which he admitted were "grossly out of proportion to any provocation or precipitating factors."

In September 1999, following an angry outburst on the job, Koshko agreed to take a short-term disability medical leave. One month later, he was diagnosed with intermittent explosive disorder -- which is characterized by a failure to resist aggressive impulses that result in serious violent acts or destruction of property. Koshko's condition was treated with a combination of drugs and therapy. He was released to return to work, except for overtime, in December 1999.

Several months later, Koshko was called into a meeting with General Electric management. According to Koshko, Bob Watson, the company's national lighting manager, confronted him in a disdainful and insulting manner, criticized his work product, and stated that he should be working overtime. After the meeting, Koshko allegedly returned to his work area, began cursing, and threatened to kill Watson. His co-workers reported his conduct to management, and shortly thereafter, he was fired for violating the company's "rules of conduct."

Koshko sued GE under the ADA for failing to accommodate his disability. The court found for General Electric.

The court first held that Koshko must show that he has a physical impairment that substantially limits one or more major life activities. While his doctor stated that he has "serious emotional problems which impacted such major life activities as sleep and rest, thinking, eating, [and] social interaction with others," the judge found that the doctor didn't state that those life activities were "substantially limited" by his condition.

Even if Koshko was disabled, the court reasoned, he was not a qualified individual under the ADA because he poses a direct threat to the health and safety of others.

XXIV. NEGLIGENT TRAINING

Employers also face disability discrimination suits for failing to make training available to those persons who are disabled. Making access ramps available to those in wheelchairs, providing voice-overs or readers for the visually impaired, adding closed captions for the hearing impaired and offering individualized assistance for the mentally disabled are all examples of reasonable accommodations that employers should provide under the Americans With Disabilities Act of 1990.

In Vollmert v. Wisconsin Dept. of Transportation, 197 F.3d 293 (7th Cir. 1999), Jane Vollmert had been employed by the Wisconsin Department of Transportation for over 21 years when the Department installed a new computer system. In her most recent position with the Department, Vollmert processed specialized license plates for the disabled and certain organizations serving the disabled. Vollmert herself suffered from learning disabilities, such as dyslexia. As a result, she had a very difficult time learning how to use the new computer system in her job.

The Department gave her computer training, but she could not retain what she had learned and use it later in her duties. As a result, the Department gave Vollmert one-on-one computer training. However, again, Vollmert was unable to retain this instruction and was therefore unable to apply these skills on the job.

As a result of her inability to operate the computer, Vollmert fell way behind on her production requirements. While Vollmert's co-workers were able to process 50 to 60 applications every two hours, Vollmert was only able to process an average of 67 new applications a day.

Vollmert's union president suggested that the Department hire a specialist to assist Vollmert with her training. In fact, learning disability specialists were available from the state at no charge. However, Vollmert's supervisor denied all of these requests, claiming that Vollmert had already received sufficient training.

The supervisor then gave Vollmert an ultimatum: she could either continue in her current job for another four months and then be subject to discharge for poor performance if she did not meet the standards set for her, or she could accept a transfer to another position not requiring the use of a computer. Vollmert reluctantly chose to accept the transfer…the sued the Department for disability discrimination under the ADA.

The Department defended itself by claiming that Vollmert was not a "qualified person" for this position any longer since she could not perform its essential functions…one of which was to operate a computer. The Department argued that it gave Vollmert one-on-one training, which did not work. It then claimed to have accommodated Vollmert again by transferring her to another position.

However, Vollmert claimed the training she received did not meet her special needs. Vollmert contended that she could be a "qualified person" for this job if she received the type of training she needed.

The court ruled in favor of Vollmert.

The court based its ruling largely upon the opinion of a vocational expert. The vocational expert testified that Vollmert could become proficient in operating this computer if she was properly trained. The vocational expert stated that Vollmert's disability did not affect her **ability** to learn…it affected the **speed** at which she learned.

The vocational expert claimed that if Vollmert was given time to actually learn these skills, she would be able to work at a high level of productivity and efficiency.

However, the expert also noted that this training should be conducted by someone who has experience in working with people who learn at a slower rate that the normal population.

The court therefore ruled that the use of a proper trainer was the appropriate reasonable accommodation… not a transfer.

