Chapter Seventeen

THE AMERICANS WITH DISABILITIES ACT AND OTHER DISABILITY DISCRIMINATION LAWS
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I. INTRODUCTION

This Chapter provides a general discussion of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101, et seq., focusing primarily on the employment-related provisions found in Title I of the Act. This Chapter also briefly addresses the Rehabilitation Act of 1973, which imposes certain affirmative action and nondiscrimination requirements on covered federal contractors and recipients of federal funds, and the Genetic Information Nondiscrimination Act (GINA), which prohibits discrimination by employers and insurers based on genetic information. Disability-related issues in the workplace may also be impacted by other federal laws, such as the Family and Medical Leave Act (FMLA) and the Patient Protection and Affordable Care Act (ACA), which are addressed in other Chapters of the SourceBook. Additionally, employers addressing disability-related issues in the workplace must consider the impact of applicable state and local laws, which are beyond the scope of this Chapter.

Congress amended the ADA in 2008 with the ADA Amendments Act (ADAAA), to reject certain U.S. Supreme Court decisions that interpreted the ADA too narrowly and created too high of a standard for individuals seeking to establish a disability under the law. The ADAAA specifically provides that the definition of disability must be construed in favor of broad coverage under the Act, to the maximum extent permitted by the Act. See 42 U.S.C. § 12102(4)(A), as amended. Additionally, the Findings and Purposes of the ADAAA state that it is the intent of Congress that the “primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.” See 110 Pub. Law 325, 122 Stat. 3553.

The ADAAA was effective January 1, 2009 and is not retroactive. See, e.g., Rhodes v. Langston Univ., 462 F. App’x 773, 777 (10th Cir. Oct. 14, 2011) (“The overwhelming number of cases examining this issue have held that the ADAAA should not be applied retroactively, and all circuit courts have so held.”). EEOC Questions and Answers on Final Rule Implementing the ADA Amendments Act of 2008, available at: http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm. Accordingly, the analysis of certain issues, such as whether an individual is disabled under the Act, will be significantly different for claims arising before the effective date of the ADAAA versus those arising after that date.

The difference in analysis is demonstrated in Gaus v. Norfolk S. Ry. Co., 2011 WL 4527359 (W.D. Pa. Sept. 28, 2011). In that case, the court held that because the plaintiff’s claim was based on the “regarded as” prong of the definition of disability, which was expanded by the 2008 amendments, retroactive application of the ADAAA would impermissibly increase the employer's liability. Accordingly, the court applied pre-ADAAA law to claims occurring prior to January 1, 2009 and applied the ADAAA to claims that occurred after that date. The court granted summary judgment on the claims that occurred before January 1, 2009 because the plaintiff failed to establish that he was substantially limited in a major life activity or that the employer so perceived him. This was the pre-ADAAA standards as set forth in Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002). The court, however, denied summary judgment on the claims that occurred after January 1, 2009 because, under the ADAAA, the plaintiff was not required to show that his impairment substantially limited a major life activity to proceed under the “regarded as” prong. He was only required to show that he was subjected to an adverse action as a result of an actual or perceived physical or mental impairment to be “regarded as” disabled. The court denied summary

1 The Supreme Court’s decision in Toyota Motor has been superseded by the ADAAA; thus, it is no longer good law in those cases where the ADAAA governs a claim of disability discrimination. Toyota Motor is still good law with regard to claims that arose before the ADAAAs effective date, January 1, 2009. See Gaus, 2011 WL 4527359 at *14 n.15 (W.D. Pa. Sept. 28, 2011).
judgment because the plaintiff presented evidence from which a reasonable jury could find that the employer perceived him to be disabled under the “regarded as” prong of the ADA.

Despite the broad construction of disability under the ADAAA, however, the Fifth Circuit in Neely v. PSEG Tex. Ltd. Partnership, 735 F.3d 242, 245 (5th Cir. 2013), emphasized that the amendment did not eliminate the requirement that the plaintiff prove a disability, holding:

Although the text of the ADAAA expresses Congress’s intention to broaden the definition and coverage of the term “disability,” it in no way eliminated the term from the ADA or the need to prove a disability on a claim of disability discrimination. Even under the ADA as amended by the ADAAA, “[t]o prevail on a claim of disability discrimination under the ADA, [a party] must prove that (1) he has a disability; (2) he is qualified for the job; and (3) [the covered entity] made its adverse employment decision because of [the party’s] disability.” In other words, though the ADAAA makes it easier to prove a disability, it does not absolve a party from proving one.

II. OVERVIEW OF THE ADA

The ADA prohibits discrimination against individuals with disabilities in employment, public accommodations, transportation, state and local government services, and telecommunications.

A. Title I. Title I of the ADA concerns employment. It applies to all employers, public or private, that have 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year. Covered employers are required to post notices of the Act’s requirements. See 42 U.S.C. § 12115.

1. Remedies and Procedures. The employment provisions of the ADA incorporate, by reference, the remedies and procedures of Title VII. These remedies include reinstatement, back pay, and an award of attorneys’ fees to the prevailing party. Additionally, prevailing plaintiffs may be able to recover compensatory and punitive damages, if appropriate. Plaintiffs are also entitled to demand a trial by jury.

The Equal Employment Opportunity Commission (EEOC) is charged with enforcement of the ADA and plaintiffs are required to exhaust their administrative remedies by filing a discrimination charge with the EEOC prior to filing a lawsuit under Title I. See, e.g., Cronin v. Visiting Nurses Ass’n of St. Luke’s Hosp., 2009 WL 3152172 (E.D. Pa. Sept. 30, 2009) (“Before a plaintiff may file a civil suit for violations of the Americans with Disabilities Act, she must exhaust her administrative remedies by filing a claim with either the EEOC or the PHRC. 42 U.S.C. § 12117; 42 U.S.C. § 2000e-5.”), summary judgment granted, 2010 WL 3768320 (E.D. Pa. Sept. 27, 2010).

2. Confidentiality of Medical Records. The ADA requires employers to keep employees’ medical information confidential. See 42 U.S.C. § 12112(d)(B). Medical information must be kept in separate files, segregated and secured from general personnel files. Those without a need to know the information should not have access to the medical information. In some instances, this includes not disclosing medical information to managers and supervisors, who may simply need to be aware that an accommodation is being made (and their role in an accommodation). People involved in the accommodation process and first aid personnel may have access to employee medical information.

3. State Employees. In Board of Trustees v. Garrett, 531 U.S. 356, 374 (2001), the Supreme Court held that Congress did not validly abrogate states’ sovereign immunity from suit by private individuals for money damages under Title I of the ADA. The Court noted, however, “This does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief.” Id. See also United States v. Mississippi Dep’t of Public Safety, 321 F.3d
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495 (5th Cir. 2003) (permitting federal government attorneys to bring ADA actions on behalf of individual state employees).

4. Shareholders as Employees. In Clackamas Gastroenterology Associates v. Wells, 538 U.S. 440 (2003), the Supreme Court held that the common-law element of control is the principal guidepost that should be followed in determining whether physicians, who were shareholders and directors of a professional corporation, should be considered employees when determining whether the employer is covered by the ADA.

B. Title II. Title II of the ADA concerns “public services.” The first part of Title II essentially makes § 504 of the Rehabilitation Act applicable to all public entities, state and local. The Eleventh Circuit has held that an employee may sue his or her municipal employer under Title II of the ADA. See Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816 (11th Cir. 1998) (holding that the broad language of Title II allows a public employee to sue for employment discrimination under Title II of the ADA). However, the Seventh Circuit has reached the opposite conclusion. See Brumfield v. City of Chicago, 735 F.3d 619 (7th Cir. 2013) (“we join the Ninth and Tenth Circuits and hold that Title II of the ADA does not cover disability-based employment discrimination. Instead, employment-discrimination claims must proceed under Title I of the ADA, which addresses itself specifically to employment discrimination and, among other things, requires the plaintiff to satisfy certain administrative preconditions to filing suit”). The Supreme Court did not rule on this issue when it addressed state sovereign immunity under Title I of the ADA in Garrett, supra.

The second part of Title II deals with prohibited discrimination by public entities with respect to public transportation.

C. Title III. Title III of the ADA prohibits discrimination by private entities with respect to “public accommodations” (i.e., motels, hospitals, restaurants, grocery stores, shopping centers, libraries, golf courses, hospitals, barbershops, etc.). Title III prohibits discrimination “in the full and equal enjoyment” of the goods, services, and facilities offered to the public. In addition, Title III of the ADA places accessibility requirements on all places of public accommodation and commercial facilities when altering a current workplace or when performing construction. Title III also requires that public accommodations be made accessible to individuals with disabilities.

The Department of Justice has published regulations interpreting the requirements of Title II and Title III, which are available at: http://www.ada.gov/.

III. DEFINITION OF DISABILITY UNDER THE ADA

The ADA as amended by the ADAAA provides that the term “disability” means, “with respect to an individual – (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3)).” See 42 U.S.C. § 12102(1).

A. “Actual Disability.” Although the ADAAA did not change the “actual disability” prong, subsection (1)(A), which defines disability as a physical or mental impairment that substantially limits one or more major life activities, it changed the way statutory terms relating to the definition of disability should be interpreted and requires the definition of disability to be broadly construed in favor of coverage.

The EEOC has issued revised regulations and a revised Appendix, incorporating the ADAAA’s revisions. Similar to the ADAAA, the EEOC’s revised regulations retain the basic definition of “disability” but modify the terms underlying the definition – “impairment,” “major life activities,” “substantially limits,” etc. – in favor of “broad coverage to the maximum extent permitted by the terms of the ADA as amended.” Additionally, the regulations state that their goal, like that of the ADAAA, is to limit “extensive analysis” into whether an individual has a disability, and instead focus on whether employers have “complied with their obligations and whether discrimination has occurred.” See 29 C.F.R. §
1630.2. The EEOC has issued questions and answers on the revised regulations. See [http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm](http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm).

1. **Mitigating Measures.** The ADAAA provides that mitigating measures should not be considered in determining whether an individual has a disability. Through this provision, the ADAAA specifically overrules the Supreme Court’s decisions in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases (*Murphy v. UPS*, 527 U.S. 516 (1999), and *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999)). The Act specifically excludes ordinary eyeglasses and contact lenses from the list of mitigating measures that should not be considered. The EEOC’s revised regulations include a similar provision. See 29 C.F.R. § 1630.2(j)(iv).

2. **Substantially Limits.** The ADAAA also expands the definition of “substantially limits” as used in the ADA and overrules the Supreme Court’s decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), which held that an impairment substantially limits a major life activity if it “prevents or severely restricts the individual” from performing the activity. The ADAAA states that this definition imposes too high of a standard. The EEOC revised its regulations addressing the definition of “substantially limits” to be consistent with the Act’s goal of broadening coverage of individuals protected under the ADA. The EEOC’s regulations now provide nine new “rules of construction,” including:

   a. The impairment does not have to “prevent” or “significantly or severely restrict” the individual from performing a major life activity. The impairment need only substantially limit “the ability of an individual to perform a major life activity as compared to most people in the general population.” According to the regulations, this comparison usually will not require scientific, medical, or statistical analysis; however, nothing prohibits the presentation of such evidence where appropriate.

   b. The focus 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. Therefore, the threshold issue of whether an impairment “substantially limits” a major life activity should not demand extensive analysis.

   c. The determination of whether an impairment substantially limits a major life activity requires an individualized assessment, as was the case before the ADAAA was enacted. However, the new regulations specifically state that in making this assessment, the term “substantially limits” requires a lower degree of functional limitation than was the standard prior to the ADAAA. According to the EEOC regulations, some types of impairments will “in virtually all cases” result in a determination of coverage under the “actual disability” prong or the “record of” prong. Such impairments include: deafness; blindness; intellectual disability; missing limbs; autism; cerebral palsy; diabetes; epilepsy; HIV infection; multiple sclerosis; muscular dystrophy; major depressive disorder; bipolar disorder; post-traumatic stress disorder; obsessive compulsive disorder; and schizophrenia. See 29 C.F.R. § 1630.2(j)(3)(iii).

   d. The regulations also state that “the effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.” 29 C.F.R. § 1630.2. In *Summers v. Altarum Inst., Corp.*, 740 F.3d 325, 330 (4th Cir. 2014), the Fourth Circuit held that under the ADAAA, the plaintiff, who suffered an accident that “left him unable to walk for seven months and that without surgery, pain medication, and physical therapy, he ‘likely’ would have been unable to walk for far longer,” had sufficiently alleged a disability sufficient to survive a Rule 12(b)(6) motion to dismiss. The court held, “the text and purpose of the ADAAA and its implementing regulations make clear that such an impairment can constitute a disability.” *Id.* Accordingly, the court held that the lower court erred in ruling that the plaintiff could not establish that he was disabled as a matter of law.

3. **Major Life Activity.** The ADAAA provides a nonexhaustive list of major life activities, such as seeing, hearing, eating, sleeping, walking, learning, and concentrating. The EEOC’s regulations
add a number of activities to this list including: standing; sitting; reaching; lifting; bending; reading; thinking; communicating; and interacting with others. 29 C.F.R. § 1630.2(i)(1)(i). Additionally, the ADAAA provides that major life activities also include the operation of "major bodily functions," such as the immune system, normal cell growth, and the endocrine system. The EEOC regulations provide additional examples. See 29 C.F.R. § 1630.2(i)(1)(ii). The EEOC regulations also state, "Whether an activity is a ‘major life activity’ is not determined by reference to whether it is of ‘central importance to daily life,’” rejecting prior definitions that included this requirement. See 29 C.F.R. § 1630.2(i)(2).

The ADAAA further provides that an impairment that limits one major life activity need not limit other major life activities in order to be considered a disability. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. The EEOC’s new regulations echo these provisions.

In Weaving v. City of Hillsboro, 763 F.3d 1106 (9th Cir. 2014), cert. denied, 135 S. Ct. 1500 (2015), the Ninth Circuit vacated a jury verdict of over $500,000 in favor of a former police officer, holding that a jury could not reasonably have concluded that his Attention Deficit Hyperactivity Disorder (ADHD) substantially limited his ability to work. The court acknowledged that the ADAAA “relaxed the standard for determining whether a plaintiff is substantially limited in engaging in a major life activity,” but held that the plaintiff “cannot satisfy even the lower standard under current law.” Id. at 1112. The plaintiff in Weaving had little trouble behaving appropriately with his superiors; his interpersonal problems existed almost exclusively in his interactions with his peers and associates. Id. In vacating the jury’s verdict, the court held:

One who is able to communicate with others, though his communications may at times be offensive, “inappropriate, ineffective, or unsuccessful,” is not substantially limited in his ability to interact with others within the meaning of the ADA. … To hold otherwise would be to expose to potential ADA liability employers who take adverse employment actions against ill-tempered employees who create a hostile workplace environment for their colleagues.

Id. at 1114 (citations omitted). See also Cunningham v. Nordisk, 2015 WL 3622885, at *2 (3d Cir. June 11, 2015) ("Although [the plaintiff] correctly points out that the ADAAA made it easier to prove a disability, she must still show a substantial limitation. See 42 U.S.C. § 12102(1)-(2). She presented no evidence demonstrating that, because of her heart attack and subsequent surgery, she was substantially limited in a major life activity. Indeed, [the plaintiff] admitted that, since returning to work, she has been fully capable of working, performing her job duties, and caring for herself."); See also Crowell v. Denver Health & Hosp. Auth., 572 F. App’x 650 (10th Cir. July 23, 2014) (holding that even under the ADAAAs less demanding standard, the plaintiff’s testimony did not show that she was substantially limited in the ability to lift, sit or walk; additionally, she failed to show that she was substantially limited in her ability to perform a major life activity as compared to most people in the general population).

B. A Record of Impairment. As noted above, persons with a “record” of a physical or mental impairment that substantially limits a major life activity are also protected from discrimination. See 42 U.S.C. § 12102(1)(B). The EEOC’s new regulations require employers, absent substantial hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the “record of” prong (as well as the actual disability prong). See 29 C.F.R. § 1630.9(e). The EEOC’s Interpretive Guidance provides that “an individual may have a ‘record of’ a substantially limiting impairment – and thus be protected under the ‘record of’ prong of the statute – even if a covered entity does not specifically know about the relevant record.” However, the individual must show that the covered entity discriminated on the basis of the “record of” disability for the entity to be liable for discrimination under Title I of the ADA. See EEOC Interpretive Guidance.

C. Regarded as Disabled. The ADAAA provides that employees who claim they are “regarded as” disabled only need to show that discrimination based on a perceived disability violates the law,
regardless of whether the impairment actually substantially limits, or is perceived to limit, a major life activity. See 42 U.S.C. § 12102(3)(A). See also Hoey v. Cnty. of Nassau, 2014 WL 4656223, at *4 (E.D.N.Y. Sept. 12, 2014) (“in light of the characterization by police officials of plaintiff as someone who suffered ‘a mental breakdown,’ which provided a basis for determining that he had to remain on restricted duty, it would be difficult for defendants to contend that he was not regarded as an individual with a disability”). The EEOC’s regulations note that establishing that an individual is “regarded as” having an impairment does not establish liability under the ADA. Liability under Title I of the ADA is established “only when an individual proves that a covered entity discriminated on the basis of disability within the meaning of § 102 of the ADA, 42 U.S.C. 12112.” See 29 C.F.R. § 1630.2(l)(3).

