
## Monday, October 1, 2012
## 11:00 AM - 12:30 PM

# 501 – Proving a Disability Under the ADAAA: The Big Easy?

**Grant Dearborn**
*Corporate Attorney*
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**John Gronda**
*Vice President, Counsel for Labor, Employment and Employee Benefits*
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**Andrew Hament**
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**Cathi Hunt**
*Director, Corporate Counsel*
Starbucks Coffee Company

# Faculty Biographies

**Grant Dearborn**

Grant P. Dearborn is a board certified health care lawyer who currently works for an integrated health care system in central Florida. His current responsibilities include regulatory, contracting and supporting human resources.

Prior to his current position, Mr. Dearborn worked for the Florida Agency for Health Care Administration. He has also worked in private practice and for a legal services organization.

Mr. Dearborn is active in the Florida Bar Health Law section. He is a graduate of the University of Florida Law School (JD) and of the Syracuse University Law School (LLM).

**John Gronda**

John D. Gronda is associate general counsel vice president- employment and benefits for Harris Corporation in Melbourne, FL. His responsibilities include providing legal support to Harris Corporation and its subsidiaries and affiliates on a global basis on matters pertaining to labor and employment law, employee benefits and immigration. Mr. Gronda also provides legal support to the Harris business conduct and ethics program.

Before joining Harris, Mr. Gronda served as a partner in a Miami labor and employment law firm. Mr. Gronda earned a BBA degree in business administration from the University of Michigan and a law degree from Wayne State University Law School.

**Andrew Hament**

Andrew S. Hament represents management in all areas of employment and labor law and is certified by the Florida Bar as a specialist.

He advises private and public sector employers in discipline and discharge, reductions-in-force, collective bargaining, union grievance/arbitrations, discrimination issues, sexual harassment investigations, executive employment and severance agreements, trade secret and non-compete issues, drug abuse and drug testing, the Family and Medical Leave Act and violence in the workplace.

Mr. Hament regularly represents employers in state and federal courts and in investigations and charges before the U.S. EEOC, the Florida Commission on Human Relations, the U.S. Department of Labor, the National Labor Relations Board and the Florida Public Employees Relations Commission.

Earlier in his career, he was in-house labor counsel to Harris Corporation, where he handled all the company's domestic and international employment, labor and benefits law matters for 30,000 employees worldwide. While at Harris he also served for several years as Harris' European counsel based in Brussels, Belgium.

He currently serves as the president of the Academy of Florida Management Attorneys. He previously served on the board of directors of the United Way of Brevard County, where he co-chaired the Leadership Giving Council, as well as on the board of directors of the Easter Seals of Brevard and Bridges, Inc., human services agencies, which provide support services to individuals with developmental disabilities.

Mr. Hament received a BA from Johns Hopkins University and is a graduate of the University of Baltimore School of Law.

**Cathi Hunt**
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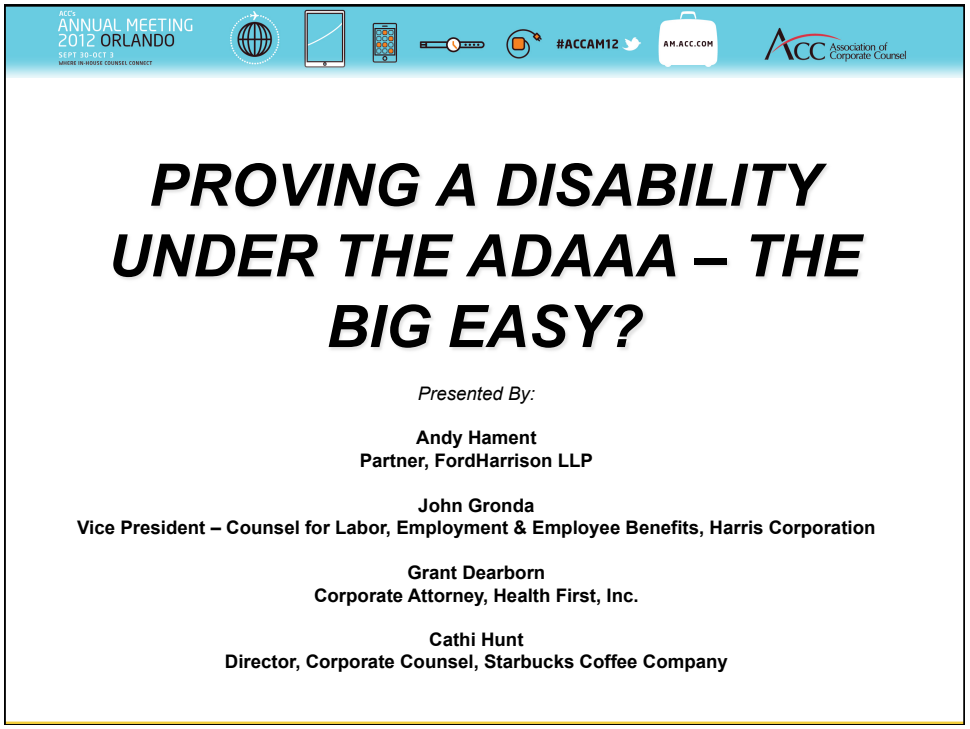


# *PROVING A DISABILITY UNDER THE ADAAA – THE BIG EASY?*

*Presented By:*

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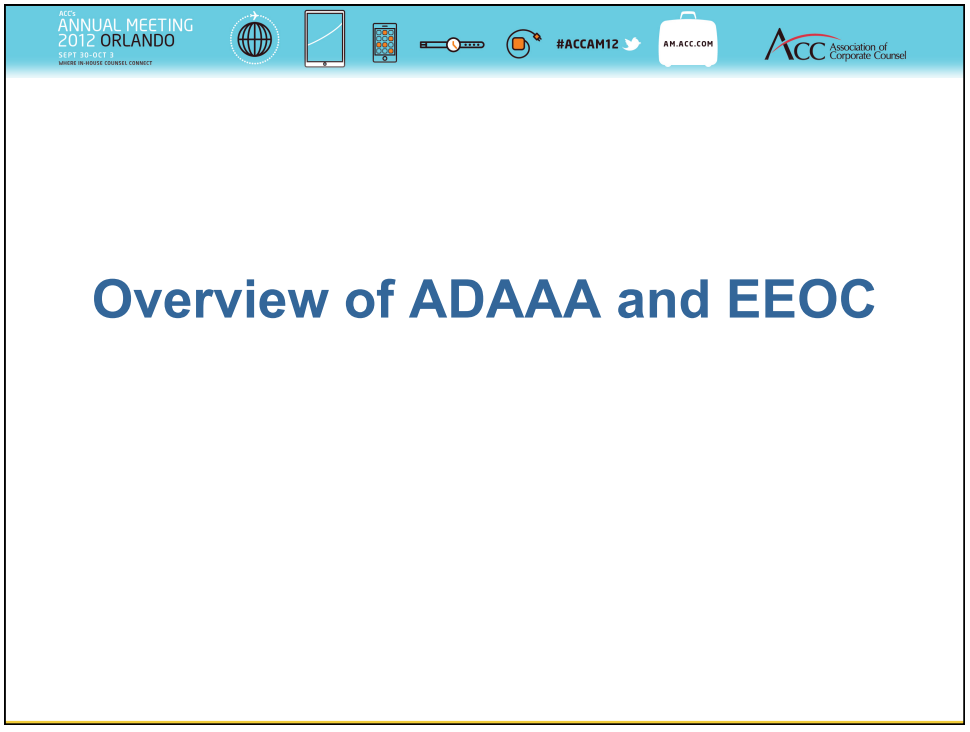
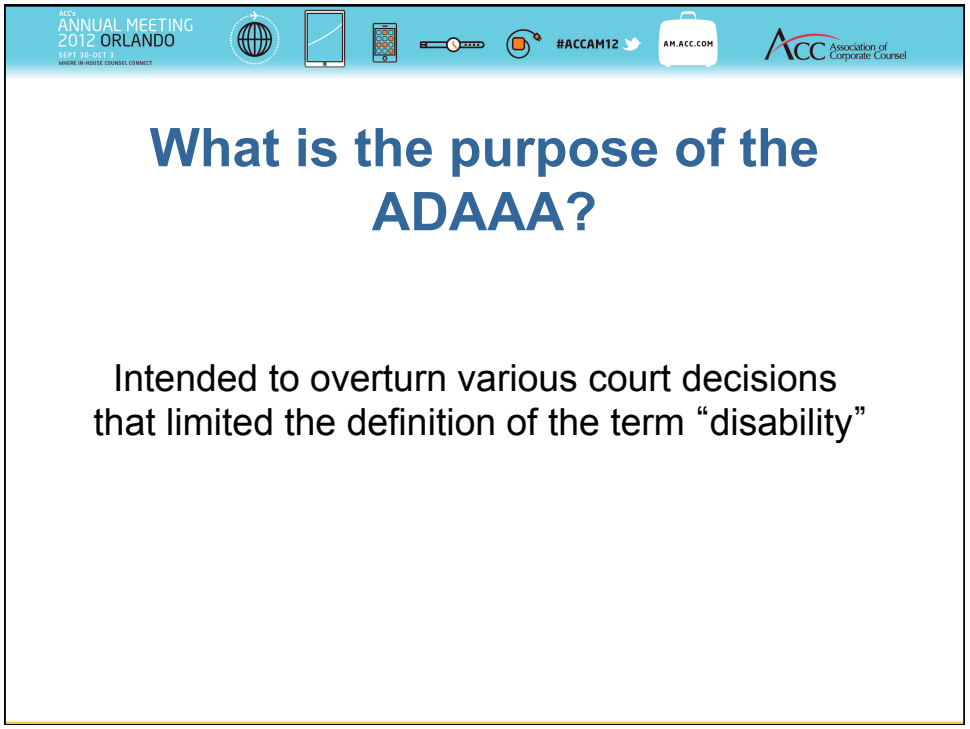
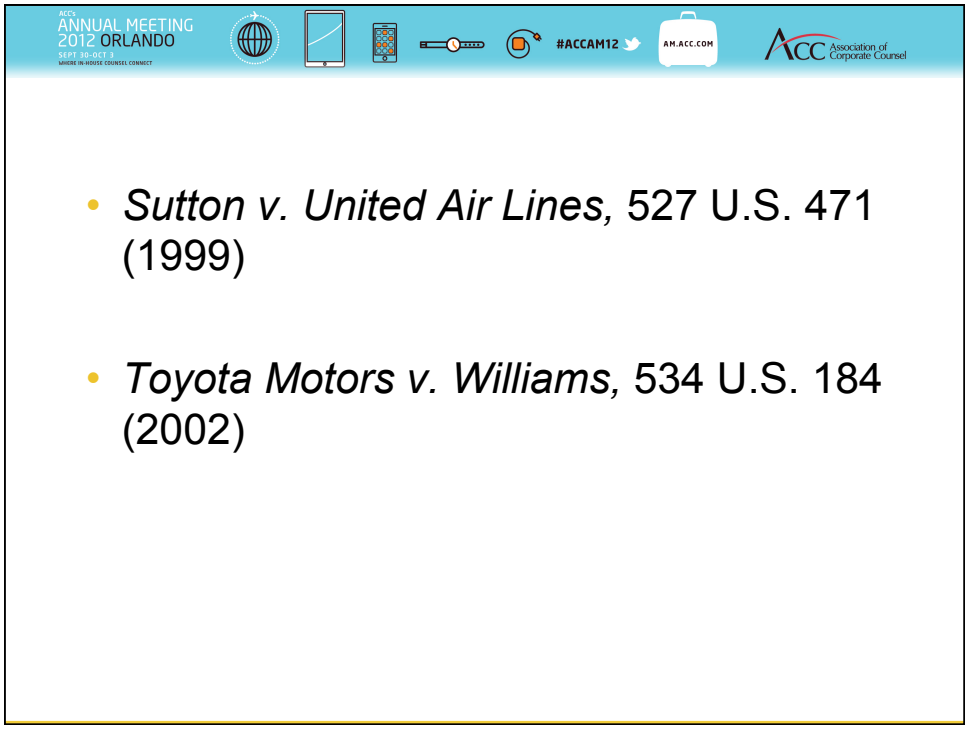