Therefore, employers should make certain that they are accommodating the needs of their disabled employees so they too are afforded the advantages training brings. When disabled individuals are involved, oftentimes the opinion of an expert will be required.

XXV. U.S. SUPREME COURT: ADA ***DOES NOT*** TRUMP SENIORITY RIGHTS

In US Airways, Inc. v. Barnett, No. 00-1250 (U.S. April 29, 2002) Robert Barnett, a cargo handler for US Airways, injured his back while working for US Airways. Barnett transferred to position in the mailroom that was less physically demanding. However, Barnett learned that two employees with greater seniority planned to bid on this job. Barnett then asked US Airways to make an exception to the seniority system and allow him to remain in the mailroom as an accommodation. US Airways refused to make an exception to its seniority system and Barnett lost his job.

Barnett sued US Airways, claiming it violated the Americans With Disabilities Act by refusing to make an exception to its seniority system. US Airways argued the ADA does not require an employer to reassign a disabled employee to a position as a reasonable accommodation when another employee is entitled to hold the position under the employer's bona fide seniority system.

On April 29, 2002, in a 5-4 decision, the U.S. Supreme Court held the Americans With Disabilities Act **ordinarily** does not require an employer to violate a seniority based system and transfer a qualified disabled employee to another position as a reasonable accommodation.

The U.S. Supreme Court held that in most cases, the ADA does **not** require an employer to violate a bona fide seniority system in order to make a reasonable accommodation. However, the Court held an employee is free to show special circumstances that would make an exception to a seniority system a reasonable accommodation. For example, the Court stated an employee may be able to show the employer made exceptions to the seniority system. If the employee proves such special circumstances, the employer would then have to defend a failure to accommodate by proving the accommodation posed an undue hardship.

The Court then held that it is the **plaintiff's burden to prove** that a requested accommodation is reasonable and that **special circumstances** exist make overriding the employer's seniority system reasonable.

XXVI. FINAL THOUGHTS: GENERAL CHECKLIST

As a general checklist, employers should make sure they have the following aspects of their business in updated in order to comply with the ADA:

1. Display the ADA poster in a conspicuous location.

2. Train supervisors and managers on the new regulations and law and how to handle requests for accommodations. Supervisors must be trained in recognizing an employee's request or need for accommodation and the employer's responsibilities.

3. Review every position's job description to ensure that all of the essential functions of the job are listed, including any physical requirements, as well as how frequently these functions are performed and their duration. A copy of the appropriate job description should be given to both the employer's applicants and employees.

4. Establish the minimum requirements needed in order to be a qualified individual for each position, such as the level of education, work experience, any specific skills required, as well as the physical and mental standards the person must be able to meet in order to perform the job in a safe and productive manner. If any of these pre-established requirements tend to screen out disabled persons, then employers should make sure that these standards are CLEARLY job-related and are consistent with business necessity.

   Of course, these standards must actually exist in practice ... not just on paper.

5. Recite the essential functions of the position in the help wanted ads, as well as the fact that the employer does not discriminate against the disabled. Employers should also make information regarding their job openings available to disabled individuals.

6. Eliminate any questions from the employment application that may reveal the applicant's protected class status.

7. Develop standardized procedures that are to be used whenever a reasonable accommodation is requested, which includes determining if the requested accommodation is reasonable and how such accommodations are to be implemented. As part of this process, supervisors should be required to contact the Human Resource Department regarding the implementation of such accommodations. These procedures should then be distributed to everyone involved in the process, including the company's managers.

8. Whenever an employee claims to be disabled in any way … **GET THE MEDICAL CERTIFICATION FORM COMPLETED!** This form will verify the employee's condition for you. Also, make sure you discover all the limitations the employee will have as a result of this condition. How much can the employee

lift? How long can she sit? Stare at a computer screen? See a computer screen? Stand? Drive? Will they be late to work? Etc.

You will need this information to determine what reasonable accommodations might be required.

9. Have a procedure in place that follows the Interactive Process.

10. Have a process in place that documents the Interactive Process, including how, when and what the employer did to try and reasonably accommodate the individual, rather than trying to argue that the individual was not disabled under the ADA.