Further, resolving a disagreement among federal courts, the ADAAA and the EEOC regulations clarify that employers do not have a duty to reasonably accommodate individuals who claim “regarded as” discrimination. See 29 C.F.R. § 1630.9(e) (“a covered entity … is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the ‘regarded as’ prong”). The ADAAA also specifically states that “regarded as” claims cannot be based on impairments that are transitory and minor, which the Act defines as impairments with an actual or expected duration of six months or less. See 42 U.S.C. § 12102(3)(B).

In Tice v. Centre Area Transportation Authority, 247 F.3d 506 (3d Cir. 2001), the court held that a request for an independent medical examination of an employee is not enough to demonstrate that the employer “regards” the employee as disabled. The court stated that “doubts alone” over an individual’s ability to perform his job does not show that the employee is regarded as disabled. See also Johnson v. Univ. Hospitals Physician Servs., 2015 WL 4080942, at *4 (6th Cir. July 7, 2015) (rejecting plaintiff’s argument that her employer perceived her as disabled because it referred her to a fitness-for-duty evaluation, since “an employer’s perception that health problems are adversely affecting an employee’s job performance is not tantamount to regarding that employee as disabled”) (quoting Sullivan v. River Valley Sch. Dist., 197 F.3d 804, 813 (6th Cir. 1999)); Berry v. T-Mobile USA, Inc., 490 F.3d 1211 (10th Cir. 2007) (holding that an employer’s grant of FMLA leave to employee with multiple sclerosis did not show that she was regarded as disabled). In Berry, the court noted that the standards under the two statutes are different – the definition of “disability” and the applicable regulations state that the FMLAs “serious health condition” is a different concept that must be analyzed separately.

IV. ASSOCIATIONAL PROTECTIONS

The ADA also forbids “excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.” See 42 U.S.C. § 12112(b)(4).

The Seventh Circuit has identified three categories of situations in which association claims arise: expense; disability by association; and distraction. In Larimer v. International Business Machines Corp., 370 F.3d 698 (7th Cir. 2004), the court gave the following examples of these categories: an employee is fired (or suffers some other adverse personnel action) because: (a) (“expense”) his spouse has a disability that is costly to the employer because the spouse is covered by the company’s health plan; (b(1)) (“disability by association”) the employee’s homosexual partner is infected with HIV and the employer fears that the employee may also have become infected through sexual contact with the companion; (b(2)) (another example of disability by association) one of the employee’s blood relatives has a disabling ailment that has a genetic component and the employee is likely to develop the disability as well (maybe the relative is an identical twin); (c) (“distraction”) the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his employer’s satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours. The qualification concerning the need for an accommodation (that is, special consideration) is critical because the right to an accommodation, being limited to disabled employees, does not extend to a nondisabled associate of a disabled person. Id. at 700. The court dismissed the plaintiff’s claims in
Larimer, holding that the premature birth of twin daughters who appeared healthy at the time the case was filed but who may develop disabilities in the future fit none of the above categories. *Id.* at 701.

In *Stansberry v Air Wis. Airlines Corp.*, 651 F.3d 482 (6th Cir. 2011), the Sixth Circuit set forth the elements of a prima facie case for an associational disability claim. Under *Stansberry*, the plaintiff must prove: (a) he is qualified for the position; (b) he was subjected to an adverse employment action; (c) he was known to be associated with a disabled individual; and (d) the adverse action occurred under circumstances that raise a reasonable inference that the disability of the relative was a determining factor in the decision. In *Stansberry*, the court held that the plaintiff failed to establish the fourth prong. The plaintiff claimed that a jury could infer that he was terminated "on account of his wife's disability because he was discharged shortly after her condition worsened." However, the court noted that "his performance grew remarkably worse in the time leading up to his termination," and that he failed to refute the employer's reasons or present evidence of any pretext. The court also held that the fact that the plaintiff's poor performance was due to his wife's illness was irrelevant under the associational disability provision of the Act. "Stansberry was not entitled to a reasonable accommodation on account of his wife's disability. Therefore, because his discharge was based on actually performing his job unsatisfactorily, and not fears that his wife's disability might prevent him from performing adequately," his termination was not discrimination. *Id.* at 489.

The court's decision in *Stansberry* holding that a reasonable accommodation is not required under the associational disability provision is in keeping with other court decisions. See, e.g., *Magnus v. St. Mark United Methodist Church*, 688 F.3d 331, 339 (7th Cir. 2012) (holding that the plaintiff failed to rebut the employer's legitimate, nondiscriminatory reason for terminating her – poor performance, agreeing with the lower court's determination that it was "difficult to escape the conclusion that the crux of this case remains Magnus' belief that she should not be made to work on weekends when she needs to care for her daughter … Unfortunately for Magnus, despite the fact that the church may have placed her in a difficult situation considering her commendable commitment to care for her disabled daughter, she was not entitled to an accommodated schedule"). See also *Cusick v. Yellowbook, Inc.*, 607 F. App'x 953, 955-56 (11th Cir. 2015) (affirming summary judgment on plaintiff's claim he was demoted because of discrimination based on the known disability of his daughter, finding no evidence either decision-maker harbored discriminatory animus toward the plaintiff or even knew whether his daughter was imposing increased costs on the company). In *Cusick*, the court held, "in the context of the substantial restructuring Yellowbook was undertaking at the time, we cannot conclude that Cusick has created genuine issues of fact with respect to whether Cusick's daughter's medical condition was a determinative factor in Yellowbook's employment decisions."

V. “QUALIFIED INDIVIDUALS” UNDER THE ADA

Prior to the ADAAA amendments, the ADA prohibited discrimination against a “qualified individual with a disability because of the disability of such individual.” The ADAAA amended this provision to prohibit discrimination “against a qualified individual on the basis of disability.” See 42 U.S.C. § 12112. The EEOC regulations and Appendix incorporate this change. According to the Appendix, “[t]his ensures that the emphasis in questions of disability discrimination is properly on the critical inquiry of whether a qualified person has been discriminated against on the basis of disability, and not unduly focused on the preliminary question of whether a particular person is a ‘person with a disability.’” See 29 C.F.R. Part 1630 Appendix, “Note on Certain Terminology Used,” 17 Fed. Reg. 17005 (citing 2008 Senate Statement of Managers at 11).

As defined by the ADA, a “qualified individual” is “an individual who with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” See 42 U.S.C. § 12111(8); *Majors v. Gen. Elec. Co.*, 714 F.3d 527, 533 (7th Cir. 2013); *Gera v. Cnty. of Schuykill*, 2015 WL 4269963, at *2 (3d Cir. July 15, 2015) (holding that plaintiff who had degenerative joint disease that limited his mobility was not a qualified individual because he could not perform the essential functions of his job as a correctional officer and “no accommodation existed that would have enabled him” to do so).
A. Essential Functions. The EEOC regulations define “essential functions” to mean “the fundamental job duties,” and provide that the term does not include the “marginal” functions of the position. See 29 C.F.R. § 1630.2(n)(1). See, e.g., Stern v. St. Anthony’s Health Ctr., 788 F.3d 276, 285 (7th Cir. 2015) (“The factors we consider to determine whether a particular duty is an essential function include the employee's job description, the employer's opinion, the amount of time spent performing the function, the consequences for not requiring the individual to perform the duty, and past and current work experiences.”) (citations omitted); E.E.O.C. v. Ford Motor Co., 782 F.3d 753, 761-62 (6th Cir. 2015) (“Essential functions generally are those that the employer's ‘judgment’ and ‘written [job] description’ prior to litigation deem essential.”); E.E.O.C. v. Womble Carlyle Sandridge & Rice, LLP, 2015 WL 3916760, at *5 (4th Cir. June 26, 2015) (“In determining whether a responsibility is an essential function of a job, we look to the general components of the job rather than to the employee's particular experience. That an employee may typically be assigned to only certain tasks of a multifaceted job ‘does not necessarily mean that those tasks to which she was not assigned are not essential.’”) (citations omitted); Majors, 714 F.3d at 534 (“[t]o determine whether a job function is essential, we look to the employer’s judgment, written job descriptions, the amount of time spent on the function, and the experience of those who previously or currently hold the position”) (quoting Rooney v. Koch Air, LLC, 410 F.3d 376, 382 (7th Cir.2005); Colón-Fontánez v. Municipality of San Juan, 660 F.3d 17 (1st Cir. 2011) (“An essential function is one that ‘bear[s] more than a marginal relationship to the job at issue.’”); Deane v. Pocono Med. Ctr., 142 F.3d 138 (3d Cir. 1998) (the ADA requires proof only of plaintiff’s ability to perform job’s essential functions, not all functions, in order to be “qualified”).

The employer has substantial leeway in determining a job’s ‘essential functions.’ “[C]onsideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.” See 42 U.S.C. § 12111(8). See also, e.g., Minnihan v. Mediacom Commc’ns Corp., 779 F.3d 803, 812 (8th Cir. 2015) (“for established public policy reasons, ‘[a]n employer does not concede that a job function is nonessential simply by voluntarily assuming the limited burden associated with a temporary accommodation, nor thereby acknowledge that the burden associated with a permanent accommodation would not be unduly onerous.’ … We have held that ‘to find otherwise would unacceptably punish employers from doing more than the ADA requires, and might discourage such an undertaking on the part of the employers.’”) (citations omitted); Robert v. Bd. of County Comm’rs of Brown County, 691 F.3d 1211, 1217 (10th Cir. 2012) (holding that the fact that the employer was willing to temporarily excuse an employee from performing certain duties of her job did not mean that those duties were nonessential). The court in Robert further held that “a plaintiff cannot use her employer’s tolerance of her impairment-based, ostensibly temporary nonperformance of essential duties as evidence that those duties are nonessential. To give weight to such a fact would perversely punish employers for going beyond the minimum standards of the ADA by providing additional accommodation to their employees.” See also Stephenson v. Pfizer, 49 F. Supp. 3d 434, 442 (M.D.N.C. 2014) (holding that the employer was not required to provide a driver for blind sales person where driving was an essential function of her position). In Stephenson, the court held that “the accommodations that Pfizer can be required to make under the ADA are not unlimited. Pfizer is ‘not required to reallocate essential functions,’ such as providing an assistant to perform some of the essential functions of a legally blind employee’s job. … Nor is Pfizer required to hire someone to do so.” But see Keith v. County of Oakland, 703 F.3d 918 (6th Cir. 2013) (reversing summary judgment in favor of employer on deaf individual’s ADA claim of discrimination based on the employer’s refusal to hire him for a lifeguard position). In Keith, addressing whether a deaf individual could perform the essential functions of a lifeguard position, the court acknowledged that the ability to communicate is an essential function of the position but, in light of the evidence presented by the plaintiffs’ experts, found an issue of fact regarding whether the plaintiff could perform the essential communication functions of the position.
The EEOC regulations provide that a job function may be considered essential for any of several reasons, including: the reason the position exists is to perform that function; there are a limited number of employees available to perform the function; and/or the function is highly specialized and the incumbent is hired due to his or her expertise or ability to perform that function. See 29 C.F.R. § 1630.2(n).

The frequency of a particular function, however, does not necessarily affect whether the function is “essential.” The EEOC regulations explain that a “function may be essential because the reason the position exists is to perform that function.” See 29 C.F.R. § 1630(n)(2)(i). The appendix to the EEOC’s regulations provides an instructive example: “although a firefighter may not regularly have to carry an unconscious adult out of a burning building, the consequence of failing to require the firefighter to perform this function would be serious.” 29 C.F.R. Part 1630 Appendix.

1. Absenteeism. Disciplining a disabled employee for excessive absenteeism can involve difficult decisions for an employer. Many courts will enforce absenteeism policies, even as applied to individuals who are disabled (as long as the absences are not protected under the FMLA). A number of courts have held that “common sense dictates that regular attendance is usually an essential function in most every employment setting; if one is not present, he is usually unable to perform his job.” EEOC v. Yellow Freight System, 253 F.3d 943 (7th Cir. 2001) (en banc). See also, e.g., E.E.O.C. v. Ford Motor Co., 782 F.3d 753, 762-63 (6th Cir. 2015) (“Regular, in-person attendance is an essential function—and a prerequisite to essential functions—of most jobs, especially the interactive ones. That’s the same rule that case law from around the country, the statute’s language, its regulations, and the EEOC’s guidance all point toward.”); Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233 (9th Cir. 2012) (“The common-sense notion that on-site regular attendance is an essential job function could hardly be more illustrative than in the context of a neo-natal nurse.”). In Samper, the court affirmed summary judgment in favor of employer because “plaintiff essentially asked for a reasonable accommodation that exempted her from an essential function [attendance].” See also Colón-Fontánez v. Municipality of San Juan, 660 F.3d 17 (1st Cir. 2011) (“This Court – as well as the majority of circuit courts – has recognized that ‘attendance is an essential function of any job’.”); Fisher v. Vizioncore, Inc., 429 F. App’x 613 (7th Cir. July 20, 2011) (affirming summary judgment in favor of employer where employee missed four of her first 10 days of work). In Fisher, the court found attendance to be an essential job function, noting “[t]o determine a job’s essential functions, we consider the employer’s judgment, any written job descriptions, the consequences of not requiring the incumbent to perform the function, and the work experience of any current incumbents in similar jobs.” See also Crowell v. Denver Health & Hosp. Auth., 2014 WL 3608698, at *8 (10th Cir. July 23, 2014) (“Although the ADA provides for part-time or modified work schedules as a reasonable accommodation, 42 U.S.C. § 12111(9)(B), an unpredictable, flexible schedule that would permit Crowell to leave work whenever she has a medical episode is unreasonable as a matter of law.”).

In Ford Motor Co., supra, the Sixth Circuit held that regular and predictable on-site attendance was an essential function of the plaintiff’s job as a resale buyer, especially in light of the interactive nature of the plaintiff’s job. The plaintiff’s job required teamwork, “meetings with suppliers and stampers and on-site availability to participate in … face-to-face interactions.” The court noted that the employer’s policy and practice were to require on-site attendance by all employees in the plaintiff’s job. Further, the court noted that the plaintiff’s own experience enforced this determination, since her “excessive absences caused her to make mistakes and caused strife in those around her. And she agreed that four of her ten primary duties could not be performed from home.” Id. at 763. The court also held that the plaintiff’s proposed accommodation of an “unpredictable, ad hoc telecommuting schedule was not reasonable because it would have removed at least one essential function from her job.” Id. at 767. Thus the court held that the plaintiff was unqualified as a matter of law and affirmed the lower court’s grant of summary judgment in favor of the employer. The court also clarified that it was not holding that “whatever the employer says
is essential necessarily becomes essential” and its ruling “does not require blind deference to the employer's judgement as to essential job functions.” Id. 765. However, “it does require granting summary judgment where an employer's judgment as to essential job functions—evidenced by the employer's words, policies, and practices and taking into account all relevant factors—is ‘job-related, uniformly-enforced, and consistent with business necessity.’” Id. at 765-66. Thus, while employers cannot assume that courts will find attendance to be an essential job function in every case, where an employer can support its attendance requirement through its words, policies and practices, as the employer in Ford did, it will be more likely to prevail in an argument that attendance is an essential function. See also Brenneman v. MedCentral Health Sys., 366 F.3d 412, 419 (6th Cir. 2004) (holding that pharmacy tech not qualified for his job due to his excessive absenteeism); Amadio v. Ford Motor Company, 238 F.3d 919 (7th Cir. 2001) (holding that failure to meet minimum attendance requirements rendered chronically absent factory worker not “qualified,” and finding that attendance is an essential function of assembly line worker position, even though attendance may not be an essential function of every possible employment position); Pickens v. Soo Line R.R. Co., 264 F.3d 773 (8th Cir. 2001) (finding that railroad conductor’s high absenteeism rate prevented him from performing essential functions of his job).

2. Impact of the FMLA on Employee Attendance Issues. Before disciplining or discharging FMLA-eligible employees for excessive absenteeism, employers must analyze whether any absences underlying their decision are protected by the FMLA. When an employer is considering the discharge of an employee for excessive absenteeism, the employer should determine whether the employee's non-FMLA protected absences exceed the amount previously allowed by the employer to nondisabled employees. Leave in excess of the leave allowed under either the employer's policy or the FMLA may still be needed as a “reasonable accommodation,” which will entail a fact-specific inquiry based on the employer’s needs and practices. See, e.g., Rogers v. New York University, 250 F. Supp. 2d 310 (S.D.N.Y. 2002) (holding that the ADA allows indeterminate amount of leave, short of undue hardship, as a reasonable accommodation). See also Smith v. Diffee Ford-Lincoln-Mercury, Inc., 298 F.3d 955 (10th Cir. 2002) (the court could not conclude that the plaintiff’s requested leave was unreasonable or unduly burdened the employer where the employee requested and took no more leave than the FMLA permitted). See the discussion below on requests for indefinite leave. If the employer overcomes these hurdles, it must also consider the danger of a workers' compensation retaliation lawsuit if the employee's absences are due or partially due to an on-the-job injury.

Qualification Standards. In two separate sections (defining discrimination and defenses) the ADA explains that employers may apply qualification standards that tend to exclude individuals with disabilities so long as those qualifications are “shown to be job-related … and consistent with business necessity.” 42 U.S.C. §§ 12112(b)(6) and 12113(a). See also EEOC Fact Sheet on Employment Tests and Selection Procedures, http://www.eeoc.gov/policy/docs/factemployment_procedures.html.