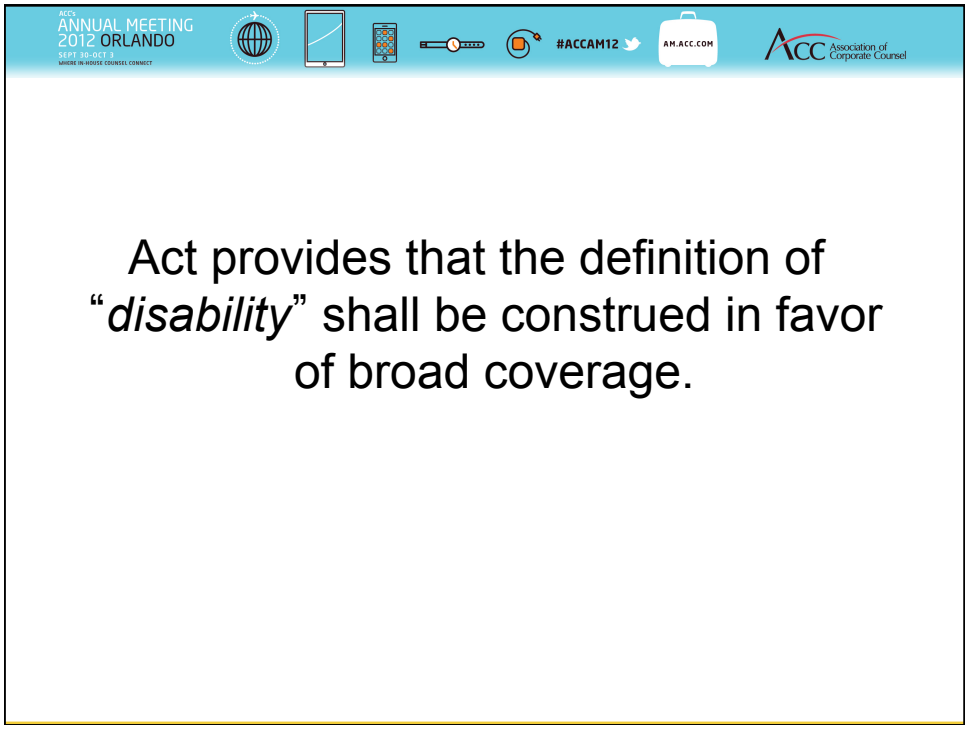

## Overview of ADAAA and EEOC

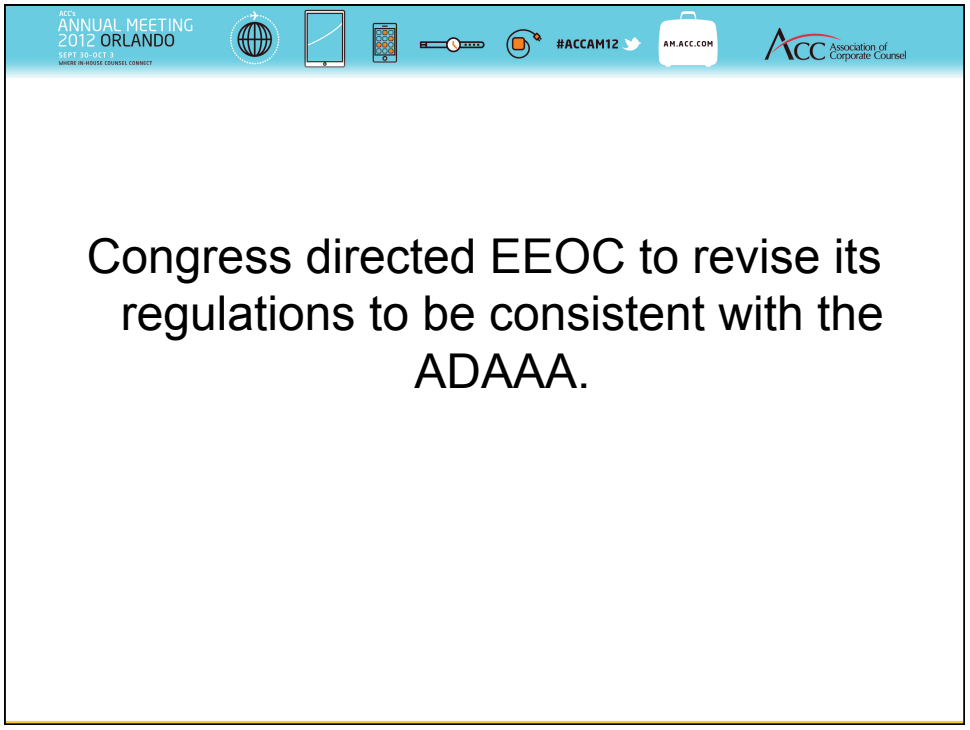
 



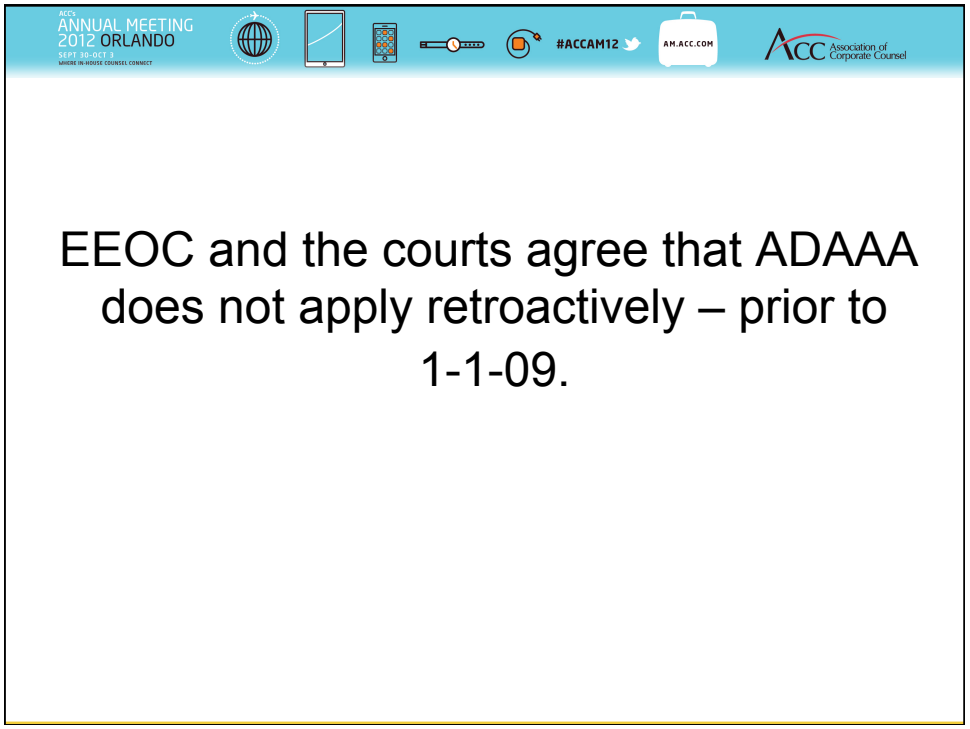



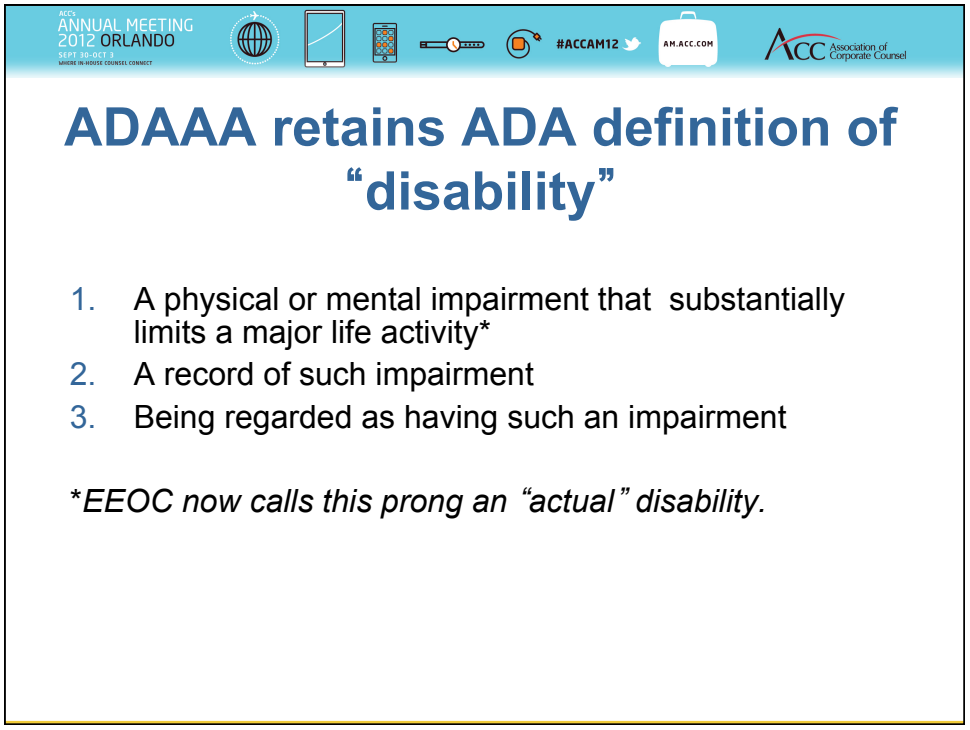

 



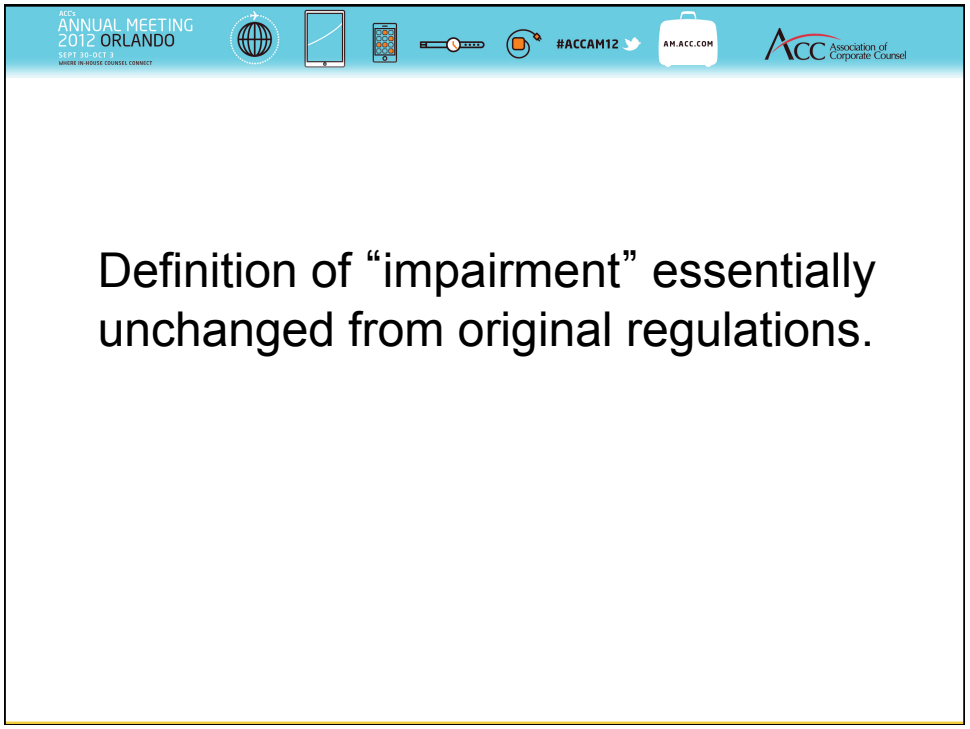



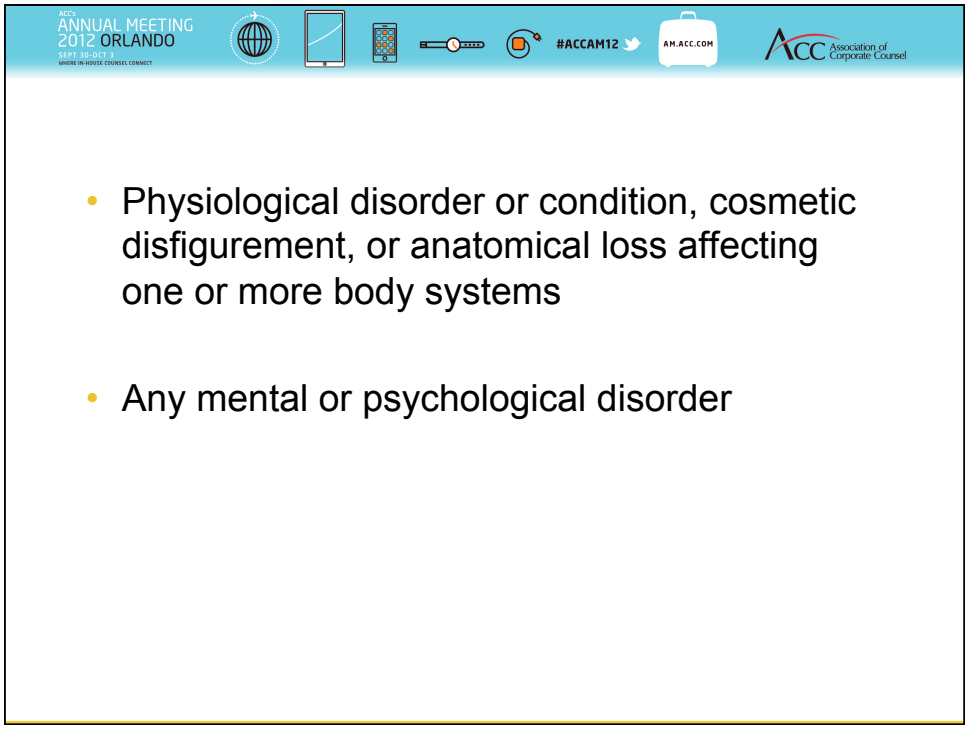

 





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## When does an impairment "substantially limit" a major life activity?

- Toyota standard: "severely" restricts a major life activity
- Old EEOC regs.: "significantly" restricts a major life activity
- New EEOC regs.: Common sense assessment based on comparison with "most people in the general population"

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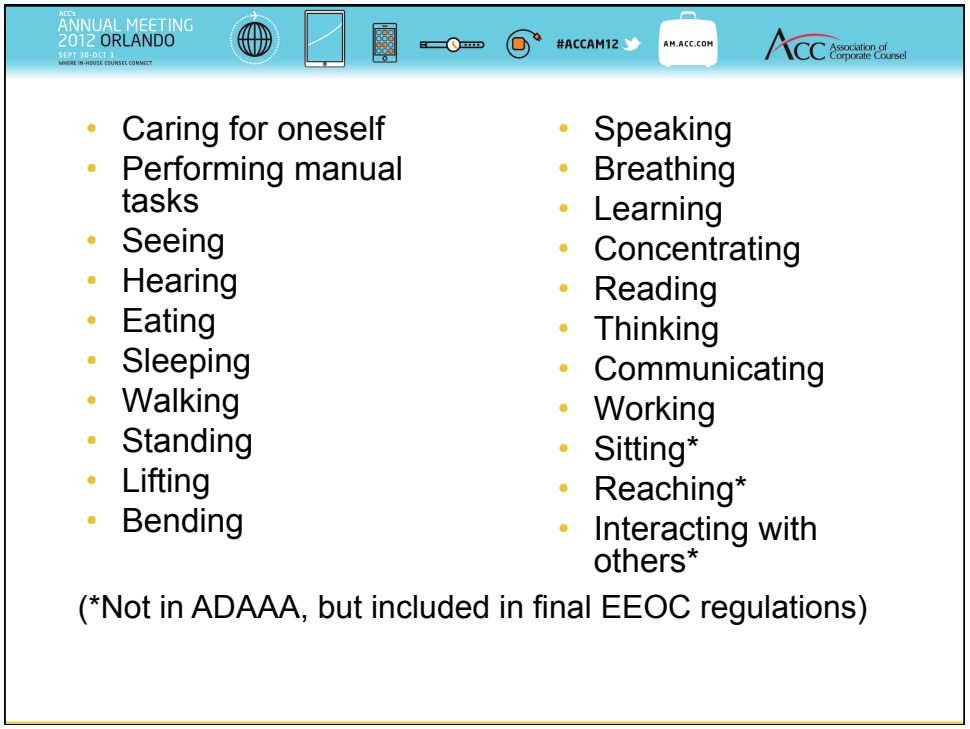
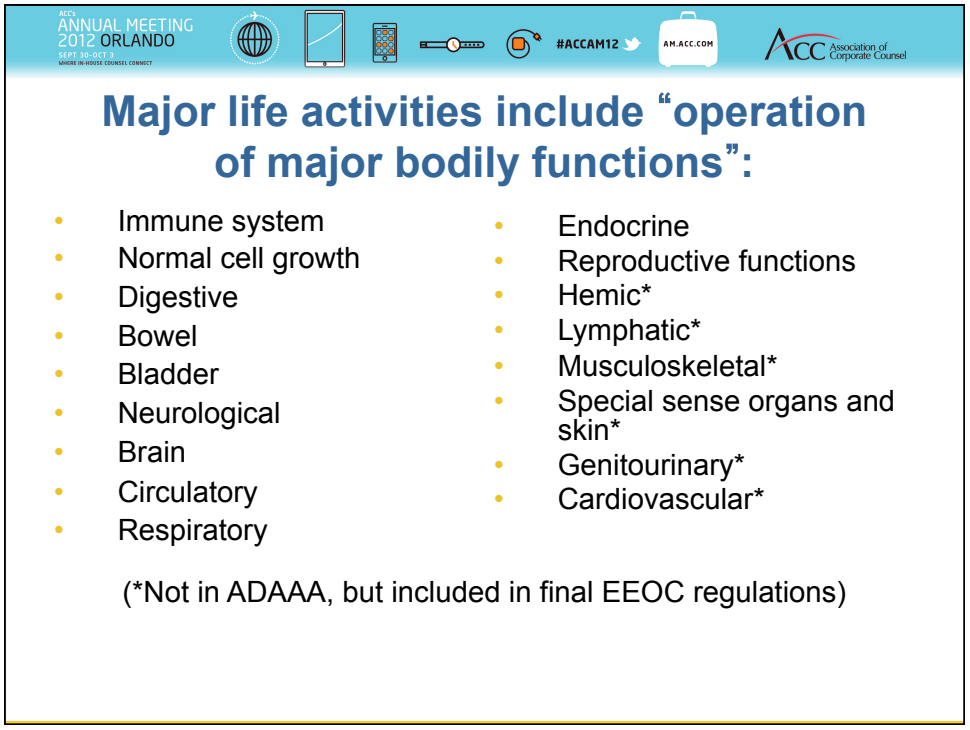
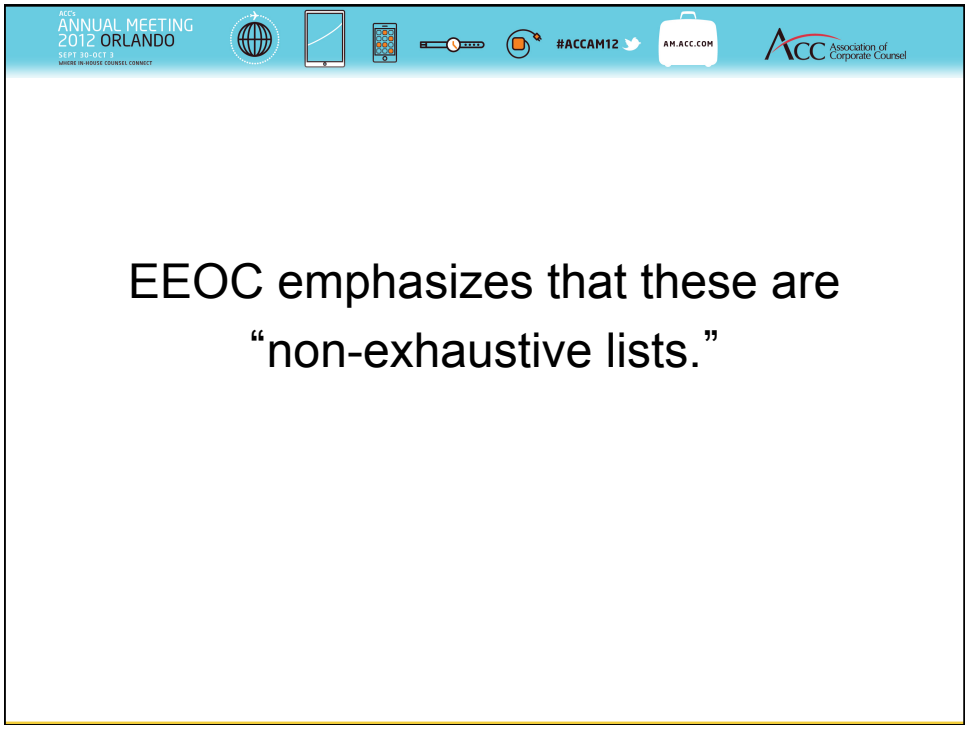
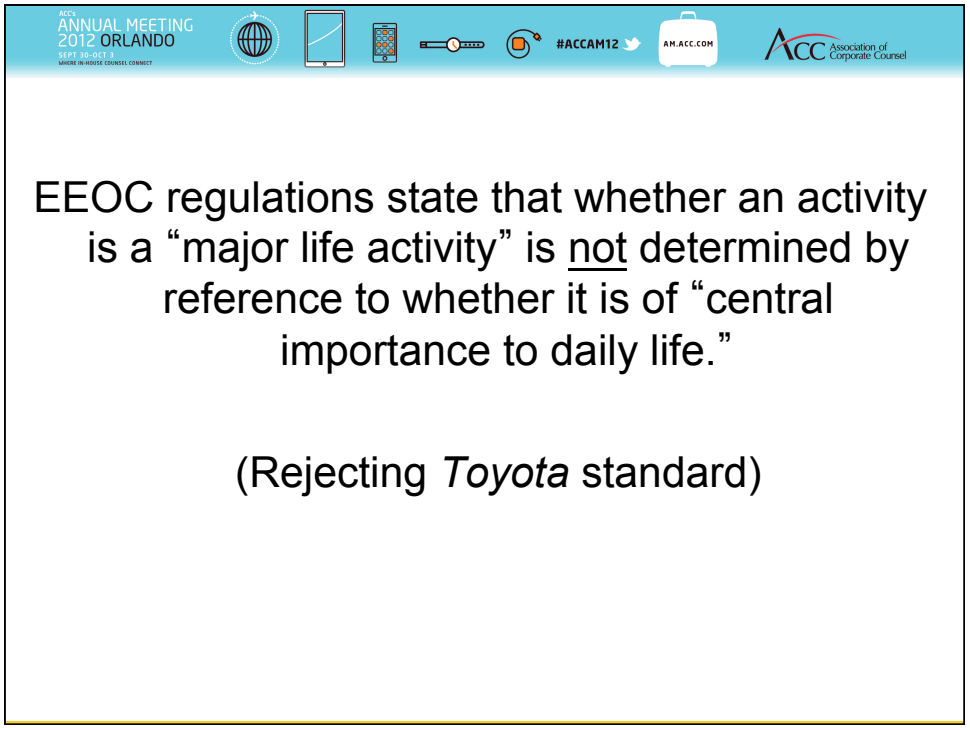
## What are "major life activities" under the ADAAA?





