UNDERSTANDING THE *NEW* AMERICANS WITH DISABILITIES ACT OF 1990

For Supervisors

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. 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.

V. 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 Rues 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.

VI. MITIGATING MEASURES IGNORED

A. U.S. Supreme Court Sutton Case

In in Sutton v. United Airlines, Inc., 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.

VII. 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. 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.

E. 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.

VIII. 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: 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.

C. 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.

IX. 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. 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.

D. 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.

E. 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.**"

F. 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.

G. 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.

H. 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.

X. 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.

XI. "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. also 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 that was to be completed by Denese G.'s physician (Dr). Denese's Dr stated that she 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 forced her to disclose her medical condition to everyone in the room.

After Denese G. received 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 she did not hear back on her accommodation request, Denese G. applied to take a leave of absence under the FMLA. On March 20, 2012, S1 approved her sick and annual leave request and asked her to provide medical justification for her FMLA request.

On April 17, 2012, management denied Denese G.'s February 29, 2012 reasonable accommodation request to excuse herself during meetings to adjust her insulin pump.

On or about July 27, 2012, Denese G. contacted an EEO Counselor.

Denese G.'s reiterated that she needed to use 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.

On August 27, 2012, Denses G's attorney again requested these accommodation for her in a letter he sent to the Treasury.

On September 4, 2012, S2, an EEO counselor, responded to Denese G.'s requests for a private room to use for medical purposes and approval to eat during group meetings.

S2 stated that there are various places in the office for Denese G. to use for medical purposes such as the ladies' lavatory, which has a couch, and the nurse's station, which has a room used for nursing mothers.

S3 further stated that there was no prohibition on eating during meetings, and food was brought to almost all 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 clarifying the current accommodations available to Denese G., she expected her to overcome any misunderstanding about her position about Denese G.'s medical condition.

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.

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.

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).

The EEOC held that 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. Consequently, the EEOC found that the requested accommodation did not constitute an undue burden on the Treasury's operations.

The Treasury claimed that it accommodated these requests when S1 assured Denese G. 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 its 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 reaching this conclusion, the EEOC noted 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.

The Treasury 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).

Also, the EEOC found that S1's assurances given 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.

Further, 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 a break and lunch during work hours 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, the Commission found that S1's response did not provide Denese G. with an effective reasonable accommodation.

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.

XII. 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.

XIII. "RETURN-TO WORK" OR "FIT FOR DUTY" CERTIFICATE REQUIREMENTS

A. "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.

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 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***.

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Scott has been named one of Business First's 20 People To Know In HR, CEO Magazine's 2008 Human Resources "Superstar," a Nationally Certified Emotional Quotient Counsellor (CEQC) and a SHRM National Diversity Conference Presenter in 2003, 2006, 2007, 2008, 2010 and 2012. Scott has also received the Human Resource Association of Central Ohio's Linda Kerns Award for Outstanding Creativity in the Field of HR Management and the Ohio State Human Resource Council's David Prize for Creativity in HR Management.

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