Many cases hold that the ADA plaintiff bears the initial burden of proving that he or she is “qualified.” See, e.g., EEOC v. Exxon Corp., 203 F.3d 871 (5th Cir. 2000); Koshinski v. Decatur Foundry, Inc., 177 F.3d 599 (7th Cir. 1999); Majors v. Gen. Elec. Co., 714 F.3d 527, 534 (7th Cir. 2013) (holding that the plaintiff “bears the burden of establishing that she could perform the essential functions of the position with or without reasonable accommodation, and can't meet this burden if the only accommodations suggested were unreasonable”). In Majors, the court held that the plaintiff’s suggested accommodation — providing another person to perform an essential function of the job she wanted (occasionally lifting more than 20 pounds) was, as a matter of law, not reasonable. Accordingly, the employer was not required to show the accommodation would create an undue hardship. Specifically, the court held, “Ms. Majors hasn't pointed to evidence that could support a finding that she was a qualified individual; without that, she can't show that GE failed to provide a reasonable accommodation.” 714 F.3d at 535 (citations omitted). Some decisions, as discussed below, then require the employer to justify certain exclusionary qualification standards under the “job-related and consistent with business necessity” standard.
In *EEOC v. Exxon Corp.*, 203 F.3d 871 (5th Cir. 2000), the court held that employers may impose safety-based qualification standards for safety-sensitive jobs, even if that standard barred persons who have undergone substance abuse treatment. Departing from EEOC Guidance asserting that safety requirements tending to screen out individuals with disabilities must be justified only with a showing of a “direct threat” to safety, the court further held that the qualification standards, if uniformly applied, could be justified as a business necessity and were not subject to the more restrictive and individualized “direct threat to safety” defense (discussed below). See also *Mathews v. Denver Post*, 263 F.3d 1164 (10th Cir. 2001) (finding that grand mal seizures made it dangerous for employee to work with machinery, rendering him not qualified for his position); *Waddell v. Valley Forge Dental Associates, Inc.*, 276 F.3d 1275 (11th Cir. 2001) (holding that dental hygienist with Human Immunodeficiency Virus (HIV) was not “qualified” due to safety risk from on-the-job blood to blood contact from sticks or cuts during treatment where the risk could not be eliminated by reasonable accommodation).

### B. Effect of Claiming Social Security Disability Benefits on “Qualified” Status

The Supreme Court has clarified that a person who files for or receives Social Security Disability Insurance (SSDI), and certifies that he/she is totally “disabled,” is not automatically disqualified from maintaining a suit for disability discrimination under the ADA. See *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999). According to the Court, an individual receiving SSDI benefits and claiming to be a qualified individual with a disability under ADA must come forward with evidence to explain why receipt of SSDI benefits is consistent with being a qualified individual with a disability under ADA. See also *EEOC v. Stowe-Pharr Mills, Inc.*, 216 F.3d 373 (4th Cir. 2000) (reinstating suit by SSDI recipient, holding that the plaintiff “is required to proffer a sufficient explanation for any apparent contradiction between the two claims”). But see *Opsteen v. Keller Structures, Inc.*, 408 F.3d 390 (7th Cir. 2005) (holding that plaintiff who provided medical documentation of a serious, disabling and permanent condition in support of his claim for Social Security benefits could not proceed with his ADA claim where he could not explain the inconsistencies between his assertions in the two cases).

The EEOC also provides in its Enforcement Guidance No. 915.002 that representations made in connection with an application for disability benefits should not be an automatic bar to an ADA claim. The EEOC maintains that the ADA definition of “qualified individual with a disability” differs from the definitions used in the Social Security Administration (SSA), state workers’ compensation laws, disability insurance plans, and other disability benefits programs. See *EEOC Enforcement Guidance* at: http://www.eeoc.gov/policy/docs/qidreps.html.

### C. Impact of Safety Concerns on Qualification Determination

If a disability renders particular employment dangerous to the disabled employee or to others, is the disabled employee “qualified”? Although some cases allow for uniformly applied, safety-based qualification standards (*EEOC v. Exxon Corp.*, 203 F.3d 871 (5th Cir. 2000), holding that employers may impose safety-based qualification standards for safety-sensitive jobs without demonstrating “direct threat,” even if that standard bars persons who may be protected under ADA), the decision to exclude an employee as a threat to safety must often be justified on an objective, *individualized* basis. See, e.g., *Kroll v. White Lake Ambulance Auth.*, 763 F.3d 619, 626 (6th Cir. 2014) (“In determining whether a direct threat exists, the court should consider: (1) [t]he duration of the risk; (2) [t]he nature and severity of the potential harm; (3) [t]he likelihood that the potential harm will occur; and (4) [t]he imminence of the potential harm.”) (citing EEOC regulations); *Branham v. Snow*, 392 F.3d 896 (7th Cir. 2004) (allowing insulin-dependent employee with diabetes to proceed with Rehabilitation Act claim based on being excluded from investigator position, finding that the employer’s fear that employee would suffer incapacitation on the job and place himself and others at risk was not supported with a showing of significant risk of harm); *Kapche v. San Antonio*, 304 F.3d 493 (5th Cir. 2002) (stating that police department should evaluate independently, rather than as a per se rule, whether being insulin-dependent prevents a diabetic from performing the essential functions of his position safely).

To exclude an employee or applicant, the ADA requires proof of “direct threat,” meaning:
a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated by reasonable accommodation. The determination that an individual with a disability poses a direct threat should be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

29 C.F.R. § 1630.2(r). This is a difficult burden for an employer to meet. See, e.g., Kroll, 763 F.3d at *627 (stating that while the court has not determined precisely what this regulation requires, “[f]or the regulation to have any meaning … an employer must do more than follow its own lay intuition regarding the threat posed by an employee’s potential medical condition” and reversing summary judgment in favor of the employer where the evidence suggested the director ordered plaintiff to undergo psychological counseling based on his moral concerns about her sexual relationships); Hoey v. Cnty. of Nassau, 2014 WL 4656223, at *6 (E.D.N.Y. Sept. 12, 2014) (quoting EEOC guidelines and holding, based on the fact that “the only evidence of record concerning plaintiff’s condition were the findings of … an NCPD psychiatrist, who determined that ‘at this time, there is no psychiatric contraindication to PO’s returning to full duty status with weapons,’” the employer’s direct threat argument failed); Shelton v. City of Cincinnati, 2012 WL 5385601, at *12 (S.D. Ohio Nov. 1, 2012) (holding that an employer cannot deny an employment opportunity to an individual with a disability because of a slightly increased risk of harm, stating that “[t]he burden is on the employer to show that the plaintiff is not qualified to perform the requirements of a particular job because he poses a direct threat to the health or safety of others.”). In Shelton, the court found a question of fact regarding whether a diabetic plaintiff posed a direct threat to his own safety or that of others such that he was not qualified for a full duty firefighter position. See also Rizzo v. Children’s World Learning Ctrs., Inc., 213 F.3d 209 (5th Cir. 2000) (en banc) (holding, in a pre-ADAAA case, that child care center failed to prove that driver with hearing impairment and safe driving history posed a direct threat to the children in the van, and stating that the burden of showing she could not safely transport the children rests on employer).

1. Safety Threats to Others and to the Individual With a Disability? EEOC guidance extended the “direct threat” defense to the safety of not only others, but also the individual with a disability. The Supreme Court has held that the ADA does not require that employees be placed in jobs that pose a threat to their own safety or health. See Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73 (2002). The Court’s decision resolved a challenge to an EEOC regulation interpreting the ADA that requires that employees not pose a direct threat to their own safety or health or to the safety or health of others. An employer’s judgment that an individual would be a threat to himself or others if placed in particular position must be based on specific medical findings.

On remand, however, the Ninth Circuit held that the employer may not have met the requirements for asserting a direct threat defense because the employer only consulted with “generalists,” and did not consult with specialists specifically familiar with chemical exposure and its effect on the liver. See Echazabal v. Chevron U.S.A., Inc., 336 F.3d 1023 (9th Cir. 2003). In other words, according to the Ninth Circuit, the employer did not properly assess the nature of the potential harm. The dissent in the case commented that requiring awareness of cutting-edge medical research, rather than a sound medical analysis, placed too great of a burden on the employer. See also Ollie v. Titan Tire Corp., 336 F.3d 680 (8th Cir. 2003) (holding that employer cannot refuse to hire applicant with asthma based on assumption that exposure to dust and fumes would render individual unable to perform the job).

2. Significant Risk of Substantial Harm. There must be a “high probability” of substantial harm if the person was employed; the determination of the risk cannot be based on “mere speculation.” See The Americans with Disabilities Act: A Primer for Small Business, http://www.eeoc.gov/eeoc/publications/adahandbook.cfm#safetyconcerns. The following four factors should be considered in identifying the risk: the duration of the risk; the nature and severity of the potential harm; the likelihood the potential harm will occur; and the imminence of the potential harm. Id. See also, e.g., Gaus v. Norfolk S. Ry. Co., 2011 WL 4527359 (W.D. Pa. Sept. 28, 2011) (discussing
the four factors and holding that the employer failed to establish that the plaintiff posed direct threat). The assessment of the risk must be based on objective medical or other evidence related to a particular individual. This may include: input from the individual with a disability; the experience of this individual in previous jobs; or documentation from medical doctors or others who have expertise in the disability involved and/or direct knowledge of the individual with a disability.

3. Whether the Risk can be Eliminated by Reasonable Accommodation. To exclude an applicant or employee on “safety” grounds, an employer must identify a specific risk that the individual with the disability poses. Making such a determination requires a fact-specific, individualized inquiry resulting in a well-informed judgment grounded in a careful and open-minded weighing of the risks and possible alternatives. See Hall v. United States Postal Service, 857 F.2d 1073 (6th Cir. 1988); Waddell v. Valley Forge Dental Associates, Inc., 276 F.3d 1275 (11th Cir. 2001) (holding that safety risk for dental hygienist with HIV stemming from on-the-job blood to blood contact from sticks or cuts during treatment could not be eliminated by reasonable accommodation).

4. Exclusion Due to Other Federal Safety Regulations. If the alleged discriminatory action was taken in compliance with another federal law or regulation, the employer may offer its obligation to comply with the conflicting standard as a defense. See 29 C.F.R. Part 1630 Appendix, § 1630.15(e). The EEOC takes the position that the employer’s defense of a conflicting federal requirement or regulation may be rebutted by a showing of pretext, or by showing that the federal standard did not require the discriminatory action, or that there was a nonexclusionary means to comply with the standard that would not conflict with the ADA. See also Tate v. Farmland Industries, Inc., 268 F.3d 989 (10th Cir. 2001) (holding that driver taking antiseizure medication was not “qualified” for position in light of U.S. DOT criteria regarding drivers taking antiseizure medication).

5. Human Immunodeficiency Virus/Acquired Immunodeficiency Disorder (HIV/AIDS). Under the ADAAA and revised EEOC regulations, it is likely that individuals with HIV/AIDS will be considered to have a disability. The EEOC regulations state that under the regulations’ revised analysis, it should easily be concluded that “the following types of impairments will, at a minimum, substantially limit the major life activities indicated: … Human Immunodeficiency Virus (HIV) infection substantially limits immune function.” 29 C.F.R. 1630.2(j)(3)(iii). Additionally, the Supreme Court has held that one individual’s asymptomatic HIV is a disability under the ADA. See Bragdon v. Abbott, 524 U.S. 624 (1998). In another case involving an HIV-positive plaintiff, an appeals court confirmed that the ADA permits an action for disability-based harassment under a hostile environment theory. See Flowers v. Southern Regional Physician Servs., Inc., 247 F.3d 229 (5th Cir. 2001). Accordingly, litigation involving employees with HIV/AIDS will more likely address reasonable accommodation issues rather than whether the employee is disabled.

Employers should be aware that suspending or discharging an employee because the employee’s HIV or AIDS infection poses a significant risk to the employee or co-workers is a difficult standard to meet. Courts are reluctant to find the risk of co-worker infection to be a legitimate, nondiscriminatory reason for discharge unless the employer can demonstrate from objective evidence that there is a clear risk that HIV or AIDS would be transmitted by one or more of the limited medically proven methods of transmission. Cases allowing exclusions of employees with HIV/AIDS on safety-related grounds have generally been limited to jobs involving invasive surgery or blood-to-blood contact. See, e.g., Waddell v. Valley Forge Dental Associates, Inc., 276 F.3d 1275 (11th Cir. 2001) (dental hygienist with HIV was risk to safety due to on-the-job blood to blood contact from sticks or cuts during treatment; risk could not be eliminated by reasonable accommodation). Any decision to exclude an employee must still be based on objective medical evidence. In addition, as with medical information on the person’s condition itself, information on individual’s medication must be kept confidential.

Other employees’ (and customers’) attitudes and concerns compound the problem of managing HIV/AIDS. Generally, “customer preference” is not a valid defense to denial of a job under any

6. Analysis of Direct Threat Situations. Employers faced with an employee or applicant whose disability could pose an objective (not just imagined or suspected) danger to themselves in the workplace should take the following steps:

a. Evaluate all situations on a case-by-case basis;

b. Inform the employee of the health or safety risks of the job and get the employee’s input on those risks;

c. Determine whether there are any reasonable accommodations that can be made to reduce the risks involved;

d. Make sure the individual can perform the essential functions of the job; and

e. Consider whether the individual is a threat to others or only to himself or herself.

VI. THEORIES OF DISABILITY DISCRIMINATION

A. Disparate Treatment. The “burden shifting” method of proof in a disparate treatment case is applicable unless there is direct evidence of discrimination. Under the burden shifting method, ADA plaintiffs demonstrate disparate treatment by establishing a prima facie claim just as under Title VII cases. The claim survives if the plaintiff can successfully rebut the employer’s legitimate business reason for the adverse employment action and show the explanation to be a pretext for discrimination. See, e.g., Robinson v. Dibble, 613 F. App’x 9 (2d Cir. 2015) (affirming summary judgment in favor of the employer on the plaintiff’s ADA disparate treatment claim since the plaintiff failed to present evidence from which a reasonable jury could conclude that the employer’s legitimate, nondiscriminatory reason for her termination – that the project she was working on was reaching completion and the company was carrying out layoffs due to reduced staffing – was pretextual; the plaintiff presented no evidence that the individuals who allegedly had discriminatory animus toward her played any role in her termination); Cody v. Prairie Ethanol, LLC, 763 F.3d 992 (8th Cir. 2014) (affirming summary judgment in favor of employer where plaintiff failed to show that the employer’s reason for discharging him (poor performance) was pretext, noting that temporal proximity between his request for additional light duty accommodation and his termination was not sufficient, and finding that nondisabled employee with performance deficiencies who was not discharged was not similarly situated because his performance deficiencies were not of the same or comparable seriousness); Withers v. Johnson, 763 F.3d 998 (8th Cir. 2014) (affirming summary judgment in favor of employer where plaintiff failed to show that the employer’s reason for discharging him (violation of the county’s policy that he immediately provide his supervisor with his medical release) was pretext for discrimination).

B. Manner of Discrimination. Under the ADA, “no covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” See 42 U.S.C. § 12112.

The ADA’s nondiscrimination prohibitions include disability-based harassment under a “hostile environment” theory. In Shaver v. Independent Stave Co., 350 F.3d 716 (8th Cir. 2003), Fox v. General Motors Corp., 247 F.3d 169 (4th Cir. 2001), and Flowers v. Southern Regional Physician Services, Inc., 247 F.3d 229 (5th Cir. 2001), the Courts of Appeals, relying on case law interpreting Title VII, held that such claims are available under the ADA. See also Robinson v. Dibble, 613 F. App’x 9 (2d Cir. 2015) (affirming summary judgment on the plaintiff’s hostile work environment claim, finding “evidence of crude and offensive comments directed at her gender or mental health issues that were delivered sporadically by coworkers … while condemnable, did not rise to the level of creating an abusive and hostile workplace environment”); Mannie v. Potter, 394 F.3d 977 (7th Cir. 2005) (as-
assuming that hostile work environment is cognizable under ADA and that Title VII standards govern, court held that schizophrenic employee was not subjected to hostile work environment, finding that allegations that supervisor made derogatory comments about her mental condition to others and that co-workers intentionally offended her by wearing tight-fitting clothing were minor and isolated; plaintiff failed to demonstrate that behavior of co-workers and supervisors altered the terms or conditions of her employment).

C. Limiting, Segregating, Classifying. ADA discrimination includes “limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee.” See 42 U.S.C. § 12112(b)(1). Under the ADA, discrimination also includes “excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.” See 42 U.S.C. § 12112(b)(4).

Comparison with Others. Courts have rejected attempts to challenge employer conduct by comparing treatment of disabled employees with other disabled employees. For example, an employee cannot establish a claim under the ADA by comparing his or her treatment to similarly situated disabled employees. See Myers v. Hose, 50 F.3d 278 (4th Cir. 1995), superceded by statute on other grounds as stated in Gile v. United Airlines, Inc., 95 F.3d 492 (7th Cir. 1996). Nothing in the ADA or the Rehabilitation Act requires that any benefit extended to one category of disabled individuals also be extended to all other categories of disabled individuals.