EEOC regulations state that "substantially limits" is "not meant to be a demanding standard" …. This assessment "usually will not require scientific, medical, or statistical analysis."

## Does ADAAA allow consideration of "mitigating measures"?

No. Generally not allowed to consider

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## Examples of mitigating measures:

- Medication
- Medical supplies, equipment or devices
- Prosthetic limbs, etc.
- Low vision devices
- Reasonable accommodations
- Behavioral modifications
- Psychotherapy*
- Behavior therapy*
- Physical therapy*

(*Not in ADAAA, but included in final EEOC regulations)

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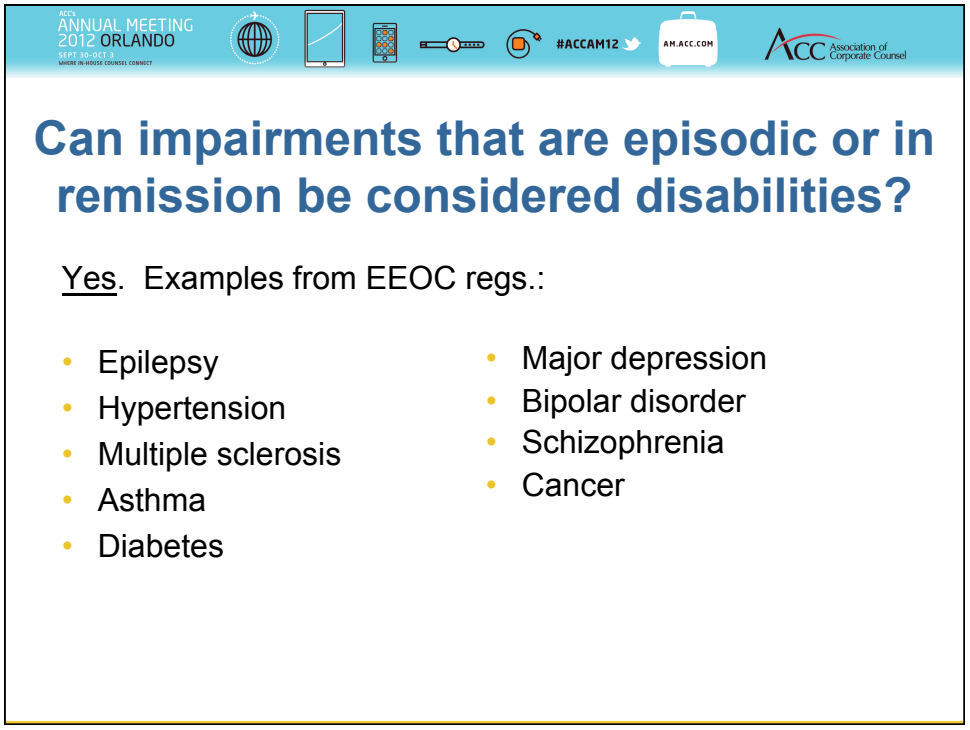
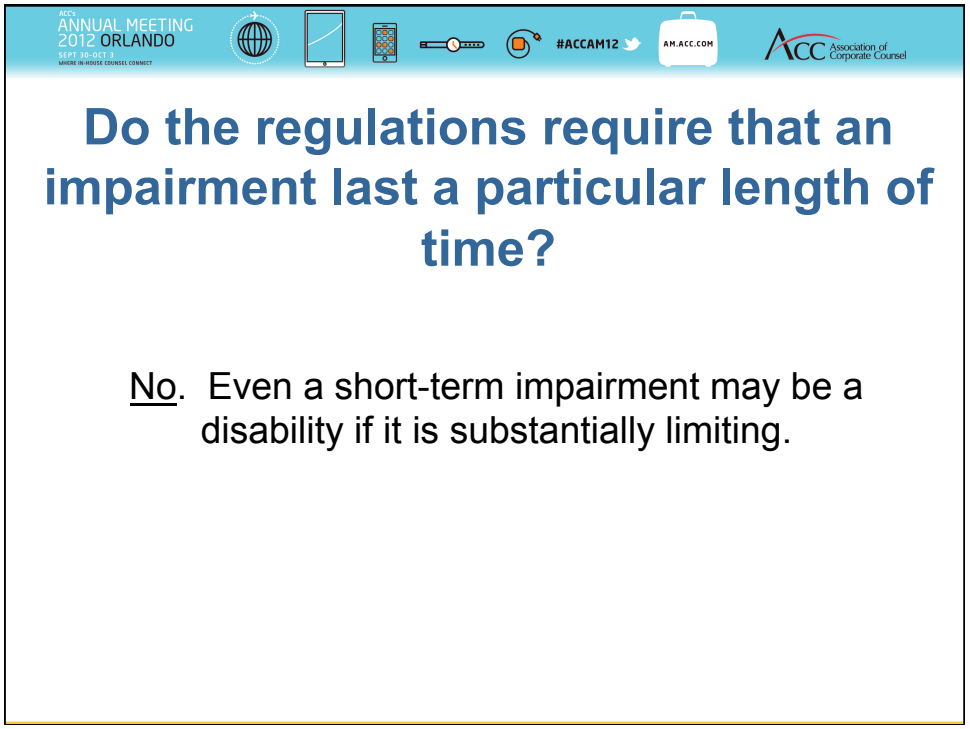
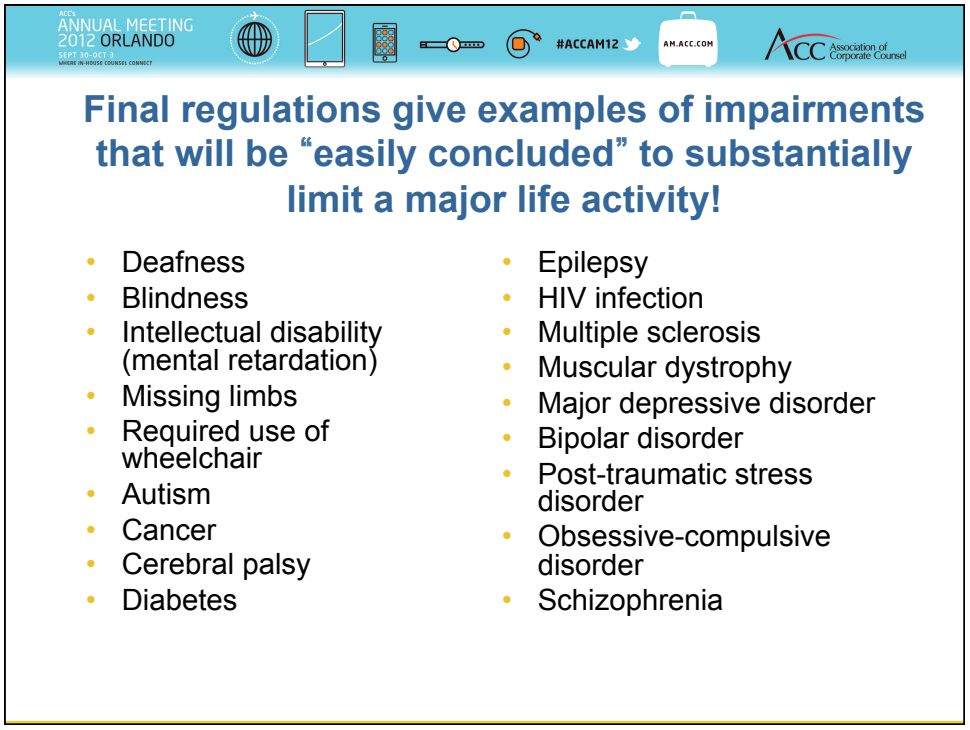
## Does this rule apply to ordinary eyeglasses or contact lenses?

No. They may be considered in determining whether someone has a disability.



EEOC deleted examples of impairments that "are usually not disabilities" from final regulations, including "a broken bone that is expected to heal completely" and a "sprained joint."

## Is pregnancy a disability under the proposed regulations?

No. Pregnancy is not an impairment, but impairments resulting from pregnancy (e.g. gestational diabetes) could be a disability if they substantially limit a major life activity

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## Is current drug use protected under proposed regs.?

No, but could meet definition of "disability" if:

- Rehabilitated successfully, or
- Participating in a supervised rehabilitation program

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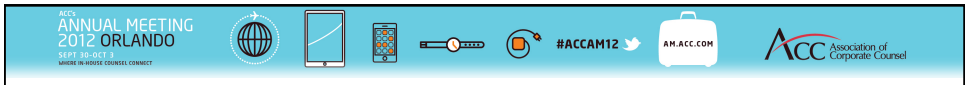
## What does it mean for an employer to "regard" an individual as having a disability under final regulations?

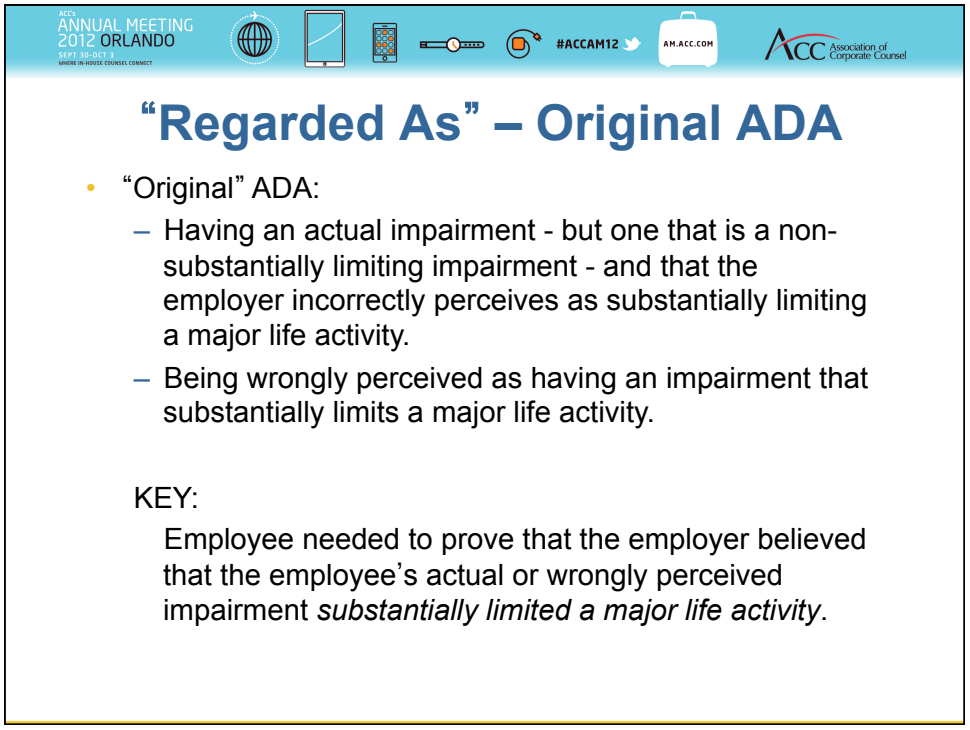
- If employer takes adverse action "because of an actual or perceived" impairment
- No longer have to show employer believed impairment substantially limited a major life activity



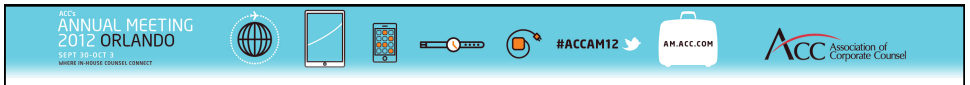

- May be a defense to "regarded as" claim if employer demonstrates that the impairment is both "transitory" and "minor." Must be based on objective evidence as opposed to subjective belief.
- EEOC regs. define "transitory" as "lasting or expected to last 6 months or less."


## Increase in Individuals Covered by ADAAA

- 1990 Congressional estimate: 43 Million Americans have disabilities that would fall under ADA.
- Preliminary EEOC estimate: 1 Million more workers that could fall under ADAAA.
- Final EEOC estimate: 38.4 Million more workers that could fall under ADAAA.




## "Regarded As" Defined: 29 C.F.R. § 1630.2(l)

- ADAAA
  - Employer is aware that the employee has an actual impairment – but one that is transitory and minor - but perceives it as a non-transitory and non-minor impairment.
  - Employer wrongly perceives that the employee has a non-transitory and non-minor impairment.

KEY:

Employee need only show that the employer was aware of an impairment or perceived that s/he has a non-transitory and non-minor impairment and no longer needs to prove that the employer believed that the employee's actual or wrongly perceived impairment *substantially limited a major life activity*.

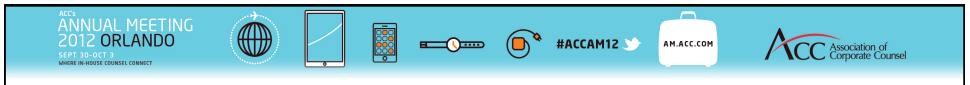

## Transitory and Minor Impairments

- Employer's defense: Impairments that are "transitory" and "minor" cannot be used to satisfy the "regarded as" prong (42 U.S.C. §12102(3)(B); 29 C.F.R. § 1630.15(f)).

  The EEOC regulations state that this is a defense to "regarded as" EEOC charge, which suggests that the employer has the burden of proof in a subsequent lawsuit.

- The term "transitory" is defined to mean 6 months or less.

- The term "minor" is not defined in the statute or regulations.




## Transitory and Minor Impairments (cont.)

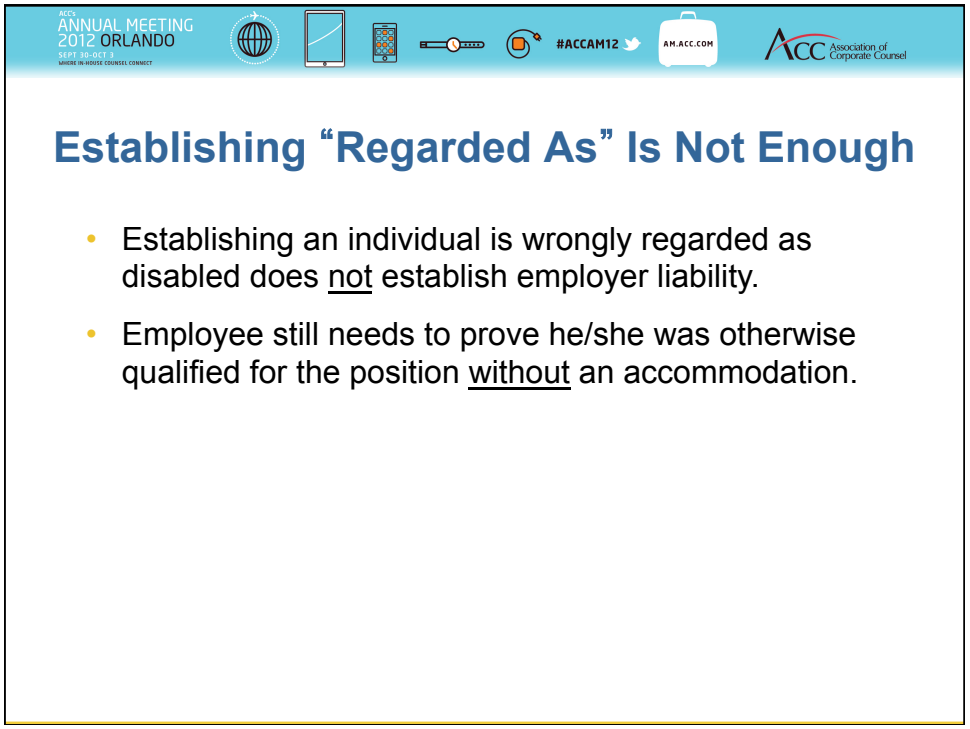
- "Whether the impairment at issue is or would be 'transitory and minor' is to be determined objectively."