11. Employers must be sure to document the training that is given to employees, as well as the training employees refused to undertake. This may very likely be critical evidence in many upcoming cases.

12. In case an employee claims to be a disabled individual, yet the employer doubts the validity of the person's claim, employers should have a policy and procedure in place for having the employee evaluated by a physician identified by the employer. Applicants, on the other hand, may only be subject to medical examinations after a conditional offer of employment has been made. Of course, such medical examinations must always be job-related and consistent with business necessity.

13. Any information relating to an employee's medical condition, or that identifies the employee as a disabled person, must be kept in a file that is separate from the employee's other personnel data.

14. All of the employer's benefit plans should allow equal access to all employees and should not discriminate on the basis of disability.

15. Not only should the employer's workplace be accessible to disabled individuals, which includes both current employees and job applicants alike, but where ever the employer holds its off-site activities, such as its social events, its recreational activities, and its training programs, such facilities must also be accessible.

16. Make sure that none of the employer's policies, procedures or employment actions discriminate against the disabled. (i.e., layoffs, excessive absence policy, dress codes, transfers, promotions, etc.).

Notice: Legal Advice Disclaimer

The purpose of these materials is not to act as legal advice but is intended to provide human resource professionals and their managers with a general overview of some of the more important employment and labor laws affecting their departments. The facts of each instance vary to the point that such a brief overview could not possibly be used in place of the advice of legal counsel.

Also, every situation tends to be factually different depending on the circumstances involved, which requires a specific application of the law.

Additionally, employment and labor laws are in a constant state of change by way of either court decisions or the legislature.

Therefore, whenever such issues arise, the advice of an attorney should be sought.

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Scott's Bio

Scott Warrick (**www.scottwarrick.com**) is a practicing Employment Law Attorney, Human Resource Professional and three-time best-selling author with over 40 years of hands-on experience. Scott uses his unique background to help organizations get where they want to go, which includes coaching and training managers and employees on site in his own unique, practical and entertaining style.

Scott combines the areas of law and human resources to help organizations in "Solving Employee Problems ***BEFORE*** They Start." Scott's goal is ***NOT*** to win lawsuits. Instead, Scott's goal is to ***PREVENT THEM*** while improving ***EMPLOYEE MORALE***.

Scott's first book, ***Solve Employee Problems Before They Start: Resolving Conflict in the Real World***, is a #1 Best Seller for Business and Conflict Resolution. It was also named by EGLOBALIS as one of the best global Customer and Employee books for 2020-2021. Scott's next book, ***Living The Five Skills of Tolerance***, is also a #1 Best Seller in 13 categories on Amazon. His most recent book, ***Healing The Human Brain***, is an International Best Seller in 14 categories with sales in over a dozen countries worldwide.

Scott Trains Managers & Employees ON-SITE in over 50 topics, all of which are customized for each client. Scott is a national speaker who travels the country presenting seminars on such topics as Healing The Human Brain, Employment Law, Conflict Resolution, Leadership and Tolerance, to mention a few.

Scott is also a seven-time SHRM National Diversity Conference presenter. In 2023, he presented his ground-breaking "**TOLERANCE & BRAIN HEALTH**" program.

Scott's ***MASTER HR TOOL KIT SUBSCRIPTION*** is a favorite for anyone wanting to learn Employment Law and run an HR Department.

Scott's videos are also favorite tools for anyone wanting easy, convenient and affordable access to in-house training, including his ***SCOTT'S SUPERVISOR MASTER VIDEO SERIES*** and his ***STOP BULLYING & HARASSMENT NOW!*** video, which complies with all of the new EEOC Harassment Training Guidelines.

Scott was named one of Business First's 20 People To Know In HR by CEO Magazine' and a Human Resources "Superstar" in 2008. Scott also received the Linda Kerns Award for Outstanding Creativity in HR and the Ohio State Human Resource Council's David Prize for Creativity in HR Management.

Scott's academic background and awards include Capital University College of Law (Class Valedictorian (1st out of 233) and Summa Cum Laude), Master of Labor & Human Resources and B.A. in Organizational Communication from The Ohio State University.

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UNDERSTANDING THE *NEW*
AMERICANS WITH DISABILITIES ACT OF 1990

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