D. Medical Examinations and Inquiries. ADA discrimination includes requiring medical examinations or making inquiries about disabilities in certain circumstances. See 42 U.S.C. § 12112(d). The ADA severely restricts medical examinations and mandates responsible and confidential treatment of employees' medical information. These obligations are outlined in the EEOC’s Enforcement Guidance on Pre-Employment Medical Inquiries Under the ADA, http://www.eeoc.gov/policy/docs/pre-emp.html, and its Enforcement Guidance on Disability-Related Inquiries and Medical Examinations Of Employees Under the ADA (July 26, 2000), http://www.eeoc.gov/policy/docs/guidance-inquiries.html. As a practical matter, the fewer people who know about an employee's medical condition, the fewer the opportunities for improper disclosure and improper action based on the employee's medical condition. The ADA requires that any medical information be collected and maintained on separate forms and in separate medical files. See 42 U.S.C. § 12112(d)(3)(B). Employers should not place any medical information in an employee's nonmedical personnel file.

In assessing the wisdom of medical inquiries of employees and applicants, employers therefore need to ask themselves: Is it legal? and Is it worth it?

Generally, the ADA: (1) forbids pre-employment medical inquiries; (2) permits post-offer medical inquiries for all similarly situated employees; and (3) permits medical inquiries of employees incident to requests for reasonable accommodations or job-related inquiries to resolve objective concerns over workplace safety and health.

E. Disparate Impact. When a “facially neutral” practice has a disproportionate impact on a protected group and is not sufficiently job-related, it is said to have a disparate impact. See Griggs v. Duke Power Co., 401 U.S. 424 (1971).

While not common, disparate impact claims are possible under ADA. Under the ADA, prohibited discrimination includes: “[U]tilizing standards, criteria, or methods of administration (a) that have the effect of discrimination on the basis of disability, or (b) that perpetuate the discrimination of others who are subject to common administrative control.” See 42 U.S.C. § 12112(b)(3). It also includes:

[U]sing qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.
42 U.S.C. § 12112(b)(6). It may be a defense to a charge of discrimination under the ADA that the use of standards, tests, or selection criteria that tend to screen out or otherwise deny a job or benefit to a disabled individual is job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation.

F. Retaliation. As with all nondiscrimination laws, an individual may assert claims for retaliation for good faith exercise of rights under the ADA. See Shellenberger v. Summit Bancorp Inc., 318 F.3d 183 (3d Cir. 2003) (holding that the absence of a disability does not translate into absence of protection from anti-retaliation provisions of ADA); Withers v. Johnson, 763 F.3d 998, 1004-5 (8th Cir. 2014) (noting that it treats retaliation claims under the ADA and the Rehabilitation Act interchangeably but finding the plaintiff failed to present evidence that retaliation was the true motive for his discharge; the plaintiff mentioned the “temporal proximity of his leave to his termination, but timing alone is not sufficient to create a genuine issue of fact, particularly given that [the employer’s] proffered reason for the termination arose in the same window of time”). See also Smith v. Miami-Dade Cnty., 2015 WL 3635417, at *4 (11th Cir. June 12, 2015) (affirming dismissal of plaintiff’s claim that former employer filed a counterclaim against her in retaliation for her ADA complaint, holding that a plaintiff “must allege that the lawsuit or counterclaim was filed with a retaliatory motive and was lacking a reasonable basis in fact or law,” and finding that the plaintiff failed to meet that requirement).

Employees may claim retaliation for engaging in protected activity under ADA, such as requesting a reasonable accommodation, even if the requested accommodation was not reasonable. See, e.g., Rhoads v. Federal Deposit Insurance Corp., 257 F.3d 373 (4th Cir. 2001). The Seventh Circuit, however, has held that compensatory and punitive damages are not available for a retaliation claim under the ADA. See Kramer v. Banc of America Securities, LLC, 355 F.3d 961 (7th Cir. 2004). The court held that remedies for ADA retaliation are limited to those found in 42 U.S.C. § 2000e-5(g)(1) (equitable remedies of back pay, reinstatement, and injunctive relief). The court based its determination on the plain language of the 1991 Civil Rights Act and did not examine the legislative history of the Act. The court also held that because the plaintiff was not entitled to compensatory or punitive damages, she had no right to a jury trial on her retaliation claim, noting, “There is no right to a jury where the only remedies sought (or available) are equitable.”

G. Individual Liability Under the ADA. Several federal courts have held that supervisors cannot be sued in their individual capacity under the ADA or the Rehabilitation Act of 1973. See Butler v. City of Prairie Village, 172 F.3d 736 (10th Cir. 1999); Silk v. City of Chicago, 194 F.3d 788 (7th Cir. 1999); Reno v. Baird, 957 P.2d 1333 (1998). See also Albright v. Advan, Inc., 490 F.3d 826 (11th Cir. 2007) (Individuals are not subject to liability under the anti-retaliation provisions of the ADA that address employment discrimination, even though earlier decisions held individuals could be sued for retaliation under the ADA’s public services provision; the definition of employer is similar to that in Title VII which does not allow individual liability for retaliation.). Parallel state or local laws, however, may impose individual liability.

VII. THE “REASONABLE ACCOMMODATION” CONCEPT

A. General “Reasonable Accommodation” Principles. The ADA requires employers to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship. See 42 U.S.C. § 12112(b)(5)(A). The ADA also prohibits employers from denying employment opportunities to a job applicant who is an otherwise qualified individual with a disability if the denial is based on the need to provide a reasonable accommodation. See 42 U.S.C. § 12112(b)(5)(B). Accommodations are not tantamount to paternalism or abandoning performance expectations to which other employees are held. Accommodations are steps designed to enable the otherwise qualified individual to perform the essential functions of the job. The accommodations obligation also means employers cannot choose a nondisabled applicant over a disabled applicant simply because the disabled applicant needs a reasonable accommodation to fulfill the require-
ments of the position. In fact, employers must notify applicants of the obligation to make reasonable accommodations. Refusal to attempt “reasonable accommodations” for an existing employee, if geared toward forcing the employee to quit, may constitute constructive discharge. Moreover, refusing to try in good faith to make a reasonable accommodation (or discuss reasonable accommodations) may allow an aggrieved employee to seek higher levels of damages in litigation.

Whether an accommodation is “reasonable” depends largely on: (1) whether it is effective (meaning it actually would enable the individual to perform the essential functions of the job); and (2) whether the employer can demonstrate that making the accommodation would create an undue hardship, in view of cost and degree of disruption associated with the accommodation, compared with the size and type of business, financial strength, and structure of operations. As discussed below, employers bear the burden of proving “undue hardship” with objective evidence and not speculation.


The Guidance discusses the interactive process for arriving at an accommodation, choosing among accommodations, addressing the concerns and questions of others, the employer's duties, and the employee's duties. It also addresses hardship defense considerations and rejects such theories as cost-benefit analysis, meaning that the accommodations provided for an organization's most prized employee will become the standard for all employees requesting the accommodation. Finally, it discusses particular types of accommodations, such as leave, reassignments, altering policies, and making facilities and equipment accessible.

B. Knowledge of Condition. The ADA “does not require clairvoyance.” See Hedberg v. Indiana Bell Tel. Co., 47 F.3d 928, 933 (7th Cir. 1995). An employer who is unaware of an employee's disability generally cannot be held liable for disability discrimination even when symptoms of a disabling condition may be present. See, e.g., Amadio v. Ford Motor Co., 238 F.3d 919 (7th Cir. 2001) (holding that employee cannot wait until time of termination to request accommodation and disclose disability); Morisky v. Broward County, 80 F.3d 445 (11th Cir. 1996) (holding that an employer cannot be liable under ADA for firing employee when it had no knowledge of the disability); Rogers v. CH2M Hill, 18 F. Supp. 2d 1328 (M.D. Ala. 1998) (“[a]n employer would probably never be held to have imputed knowledge of a depression or an anxiety disorder of its employee”). The EEOC Guidance on Reasonable Accommodations, discussed infra, also encourages individuals needing an accommodation to inform their employer of their disability.

C. Reasonable Accommodation Process.

1. Employee's Responsibility to Request Accommodation. Generally, the individual with a disability must request a reasonable accommodation. See, e.g., Preddie v. Bartholomew Consol. Sch. Corp., 799 F.3d 806, 813 (7th Cir. 2015) (“a plaintiff typically must request an accommodation for his disability in order to claim that he was improperly denied an accommodation under the ADA”) (citing Fleishman v. Cont'l Cas. Co., 698 F.3d 598, 608 (7th Cir. 2012) (“[T]he standard rule is that a plaintiff must normally request an accommodation before liability under the ADA attaches....”)). The EEOC has taken the position that an individual must merely show that an accommodation is “effective” (that it would enable the individual to perform the job) in order to be “reasonable.” The court in Reed v. Lepage Bakeries, Inc., 244 F.3d 254 (1st Cir. 2001) disagreed, holding:

In order to prove “reasonable accommodation,” a plaintiff needs to show not only that the proposed accommodation would enable her to perform the essential functions of her job, but also that, at least on the face of things, it is feasible for the employer under the circumstances. If the plaintiff succeeds in carrying this burden, the defendant then has the opportunity to show that the proposed accommodation is not as feasible as it appears, but rather that there are further costs to be considered, certain devils in the details.
See also Hoskins v. Oakland Cnty. Sheriff’s Dept., 227 F.3d 719 (6th Cir. 2000); Willis v. Conopco, Inc., 108 F.3d 282 (11th Cir. 1997). Other courts have imposed similar requirements. For example, in Keith v. County of Oakland, 703 F.3d 918, 927 (6th Cir. 2013), the Sixth Circuit held that it is the plaintiff’s burden to propose an accommodation that is objectively reasonable, meaning one that is efficacious and for which the benefit is proportionate to its costs. See also Jakubowski v. Christ Hosp., Inc., 627 F.3d 195 (6th Cir. 2010) (noting that the plaintiff (who suffered from Asperger’s Disorder) had the burden of proposing an accommodation and proving that it was reasonable; the plaintiff’s proposed accommodation of “knowledge and understanding” on the part of the medical staff did not address a key obstacle preventing him from performing a necessary function of a medical resident, that of effective communication).

To request a reasonable accommodation, the individual need not necessarily mention the ADA or the term “reasonable accommodation.” See, e.g., Taylor v. Phoenixville School District, 184 F.3d 296 (3d Cir. 1999).

2. Interactive Process. According to EEOC regulations, once the employee has requested an accommodation, the employer may need to initiate an informal, interactive process with the individual needing an accommodation in order to determine the appropriate reasonable accommodation. See 29 C.F.R. § 1630.2(o)(3). See also Jakubowski, supra, 627 F.3d at 203 (noting that the employer is not required to make a counter proposal after rejecting the employee’s proposed accommodation; however, doing so may be additional evidence of the employer’s good faith efforts to accommodate the employee). In Jakubowski the court held that because the employer met with the plaintiff, considered his proposed accommodations, informed him why they were unreasonable, offered assistance in finding a new pathology residency, and never hindered the process along the way, there was no dispute that it participated in the interactive accommodation process in good faith. “If an employer takes that step and offers a reasonable counter accommodation, the employee cannot demand a different accommodation.” Id. at 203 (citing Hedrick v. W. Reserve Care Sys., 355 F.3d 444, 457 (6th Cir. 2004)).

There is a split of authority regarding whether the interactive process is mandatory and, if so, whether failing to engage in it creates an independent cause of action. See, e.g. Stern v. St. Anthony’s Health Ctr., 788 F.3d 276, 292 (7th Cir. 2015) (finding interactive process “mandated” by the ADA but holding that “[f]ailure of the interactive process is not an independent basis for liability under the ADA.” (citing Spurling v. C & M Fine Pack, Inc., 739 F.3d 1055, 1059 (7th Cir. 2014)). The court stated that an employer’s failure to engage in the interactive process is actionable if it prevents identification of an appropriate accommodation for a qualified individual. In Stern, the plaintiff “failed to produce adequate evidence that he is a qualified individual, capable of performing the essential functions of his job with or without reasonable accommodation. Therefore, this case falls into the category of cases in which an employer’s alleged failure to adequately engage in the interactive process is immaterial.” Id. at 293.

The court also noted that while it was troubled by the hospital’s failure to meaningfully engage in the interactive process, it was appropriate for the employer to consider the sensitive nature of the employee’s position when evaluating potential accommodations. The court noted the plaintiff’s position required him to be solely responsible for the clinical treatment of high-risk patients, most of whom were children. In light of the plaintiff’s expert’s report and the concerns of the hospital management, the court thought it fair to surmise that “few parents would volunteer their troubled children to act as guinea pigs for testing the efficacy of proposed accommodations such as note-taking or reduced responsibilities. We have held that an employer does not have to wait for a disabled employee in a sensitive position to injure someone before it can evaluate the employee’s fitness for duty, and, once evaluated, the employer is ‘entitled to rely on a physician’s recommendation’ that the employee is not able to safely perform an essential function of his job.” Id. at 294. See also Minnihan v. Mediacom Commc’ns Corp., 779 F.3d 803, 813 (8th Cir. 2015) (“There is no per se liability under the ADA if an employer fails to engage in the interactive process.”); Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc., 439 F.3d 894 (8th Cir. 2006)
(holding that a claim based on failure to engage in the accommodations process depends in part on whether the employee can show that he or she could have been accommodated but for the employer’s alleged lack of good faith in participating in the process); Breitfelder v. Leis, 151 F. App’x 379 (6th Cir. Oct. 7, 2005) (holding that even if employer failed to engage in interactive process, the employer did not violate the ADA because the plaintiff’s disability could not be reasonably accommodated); Rehling v. City of Chicago, 207 F.3d 1009 (7th Cir. 2000) (“the interactive process the ADA foresees is not an end in itself; rather it is a means for determining what reasonable accommodations are available” and plaintiff therefore must prove that employer actually engaged in behavior that resulted in failure to identify an appropriate accommodation); Smith v. Midland Brake, 180 F.3d 1154, 1172 (10th Cir. Kan. 1999) (“The obligation to engage in an interactive process is inherent in the statutory obligation to offer a reasonable accommodation to an otherwise qualified disabled employee.”). The court in Smith also noted, however, that even if the employer failed to fulfill its interactive obligations, the plaintiff would not be entitled to recovery unless he could show that a reasonable accommodation was possible. See also Tobin v. Liberty Mutual Insurance Co., 433 F.3d 100 (1st Cir. 2005) (finding that employer was not liable for failing to engage in the interactive process to determine an appropriate reasonable accommodation for the plaintiff where the employer offered the plaintiff several accommodations, but the plaintiff ultimately was unable to meet his sales goals and was discharged for poor performance). But see Keith, 703 F.3d at 930 (reversing summary judgment in favor of employer on deaf applicant’s claim of ADA discrimination based on employer’s failure to hire him as a lifeguard; the district court erred in finding no reasonable accommodation was possible, thus, on remand the court was to consider whether the employer violated the ADAs individualized inquiry mandate by relying on the advice and opinions of third parties and whether it failed to engage in the interactive process).

Additionally, some courts have held that an employee’s unilateral withdrawal from the interactive process is fatal to a failure to accommodate claim. See Gordon v. Acosta Sales & Mktg., Inc., 2015 WL 4878434, at *3 (5th Cir. Aug. 14, 2015) (“we need not address whether [the employer] provided a reasonable accommodation, because we conclude that [the plaintiff’s] unilateral withdrawal from the interactive process is fatal to his claim”; where the plaintiff ended the interactive process by resigning within hours of the employer’s accommodation offer instead of responding to the offer or explaining why an alternative accommodation was necessary “no reasonable jury could find that [the plaintiff] was not responsible for the breakdown in the informal, interactive process. Accordingly, summary judgment was properly granted to [the employer] on [the plaintiff’s] reasonable accommodation claim.”); Ward v. McDonald, 762 F.3d 24, 34 (D.C. Cir. Aug. 12, 2014) (affirming summary judgment on plaintiff’s claim employer failed to accommodate her request to work from home where the plaintiff resigned instead of providing additional information requested by employer, holding that “[n]o reasonable juror could have found that the [the employer] denied [plaintiff’s] request for an accommodation … because [plaintiff] abandoned the interactive process before the [the employer] had the information it needed to determine the appropriate accommodation”).

3. Suggested Problem Solving Approach to Accommodation Request. When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should:

- Analyze the particular job involved and determine its purpose and essential functions.
- Consult with the disabled individual to ascertain the precise job-related limitations imposed by the individual’s disability and how those limitations could be overcome with a reasonable accommodation.
- In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; when necessary consult with medical or other experts.
• Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer. Although the employee’s preference for a type of accommodation should be considered, the employer is not required to implement the employee’s preferred accommodation and may implement an alternative reasonable accommodation. See, e.g., Noll v. Int’l Bus. Machines Corp., 787 F.3d 89, 95 (2d Cir. 2015) (“employers are not required to provide a perfect accommodation or the very accommodation most strongly preferred by the employee”; rejecting deaf employee’s argument that employer failed to reasonably accommodate by denying his request that all intranet videos be captioned and all audio files have transcripts at the time they are posted, where the employer gave the employee access to ASL interpreters who provided real-time translation services for intranet content as well as for live meetings); Swanson v. Vill. of Flossmoor, 794 F.3d 820, 827 (7th Cir. 2015) (rejecting plaintiff’s argument that the employer’s alleged refusal to consider providing him “light duty” work constituted a failure to engage in the ADA’s interactive process, holding, “the ADA does not entitle a disabled employee to the accommodation of his choice. Rather, the law entitles him to a reasonable accommodation in view of his limitations and his employer’s needs. Accordingly, permitting an employee to use paid leave can constitute a reasonable accommodation.”).