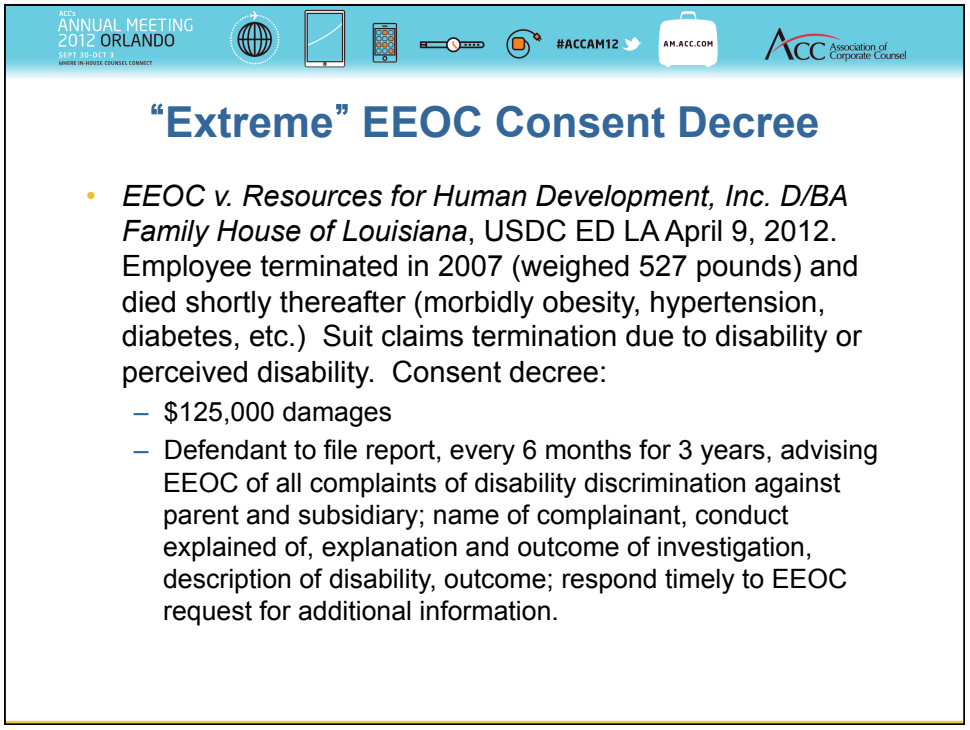
  Note: An employee may have an actual disability even if the impairment is less than 6 months in duration and/or minor.


## No Reasonable Accommodation Obligation

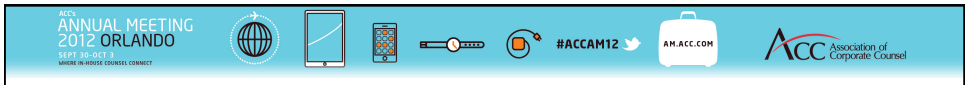
- An employer has no duty or obligation to accommodate an employee who is regarded as disabled but not actually disabled (42 U.S.C. § 12201 (h)).

- So, in a lawsuit under the ADAAA, an employee who cannot prove he/she has an actual disability cannot maintain a failure to accommodate claim; but he/she still may be able to maintain a disparate treatment claim.



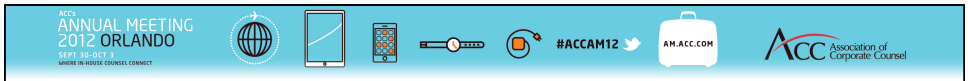






## "Extreme" EEOC Consent Decree (Cont.)

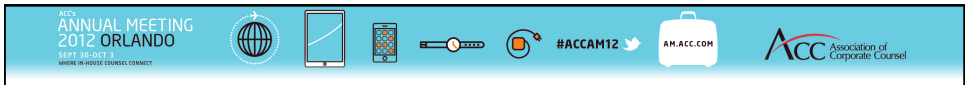
- 2 hour annual training by employment counsel of certain individuals.
- Implement/post disability discrimination policy (terms of policy outlined by EEOC).
- Post notices of violation of law by employer.
- Tribute to deceased former employee (name room in hospital after the individual, provide a plaque of prescribed size with prescribed wording and the plaque "shall at all times include or be accompanied by a color copy of a photograph of the individual attached as Exhibit A, printed on archival quality paper, not less than 8 by 10 inches in dimension").




## Bad Facts Make Bad Law - and Can be Embarrassing and Expensive

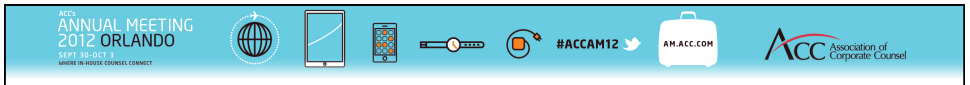
*EEOC v. Cottonwood Financial, Ltd. USDC E.D. WA March 28. 2012.*

Model Employee: High School honor student with college academic scholarship. Diagnosed with bi-polar disorder, causing him to leave school. Employed as assistant store manager, received awards, then promoted to store manager. Needed short leave to adapt to new medication.



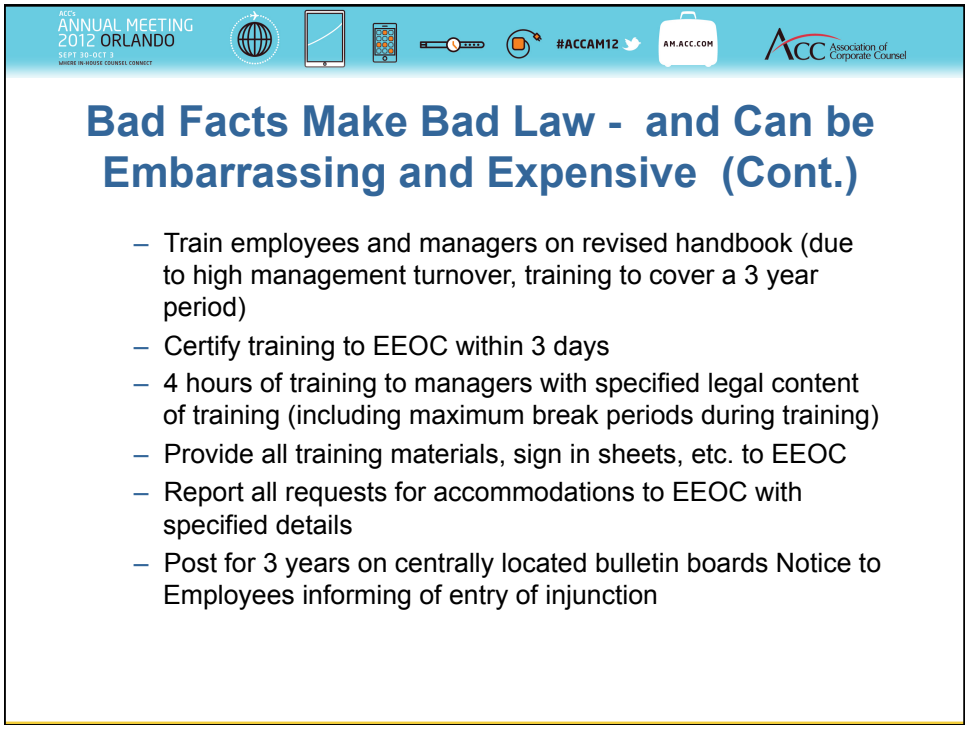

## Bad Facts Make Bad Law - and Can be Embarrassing and Expensive (Cont.)

- What was Employer Thinking: Leave denied forcing premature return to work. Employee fired soon thereafter. Employer gave a number of reasons to EEOC as to why it fired the individual, all related to a variety of performance related reasons occurring within days of the employee suffering a bi-polar incident. At trial, the company testified it fired the individual for a single reason – he used the word "f--k" on a business report. This was a new, never raised "justification"; he had already been issued a warning for this conduct before his termination.



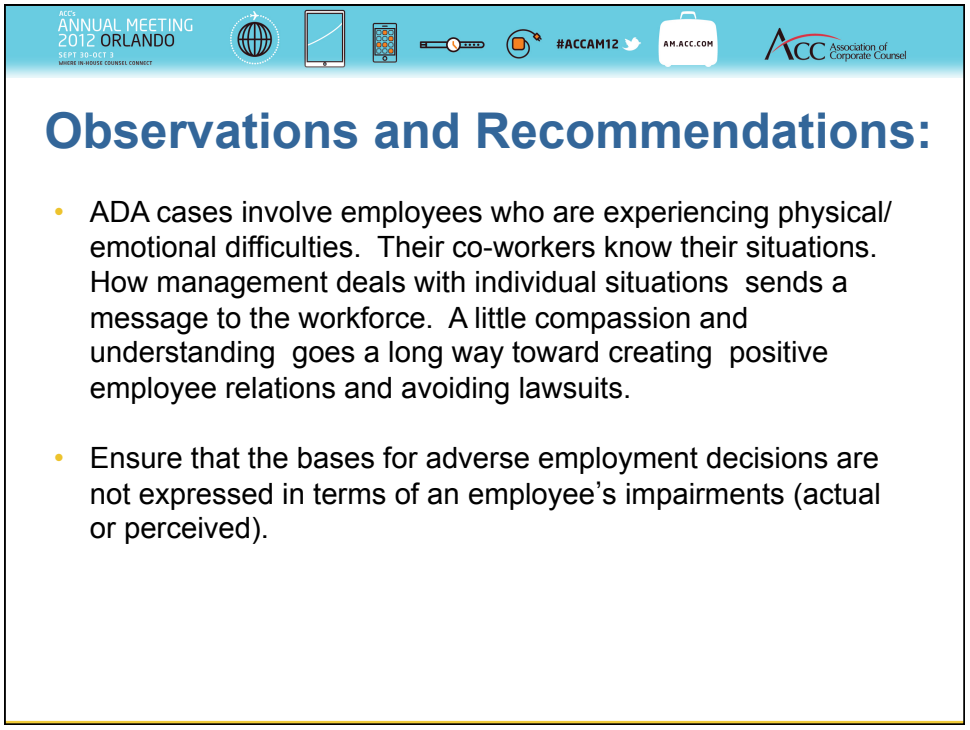

## Bad Facts Make Bad Law - and Can be Embarrassing and Expensive (Cont.)

- The Court held…after commending Mr. Reilly for coping so well with his bi-polar issues, and on becoming employed…that Mr. Reilly was fired on account of his perceived disability (under the ADA's original definition):
  - $56,000 damage award
  - $255,000 + attorney's fees and costs
  - Injunctive Relief, to include:
    - Employer must revise their legally deficient handbook to include provisions dictated by the court, such as adding the definition of disability "being regarded as having such impairment".
    - Employer to correct a minor typographical error found by the court on the Request for Reasonable Accommodation form.



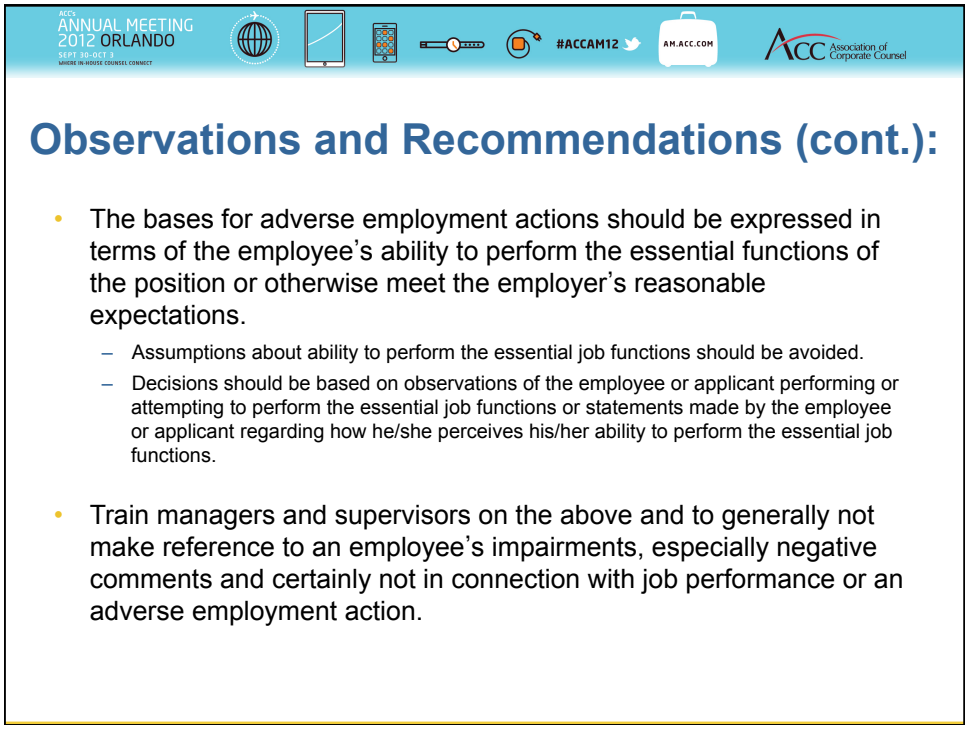

## Bad Facts Make Bad Law - and Can be Embarrassing and Expensive (Cont.)

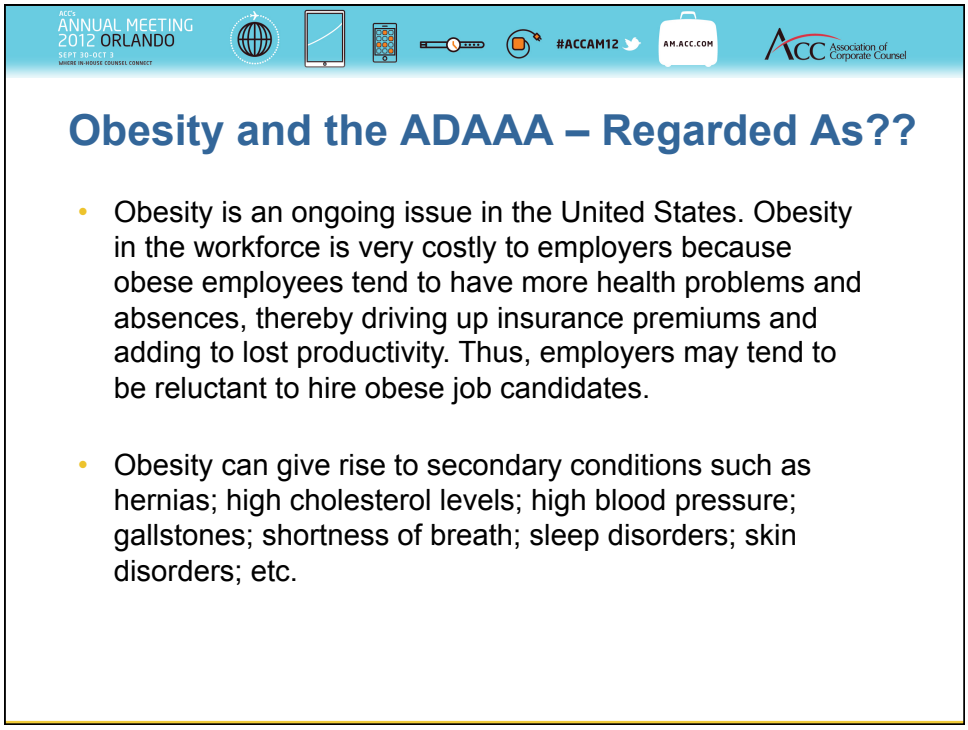
- Train employees and managers on revised handbook (due to high management turnover, training to cover a 3 year period)
- Certify training to EEOC within 3 days
- 4 hours of training to managers with specified legal content of training (including maximum break periods during training)
- Provide all training materials, sign in sheets, etc. to EEOC
- Report all requests for accommodations to EEOC with specified details
- Post for 3 years on centrally located bulletin boards Notice to Employees informing of entry of injunction



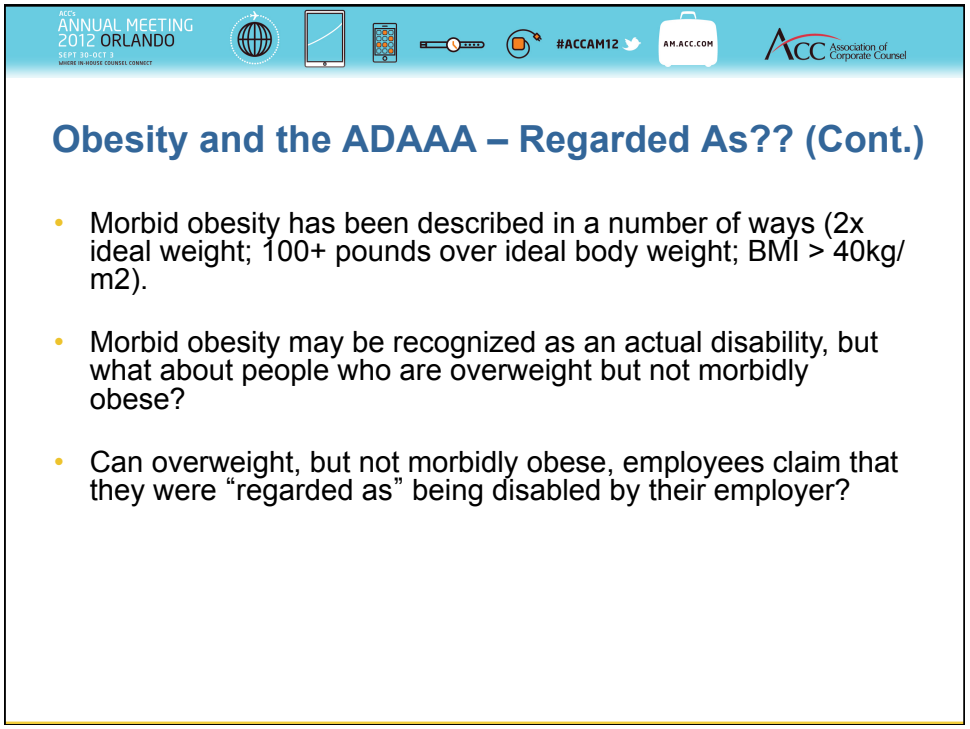

## Observations and Recommendations:

- ADA cases involve employees who are experiencing physical/ emotional difficulties. Their co-workers know their situations. How management deals with individual situations sends a message to the workforce. A little compassion and understanding goes a long way toward creating positive employee relations and avoiding lawsuits.
- Ensure that the bases for adverse employment decisions are not expressed in terms of an employee's impairments (actual or perceived).