• Employers should consider documenting the stages of the accommodation process, including requests and discussions, and tracking effectiveness of the accommodations. In situations where accommodations are being handled properly, this helps in creating a repository of knowledge on the particular case, and an institutional memory.

• Employers should also keep in mind that the evolving nature of an individual’s disability, job duties, and functional limitations requires ongoing evaluation, ideally in consultation with the disabled employee, of what accommodations are effective, needed, and reasonable. These changes, along with changes in both technology and the organization’s ability to implement accommodations, are “moving targets” in need of constant re-evaluation.

D. An Employer’s Right to Inquire About an Employee’s Medical Condition and Require Documentation Supporting a Claimed Disability. An employer “before providing reasonable accommodation, may require that the individual with a disability provide documentation of the need for accommodation.” See Miller v. National Casualty Co., 61 F.3d 627 (8th Cir. 1995). Medical information acquired in this process must be kept confidential. The EEOC takes the position that the ADA does not prevent an employer from requiring an employee to go to an appropriate health care professional of the employer’s choice if the employee provides insufficient documentation from his or her treating physician (or other health care professional) to substantiate that she or he has an ADA disability and needs a reasonable accommodation. See EEOC Enforcement Guidance on Disability-Related Inquiries, http://www.eeoc.gov/policy/docs/guidance-inquiries.html. The Guidance also states that if an employee provides insufficient documentation in response to the employer’s initial request, the employer should explain why the documentation is insufficient and allow the employee an opportunity to provide the missing information in a timely manner. Further, the EEOC encourages the employer to consider consulting with the employee’s doctor (with the employee’s consent) before requiring the employee to go to a health care professional of its choice.

An employee’s failure to respond to an employer’s legitimate inquiries is a basis for barring recovery in an ADA suit. For example, in Beck v. University of Wisconsin Board of Regents, 75 F.3d 1130 (7th Cir. 1996), an employee’s failure to provide medical information or to sign a medical release permitting the employer to evaluate what accommodations would allow her to perform the essential functions of her position precluded liability against the employer for failure to provide reasonable accommodation.

E. Nature and Extent of the Obligation of “Reasonable Accommodation.” Under the ADA, the term “reasonable accommodation” may include: making existing facilities used by employees readily accessible to and usable by individuals with disabilities; job restructuring; part-time or modified
work schedules; reassignment to a vacant position; acquisition or modification of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities. See 42 U.S.C. § 12111(9).

The EEOC’s revised ADA regulations state that the term reasonable accommodation means:

- 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
- 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 an individual with a disability who is qualified to perform the essential functions of that position; or
- 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.

29 C.F.R. § 1630.2(o)(1)(i-iii). Additionally, the regulations provide that reasonable accommodation may include but is not limited to:

- Making existing facilities used by employees readily accessible to and usable by individuals with disabilities;
- Job restructuring;
- Part-time or modified work schedules;
- Reassignment to a vacant position;
- Acquisition or modifications of equipment or devices;
- Appropriate adjustment or modifications of examinations, training materials, or policies;
- The provision of qualified readers or interpreters; and
- Other similar accommodations for individuals with disabilities.

29 C.F.R. § 1630.2(o)(2)(i-ii). With regard to reassignment to vacant positions, at least one court has held that the employee with the disability must show that a vacant position exists for which he or she is qualified. Ozlowski v. Henderson, 237 F.3d 837 (7th Cir. 2001). See also Sneed v. City of Harvey, Ill., 598 F. App’x 442, 445 (7th Cir. 2015) (post-ADAAA decision citing Ozlowski and holding that the employer was not required to reassign other employees to create a new vacancy for the plaintiff).

F. Defense: “Undue Hardship.” Undue hardship is a defense to the failure to provide reasonable accommodation. The de minimis rule applied in religious accommodation cases is inapplicable. See Prewitt v. United States Postal Service, 662 F.2d 292, n.22 (5th Cir. 1981). Undue hardship is described in the ADA as follows:

(A) In general. The term “undue hardship” means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, the factors to be considered include –

(i) the nature and cost of the accommodation needed under the [ADA];

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities, and
1. **Examples of Modification of Facilities/Making of Expenditures.** Providing a voice-activated computer to a quadriplegic employee may be a reasonable accommodation. *See Chirico v. Office of Vocational Educational Services for Individuals with Disabilities*, 211 A.D.2d 258 (N.Y. Sup. Ct. 1995) (state court interpreting state law consistent with the federal ADA decisions). Providing a work atmosphere absolutely free of all allergens, however, is not reasonable. *See Cassidy v. Detroit Edison Co.*, 138 F.3d 629 (6th Cir. 1998) (the diagnosis “chemical bronchitis” was too vague; employee failed to identify an objectively reasonable accommodation by requesting an allergy-free workplace); but see *Burnley v. San Antonio*, 2004 WL 298709 (W.D. Tex. January 6, 2004) (reasonableness of request for mold-free office environment by individual with respiratory disorder and “sick building syndrome” is a fact question)2.

2. **Modification of Policies.** In some instances, employers may need to modify certain policies in order to accommodate an individual with a disability. In *Davidson v. America Online Inc.*, 337 F.3d 1179 (10th Cir. 2003), for example, the court held that a policy of reserving “non-voicephone” customer care positions (positions that did not require the employee to speak on the telephone) to internal applicants may improperly bar qualified outside applicants with disabilities, such as hearing impairments, from employment.

3. **Job Restructuring and/or Light Duty.** Transfer of a disabled employee to an identical job at a different facility of same employer would be a modest example of job restructuring as accommodation under the Rehabilitation Act. *See Miller v. Runyon*, 77 F.3d 189 (7th Cir. 1996). *But see Watson v. Lithonia Lighting*, 304 F.3d 749 (7th Cir. 2002) (holding that the employer need not set aside positions for employees recovering from injuries and make those positions available indefinitely or create permanent light duty job); *DeVito v. Chicago Park District*, 270 F.3d 532 (7th Cir. 2001) (determining that park laborer who could not return to his full time job was no longer qualified and holding that the employer was not required to keep the employee indefinitely in a temporary light duty position geared toward returning him to full time work); *Hoskins v. Oakland County Sheriff’s Dep’t*, 227 F.3d 719 (6th Cir. 2000) (holding that a permanent assignment to a relief position, with diminished or “light duty” responsibilities, is not a reasonable accommodation).

In *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015), the Supreme Court rejected the EEOC’s statement in its Guidance on Pregnancy Discrimination and Related Issues, that “an employer may not deny light duty to a pregnant employee based on a policy that limits light duty to employees with on-the-job injuries.” The Court held that the timing, consistency, and thoroughness of the guidance limited its persuasiveness. Id. at 1352. In *Young*, the plaintiff alleged the employer violated the Pregnancy Discrimination Act (PDA) by providing light duty to workers injured on the job but not providing it to pregnant workers. The Court acknowledged that the impact of its decision may be affected by amendments made by the ADAAA, which, as interpreted by the EEOC, require employers to accommodate employees whose temporary lifting restrictions originate off the job. The Court expressed no opinion on this interpretation. The Court held that a PDA plaintiff may be able to get her claim to a jury if she can show that (1) she belongs to the protected class; (2) she sought accommodation; (3) the employer did not accommodate her; and

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2 This case was subsequently tried to a jury, which returned a verdict for the plaintiff of $165,000 in compensatory damages. *See Burnley v. City of San Antonio*, 470 F.3d 189 (5th Cir. Tex. 2006) (reciting case history and finding employer’s appeal of the merits of the decision to be untimely).
(4) the employer did accommodate others similar in their ability or inability to work. The Court explained that an employer may justify its refusal to accommodate by presenting a legitimate, nondiscriminatory reason for denying the accommodation, but the employer could not rely upon the rationale that it was more expensive or less convenient to accommodate a pregnant employee than other non-pregnant employees. The Supreme Court further held that where an employer offers an apparently legitimate nondiscriminatory reason for its actions, plaintiffs can create a question of pretext, and thereby avoid summary judgment, by providing “sufficient evidence that the employer’s policies impose a significant burden on pregnant workers, and that the employer’s ‘legitimate, nondiscriminatory’ reasons are not sufficiently strong to justify the burden.”

The EEOC amended its Guidance after the Court’s opinion in Young, but still takes the position that temporary assignment to a light duty position may be a reasonable accommodation for a pregnant employee under the ADA, depending on the restrictions resulting from the pregnancy. See EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues, http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

4. Examples of Modification of Work Schedule. A job applicant can be required to meet legitimate attendance requirements. However, see the Attendance discussion above. An employer need not waive overtime work requirements if performing overtime is an essential function of the job. Davis v. Florida Power & Light Co., 205 F.3d 1301 (11th Cir. 2000); See also Rehrs v. Iams Co., 486 F.3d 353 (8th Cir. 2007) (holding that diabetic warehouse worker had no right to an accommodation of straight shift work when all of his counterparts had rotating shifts and rotating shift work was an essential job function. The court held that the employer was not required to accommodate the plaintiff if doing so would require other employees to work harder, longer, or be deprived of opportunities.).

In Breen v. Department of Transportation, 282 F.3d 839 (D.C. Cir. 2002), however, the court held that an employee may have a Rehabilitation Act claim for her agency’s failure to respond to her request for an alternative work schedule as an accommodation for her obsessive-compulsive disorder. Whether the job lends itself to this type of accommodation should be approached on an individual, case-by-case basis.

5. Transfers to Other Jobs. Most courts now agree that the ADA obligates employers to reassign disabled workers to a vacant job for which they are qualified if they cannot be accommodated in their current job. See Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999) (en banc).

The EEOC Guidance on Accommodations asserts that reassignment must be considered on an organization-wide basis, which may prove challenging for large, national operations. Reassignment to a lower-paying position should only be considered, however, if the disabled individual requests it, or if reasonable accommodations cannot enable him or her to perform their higher-paying job. Even if it may cost more to accommodate an employee in their existing job, the EEOC Guidance on Accommodations explains that reassignment is a “last resort” and is an inappropriate accommodation if the employee does not wish to be reassigned and can still perform his or her old job with the more costly accommodation. The Guidance also claims that employees with disabilities must be granted transfers or reassignments if the employee is minimally qualified for the new job, even if a more qualified applicant or employee has bid for the position. The EEOC has explained that this ADA accommodation preference takes precedence over affirmative action plans. See Daily Labor Report (BNA) (February 10, 2000), E-1. Some courts appear to support the EEOC’s position, reasoning that the reassignment obligation must mean something more than merely allowing a disabled person to compete equally with the rest of the world. See Aka v. Washington Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998).

Cir. 2001) (holding that employers are not expected to promote or displace workers to accommodate disabled employees). The EEOC, however, takes the position that if the employee’s return to his or her prior position is not feasible, the employer should make efforts to place the employee in another vacant position.

b. No Violation of Bona Fide Seniority System. The Supreme Court has held that an employer ordinarily is not required to violate the terms of a bona fide seniority system when faced with a request for reassignment as an accommodation under the ADA. See US Airways v. Barnett, 535 U.S. 391 (2002) (holding that the plaintiff’s requested accommodation was not reasonable because it violated the terms of the employer’s bona fide seniority system. The Court noted that this would be the result in most cases, unless the employee can show the existence of special circumstances. This rule applies to both collectively bargained seniority systems and to seniority systems unilaterally imposed by management.).

The significance of this case is that the tangible rights or expectations of other employees belong in the “reasonableness” equation rather than as part of an undue hardship defense. Making a “reasonable accommodation,” therefore, is not simply an analysis in a vacuum, looking only to whether the accommodation could be “effective” for the employee with a disability. See also Medrano v. City of San Antonio, 179 F. App’x 897 (5th Cir. 2006) (holding that an accommodation is not reasonable if it violates seniority system absent special circumstances, which were not shown in this case).

c. Promotion/Additional Training. An employer is not required to offer a promotion to an employee as a reasonable accommodation. See, e.g., Hedrick v. W. Reserve Care Sys., 355 F.3d 444 (6th Cir. 2004); Lucas v. W. W. Grainger, Inc., 257 F.3d 1249 (11th Cir. 2001). Additionally, at least one court has held that an employer is not required to offer a disabled employee special training to enable her to perform another job as a reasonable accommodation. See Williams v. United Insurance Co. of Am., 253 F.3d 280 (7th Cir. 2001). The EEOC Interpretive Guidance also suggests that employees with disabilities are not entitled to any more training than afforded or available to other employees.

6. Leave As a Reasonable Accommodation. The EEOC Interpretive Guidance includes granting leave for receiving necessary treatment as a form of accommodation. In Cehrs v. Northeast Ohio Alzheimer’s Research Ctr., 155 F.3d 775 (6th Cir. 1998), the court held, “We are not sure that there should be a per se rule that an unpaid leave of indefinite duration (or a very lengthy period, such as one year) could never constitute a ‘reasonable accommodation’ under the ADA.” See also Dark v. Curry County, 451 F.3d 1078 (9th Cir. 2006) (holding that extended leave or an extension of an existing leave period may be reasonable accommodation and finding factual issue regarding whether defendant could have allowed plaintiff, a heavy equipment operator who had an on-the-job seizure because of epilepsy, to use 89 days of accrued sick leave or unpaid medical leave while the levels of his anti-seizure medication were being adjusted).

In Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 649-50 (1st Cir. 2000), the court noted that some employees, by the nature of their disability, are unable to provide an absolutely assured time for their return to employment, but that does not necessarily make their request for leave to a particular date indefinite. The court held that each case must be scrutinized on its own facts. Note that in Garcia-Ayala, the plaintiff requested leave until a particular date, so the request was not really a request for indefinite leave.

In Robert v. Bd. of County Comm’rs of Brown County, 691 F.3d 1211 (10th Cir. 2012), the court noted that there are two limits on the bounds of reasonableness for a leave of absence. “The first limit is clear: The employer must provide the employee an estimated date when she can resume her essential duties.” Id. at 1218. The second limit is durational. “A leave request must assure an employer that an employee can perform the essential functions of her position in the ‘near future.’” Id. The court noted that the Tenth Circuit has not specified how near that future must be; however, the Eighth Circuit has held that a six-month leave request is too long to be a reasonable accommodation. Id.
Indefinite Leave. Several appeals courts have held that indefinite medical leave could not be a reasonable accommodation. See, e.g., Jarrell v. Hosp. for Special Care, 2015 WL 5568427, at *3 (2d Cir. Sept. 23, 2015) (affirming summary judgment in favor of employer, agreeing with lower court that the accommodation the plaintiff sought “was in essence an indeterminate period of leave and that no genuine dispute exists that such accommodation would be unreasonable”); Fogelman v. Greater Hazleton Health Alliance, 2004 WL 2965392 (3d Cir. Dec. 23, 2004) (unpublished decision) (finding that indefinite leave is not reasonable when plaintiff could not show when she could perform essential job functions and eventually return to work); Wood v. Green, 323 F.3d 1309 (11th Cir. 2003) (holding that the plaintiff’s request for an indefinite leave of absence was a request to return to work at some point in the future, not a request for an accommodation that would enable him to work in the present); EEOC v. Yellow Freight System, 253 F.3d 943 (7th Cir. 2001) (en banc) (noting that the Seventh Circuit has held that requests for unlimited sick days are not reasonable as a matter of law). See also Rodgers v. Time Customer Serv., 2011 WL 2160296 (M.D. Fla. May 5, 2011) (holding that plaintiff’s request for indefinite leave of absence did not constitute a reasonable accommodation because that accommodation would not allow the plaintiff to perform the essential functions of his job presently or in the immediate future, and noting that just because the employer had previously accommodated the plaintiff’s requests for extensive leave over the course of his nearly 10 years of employment, it does not necessarily make that accommodation reasonable), adopted, approved, summary judgment granted, Rodgers v. Time Customer Serv., 2011 WL 2160554 (M.D. Fla. May 31, 2011).

7. Providing Another Worker to Assist. In LaMott v. Apple Valley Health Care Ctr., 465 N.W.2d 585 (Minn. App. 1991), the court specifically faulted a nursing home for failing to schedule a second housekeeper to assist a housekeeper who had suffered a stroke. However, a federal agency that had already accommodated an employee through a part-time assistant was not required to hire a full-time assistant for the employee as an accommodation so that employee could receive a promotion, especially when there was evidence that the individual would not be qualified to perform in the promoted position even with such accommodation. See Adrain v. Alexander, 792 F. Supp. 124 (D.D.C. 1992), aff’d, 28 F.3d 1295 (D.C. Cir. 1994).