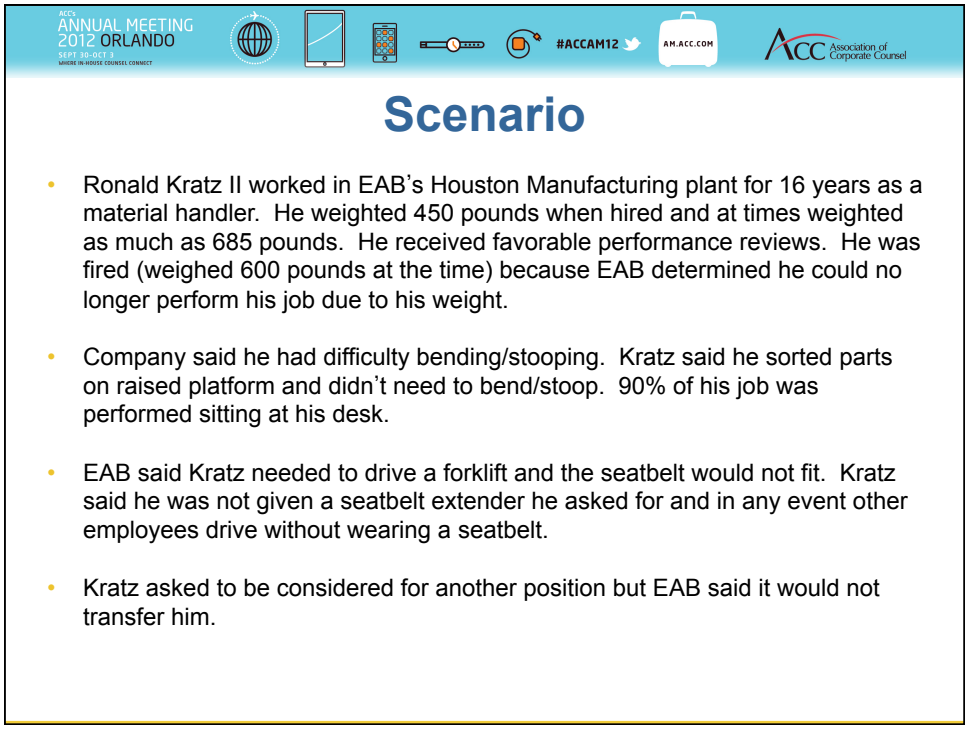





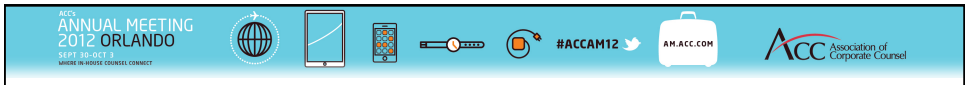

## Obesity and the ADAAA – Regarded As?? (Cont.)

- Morbid obesity has been described in a number of ways (2x ideal weight; 100+ pounds over ideal body weight; BMI > 40kg/ m2).
- Morbid obesity may be recognized as an actual disability, but what about people who are overweight but not morbidly obese?
- Can overweight, but not morbidly obese, employees claim that they were "regarded as" being disabled by their employer?




## Scenario

- Ronald Kratz II worked in EAB's Houston Manufacturing plant for 16 years as a material handler. He weighted 450 pounds when hired and at times weighted as much as 685 pounds. He received favorable performance reviews. He was fired (weighed 600 pounds at the time) because EAB determined he could no longer perform his job due to his weight.
- Company said he had difficulty bending/stooping. Kratz said he sorted parts on raised platform and didn't need to bend/stoop. 90% of his job was performed sitting at his desk.
- EAB said Kratz needed to drive a forklift and the seatbelt would not fit. Kratz said he was not given a seatbelt extender he asked for and in any event other employees drive without wearing a seatbelt.
- Kratz asked to be considered for another position but EAB said it would not transfer him.



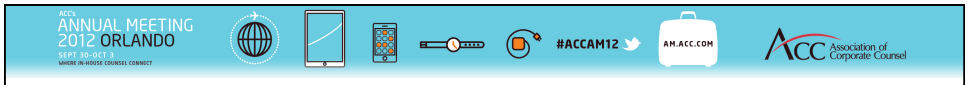

## Scenario Q&A:

Q: What do you think the company's legal position would be?

Q: What do you think the employee would argue?

Q: What if the employee weighed 90 pounds and was fired for being too skinny, too frail to do the job?

Q: What if there were overweight females who were not reviewed/fired by EAB?

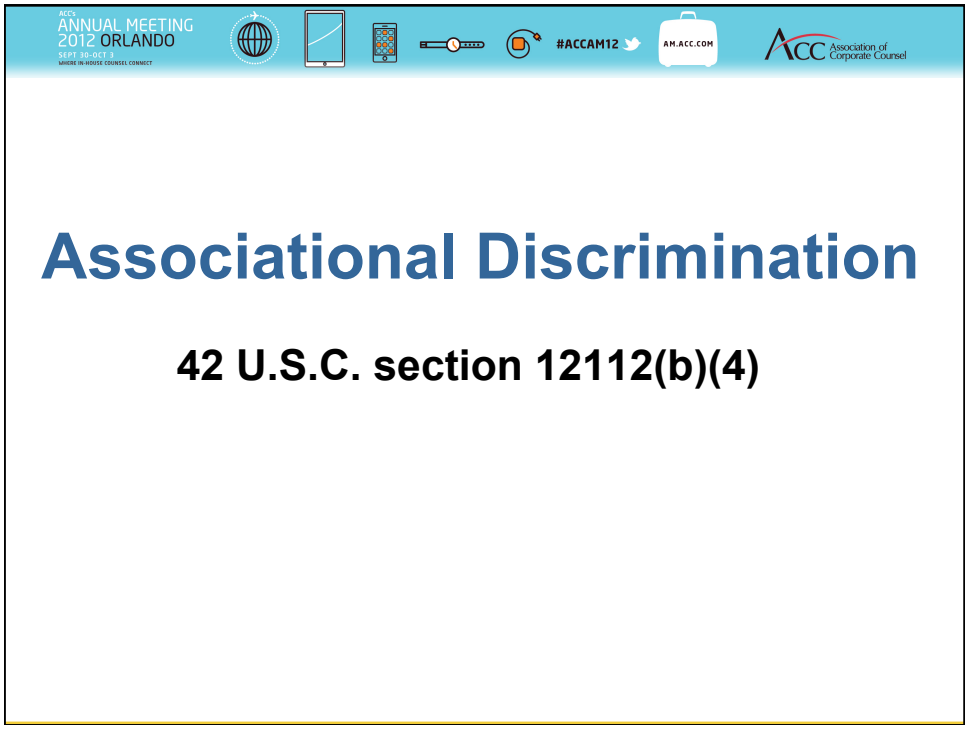


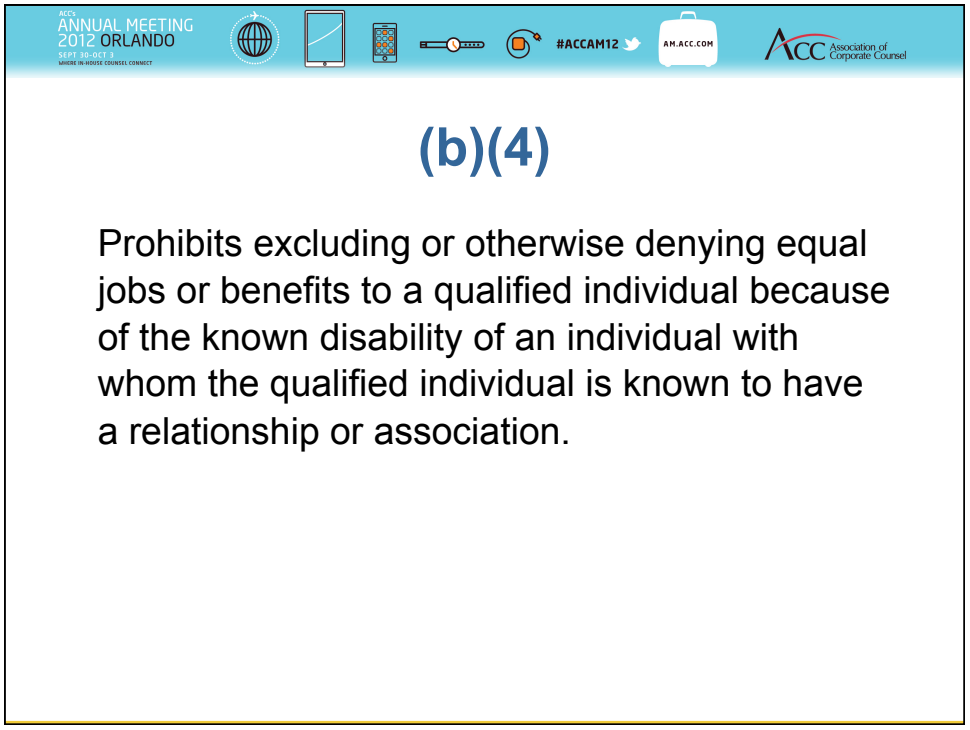

## Scenario Outcome

- The scenario is EEOC v. BAE Systems Tactical Vehicle Systems, LP., filed in U.S. District Court, Southern District of Texas. Suit claimed ADA violation for failing to offer reasonable accommodations and for firing someone who suffered from a disability yet could perform the essential requirements of their job; or violation for firing someone improperly regarded as being disabled.
- EEOC's July 24, 2012 Press Release announced a settlement via consent decree, which required BAE to :

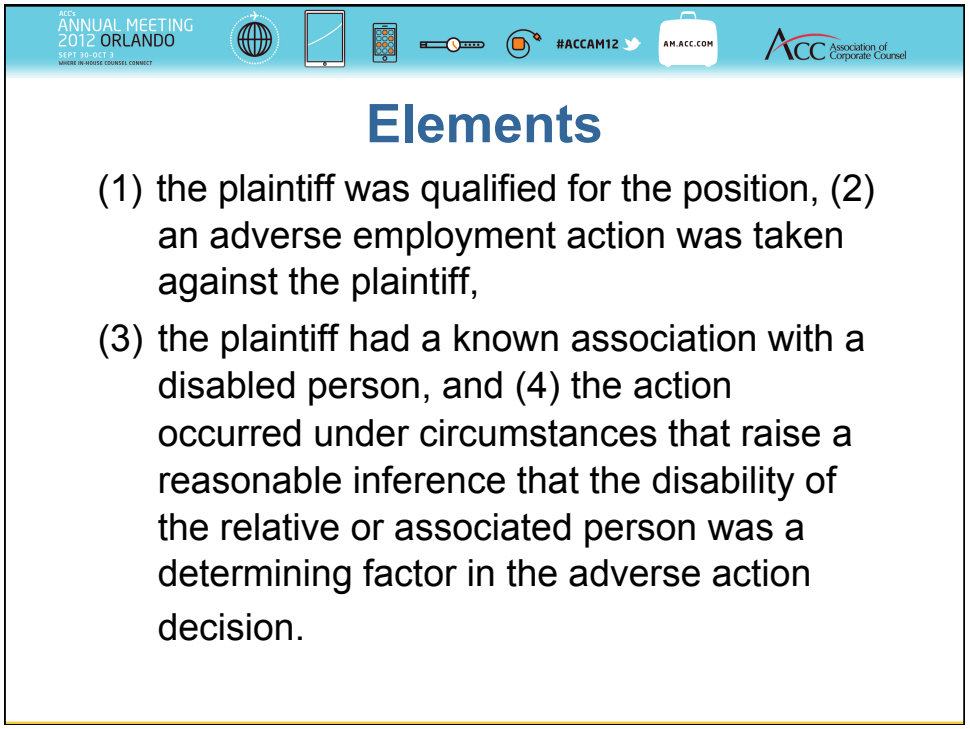
1. Pay $55,000 to Kratz
2. Provide 6 months outplacement services
3. Train HR and Management
4. Post notice

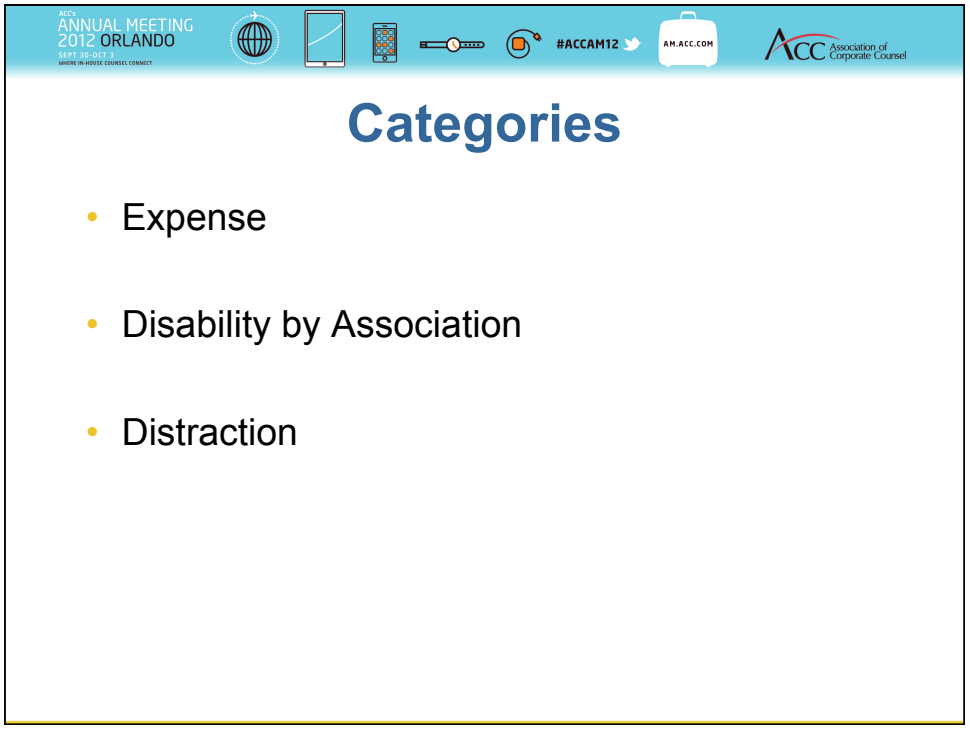
 



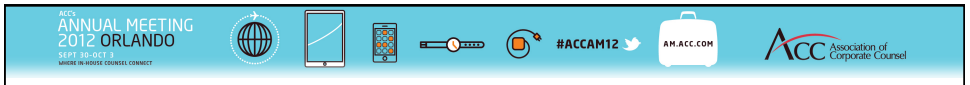








- Employer can enforce neutral policies regarding attendance.
- No obligation to accommodate nondisabled person.
- McDonnell Douglas shifting.
- Plaintiff may use circumstantial evidence and proximity in time to show pretext.


## Hypothetical Scenario

Mother and father work for factory that has a self funded health plan. The couple have a child who is born with disabilities. The child requires $50,000 per year in coverage. The factory is having financial challenges and management has weekly posts about cutting costs. On more that one occasion, healthcare costs are referenced as an expensive budget item. The child's condition gets worse and both parents take leave for doctor's appointments. The father has called in sick in violation of policy. Management knows about the leave and the reason. Shortly after, the couple become the subject of an investigation for missing supplies. After a short investigation, the couple are thereafter terminated for theft.

# Absence, Tardiness and Leave

## Hypothetical Scenario

- Retail clothing company maintains an attendance policy that provides:
  - Following 6 tardy instances or 2 unscheduled absences in a 12 month period, progressive discipline will be implemented up to and including termination of employment
- Job descriptions provide that strict adherence to the attendance policy is required

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## Michael

- Michael is an accountant for the company. He is responsible for maintaining financial accounts for the stores, including balancing store receipts on a daily basis.
- After 6 instances of tardiness, he informs his manager he has epilepsy, episodes of which cause him to be late on occasion. He requests ability to arrive late on days the epilepsy effects him and offers to work late to make up the missing time.
- After three warnings and continued instances of tardiness, his employment is terminated.

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## Angela

- Angela is a store area coordinator for one of the retail stores. She is responsible for preparing the department in the morning for the store's opening – stocking merchandise, placing cash in registers, arranging displays.
- After 6 instances of tardiness, she informs her manager that she has migraine headaches, which cause her to be late due to pain. She requests ability to arrive late on days she has migraines and offers to work late to make up the missing time.
- After three warnings and continued instances of tardiness, her employment is terminated.

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## Are the Terminations Lawful under ADAAA?

- Can the individual perform the essential functions of the position with or without accommodation?
- What are the essential functions?
  - Michael / Angela

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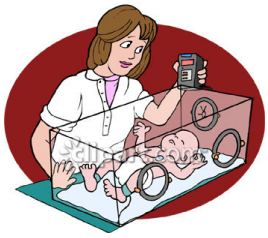
## Regular, Predictable Attendance as an Essential Function

- Individualized Assessment – Some Factors to Consider:
  - Employer's judgment that punctuality/attendance is essential
    - Job description, Attendance policy
  - Nature of the work operation
    - Whether tasks must be performed at particular time, by particular person
  - Consequences of not performing the function
    - Customer service impact, team member impact

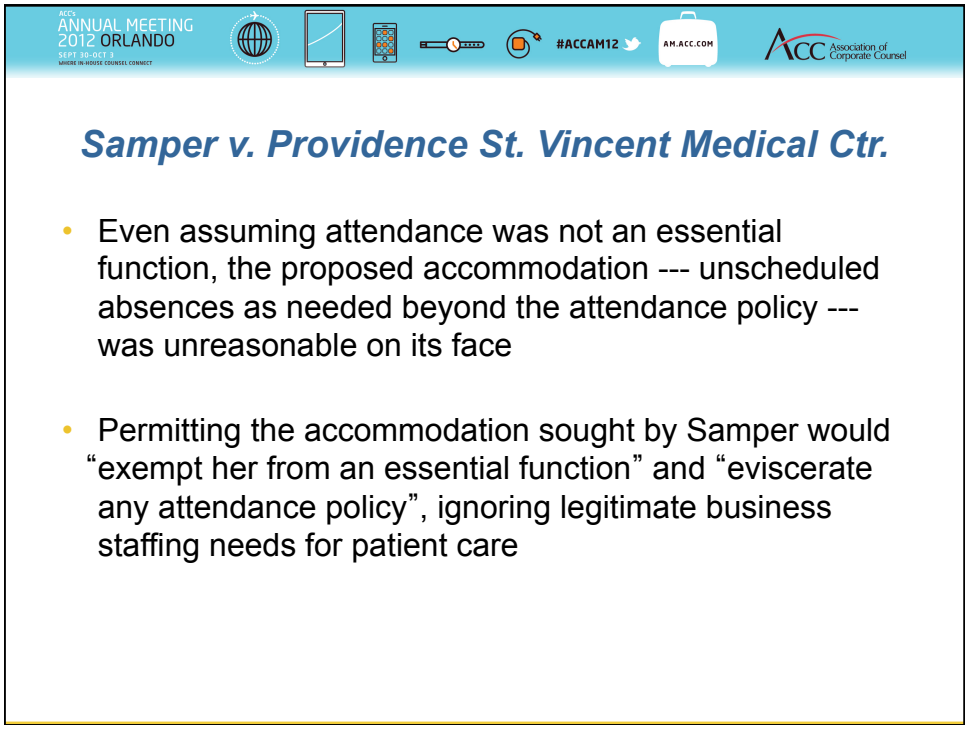
## Affirmed Under ADAAA – *Samper v. Providence St. Vincent Medical Ctr.* (9th Cir. 2012)

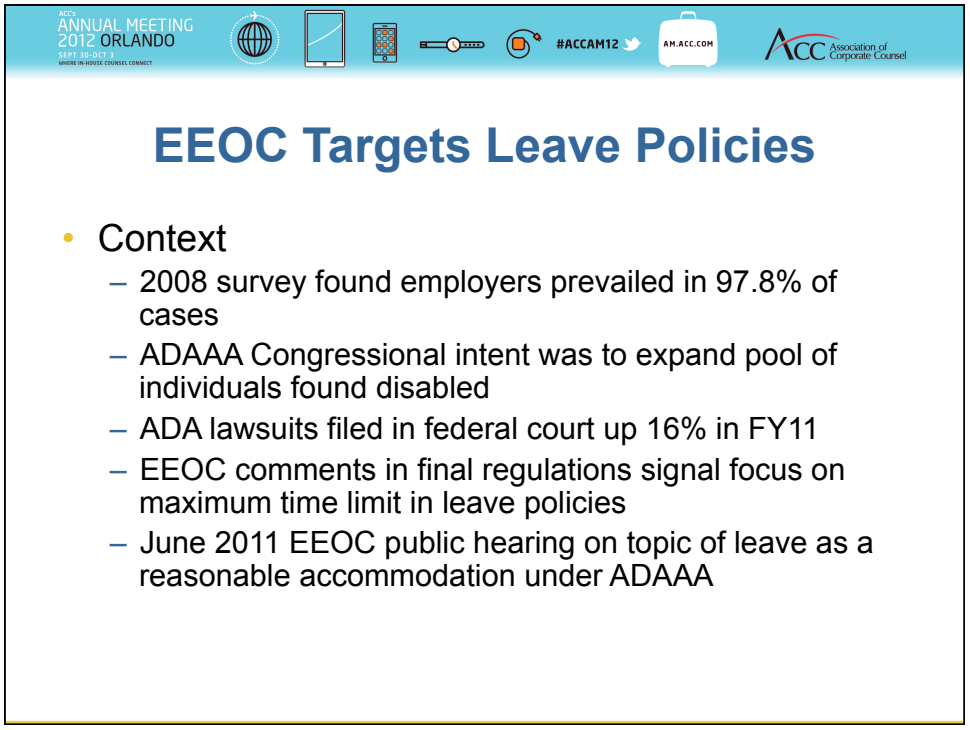


- Neo-natal intensive care unit RN with fibromyalgia
- Exceeded maximum number of unscheduled absences allowed under attendance policy
- Coached, warned, allowed to changes shifts when needed

## *Samper v. Providence St. Vincent Medical Ctr.*

- Majority of circuits have recognized irregular attendance can compromise essential job functions
  - An employee who does not come to work cannot perform his/her job "essential or otherwise."
  - Factors that demonstrate that attendance is an essential function include:
    - Employee must work as part of a team
    - Face-to-face interaction with clients or employees required
    - Work with on-site items and equipment is required



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## Systemic Discrimination Lawsuit/ Settlement Landscape

- 2009 "largest EEOC ADA settlement" against national home appliance retailer - $6.2 M
- July 2011 "largest EEOC ADA settlement" against national wireless communications provider - $20 M
- Jan. 2011 supermarket chain - $3.2 M

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## Other Leave Policy Cases

- National package delivery service provider – inflexible leave policy
- New Jersey healthcare provider – inflexible leave policy
- National clothing retailer – Requiring any health-related absence to be substantiated with a doctor's note specifying nature of condition treated is violation of ADA (Feb. 2012)

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## Inflexible Leave Policies

- Treating everyone the same is the problem
- Adhering to maximum amount of FMLA leave is not sufficient
- Problematic to believe a generous amount of leave time (e.g., 6 or 12 months) is sufficient
- EEOC states must grant the requested time unless:
  (1) another effective accommodation or
  (2) undue hardship


- Solution?
  individualized assessment and interactive process

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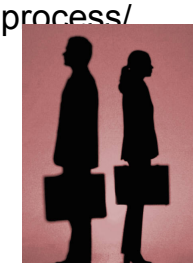
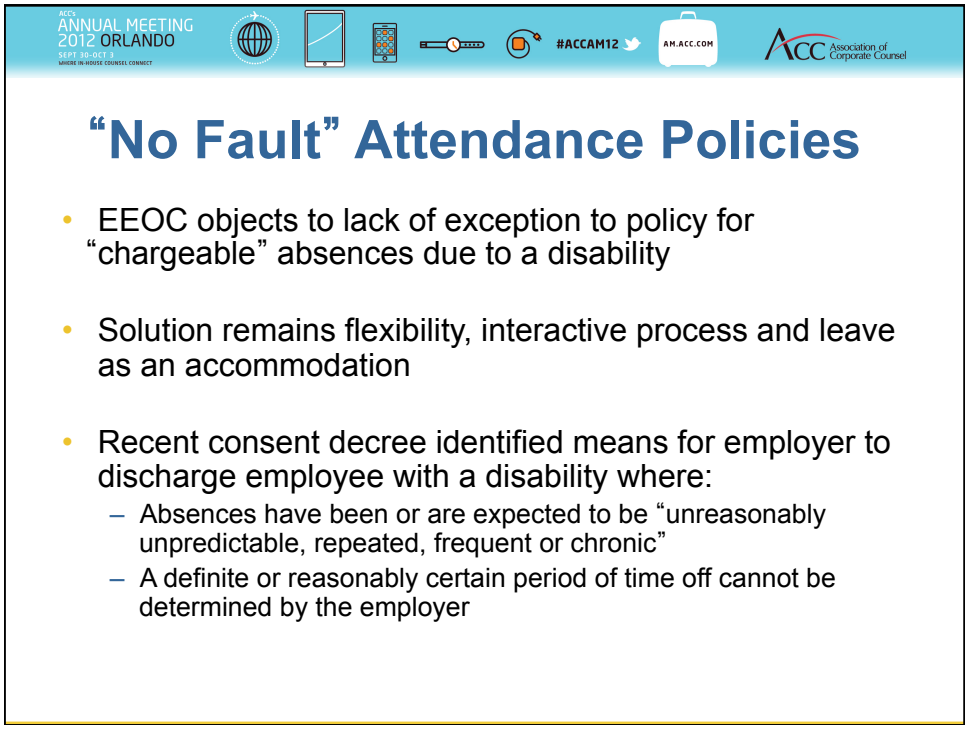
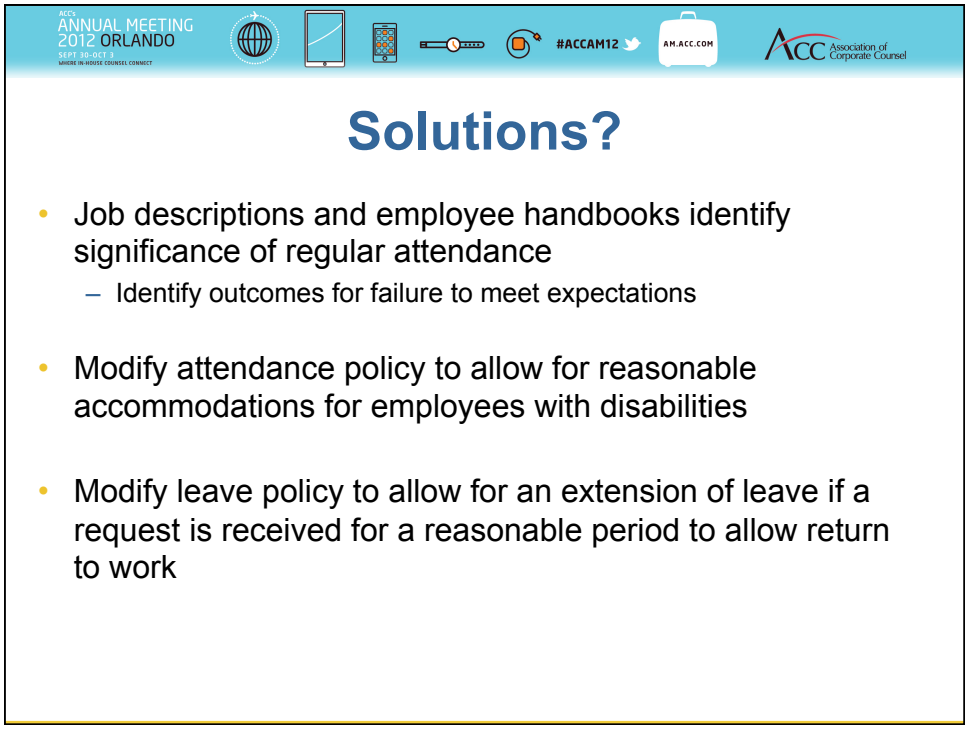
## Employer's Defenses

- Undue Hardship
  - Financially impractical
  - Unduly extensive, substantial, or disruptive or would fundamentally alter the nature or operation of the business
- Employee breakdown of interactive process/ compliance with reasonable employer requests
- Indefinite leave period
- Other effective reasonable accommodations offered





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## Solutions?

- Document accommodation requests and responses
- Engage in interactive process
- Individualized assessment of reasonable accommodation options

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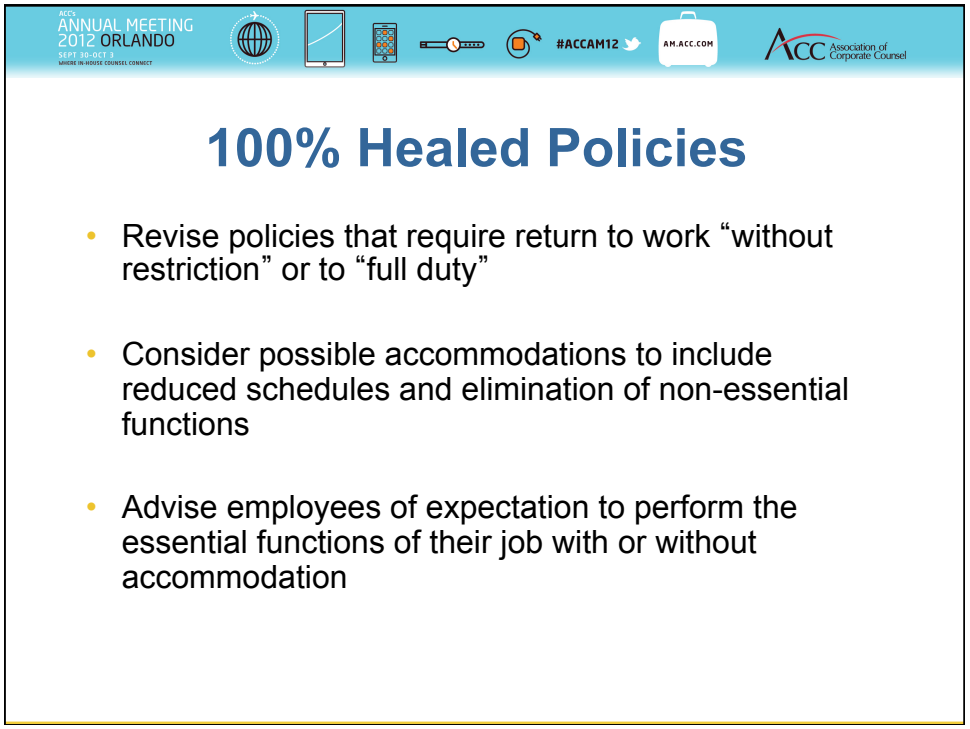
## 100% Healed Policies

"The risk of [100% healed] policy is even greater (if not absolute) now that the ADAAA has changed the definition of "regarded as" disabled."