8. Essential Job Functions. An employer is not required to eliminate essential job functions as a reasonable accommodation. For example, in Stern v. St. Anthony’s Health Center, 788 F.3d 276 (7th Cir. 2015), the plaintiff, the chief clinical psychologist for an acute-care facility, suffered from short-term memory loss that impaired his ability to perform supervisory and administrative duties, which the court found were essential functions of his position. The plaintiff argued that the employer should transfer his supervisory and administrative duties as a reasonable accommodation, since the ADA defines “reasonable accommodation” to include “job restructuring.” The Seventh Circuit rejected this argument, stating that it has “repeatedly held that “[t]o have another employee perform a position’s essential function, and to a certain extent perform the job for the employee, is not a reasonable accommodation.” The court also noted that the EEOC guidance on reasonable accommodation makes clear that “[a]n employer never has to reallocate essential functions as a reasonable accommodation, but can do so if it wishes.” Id. at 289. The court also noted that “If a particular job function, such as [the plaintiff’s] supervisory responsibility, is an essential function, then it is irrelevant whether the employer could have someone else perform the function without undue hardship.” (citing Majors, supra, 714 F.3d at 535 (“The accommodation [plaintiff] seeks—another person to perform an essential function of the job she wants—is, as a matter of law, not reasonable, so [the employer] isn’t required to show the accommodation would create an undue hardship.”)). The court also rejected the plaintiff’s argument that he could have been accommodated by switching jobs with the hospital’s other Ph.D-level psychologist. The court held that there are significant limitations on an employer’s obligation to reassign an employee as a reasonable accommodation. “An employer may be obligated to reassign a disabled employee, but only to vacant positions; an employer is not required to ‘bump’ other employees to create a vacancy so as to be able to reassign the disabled employee. Nor is an employer obligated to create a ‘new’ position for the disabled employee.” Id. at 291. (citations
omitted). See, e.g., *E.E.O.C. v. Womble Carlyle Sandridge & Rice, LLP*, 616 F. App’x 588, 595 (4th Cir. June 26, 2015) (holding that the employer was not required to excuse the plaintiff (who had a lifting restriction) from all heavy lifting or provide assistance for all tasks requiring lifting more than 20 pounds because lifting more than 20 pounds was an essential job function and the ADA does not require reallocation of the essential functions of the job); *Minnihan v. Mediaco m Cons’ns Corp.*, 779 F.3d 803, 812 (8th Cir. 2015). (“Although restructuring is one of the possible accommodations under the ADAAA, an employer ‘is not required to reallocate the essential functions of a job.’ … Additionally, we have held that ‘an accommodation that would cause other employees to work harder, longer, or be deprived of opportunities is not mandated’ under the ADA.”).

However, the Fifth Circuit has held that an employee was not required to show that a requested accommodation was related to her ability to perform the essential functions of her job. See *Feist v. State of Louisiana*, 730 F.3d 450 (5th Cir. 2013). The Fifth Circuit did not hold that the requested accommodation, a reserved, free on-site parking space, was reasonable, only that the lower court erred in requiring her to show that the requested accommodation enabled her to perform the essential functions of her job. The Fifth Circuit noted that the requested accommodation could have made the workplace readily accessible and usable, which would be reasonable under the ADA. On remand, the district court granted summary judgment to the employer, finding the plaintiff was responsible for the breakdown in the interactive process. See *Feist v. Louisiana*, 2014 WL 2979623 (E.D. La. July 1, 2014) (noting that the plaintiff was unwilling to accept “the reasonable accommodation of parking free of charge in the on-site handicapped spaces, until the LaDOJ could obtain a permanent parking space for her. Plaintiff was obviously unwilling to engage in the process unless she received exactly what she requested.”).

9. Working at Home. Requests to perform work in an employee’s home may not be an unreasonable accommodation as a matter of law, and employers should not summarily reject all telecommuting requests. See *Humphrey v. Memorial Hospitals Ass’n*, 239 F.3d 1128 (9th Cir. 2001); *Langon v. Department of Health and Human Services*, 959 F.2d 1053 (D.C. Cir. 1992). In *Robert v. Bd. of County Comm’rs of Brown County*, 691 F.3d 1211, 1218, n.2 (10th Cir. 2012), the court noted that when an individual can perform the essential functions of her job from home, working remotely may be a reasonable accommodation. However, when a disability renders an employee completely unable to perform an essential function, “the only potential accommodation is temporary relief from that duty.”

Some courts have held that requests to work from home are not reasonable. See, e.g., *Mason v. Avaya Communications, Inc.*, 357 F.3d 1114, 1122, 1124 (10th Cir. 2004) (affirming summary judgment in favor of the employer because attendance was an essential function of the plaintiff’s position, making her request to work from home unreasonable because it would eliminate an essential function of her job); *Rauen v. U.S. Tobacco Mfg. Ltd. Partnership*, 319 F.3d 891 (7th Cir. 2003) (affirming summary judgment in favor of employer, finding central aspects of employee’s particular job required work on site and her request to work entirely from home office therefore was not reasonable); *Rodgers v. Time Customer Serv.*, 2011 WL 2160296 (M.D. Fla. May 5, 2011) (holding that plaintiff’s request to work from home did not constitute a reasonable accommodation because that accommodation would not allow the plaintiff to perform the essential functions of his job as a customer service representative, specifically on-site attendance and handling telephone calls), adopted, approved, summary judgment granted, *Rodgers v. Time Customer Serv.*, 2011 WL 2160554 (M.D. Fla. May 31, 2011). The EEOC recently issued guidance on telework as a reasonable accommodation, meant to supplement its *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under ADA*. See [http://www.eeoc.gov/facts/telework.html](http://www.eeoc.gov/facts/telework.html). These guidelines acknowledge that the ADA does not require employers to offer telework to all employees. In addition, even if telework is the employee’s preferred or requested accommodation, the employer may still offer alternate accommodations as long as they are effective.
10. Providing a Flexible Schedule. Some courts have held that an employer is not required to provide a flexible schedule as an accommodation. See Carr v. Reno, 23 F.3d 525 (D.C. Cir. 1994) (The U.S. Attorney’s Office was not required to grant a clerical employee a flexible schedule where the clerical position was a time-sensitive job, and granting the employee’s request would stretch reasonable accommodation to absurd proportions and imperil the effectiveness of the employer’s public enterprise.); Ezikovich v. Commission on Human Rights and Opportunities, 750 A.2d 494 (Conn. App. Ct. 2000) (following ADA, rejecting disability discrimination claim of employee with chronic fatigue syndrome who wanted to begin work without a fixed starting time, noting that the employee was previously accommodated with a part-time schedule).

11. Separating Employees and Reducing Stress. The ADA does not require separation from a supervisor as an accommodation. See EEOC Guidelines; MacKenzie v. Denver, 414 F.3d 1266 (10th Cir. 2005) (holding that city clerk whose coronary disease required her to avoid stressful situations is not substantially limited in the major life activity of working and therefore not covered by the ADA where the employee claimed that working under a certain supervisor caused stress); Gaul v. Lucent Techs., 134 F.3d 576, 581 (3d Cir. 1998) (holding that clinically depressed employee’s request for “stress free” work environment was not reasonable especially since the employee could not even show that such an accommodation was possible).

VIII. COMMUTING TO WORK

The Second Circuit has held that in some circumstances an employer may have an obligation to assist an employee’s commute to work as a reasonable accommodation. See Nixon-Tinkelman v. N.Y. City Dept’ of Health & Mental Hygiene, 434 F.App’x 17 (2d Cir. Aug. 10, 2011) (reversing summary judgment for employer and remanding for the lower court to consider whether it would have been reasonable for the employer to provide assistance relating to the plaintiff’s commute to work). In Nixon-Tinkelman the court provided examples of accommodations that the employer could consider, including transferring the plaintiff back to her prior worksite or to another closer location; allowing her to work from home; or providing a car or parking permit. Additionally, the court listed factors the lower court should consider when determining whether an accommodation is reasonable, including: the number of employees employed by the employer; the number and location of its offices; whether other available positions existed for which the plaintiff showed that she was qualified; whether she could have been shifted to a more convenient office without unduly burdening the employer’s operations; and the reasonableness of allowing her to work without on-site supervision. See also Colwell v. Rite Aid Corp., 602 F.3d 495 (3d Cir. Pa. 2010) (“We therefore hold that under certain circumstances the ADA can obligate an employer to accommodate an employee’s disability-related difficulties in getting to work, if reasonable. One such circumstance is when the requested accommodation is a change to a workplace condition that is entirely within an employer’s control and that would allow the employee to get to work and perform her job … A change in shifts could be that kind of accommodation.”). The court in Colwell clarified that its holding does not make employers “responsible for how an employee gets to work,” noting that the plaintiff did not ask for help in the method or means of her commute.

IX. SPECIFIC CONDITIONS UNDER THE ADA

A. Mental and Psychiatric Disabilities. As with any condition, a mental impairment must be sufficiently severe that it substantially limits a major life activity. However, in light of the statement in the Findings and Purposes of the ADAAA that it is the intent of Congress that the “question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis,” see 110 Pub. Law 325, 122 Stat. 3553, pre-ADAAA decisions finding mental or psychiatric impairments not disabilities under the ADA may not be applicable to cases arising under the ADAAA. Additionally, the EEOC’s revised regulations state that, applying the principles set forth in the regulations, it easily should be concluded that certain types of impairments will, at a minimum, substantially limit
the major life activity indicated and lists the following: “an intellectual disability (formerly termed mental retardation) substantially limits brain function … autism substantially limits brain function … major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function.” See 29 C.F.R. § 1630.2(j)(3)(iii). Of course, establishing that the plaintiff is disabled (as that term is defined under the ADA) is only one of the essential elements of a prima facie case of disability discrimination. To prevail, a plaintiff must still establish the remaining elements of a claim. See, e.g., Naber v. Dover Healthcare Associates, Inc., 765 F. Supp. 2d 622, 646-47 (D. Del. 2011) (finding question of fact as to whether the plaintiff’s depression and sleeplessness were disabilities under the ADA, but granting summary judgment on her ADA claim because she could not show the employer’s legitimate nondiscriminatory reason for her termination was pretext for discrimination), aff’d, 473 F. App’x 157 (3d Cir. 2012); Gesegnet v. J.B. Hunt Transp., Inc., 2011 WL 2119248, at *4 (W.D. Ky. May 26, 2011) (Addressing ADA claim based on anxiety and bi-polar disorder, the court stated that it “doubts that the medical and personal evidence here is sufficient to show an actual inability to perform a basic function of life. Nevertheless, given the broad definition of disability Congress intended, the Court will assume that Plaintiff has a disability under the ADAAA.”). In Gesegnet the court granted summary judgment to the employer, however, because the plaintiff failed to request an accommodation with sufficient specificity, noting that the “First Circuit not only requires that a request be ‘direct and specific,’ but also include an explanation of the link between the disability and the request.” Id. at *5 (citations omitted). But see Kinney v. Century Servs. Corp., II, 2011 WL 3476569 (S.D. Ind. Aug. 9, 2011) (finding an issue of fact regarding whether the plaintiff’s episodic depression was a disability under the ADA). In Kinney, the court noted that prior to the passage of the ADAAA, the Seventh Circuit frequently found “isolated bouts” of depression to be temporary impairments and not disabilities as defined by the ADA. The court also noted, however, that the ADAAA specifically provides that “an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.” Id. at *10. The court assumed, without deciding, that the plaintiff’s depression was a protected disability under the ADA and denied the employer’s motion for summary judgment, finding the plaintiff had presented evidence giving rise to an inference that the employer’s reason for discharging her was pretext for discrimination.

The EEOC’s Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, http://www.eeoc.gov/policy/docs/psych.html, includes “interacting with others” as a major life activity. The EEOC also explains that certain behavioral traits, such as irritability, inability to handle stress, lateness, and poor judgment are not mental impairments, even though they may be linked to mental impairments. See also Weaving v. City of Hillsboro, 763 F.3d 1106, 1113 (9th Cir. 2014) (noting that although the Ninth Circuit has specifically recognized interacting with others as a major life activity, that “does not mean that any cantankerous person will be deemed substantially limited in a major life activity. Mere trouble getting along with coworkers is not sufficient to show a substantial limitation …”)(quoting McAlindin v. County of San Diego, 192 F.3d 1226, 1235 (9th Cir.1999)).

Courts have held that an employer may discipline an employee with a mental disability, just as anyone else, for violating job-related workplace conduct standards. See, e.g., Calef v. Gillette Co., 322 F.3d 75 (1st Cir. 2003) (holding that anger and unacceptable behavior threatening the safety of others attributable to attention deficit and hyperactivity disorder rendered individual not qualified, even if the individual was substantially limited in any major life activities). Unacceptable job performance is not protected under the ADA, even though the unacceptable conduct or performance may be the manifestation of a disability. See Petzold v. Borman’s, Inc. d/b/a Farmer Jack, 241 Mich. App. 707 (Mich. Ct. App. 2000) (holding that firing grocery store “courtesy clerk” whose Tourette Syndrome resulted in employee’s use of racial slurs and obscenities with customers was not disability discrimination); Ray v. Kroger Co., 264 F. Supp. 2d 1221 (S.D. Ga. 2003) (holding that offensive, racist outbursts by supermarket employee with Tourette’s Syndrome rendered individual not qualified for the job), aff’d, 2003 WL 23186025 (11th Cir. Dec. 17, 2003); Yarberry v. Gregg Appliances, Inc., 2015 WL 5155553, at *11 (6th Cir. Sept. 3, 2015) (“E.E.O.C. 2008 Guidance and Sixth Circuit case law suggest that where there has been employee misconduct—including nonviolent disrup-
tive misconduct—the employer may terminate the employee for that behavior, even if it is related to his disability.) In Yarberry, the court held that the plaintiff’s behavior in entering the employer’s store after hours, opening the safe, roaming around the store and using store equipment, and then leaving the store without setting the alarm, all gave the employer grounds for terminating him for “his conduct alone, which violated company policies regarding safety and security as well as general behavior standards for management.” Id. The court also found that the plaintiff failed to show that the employer’s legitimate reason for terminating him was pretext for discrimination. Further, the court held that since the plaintiff was terminated for misconduct, the employer was not required to rescind the termination and consider his request for leave as a reasonable accommodation. The court noted that the EEOC takes the same position on this issue, “[i]f the appropriate disciplinary action is termination, the ADA would not require further discussion about the employee’s disability or request for reasonable accommodation.” Id. at *13 (citing EEOC 2008 Enforcement Guidance).

See also Tyler v. Ispat Inland, Inc., 245 F.3d 969 (7th Cir. 2001) (holding that employer that transferred employee with delusions of persecution to another plant to separate him from his alleged persecutors was not also required to investigate his claims of persecution nor was it required to transfer him back to his original worksite after he refused to cooperate with the employer’s efforts to determine why such a transfer would be a reasonable accommodation, since this was where his original claim of persecution arose).

Dangers occur when employers attempt to “diagnose” the underlying causes of workplace behavior and attach labels such as “paranoid.” “Diagnosing” places individuals that might not otherwise be protected under the ADA into protected status. Following up with mental health related questions also raises issues of improper medical inquiries under ADA. See, e.g., Kohn v. Lemmon Co., 1998 WL 67540 (E.D. Pa. Feb. 18, 1998) (holding that labeling employee as “paranoid” and referring her for psychological counseling placed employee in protected class of “regarded as disabled”). But see Mundo v. Sanus Health Plan of Greater New York, 966 F. Supp. 171 (E.D.N.Y. 1997) (regarding a person as having a common personality trait, such as inability to handle stress, does not mean that the employer regards the person as being disabled); Cody v. CIGNA Healthcare, 139 F.3d 595 (8th Cir. 1998) (requesting mental evaluation due to troubling behavior, including sprinkling salt at work area to keep “evil spirits” away, did not violate ADA or make employee “regarded as disabled”).

Stereotypes regarding mental conditions also raise the “direct threat to safety” issue in cases of psychiatric disabilities. The EEOC emphasizes that, as with any other disability, an individual does not pose a direct threat simply because of having a history of psychiatric illness. To prevail on a “direct threat” defense, the employer must show, with objective medical evidence, that the particular individual poses a threat to safety. In Josephs v. Pac. Bell, 443 F.3d 1050 (9th Cir. 2006) the court upheld a jury verdict in favor of an employee based on the employer’s refusal to reinstate him. The employee worked as a home service technician job, which required unsupervised visits to customers’ homes. The employer learned the employee lied on his job application when he stated that he had never been convicted of a felony. The employee had been convicted of battery on a peace officer and, in a separate incident, had been charged with attempted murder, but was found not guilty by reason of insanity and hospitalized for three years in a mental hospital. The employee claimed the employer violated the ADA by regarding him as disabled. A jury found that the employer did not violate the ADA by discharging the employee but it did violate the ADA by refusing to reinstate him. The employee worked as a home service technician job, which required unsupervised visits to customers’ homes. The employer learned the employee lied on his job application when he stated that he had never been convicted of a felony. The employee had been convicted of battery on a peace officer and, in a separate incident, had been charged with attempted murder, but was found not guilty by reason of insanity and hospitalized for three years in a mental hospital. The employee claimed the employer violated the ADA by regarding him as disabled. A jury found that the employer did not violate the ADA by discharging the employee but it did violate the ADA by refusing to reinstate him. The Ninth Circuit affirmed the jury verdict based on statements made by the employer during grievance proceedings that it was concerned the employee had been in a mental hospital for three years, and the fact that the employer in the context of union grievance proceedings had reinstated two other employees who lied on applications.

Violence and Misconduct. Unacceptable behavior, even if it is the manifestation of a disability, is not protected under ADA. Jones v. American Postal Workers Union, 192 F.3d 417, 429 (4th Cir. 1999) (“the law is well settled that the ADA is not violated when an employer discharges an individual based upon the employee’s misconduct, even if the misconduct is related to a disability”). See also Jones v. Potter, 488 F.3d 397 (6th Cir. 2007) (affirming summary judgment against U.S. Postal Service employee discharged for fighting; Rehabilitation Act of 1973 requires a showing that
employee was discharged “solely” because of a disability – at summary judgment stage, employee was required to show that the altercation did not actually motivate his discharge); Sista v. CDC Ixis N. Am., Inc., 445 F.3d 161 (2d Cir. 2006) (finding no violation for discharging employee with depression who threatened a co-worker since the employer has a right to protect itself from potentially violent employees).