– Powers v. USF Holland, Inc. (7th Cir. No. 10-2363 Dec. 2011)



# Proving a Disability Under the ADAAA: The Big Easy?

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***Special thanks to Tim Bland, a Partner in FordHarrison's Memphis office, for his extensive contributions to this article.***

## I. INTRODUCTION

In 2008 Congress enacted the ADA Amendments Act, 110 Pub. Law 325, 122 Stat. 3553 (2008), (ADAAA) for the stated purpose of rejecting 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 is to 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." 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.*, 2011 U.S. App. LEXIS 20918 at *7 (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."); *Becerril v. Pima County Assessor's Office*, 587 F.3d 1162, 1164 (9th Cir. 2009); *Fredricksen v. UPS, Inc.,* 581 F.3d 516, 521 n.1 (7th Cir. 2009) ("Significant changes to the ADA took effect on January 1, 2009, after this appeal was filed. . . . Congress did not express its intent for these changes to apply retroactively, and so we look to the law in place prior to the amendments.") (citing *Lytes v. DC Water & Sewer Auth.*, 572 F.3d 936, 939-42 (D.C. Cir. 2009)); *Thornton v. United Parcel Serv., Inc*., 587 F.3d 27, 35 n. 3 (1st Cir. 2009); *Milholland v. Sumner County Bd. of Educ*., 569 F.3d 562, 565 (6th Cir. 2009); *EEOC v. Agro Distrib. LLC*, 555 F.3d 462, 469 n.8 (5th Cir. 2009); *Lawson v. Plantation General Hosp., L.P.*, 704 F. Supp. 2d 1254, 1272-74 (S.D. Fla. 2010) (collecting cases); "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 U.S. Dist. LEXIS 111089 (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 under pre-ADAAA standards as set forth in *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002)[1]. 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 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.

## 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 fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year. Covered employers are required to post notices of the Act's requirements. 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 U.S. Dist. LEXIS 91640 (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 U.S. Dist. LEXIS 102447 (E.D. Pa. Sept. 27, 2010).

**2. Confidentiality of Medical Records.** The ADA mandates that employees' medical information be kept confidential. *See* 42 U.S.C. § 12112(d)(B). Medical information must be kept in separate files, segregated and secured from general personnel files. Persons 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).

[1] The Supreme Court's decision in *Toyota Motor* has been superseded by the ADAAA, and thus, is no longer good law in those cases where the ADAAA governs a claim of disability discrimination. Since the ADAAA only took effect on January 1, 2009, *Toyota Motor* is still good law vis-à-vis claims that arose prior to January 1, 2009. *See Gaus,* 2011 U.S. Dist. LEXIS 111089 at *45 n.15 (W.D. Pa. Sep. 28, 2011).

 

Persons 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, that "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 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 U.S. 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) (the broad language of Title II allows a public employee to sue for employment discrimination under Title II of the ADA). The U.S. 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))." 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.

On March 25, 2011, the EEOC issued revised regulations and a revised Appendix, which incorporate 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." Furthermore, the stated goal of the final regulations (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, which are available on its web site at: 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 U.S. 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 U.S. 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. Thus, for example, in *Barlow v. Walgreen Co.,* M.D. Fla., No. 8-11-cv-00071, 3/14/12), the court found that a plaintiff whose spinal problems caused her difficulty in bending

 

and lifting was disabled because her impairments left her at a disadvantage compared to most people in the general population. 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; and major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. *See* 29 C.F.R. § 1630.2(j)(3)(iii).

**3. Major Life Activity.** The ADAAA provides a non-exhaustive 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. For example, in *Katz v. Adecco USA Inc*., 25 AD Cases 1649 (S.D.N.Y. 2012), the court noted that cell growth was relevant to an ADA claim based on breast cancer. The EEOC regulations provide additional examples. *See* 29 C.F.R. § 1630.2(i)(1)(ii). The EEOC regulations also state that "[w]hether an activity is a 'major life activity' is not determined by reference to whether it is of 'central importance to daily life,'" thus rejecting prior definitions that included this requirement. 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. *See, Katz, supra*.; *Feldman v. Law Enforcement Associates Corp.,* 779 F.Supp.2d 472 (E.D.N.C. 2011). The EEOC's new regulations echo these provisions.

**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. 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). 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. *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. 42 U.S.C. § 12102(3)(A). However, impairments which are "transitory and minor" cannot be used to establish a "regarded as" claim 42 U.S.C. § 12102(3)(B); 29 C.F.R. § 1630.15(f). "Transitory" is defined to be 6 months or less; neither the statute nor the regulations define "minor".

 

**D.** 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 section 102 of the ADA, 42 U.S.C. 12112." 29 C.F.R. § 1630.2(l)(3). For example, in *Azzam v. Baptist Healthcare Affiliates, Inc.*, 2012 U.S. Dist. LEXIS 864 (W.D. Ky. Jan. 5, 2012), plaintiff demonstrated that she was regarded by her employer as being disabled on account of her suffering from a stroke or a cerebrovascular incident. Yet, the defendant prevailed in a summary judgment action because it demonstrated that plaintiff could not perform the essential requirements of her job because she could not perform on-call duties required of or surgical nurse. Similarly, in S*ickels v. Cents. Nine Career Ctr.*, 2012 U.S. Dist. LEXIS 10522 (S.D. Ind. Jan. 27, 2012) defendant was granted summary judgment even though it fired plaintiff and regarded plaintiff as disabled (on account of his stroke and heart condition and resulting lack of mobility). Defendant prevailed because plaintiff could not establish that (1) he was meeting his employer's legitimate expectations; (2) non-disabled individuals were treated more favorably; and (3) that the presumed reason for termination was pretextual.

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"). While it is fairly easy to plead a cause of action in a "regarded as" case, there is some threshold level that must be met. See *Sam-Sekur v. Whitmore Group, Ltd.*, 2012 U.S. Dist. LEXIS 83586 (E.D.N.Y. June 15, 2012) granting motion to dismiss ADAAA claims when complaint's allegations established that alleged impairments (breast cancer scare, appendectomy, infection from an IUD and oral implant) were transitory and minor. *See also*, *Dube v. Tex. Comm'n & Thomas M. Suehs*, 2012 U.S. Dist. LEXIS 87514 (W.D Tex. June 25, 2012) granting summary judgment because plaintiff, who was fired when she could not return to work after exhausting all accrued leave, admitted her employer did not say or do anything to indicate it perceived her as disabled.

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; "doubts alone" over an individual's ability to perform his job does not show that the employee is regarded as disabled. In *Berry v. T-Mobile USA, Inc.*, 490 F.3d 1211 (10th Cir. 2007), the court held that an employer's grant of FMLA leave to employee with multiple sclerosis did not show that she was regarded as disabled; the standards under the two statutes are different – the definition of "disability" and the applicable regulations state that the FMLA's "serious health condition" is a different concept that must be analyzed separately.

Despite the foregoing authority, courts do pay attention to how employees are labeled by their employers. So, an employer will not be granted summary judgment if it tells an employee with a claimed mental impairment that plaintiff was "mentally unstable". *Snyder v. Livingston*, 2012 U.S. Dist. LEXIS 59193 (N.D. Ind. Apr. 27, 2012). Similarly, an employer that fired an employee with lifting restricting and who was claiming to be regarded as disabled cannot get summary judgment when it advises the plaintiff that she was fired "due to your long-term disability". *Coffman v. Robert J. Young Co.*, 2012 Dist. LEXIS 68064 (M.D. Tenn. May 14, 2012).

 

## IV. ASSOCIATIONAL DISCRIMINATION UNDER THE AMERICANS WITH DISABILITIES ACT.

Section (b)(4) of the ADA proscribes "associational discrimination" which is described as "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." 42 U.S.C. section 12112(b)(4) (2006). The Sixth Circuit Court observed that the Seventh Circuit Court of Appeals delineated three theories of associational discrimination: "expense, disability by association and distraction". *Stansberry v. Air Wisconsin Airlines Corp*., 651 F.3d 482 (6th Cir. 2011) [citing *Larimer v. Int'l Bus. Machs. Corp* 370 F.3d 698, 700(7th Cir. 2004)]. The Sixth Circuit Court went on to explain the categories by stating that:

> The "expense" theory covers situations where an employee suffers an adverse employment action because of his or her association with a disabled individual covered under the employer's health plan, which is costly to the employer. The "disability by association" theory encompasses two related situations. Either the employer fears that the employee may contract the disability of the person he or she is associated with ( for example the employee's partner is infected with HIV and the employer fears the employee may become infected),or the employee is genetically predisposed to develop a disability that his or her relatives have. The "distraction" theory is based on the employee's being somewhat inattentive at work because of the disability of someone with whom he or she is associated. *Stansberry* at 487.

The Sixth Circuit Court did note that these are "not necessarily an exhaustive list". *Stansberry* at 487.

Courts have designated four elements of an associational discrimination claim: (1) the plaintiff was qualified for the position, (2) an adverse employment action was taken against the plaintiff, (3) the plaintiff had a known association with a disabled person, and (4) the action "occurred under circumstances that raise a reasonable inference that the disability of the relative" or associated person "was a determining factor in the decision". *Stansberry* at 487.

It should be noted that for a claim of associational discrimination under the ADA, a plaintiff can prove the pretextal basis of a decision "by showing it (1) has no basis in fact, (2) did not actually motivate its decision, or (3) was never used in the past to discharge an employee". *Somogye v. Toledo Clinic Inc,* 2012 WL 2191279 (N.D.Ohio), [citing *Taylor v. Art. Iron, Inc.*, 2002 U.S. Dist. LEXIS 17557, at *35–36 (N.D.Ohio 2002)].

Also, an employer can enforce neutral employer policies regarding attendance even when the absences are related to caring for an associated disabled person. *Tyndall v. Nat'l Educ. Ctrs.Inc. of Cal.*, 31 F.3d 209, 213 (4th Cir. 1994); *Overly v. Covenant Transport*, 178 Fed. Appx. At 490; *Bimberg v. Elkton-Pigeon-Bay Port Laker Schools*, 2012 WL 48901 (E.D. Mich. 2012).

**A. Expense Theory.** In *Lyons v. Core Systems, L.L.C.* the Plaintiff alleged that he had been laid off because of a variety of prohibited reasons including that his wife was very expense for his employer's health plan. 2011 WL 4402777 (S.D. Ohio 2011). The lay-off was part of a reduction in force. *Lyons* at 3. The Defendant contested that it had knowledge of Lyons' association with a disabled person and that the adverse action was related to a prohibited reason. *Lyons* at 14. Lyons' wife had been an employee of Defendant and left its employment for these medical reasons. *Lyons* at 14. The Court determined that a jury could find that Defendant had knowledge of the health condition. *Lyons* at 15. Lyons alleged that the Defendant's management made comments about the high costs of healthcare. *Lyons* at 15. The Court observed that even if Lyons was fired for the absences related to his wife's health that such a

 

reason is not prohibited. *Lyons* at 15. The Court found that Lyons evidence was not enough to preclude summary judgment. *Lyons* at 15.

In *Trujillo v. Pacificorp*, the Trujillos were previously both employees of the Defendant. The Plaintiffs' son had a spinal and brain tumor. The employer provided health care coverage to the family under a self-funded program. The son's medical bills exceeded 62,000. Proximate to the son's relapse, management began an investigation of the couple for time theft. Both parents were terminated related to the allegations. The Defendant management knew of the son's condition. The Court used a totality of the circumstance approach to review whether a discriminatory reason existed. *Tujillo* at 1156. The Court noted that the Plaintiff could rely on circumstantial evidence. *Trujillo* at 1156. The Court made particular note that the proximity in time of the relapse and investigation was an important fact, that the investigation had been flawed and that the Plaintiffs presented evidence that other employees had been disciplined differently. Finally, the Court found that the grant of summary judgment for the Defendant must be reversed.

**B. Distraction Theory.** In *Stansberry*, the Sixth Circuit court of Appeals had before it an allegation of "associational discrimination" under the ADA. *Stansberry* at 482. In the subject case, the Plaintiff was not disabled, but Stansberry's wife was disabled due to an autoimmune disorder. The Plaintiff alleged that the Defendant terminated him because the Defendant believed that his wife's illness would "distract" him while at work.. *Stansberry* at 484. The Court noted that Stansberry's claim was based on section 12112(b)(4) of the ADA. The Defendant claimed that it terminated Stanberry for exceeding budget, failing to report certain violations as required under policy and failing to properly supervise employees. *Stansberry* at 485.

As Stansberry offered no direct evidence of discrimination, the Court applied a *McDonnell Douglas*-like burden-shifting test. *Stansberry* at 487.

In the subject case, the Court found that the reasons for the termination were not pretextual even if his wife's illness may have been a cause of the employee's poor work performance. *Stanberry* at 489. Additionally, the Court opined that the legislative history did not require that an employer provide an accommodation to the nondisabled employee. Stanberry at 486 [citing to H.R.Rep. No. 101-485, pt. 2, at 61-62 (1990)].

In another case alleging discrimination based on the "distraction" theory, the Court asserted that a plaintiff must prove that her job performance was not actually negatively impacted by the associated disabled person's condition and that "Defendant terminated her employment based on unfounded fears that her job performance may suffer in the future". *Copeland v. Mid-Michigan Regional Medical Center*, 2012 WL 511534 (E.D. Mich. 2012). The District Court went on to state that "(i)t is irrelevant if any job performance issue were actually caused by ..disability". *Copeland* at 8.

**C. Miscellaneous.** In *Den Hartog v. Wasatch Academy*, the Tenth Circuit had to determine whether the threatening behavior of the associated disabled person could be a legal grounds for terminating a long term teacher where the teacher's son who suffered from bipolar affective disorder had threatened and committed criminal acts in relation to members of the academy's community. 129 F.3d 1076, 1077 (10 Cir. 1997). In the subject case, the employer did not claim that the employee's performance had been deficient. The Court determined that based on legislative history and EEOC guidance that an employer is not required to provide the associated nondisabled employee with a reasonable accommodation. *Den Hartog* at 1084-5. The ADA allows action when a "direct threat" exits where "direct threat" is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation". *Den Hartog* at 1088 [citing 42 U.S.C section 12111(3) (1994)]. The Court discussed the fact that the "direct threat" defense was not explicitly applicable to the associational discrimination provisions. *Den Hartog* at 1088-92. In upholding the grant of

 

summary judgment against the Plaintiff, the Court declared that the "direct threat" defense applied to a claim of associational discrimination. *Den Hartog* at 1092.

In a non-employment case, the Fourth Circuit Court had to decide what constituted an "association" with a disabled person as the Court reviewed a allegation that a physician had been a victim of associational discrimination in that her facility had denied her staff reappointment due to her advocacy on behalf of her dialysis patients. *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 216 (4 Cir. 2002). The Court found that the allegations were defective as she failed to allege "a specific association with a disabled individual". *Freilich* at 215-6. The Court stated:

> Such generalized references to association with disabled persons or to advocacy for a group of disabled persons are not sufficient to a state a claim for associational discrimination under the ADA. Freilich at 216.

In *Barkhorn v. Parts American Chesapeake, LLC*, D.Md., No. 1:10-cv-00750, 6/14/12), the Magistrate Judge had to determine whether the original ADA allowed associational discrimination as a cause of action, and she found that the original 1990 ADA did include a prohibition against associational discrimination even though the original Act contained differing language in 42 U.S.C sections 12112(b)(4) and 12112(a). The Magistrate Judge opined that the 2008 amendment was for clarification purposes and not a substantive change in the law. Also of note is the Magistrate's statement that there may be a cause of actions for associational discrimination under the Rehabilitation Act., 29 U.S.C. sections 504 and 701.

In conclusion, it appears that in employment cases "associational discrimination" claims are often paired with other claims such as FMLA. Additionally, with many employers providing health insurance now or in the future under federal law, one can surmise that there will be an increase in "expense" theory claims on the horizon. However, the courts have generally found that the statute provides less protection under the "associational" ADA claims than under more traditionally pled ADA provisions.

## 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." 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.'" 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." 42 U.S.C. § 12111(8).