Additionally, an employer does not violate the ADA when it discharges an employee because of a mistaken perception of misconduct, even if that misconduct would have been related to a disability. Pence v. Tenneco Auto. Operating Co., 169 F. App’x 808 (4th Cir. 2006).

B. The ADA and “Current Drug Users.” The ADA does not protect any employee or applicant “who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.” See 42 U.S.C. § 12114(a). See, e.g., Dovenmuehler v. St. Cloud Hosp., 509 F.3d 435 (8th Cir. 2007) (affirming summary judgment against nurse with history of drug abuse who did not have an impairment requiring accommodation – she was neither limited in a major life activity nor regarded as disabled; holding that her requested accommodation was unreasonable, and her discharge for stealing drugs was not pretextual since her drug dependency did not excuse this illicit conduct).

1. “Current Drug User.” The “currently engaging in the illegal use of drugs” language of the ADA has been construed to mean having used illegal drugs in the “weeks and months” prior to the adverse action. See McDaniel v. Mississippi Baptist Medical Ctr., 869 F. Supp. 445 (S.D. Miss. 1994) (noting that to be protected by the ADA, illegal drug users must show that they have remained drug-free for a long time, not merely a few weeks after leaving the program), aff’d, 74 F.3d 1238 (5th Cir. 1995). See also Shafer v. Preston Memorial Hosp. Corp., 107 F.3d 274 (4th Cir. 1997), abrogated on other grounds by Baird ex rel. Baird v. Rose, 192 F.3d 462 (4th Cir.1999) (holding that nurse who was currently using Fentanyl was not “a qualified person with a disability” under the ADA because she was “currently engaging in the illegal use of drugs”); Mauerhan v. Wagner Corp., 649 F.3d 1180 (10th Cir. 2011) (noting that none of the other federal appeals courts have articulated a bright-line rule for when an individual is no longer “currently” using drugs as defined by the ADA and declining to adopt such a rule).

2. Safe Harbor. The ADA provides for a “safe harbor” for those who are not currently engaging in the illegal use of drugs. The ADA specifically exempts from the exclusion of § 12114(a) an individual who:

- has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
- is participating in a supervised rehabilitation program and is no longer engaging in such use; or
- is erroneously regarded as engaging in such use, but is not engaging in such use.

42 U.S.C. § 12114(b). See also Shirley v. Precision Castparts Corp., 726 F.3d 675, 681 (5th Cir. 2013) (“Ultimately, courts must determine eligibility for safe harbor ‘on a case-by-case basis,’ asking whether ‘the circumstances of the plaintiff’s drug use and recovery justify a reasonable belief that drug use is no longer a problem.’” The court affirmed summary judgment, approving the trial court’s determination that the plaintiff’s refusal to complete an inpatient treatment program, his insistence that he remain on an opiate pain reliever, and his continued use of Vicodin following detox “support[ed] a reasonable belief that continued drug use was still an on-going problem at the time [W-G] terminated his employment.”); Mauerhan, 649 F.3d at 1187 (holding that an individual is currently engaging in the illegal use of drugs if “the drug use was sufficiently recent to justify the employer’s reasonable belief that the drug abuse remained an ongoing problem”; other factors the courts should consider include the severity of the employee’s addiction and the relapse rates for whatever drugs were used as well as the “level of responsibility entrusted to the employee; the employer’s applicable job and performance requirements; the level of competence ordinarily required to adequately perform the task in question; and the employee’s past...
performance record”) (quoting Zenor v. El Paso Healthcare Sys., Ltd., 176 F.3d 847, 856 (5th Cir. 1999)); Brown v. Lucky Stores, Inc., 246 F.3d 1182 (9th Cir. 2001) (holding that missing work due to court-ordered drug/alcohol rehabilitation is not protected under ADA “safe harbor” for recovering addicts because drug and alcohol use occurred too soon before termination).

The ADA contains other specific exclusions as well. Additionally, conditions specifically excluded from coverage by the ADA nevertheless may be protected under state law.

The Tenth Circuit has held that “the mere status of being an alcoholic or illegal drug user may” merit protection under the ADA. Nielsen v. Moroni Feed Co., 162 F.3d 604, 609 (10th Cir. 1998) (noting, however, that this protection does not extend to those currently engaging in illegal drug use); but see Burris v. Novartis Animal Health U.S., Inc., 309 F. App ’x 241, 250 (10th Cir. 2009) (“We have implicitly held that drug addiction is not per se a disability, but that the addiction must substantially limit one or more of the major life activities.”); Fowler v. Westminster Coll. of Salt Lake, 2012 WL 4069654 (D. Utah Sept. 17, 2012) (noting that “under Nielsen, [the plaintiff’s] actual addiction is presumed to have limited one or more of his major life activities, eliminating the need for separate proof on that point,” but finding the plaintiff presented evidence that his addiction impacted his ability to think and sleep; affirming jury verdict of $500,000 on plaintiff’s ADA claim).

3. Mistaken Perception that Employee is Alcoholic or Drug User. An employer’s mistaken perception that an employee is an alcoholic or illegal drug user may allow the employee to pursue an ADA claim. See, e.g., Moorer v. Baptist Mem’l Health Care System, 398 F.3d 469 (6th Cir. 2005).

4. Workplace Standards. An alcoholic or recovering alcoholic, however, can be held to the same standards as any employee with respect to alcohol use at work. See Roig v. Miami Federal Credit Union, 353 F. Supp. 2d 1213 (S.D. Fla. 2005) (holding that an individual can be held accountable for his absenteeism even if it is related to alcoholism). See also Blazek v. City of Lakewood, 576 F. App’x 512, (6th Cir. Aug. 13, 2014) (determining that alcoholic employee who admitted to being intoxicated at work on multiple occasions failed to show the employer’s reason for discharging him (violating the employer’s policies against possessing and consuming alcohol in the workplace) were pretext because the employees to whom he compared himself were not similarly situated – the plaintiff’s infractions were significantly more serious than theirs and none of the other employees was required to have a commercial drivers’ license; additionally, plaintiff’s failure to accommodate claim failed because he never requested any accommodation before he was discharged).

5. Last Chance Agreements. Courts and the EEOC have also endorsed “last chance” agreements for employees violating workplace substance abuse rules. See EEOC Guidance on Reasonable Accommodations under ADA; Longen v. Waterous Co., 347 F.3d 685 (8th Cir. 2003); Ostrowski v. Con-Way Freight, Inc., 543 F. App’x 128 (3d Cir. 2013) (employers do not violate the ADA merely by entering into return-to-work agreements that impose employment conditions different from those of other employees).

6. No-Rehire Policy. The Supreme Court has held that an employer’s no-rehire policy was a legitimate, nondiscriminatory reason for refusing to rehire a former employee who was a recovered drug addict. See Raytheon Co. v. Hernandez, 540 U.S. 44 (2003). In reaching this decision, the Court overruled a decision by the Ninth Circuit, which had held that the employer’s policy violated the ADA because it had a disparate impact on rehabilitated drug addicts. The Supreme Court held that the Ninth Circuit improperly combined the disparate impact and disparate treatment methods of analyzing discrimination claims in finding that the policy violated the ADA. The Court remanded the case to the Ninth Circuit, which held that there was an issue of fact to be resolved at trial regarding whether the employer failed to re-hire the plaintiff because of his past record of addiction rather than because of a company rule barring the re-hire of previously discharged employees. See Hernandez v. Hughes Missile Systems Co., 362 F.3d 564 (9th Cir. 2004).
7. State Medical Marijuana Laws. In *Curry v. MillerCoors, Inc.*, 2013 WL 4494307 (D. Colo. Aug. 21, 2013), the court held that an employee who used marijuana under the state's medical mari-
juana law could not sustain a claim of discrimination under the state disability discrimination law after his employer discharged him for testing positive for marijuana in violation of the employer's written drug testing policy. The court held, “[d]espite concern for Mr. Curry’s medical condition, anti-discrimination law does not extend so far as to shield a disabled employee from the imple-
mentation of his employer’s standard policies against employee misconduct.” (citing the EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA).

Please see the *Personnel and Supervisory Policies* Chapter of the SourceBook for a discussion of state medical and recreational marijuana use laws.

X. THE ADA'S INFLUENCE ON HIRING CONSIDERATIONS

A. Employment Applications and Interviews. The ADA makes it unlawful to “make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or extent of such disability.” *See* 42 U.S.C. § 12112(d)(2)(A). An employer may, however, inquire “into the ability of an applicant to perform job-related functions.” *See* 42 U.S.C. § 12112(d)(2)(B). The EEOC has issued guidance regarding the types of pre-employment questions that may be asked of applicants. *See* http://www.eeoc.gov/policy/docs/preemp.html.

The EEOC guidance regarding pre-employment questions provides that an employer may not ask questions on an application or in an interview about whether an applicant will need reasonable accommodation for a job because such an inquiry is likely to elicit information about whether the applicant has a disability. However, the guidance also provides that when an employer reasonably believes that an applicant will need reasonable accommodation to perform a job, the employer may ask the applicant certain limited questions. Specifically, “the employer may ask whether she or he needs reasonable accommodation and what type of reasonable accommodation will be needed to perform the functions of the job.” The employer can ask these questions only if:

- The employer reasonably believes the applicant will need accommodation because of an obvious disability;
- The employer reasonably believes that the applicant will need reasonable accommodation because of a hidden disability that the applicant has voluntarily disclosed to the employer; or
- The applicant has voluntarily disclosed to the employer that she or he needs reasonable accommodation to perform the job.

At the interview stage of the hiring process, the employer may ask only if the employee is able to perform the essential job functions with or without reasonable accommodation. An employer may also request that the applicant describe or demonstrate how the applicant will perform job-related functions with or without reasonable accommodation, so long as it does this for all applicants for the job or class of jobs in question. If, in response to the employer’s request to demonstrate performance, an applicant indicates that she or he will need a reasonable accommodation, the employer must either: (1) provide a reasonable accommodation that does not create an undue hardship so the applicant can demonstrate job performance; or (2) allow the applicant to simply describe how she or he would perform the function with the reasonable accommodation. The disability or medically related questions should then stop. In other words, the interviewer should not ask how the person became disabled.

Employers commonly ask how often an employee was absent with his or her previous employer. This question raises concerns under the ADA, as well as the FMLA. To avoid problems that could result from this question, the employer could merely state its attendance requirements and ask if the applicant can meet them. An employer may ask questions about an applicant's poor attendance record and questions that elicit whether the employee abused leave in the past, for example: How
many Mondays or Fridays were you absent last year on leave other than approved vacation leave?

Under the ADA, an employer may not ask about job-related injuries or workers’ compensation history prior to making a conditional offer of employment. The workers’ compensation laws of most states encourage the employment of the physically disabled by protecting employers from excess liability for compensation and medical expenses where a pre-existing, permanent physical impairment is aggravated by a subsequent injury.

In *Armstrong v. Turner Indus.*, 141 F.3d 554 (5th Cir. 1998), an applicant was not hired because he did not truthfully respond to an unlawful medical inquiry in employment application. The court rejected the EEOC’s position on pre-employment medical inquiries and held that a mere violation of the ADA’s prohibitions against pre-employment inquiries, without an actual injury, is not actionable. It is not clear whether other courts will follow this “no harm, no foul” rule. In *Griffin v. Steeltek, Inc.*, 261 F.3d 1026 (10th Cir. 2001), after denying summary judgment on a nondisabled plaintiff’s claim that employer violated the ADA by asking impermissible medical questions on its application form, the Eighth Circuit affirmed a jury verdict in favor of the employer. The court held that absent proof of injury resulting from the impermissible questions, the plaintiff was not entitled to either nominal or punitive damages. *But see Harrison v. Benchmark Elecs. Huntsville Inc.*, 593 F.3d 1206 (11th Cir. 2010) (holding that a plaintiff need not be disabled under the ADA to sue an employer for making a prohibited, pre-offer medical inquiry. Accordingly, the court reversed a trial court’s decision in favor of the employer and held that the plaintiff should be permitted to take his ADA claim to trial.).

**B. EEOC Guidance on Employment of Veterans.** The EEOC has issued two guidance documents addressing the employment rights of veterans under the ADA. The guidance documents, *Veterans and the Americans with Disabilities Act (ADA): A Guide for Employers*, http://www.eeoc.gov/eeoc/publications/ada_veterans_employers.cfm, and *Veterans and the Americans with Disabilities Act: A Guide for Veterans*, http://www.eeoc.gov/eeoc/publications/ada_veterans.cfm, represent what the EEOC considers the current best practices in this area. The guidance specifies that an employer may inquire about an applicant’s disabled veteran status if it is doing so for affirmative action purposes. If the employer encourages applicants to self-identify as disabled in this way, however, it must give clear notice to the applicant of the following: that the information is solely for use in the employer’s affirmative action program, that the information will be kept confidential, that providing the information is voluntary, that refusal to provide it will not result in adverse treatment, and that the information will be used in accordance with the ADA. Additionally, the EEOC guidance points out that a private employer may give preference to a disabled candidate over a qualified candidate without a disability because there is nothing in the ADA to prevent affirmative action on behalf of individuals with disabilities. At the same time, the EEOC states that businesses with federal contracts of certain values ($25,000 or $100,000 depending on the contract date) must “take affirmative action to employ and advance qualified disabled veterans” in accordance with the Vietnam Era Veteran’s Readjustment Assistance Act (VEVRAA). Finally, the guidance highlights several laws and programs that instruct the federal government to give special consideration to veterans with disabilities. The EEOC also discusses how an employer might appropriately ask a veteran with a disability if a reasonable accommodation is needed when none has been requested. First, at the application stage, so long as it asks all applicants, an employer may ask whether the veteran will need a reasonable accommodation to participate in any part of the hiring process. Also, where a veteran has an obvious service-connected disability (e.g., a veteran who is blind or missing a limb) and the employer reasonably believes the veteran will need a reasonable accommodation to do his or her job, the employer may ask if an accommodation will be necessary. The guidance also gives examples of the forms such reasonable accommodations may take, including permission to work from home or a modified schedule, written materials in alternate formats, modified equipment or devices, and assignment of a job coach to assist an employee who initially has some difficulty learning or remembering job tasks. Finally, the guidance notes some of the differences between Uniformed Services Employment and Reemployment Rights Act (USERRA) and the ADA. Both statutes require employers to make reasonable accommodations for disabled veterans. However, USERRA goes further because it also compels employers to make reasonable efforts to assist a returning
veteran to become qualified for a job. Such reasonable efforts could include training or retraining for a position. In addition, USERRA is broader in scope because its protections are not limited to veterans with disabilities. For a more detailed discussion of USERRA, please see the Employee Leaves Chapter of the SourceBook. For more information regarding VEVRAA and other affirmative action laws, please see the Affirmative Action Chapter of the SourceBook.

C. Pre-Employment Testing. Under the ADA, it is unlawful to use any test or selection criteria that tends to screen out persons with disabilities unless the criteria is shown to be job related and “consistent with business necessity.” It is also unlawful to “fail to select and administer tests … in the most effective manner to ensure that … such test results accurately reflect” the attributes being tested for, rather than the impairment. See 42 U.S.C. § 12112(b)(6) and (7).

D. Pre-Employment Physicals and Other Medical Opinions.

1. Conditions of Requiring a Pre-Employment Physical. The ADA prohibits employers from requiring medical examinations or making inquiries about disabilities in the pre-offer stage. See 42 U.S.C. § 12112(d)(2)(A). The EEOC’s Enforcement Guidance on Pre-Employment Disability-Related Inquiries and Medical Examinations Under the ADA identifies the following factors in determining what constitutes a “medical examination” under the ADA:

   - Is it administered by a health care professional or someone trained by a health care professional?
   - Are the results interpreted by a health care professional or someone trained by a health care professional?
   - Is it designed to reveal an impairment or physical or mental health?
   - Is the employer trying to determine the applicant’s physical or mental health or impairments?
   - Is it invasive (for example, does it require the drawing of blood, urine or breath)?

These require confidentiality of results except that: (a) supervisors may be informed regarding work restrictions or accommodations; and (b) first aid and safety personnel may be informed if the condition might require emergency treatment. Under § 504 of the Rehabilitation Act, pre-employment physicals may not be conducted except under circumstances described at 28 C.F.R. § 42.513: (a) all entering employees must be required to take the exam; and (b) results must be collected and maintained separately and kept confidential. The Office of Federal Contract Compliance Programs (OFCCP’s) 1992 changes to § 503 to comply with the ADA allow such physicals only post-offer, pre-employment, and only if they are required of all similarly situated applicants, consistent with the ADA.

2. Reliance on Medical Opinions. The cases vary as to the extent to which an employer can safely rely on a medical opinion in making its employment decisions. See Walker v. Attorney Gen. of United States, 572 F. Supp. 100 (D.D.C. 1983) (permissible to rely on medical opinion); Ben-tivegna v. DOL, 694 F.2d 619 (9th Cir. 1982) (risky – medical opinion must be sound).

3. Evidence Obtained after the Employment Decision is Made. Does evidence obtained after an employment decision is made affect the defensibility of action already taken? Again, the cases are in conflict. See Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983) (“A finding of discrimination cannot be predicated on information the [employer] did not have before it at the time it made its decision.”). But see Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985) (employer who rejected an epileptic job applicant could defend its decision with medical testimony obtained subsequent to the rejection), as amended (9th Cir. 1985).

E. Post-Conditional Offer Medical Inquiries and Examinations. The ADA allows a broad range of medical testing and inquiries once a conditional offer of employment is made – so long as all persons in the same job category are subject to the same medical inquiries or examinations, re-
sults are kept confidential, and the examination is not used to discriminate against persons with disabilities (unless the results render the individual unqualified for the offered job). See 42 U.S.C. § 12112(d)(3). The inquiries need not even be job-related. See 29 C.F.R. § 1630.14(b)(3).

Notwithstanding the broad rights accorded to employers at this stage, employers should be aware of their stringent confidentiality obligations once the employer obtains this information. Employers will be charged with knowledge of any disabilities discovered during this process. Moreover, employers must be prepared to defend any decision to revoke an employment offer in the aftermath of medical inquiries and examinations. Given these practical considerations, any post-conditional offer medical inquiries or examinations should be tailored to the particular needs of the position.

XI. ADA AND MEDICAL INQUIRIES OF CURRENT EMPLOYEES

A. Medical Inquiries. Requiring medical exams of current employees is generally prohibited under the ADA, as is making inquiries as to the nature or extent of disabilities, unless such examinations are “shown to be job-related and consistent with business necessity.” 42 U.S.C. § 12112(4)(A). See, e.g., Kroll v. White Lake Ambulance Auth., 763 F.3d 619, 623 (6th Cir. 2014) (reversing summary judgment in favor of employer who ordered plaintiff to obtain psychological counseling after alleged emotional outbursts at work; “the counseling required by [the employer] can be justified only if [the person ordering the counseling] had a reasonable basis for believing that [the plaintiff] was unable to perform the essential functions of her job … or that she posed a direct threat to her own safety or the safety of others”). The EEOC has issued enforcement guidance on disability-related inquiries and medical examinations directed toward current employees. See EEOC Enforcement Guidance on Disability-related Inquiries and Medical Examinations of Employees under the ADA, http://www.eeoc.gov/policy/docs/guidance-inquiries.html.

In the EEOC’s Guidance, the agency takes the position that restrictions on disability-related inquiries apply to both individuals with disabilities as well as those without disabilities. The Guidance provides the EEOC’s interpretation on the types of questions and inquiries that constitute a disability-related or medical inquiry (questions dealing with medical conditions, genetic information, prior history of workers’ compensation, identifying prescription medication, etc.).

The Guidance also addresses when medical inquiries are allowed, or the meaning of “job-related and consistent with business necessity.” For example, the EEOC permits inquiries when an employer has a “reasonable belief, based on objective evidence” that either of the following conditions exists: the employee’s ability to perform the job will be impaired by a medical condition (or medical treatment); or the employee may pose a direct threat to his or her own safety or the safety of others. Under these conditions, certain “fitness for duty” examinations may occur. In addition, medical examinations or testing required by regulatory authorities (i.e., for pilots under FAA regulations) are allowed, because the examinations pertain to the individual’s continued qualifications. Finally, eliciting voluntary disclosure of conditions for affirmative action purposes (so long as the information is kept confidential and is only used for remedial actions or obligations in affirmative action efforts) is not barred by the ADA.

With regard to performance-related issues, employers should make medical inquiries only if the employer already knows that the employee has a condition that may be a disability, or if the employer knows or has reason to believe that the employee is going through a medical regimen or has a physical condition that may affect job performance. To avoid exposure and claims, employers should focus on performance and functional capacity related to the job. Employers should attempt to leave it up to the employee to disclose any possible medical causes affecting performance or resulting in functional limitations.

As discussed above, employees requesting reasonable accommodations may be required to furnish medical information. The EEOC Guidance on Disability-related Inquiries and Medical Examinations of Employees Under the ADA takes the position that the ADA does not prevent an employer...
from requiring an employee to go to an appropriate health care professional of the employer's choice if the employee provides insufficient documentation from his or her treating physician (or other health care professional) to substantiate that she or he has an ADA disability and needs a reasonable accommodation. The guidance also states that if an employee provides insufficient documentation in response to the employer's initial request, the employer should explain why the documentation is insufficient and allow the employee an opportunity to provide the missing information in a timely manner. Further, the EEOC encourages the employer to consider consulting with the employee's doctor (with the employee's consent) before requiring the employee to go to a health care professional of its choice.

In accommodations and other cases, the inquiries should be narrowly tailored to the condition at issue and should not prompt broader medical inquiries into the employee's full medical history or any unrelated health conditions. The guidance also prohibits employers from requiring employees to undergo periodic medical examinations unless the employee is in a position affecting public safety and the examination is narrowly tailored.

In an employer-friendly turn, the EEOC guidance states that employers can treat a current employee who applies for and is offered a new position within the company as a conditional-offeree instead of an employee. This means the person offered a new position can be required to take post-offer tests or medical exams that would not necessarily be "job-related and consistent with business necessity" if they were required of current employees. The tests or exams must occur after an offer is made but before the individual starts the new job. Of course, the questions or exams must meet the restrictions on pre-employment medical examinations. Those restrictions, however, are much more relaxed than the restrictions that normally apply to current employees. The guidance also prohibits current supervisors from disclosing medical information to the person interviewing the employee or to the new supervisor.

The guidance also permits medical inquiries of employees seeking to return to work (from leave for a medical condition) if the employer has a reasonable belief that the employee's present ability to perform the job will be impaired by the medical condition, or the employee may pose a threat to safety or health. See Gajda v. Manhattan & Bronx Surface Transit Operating Auth., 396 F.3d 187 (2d Cir. 2005) (Transit authority's request for an HIV-positive bus driver's laboratory test results did not violate the ADA. In seeking a leave the driver had indicated he could not work due to his health condition, which this provided the transit authority with a legitimate reason to doubt his ability to perform his duties; requesting the test results was a reasonable way of achieving the goal of determining whether he could safely drive a bus); Harris v. Harris & Hart, Inc., 206 F.3d 838 (9th Cir. 2000) (requiring a former employee to provide a medical release before rehire did not violate the ADA; former employees with known disabilities (and who were out of work or impaired from performing due to the disability) could be treated the same as employees returning to work from leave).

The mere act of making a medical inquiry or requiring medical tests does not necessarily mean that the employer "regards" the employee as having a disability. See, e.g., Tice v. Centre Area Transportation Authority, 247 F.3d 506 (3d Cir. 2001) (request for medical examination of employee does not demonstrate that the employer "regards" the employee as disabled). If medical inquiries are made, employers need to take care to ensure confidentiality and to keep medical information separate from other personnel information.

B. Genetic Testing. The EEOC has also taken the position that genetic testing is a prohibited medical inquiry under the ADA, and that taking adverse employment actions based on the results of genetic information is a form of disability discrimination under the ADA. GINA prohibits discrimination by employers and insurers based on genetic information. GINA prohibits employers (as well as employment agencies and labor unions) from discriminating against employees and applicants for employment on the basis of genetic information. The law also prohibits employers from requesting or acquiring genetic information regarding an employee or a family member of an employee. Additionally, the law prohibits discrimination based on genetic information
with regard to participation in apprenticeship or training programs. It does not, however, create a disparate impact cause of action for genetic discrimination.

Additionally, the law prohibits genetic discrimination by group health plans and health insurance issuers offering insurance coverage in connection with a group health plan. It also prohibits genetic discrimination by issuers in the individual health insurance market and issuers of Medicare supplemental policies. Under GINA, group health plans cannot adjust premiums or contribution amounts for the group covered under the plan on the basis of genetic information. The law also prohibits group health plans from requiring genetic testing and from collecting genetic information prior to an individual’s enrollment in a plan. A health plan does not violate this provision if it obtains genetic information incidental to the collection of other information.

On November 9, 2010, the EEOC published final regulations implementing Title II of GINA. The regulations are available at: http://edocket.access.gpo.gov/2010/pdf/2010-28011.pdf. Some of the issues addressed in the new regulations include:

• Statements made during a casual conversation, such as a general health inquiry, do not violate GINA so long as the employer does not follow up with probing questions likely to elicit genetic information.

• An employer does not violate GINA by requesting information about the manifested disease or condition of an employee whose family member also works for the employer. For example, the employer does not violate GINA by asking someone whose sister also works for the employer to take a post-offer medical examination that does not include requests for genetic information.

• In some situations, requests for medical documentation to provide a reasonable accommodation under the ADA or in connection with a request for leave under the FMLA could result in the disclosure of genetic information that would violate GINA. The EEOC has provided sample language that employers can use when requesting medical documentation from health care providers that warns the provider not to disclose genetic information. The receipt of genetic information would be considered inadvertent if such a warning is given or if the request for medical information was phrased in such a way that was not likely to result in the acquisition of genetic information.

XII. THE ADA AND OTHER WORKPLACE LAWS

A. State Laws on Disability Discrimination. The ADA is not the exclusive law or set of remedies protecting persons with disabilities. The ADA provides remedies such as back pay, attorneys’ fees, reinstatement or injunctive relief, and additional damages available under the 1991 Civil Rights Act (varying by the number of employees). Many states, counties, and municipalities have laws that further restrict employment practices regarding individuals with disabilities. While many of these state statutes mirror the ADA, others create different substantive standards governing employers, different definitions of who is protected under the law, different remedies, and, in some cases, even the specter of individual liability. Some states also have differing interpretations of their definitions, such as whether to take mitigating measures into account.

B. Relationship of the ADA to Workers’ Compensation Law. The EEOC has issued guidance regarding the relationship of the ADA to workers’ compensation laws. The guidance provides assistance on several issues, including:

• Whether a person with an occupational injury has a disability as defined by the ADA;

• Disability-related questions and medical examinations relating to occupational injury and workers’ compensation claims;

• Hiring of persons with a history of occupational injury, return to work, and application of the direct threat standard;
• Reasonable accommodations for persons with disability-related occupational injuries;
• Light duty issues; and
• Exclusive remedy provisions in workers’ compensation laws.

These guidelines are available at: http://www.eeoc.gov/press/9-4-96.html.

C. The National Labor Relations Act (NLRA) and the ADA. Possible conflicts between the goals of the ADA and considerations underlying the NLRA and/or the Railway Labor Act (RLA) make negotiating and implementing reasonable accommodations in a unionized workplace more complicated. The potential areas of conflict include: (1) issues of direct dealing with a represented employee on accommodations; (2) restrictions on sharing employees' medical information with a union in negotiating a reasonable accommodation; (3) possible exceptions to seniority or other collective bargaining agreement provisions involving certain accommodations; and (4) addressing refusals to work over perceived unsafe working conditions (already discussed above). These potential conflicts are best addressed ahead of time rather than in litigation or grievances.

1. Collectively Bargained Seniority Systems vs. ADA Requirement of Reasonable Accommodation. The Supreme Court has held that an employer is not ordinarily required to violate the terms of a bona fide seniority system when faced with a request for reassignment as an accommodation under the ADA. See U.S. Airways v. Barnett, 535 U.S. 391 (2002), discussed above. But see Lujan v. Pacific Maritime Ass’n, 165 F.3d 738, 743 (9th Cir. 1999) (stating that if there is no violation of any seniority rights, it is not clear that the accommodation would be unreasonable and that the reasonableness of an accommodation is ordinarily a question of fact).

2. Duty to Bargain Regarding Reasonable Accommodation. Section 8(a)(5) of the NLRA requires an employer to bargain in good faith over wages, hours, and working conditions. Also, under § 8(d), an employer may not alter the terms and conditions of employment expressed in a collective bargaining agreement while the agreement is in effect without the union’s consent. Thus, an employer may unintentionally violate the NLRA by its implementation of an accommodation even though such accommodation is arguably required by the ADA. Accommodations that are contrary to or infringe upon an established employment practice or perhaps those that affect bargaining unit members other than the accommodated employee would likely require bargaining.

3. Direct Dealing and Confidentiality Issues. EEOC regulations call for direct negotiations with the disabled employee regarding reasonable accommodations and the individual’s functional limitations. See 29 C.F.R. § 1630.2(o)(3). However, the NLRA declares “direct dealing” with a union-represented employee over terms and conditions of employment to be an unfair labor practice. Even if a union becomes involved in the reasonable accommodation process, the ADA does not include union representatives in the circle of individuals with whom the employer may share otherwise confidential medical information (42 U.S.C. § 12112(d)(3); 29 C.F.R. § 1630.14(c)), unless, of course, the disabled employee consents or shares the medical information with the union. The EEOC has issued an opinion letter addressing whether the ADA permits an employer to provide medical information about an employee to a union assessing a grievance challenging the employer’s providing a reasonable accommodation that conflicts with a union contract’s seniority provisions. The EEOC stated that the ADA permits the employer to share this medical information with the union to the extent that the union is acting as a collective bargaining representative (on a “need to know” basis). It is not completely clear, however, that all courts will embrace this position should an individual who does not wish to share his or her medical information with the union bring an ADA claim. The National Labor Relations Board (NLRB) has required an employer to give a union relevant medical information about an employee who was given a highly sought after job over at least 10 co-workers with higher seniority. Roseburg Forest Prods. Co., 331 N.L.R.B. No. 124 (August 9, 2000). In Roseburg, the NLRB ordered the employer to bargain in good faith with the union to determine the relevant information it would need to proceed with the grievance.
4. Right to Discuss Terms and Conditions of Employment. Notwithstanding the employer’s obligation to: (a) preserve confidentiality of medical information; and (b) protect against hostile work environments based on disability, employers should be aware that an overly broad prohibition on employee discussions of a co-worker’s medical restrictions or accommodations could be viewed by the NLRB as a violation of the NLRA.

XIII. THE REHABILITATION ACT OF 1973

A. Section 503. Section 503 of the Rehabilitation Act, 29 U.S.C. § 793, requires certain federal contractors and subcontractors to take affirmative action to employ qualified individuals with disabilities. Specifically, the statute provides that contracts with the federal government for the procurement of personal property and nonpersonal services in excess of $10,000 (including construction) entered into by federal government departments and agencies must contain a provision requiring that the contracting party take affirmative action to employ and advance in employment qualified individuals with disabilities. See 29 U.S.C. § 793(a). This requirement also applies to subcontracts in excess of $10,000 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction). Id. The OFCCP enforces this law. The OFCCP’s interpreting regulations are found at 41 C.F.R. § 60-741.1, et seq. On September 24, 2013, the OFCCP published a Final Rule revising its regulations implementing § 503 of the Rehabilitation Act. The revised regulations took effect March 24, 2014. For more information please see the Significant Labor and Employment Law Requirements Pertaining to Federal Contractors and the Affirmative Action Chapters of the SourceBook.

B. Section 504. Section 504 applies to federal executive agencies and to recipients of federal financial assistance and provides that no otherwise qualified individual with a disability shall “solely by reason of his or her disability be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.” 29 U.S.C. § 794(a). The law further provides that the “standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.” See 29 U.S.C. § 794(d).

The Eleventh Amendment bars application of § 504 to state government employees based on sovereign immunity, absent the state’s consent to such suits. See Alabama v. Pugh, 438 U.S. 781 (1978); Patton v. Thomson, 37 Fair Empl. Prac. Cas. (BNA) 1024 (M.D. Ala. 1983), aff’d, 742 F.2d 1465 (11th Cir. 1984).

Each agency that administers federal funds has its own regulations interpreting the Rehabilitation Act. Although this section does not specifically provide for the right to a jury trial, the Eleventh Circuit has held that a jury trial is available in appropriate § 504 cases, based on the right to a jury trial embodied in the Seventh Amendment. See Waldrop v. Southern Co. Servs., 24 F.3d 152 (11th Cir. 1994).

C. Definition of Disability: Rehabilitation Act. The Rehabilitation Act incorporates the definition of disability as set forth in the ADA. However, the Rehabilitation Act provides that for the “purposes of sections 503 and 504 [29 USCS §§ 793, 794] as such sections relate to employment, the term ‘individual with a disability’ does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others.” See 29 U.S.C. § 705(20). For the purpose of §§ 503 and 504, “disabled” does not include an individual who currently has a contagious disease or infection and who, by reason of
such disease or infection, would constitute a direct threat to the health or safety of other individuals
or who, by reason of the currently contagious disease or infection, is unable to perform the duties

XIV. ENFORCEMENT UNDER THE ADA AND THE REHABILITATION ACT

A. The ADA. Enforcement of the ADA is governed by the same procedures as Title VII of the Civil
Rights Act of 1964. See 42 U.S.C. § 12117. This includes EEOC investigations and individual law-
suits in federal court. (The OFCCP will investigate ADA charges made against federal contractors
and subcontractors.)

B. Rehabilitation Act, § 503b. There is no private cause of action under § 503b of the Rehabilita-
under § 503b. See 41 C.F.R. §§ 60-741.60. A complaint must be filed with OFCCP within 300 days of
the alleged violation. 41 C.F.R. §§ 60-741.61, et seq. The Department of Labor (DOL) will investigate
a complaint made with the OFCCP. 41 C.F.R. § 60-741.61(e). Such investigation may culminate in
a recommended order. Id. When the investigation indicates a violation, the OFCCP Director gives
the contractor an opportunity for conciliation, then for a hearing if the case has not otherwise been
resolved. See 41 C.F.R. § 60-741.61(f)(4); 41 C.F.R. § 60-741.65.

For the process of charges filed against government contractors when the complaints fall within
both the ADA and § 503, see 41 C.F.R. §§ 60-742.1, et seq.