> **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. 29 C.F.R. § 1630.2(n)(1). *See 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." 42 U.S.C. § 12111(8). *See also Phelps v. Optima Health*, 251 F.3d 21 (1st Cir. 2001) ("evidence that accommodations were made so that an employee could avoid a particular task 'merely shows the job could be restructured, not that [the function] was non-essential.'"); *Stafne v. Unicare Homes*, 266 F.3d 771 (8th Cir. 2001) (arthritic nurse at an extended care facility could not perform the essential function of pushing wheelchair-bound patients, and therefore was not a "qualified individual" with a disability). *But see Turner v. Hershey Chocolate USA,* 440 F.3d 604 (3d Cir. 2006) (genuine issues of material fact precluded summary judgment in the employer's favor on whether rotating among job functions was an essential function of plaintiff's 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. 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." 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 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 an arguably 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). One court 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.*, *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.,* 2011 U.S. App. LEXIS 14908 at *5 (7th Cir. July 20, 2011) (affirming summary judgment in favor of employer where employee missed four of her first ten days of work; finding 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."); *Murray v. AT&T Mobility LLC*, 374 Fed. Appx. 667 (7th Cir. Ill. 2010) ("An employer is generally permitted to treat regular attendance as an essential job requirement and need not accommodate erratic or unreliable attendance."); *Rask v. Fresenius Med. Care N. Am.,* 509 F.3d 466 (8th Cir. 2007) (affirming summary judgment against employee with depression who was fired for attendance problems; employee did not meet the essential job function of predictably showing up for work and therefore was not qualified; noting that regular predictable attendance is an essential function of most jobs); *Samper v. Providence St. Vincent Medical Center* No. 10-35811 (9th Cir. April 11, 2012)(finding that attendance was an essential function of the plaintiff's job as a nurse and to request more unplanned time off was unreasonable in view of her role in patient care, monitoring responsibilities and the medical center's ability to obtain a replacement with the same specialized training. *But see Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775 (6th Cir. 1998) (holding that regular, predictable, and uninterrupted

 

attendance cannot necessarily be presumed to be an essential function of the job, but noting that the plaintiff nevertheless bears the burden of proving she was qualified for the position with the accommodation of medical leave).

Employers may now need to take the further step of justifying their attendance requirements in ADA cases. When the disabled employee exceeds either the employer-established level of absenteeism or the realm of reasonableness as perceived by the court, many courts disqualify the employee from ADA protection under one of two theories (or on occasion both):

**a.** The employee's excessive absenteeism renders him or her no longer qualified to perform the essential function of regular attendance. *See*, *e.g.*, *Brenneman v. MedCentral Health Sys.,* 366 F.3d 412, 419 (pharmacy tech not qualified for his job due to his excessive absenteeism); *Amadio v. Ford Motor Company*, 238 F.3d 919 (7th Cir. 2001) (failure to meet minimum attendance requirements rendered chronically absent factory worker not "qualified"; 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) (railroad conductor's high absenteeism rate prevented him from performing essential functions of his job).

**b.** The employee's excessive absenteeism renders him or her no longer qualified to perform the essential function of regular attendance and any accommodation of such irregular attendance would result in "undue hardship" to the employer. *See Jackson v. Veterans Admin.*, 22 F.3d 277 (11th Cir. 1994) (V.A. did not have duty under Rehabilitation Act to accommodate employee's unpredictable absences attributable to service-connected disability caused by rheumatoid arthritis; requiring V.A. to accommodate such absences would place upon it the burden of making last minute provisions work as housekeeping aide be done by someone else, which would place undue hardship on V.A.). *But see Dutton v. Johnson County Bd. of County Comm'rs*, 859 F. Supp. 498 (D. Kan. 1994) (employer bears burden of showing that proposed accommodation of allowing unscheduled absences is unreasonable and an undue hardship).

Of course, under the ADAAA, courts may reach conclusions differing from the above.

Notwithstanding the past trend in some courts of equating excessive absenteeism with an "unqualified" status, courts may apply a disparate treatment analysis to hold the employer liable for discrimination under the ADA when the employer condones a greater level of absences for nondisabled employees. Moreover, in view of *Cehrs* and similar cases, employers may need to be prepared to show why attendance is an essential function in the job in question.

**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) (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.

**B. 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,* available at: 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." *EEOC v. Exxon Corp.*, 203 F.3d 871 (5th Cir. 2000); *Koshinski v. Decatur Foundry, Inc.*, 177 F.3d 599 (7th Cir. 1999). 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. The court further held, 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, 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 EEOC v. J.B. Hunt Transp. Inc.,* 321 F.3d 69 (2d Cir. 2003) (policy to reject truck driver applicants taking certain prescription medications does not violate ADA because bar is not based on individual's actual or perceived disability, and individuals are not perceived as unable to work or even work a broader class of truck driving jobs) (this is a pre-ADAAA decision and the outcome might be different under the ADAAA); *Mathews v. Denver Post*, 263 F.3d 1164 (10th Cir. 2001) (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) (dental hygienist with HIV was not "qualified" due to safety risk from on-the-job blood to blood contact from sticks or cuts during treatment; risk could not be eliminated by reasonable accommodation).

**C. Effect of Claiming Social Security Disability Benefits on "Qualified" Status.** The U.S. 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) (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 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.

**D. 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 (*e.g.*, *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 Branham v. Snow*, 392 F.3d 896 (7th Cir. 2004) (insulin-dependent employee with diabetes may proceed with Rehabilitation Act claim based on exclusion from investigator position; employer's fear that employee would suffer incapacitation on job and place himself and others at risk was not supported with a showing of significant risk of harm), *opinion clarified* 2005 U.S. Dist. LEXIS 40540 (S.D. Ind Dec. 1, 2005); *Kapche v. San Antonio*, 304 F.3d 493 (5th Cir. 2002) (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 Rizzo v. Children's World Learning Ctrs., Inc.*, 213 F.3d 209 (5th Cir. 2000) (*en banc*) (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; 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 U.S. 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, the employer, according to the Ninth Circuit, 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) (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 U.S. Dist. LEXIS 111089 (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) (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. 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 Campbell v. Federal Express Corp.*, 918 F. Supp. 912 (D. Md. 1996) (plaintiff could not satisfy burden of proving he was "qualified individual with a disability" because he did not satisfy physical qualification standards in Department of Transportation (DOT) regulations; employer is entitled to rely on the DOT regulations as a complete defense). *See also Tate v. Farmland Industries, Inc.*, 268 F.3d 989 (10th Cir. 2001) (driver taking antiseizure medication was not "qualified" for position because employer relied on nonbinding U.S. DOT criteria regarding drivers taking antiseizure medication or with medical history of conditions causing loss of control or consciousness).

 

In October 2004, the EEOC offered specific guidance addressing Food and Drug Administration regulations regarding employees with certain illnesses handling food and the interaction with the ADA. The EEOC opined that employers may refuse to assign employees infected with certain pathogens transmitted through food (as enumerated by the Centers for Disease Control) if the risk of transmitting disease cannot be eliminated through a reasonable accommodation. Foodborne pathogens discussed in the guidance include salmonella typhi, shingella, shiga toxin producing Escherichia coli, and hepatitis A.

**5. 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 U.S. 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 employment discrimination laws. *See Diaz v. Pan American World Airways*, 442 F.2d 385 (5th Cir. 1971).

**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.

**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.

**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." 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 Mannie v. Potter,* 394 F.3d 977 (7th Cir. 2005) (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; 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." 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." 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), *superseded 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. 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/preemp.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. 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." 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, persons may assert claims for retaliation for exercising rights under the ADA in good faith. *See Shellenberger v. Summit Bancorp Inc.*, 318 F.3d 183 (3d Cir. 2003) (absence of a disability does not translate into absence of protection from antiretaliation provisions of ADA).

For example, 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 that "[t]here 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 Albra v. Advan, Inc.,* 490 F.3d 826 (11th Cir. 2007) (Individuals are not subject to liability under the antiretaliation 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.** While the ADAAA did not directly change the ADA's reasonable accommodation requirements, employees can expect an upsurge in employees seeking accommodations due to the broader sweep of the ADAAA. 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. 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. 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 requirements 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 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, e.g.*, *Hoskins v. Oakland County Sheriff's Department*, 227 F.3d 719 (6th Cir. 2000); *Willis v. Conopco, Inc*., 108 F.3d 282 (11th Cir. 1997).

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.

It is incumbent on the disabled employee to raise the issue of disability and request a reasonable accommodation. The law does not require clairvoyance. This is a particularly salient issue in cases involving "hidden" disabilities that are not obvious unless disclosed. Although an employer may ask employees believed to be disabled whether they need a reasonable accommodation, the responsibility to request a reasonable accommodation, and to disclose information on the disability in order to obtain a reasonable accommodation, falls squarely on the employee (though courts are split on whether the employee must specify a particular accommodation). Encouraging communication (with appropriate confidentiality safeguards) often prevents disputes over what the employer knew and whether and how the employee requested a reasonable accommodation. Furthermore, even though employers are not obligated to offer accommodations until a disability is known and the employee initiates the accommodation dialogue, sound personnel practices following a risk management strategy warrant asking any employee with performance problems (particularly if they are suspected of having a disabling condition) whether the employee has any suggestions that could help improve his or her performance.

The EEOC has issued a comprehensive guidance on reasonable accommodations. *See Revised Enforcement Guidance Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, http://www.eeoc.gov/policy/docs/accommodation.html.

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." *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) (employee cannot wait until time of termination to request accommodation and disclose disability); *Morisky v. Broward County*, 80 F.3d 445

 

(11th Cir. 1996) (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, it is incumbent on the individual with a disability to come forward and request a reasonable accommodation. This then triggers the "interactive" process between the employee and employer in developing and implementing a reasonable accommodation. 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). *But see MacGovern v. Hamilton Sunstrand Corp.,* 50 Fed. Appx. 59 (2d Cir. 2002) (individual needing accommodation has duty to request accommodation or bring inadequacy of existing accommodation to employer's attention). EEOC regulations provide that "[t]o determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation." 29 C.F.R. § 1630.2(o)(3). In *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195 (6th Cir. 2010), *cert. denied,* 131 S. Ct. 3071 (2011), the Sixth Circuit affirmed summary judgment in favor of the employer on the former employee's claim the hospital failed to accommodate his disability (Asperger's Disorder). The court noted that the plaintiff has the burden of proposing an accommodation and proving that it is reasonable. Here, the court found the plaintiff's proposed accommodations 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. Thus, the court held that he failed to meet his burden under the Act of proving he is an otherwise qualified individual. In addressing the interactive process, the court noted 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. "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)). The court rejected the plaintiff's argument that the employer did not act in good faith because it did not offer him a remediation program similar to the one offered to a previous, unnamed resident who exhibited similar deficiencies because he never requested a remediation program as part of the accommodation process and only raised it during the litigation. 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.

**2. 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; and
- 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.

**3. Interactive Process.** Some courts have held that the ADA requires employers to engage in the interactive process. *See, e.g.*, *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 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 that a reasonable accommodation was possible). Others have rejected this conclusion. *See Lenker v. Methodist Hosp.*, 210 F.3d 792 (7th Cir. 2000) (ADA "says nothing about a directed versus an interactive process"); *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). *See also Tobin v. Liberty Mutual Insurance Co*., 433 F.3d 100 (1st Cir. 2005) (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).

The Seventh Circuit has also held that an employer is not required to include an employee's attorney or other person in the interactive process. *See Ammons v. Aramark Uniform Svs.,* 368 F.3d 809, 820 (7th Cir. 2004). Another court held 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. *Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.,* 439 F.3d 894 (8th Cir. 2006).

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.

**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." *Miller v. National Casualty Co.*, 61 F.3d 627 (8th Cir. 1995). Medical information acquired in this process must be kept confidential. In its July 2000 guidance on disability-related inquiries and medical exams directed toward current employees, 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 Guidance*, at 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. 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; and
- 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).

**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. *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).
>
> (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
>
> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. § 12111(10). The statute forces employers to "look deeper and more creatively into the various possibilities suggested by an employee with a disability"; the burden for demonstrating an "undue hardship" is not satisfied with a mere showing that a proposed accommodation is "inconvenient." *Skerski v. Time Warner Cable Co.* 257 F.3d 273 (3d Cir. 2001).

**1. Examples of Modification of Facilities/Making of Expenditures**. Providing a voice-activated computer to a quadriplegic employee may be a reasonable accommodation. *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, 2004 U.S. Dist. LEXIS 421 (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 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. *Miller v. Runyon*, 77 F.3d 189 (7th Cir. 1996). *But see Watson v. Lithonia Lighting,* 304 F.3d 749 (7th Cir. 2002) (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) (park laborer who could not return to his full time job was no longer qualified; employer was not required to keep employee indefinitely in temporary light duty position geared toward returning employee to full time work); *Hoskins v. Oakland County Sheriff's Dep't*, 227 F.3d 719 (6th Cir. 2000) (a permanent assignment to a relief position, with diminished or "light duty" responsibilities, is not a reasonable accommodation).

**4. Examples of Modification of Work Schedule.** A job applicant can be required to meet legitimate attendance requirements. *But 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) (diabetic warehouse worker had no right to an accommodation of straight shift work when all of his counterparts had rotating shifts; rotating shift is an essential job function; employer was not required to accommodate 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. *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (*en banc*). However, in *Duvall v. Georgia-Pacific Consumer Products,* 607 F.3d 1255 (10th Cir. 2010), the Tenth Circuit held that

[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).

 

transferring an employee to a position held by a temporary employee is not a reasonable accommodation under the ADA because the position held by the temporary employee is not considered "vacant." Here, Duvall was transferred to another job after the GP outsourced his position. However, the new position aggravated Duvall's cystic fibrosis, so he requested a transfer to an area that was free from paper dust and eventually transferred to a lower-paying position in the storeroom. Subsequently Duvall sued GP under the ADA, claiming the company failed to reasonably accommodate him when it refused to transfer him to positions that were being filled by temporary employees, which would not have required him to take a cut in pay. The trial court ruled in favor of GP and the Tenth Circuit upheld this determination. Although the court held that the ADA imposes on employers a mandatory obligation to transfer a disabled employee to a vacant position, the court also acknowledged that this obligation is not without limit and it, like all accommodations under the ADA, must be reasonable. The court held that the positions to which Duvall sought to be transferred, which were filled by temporary employees at the time he requested the transfer, were not considered vacant because they were not available for similarly-situated nondisabled employees to apply for and obtain. The court held that if "the term vacant meant anything other than 'available to a similarly-situated nondisabled employee,' we would run the risk of transforming the ADA from an antidiscrimination statute into a mandatory preference statute."

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 costlier 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 bidding for the position exists. 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). *But see EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir. 2000) (rejecting the EEOC's approach, labeling it as "affirmative action with a vengeance," and as creating a "hierarchy of protections for groups deemed entitled to protection against discrimination.")

**a. No Requirement to Create a Special Position.** Employers are not required to create a position especially for employees with disabilities. *See, e.g.*, *Graves v. Finch Pruyn & Co.*, 457 F.3d 181 (2d Cir. 2006); *Thompson v. E.I. DuPont de Nemours & Co.*, 2003 WL 21771959, 2003 U.S. App. LEXIS 14816 (6th Cir. 2003) (unpublished decision). *See also Lucas v. W. W. Grainger, Inc.*, 257 F.3d 1249 (11th Cir. 2001) (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 U.S. 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 US Airways v. Barnett*, 535 U.S. 391 (2002) (plaintiff's requested accommodation was not reasonable because it violated the terms of the employer's bona fide seniority system; 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 Fed. Appx. 897 (5th Cir. 2006) (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. *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) (Extended leave or an extension of an existing leave period may be reasonable accommodation; 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.

***Indefinite Leave.*** Several appeals courts have held that indefinite medical leave could not be a reasonable accommodation. *See, e.g.*, *Fogleman v. Greater Hazleton Health Alliance,* 2004 WL 2965392, 2004 U.S. App. LEXIS 26861 (3d Cir. Dec. 23, 2004) (unpublished decision) (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) (the plaintiff's request for an indefinite leave of absence was a request to return to work at some point 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 U.S. Dist. LEXIS 58155 (M.D. Fla. May 5, 2011) (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; noting that just because the employer had previously accommodated the plaintiff's requests for extensive leave over the course of his nearly ten years of employment, it does not necessarily make that accommodation reasonable), *adopted, approved, summary judgment granted, Rodgers v. Time Customer Serv.,* 2011 U.S. Dist. LEXIS 58154 (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 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. *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 *Durning v. Duffins Optical, Inc.*, 1996 BNA DLR No. 44:A-2 (E.D. La. 1996), the court held that an employer did not have to eliminate a salesman's outside sales calls when the employee was incapacitated after a stroke and wanted to make his calls via telephone on the grounds that such an accommodation would substantially redefine his position and eliminate several essential functions of his job.

**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).

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 (10th Cir. 2004) (working from home for employee suffering from post-traumatic stress disorder is not reasonable accommodation if employee's physical presence in workplace – given requirement of job-related supervision and teamwork – is an essential job function); *Rauen v. U.S. Tobacco Mfg. Ltd. Partnership,* 319 F.3d 891 (7th Cir. 2003) (central aspects of employee's particular job required work on site; request to work entirely from home office therefore was not reasonable); *Rodgers v. Time Customer Serv.*, 2011 U.S. Dist. LEXIS 58155 (M.D. Fla. May 5, 2011) (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 U.S. Dist. LEXIS 58154 (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. 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; 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) (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; employee claimed that working under a certain supervisor caused stress); *Gaul v. Lucent Techs.*, 134 F.3d 576, 581 (3d Cir. 1998) (clinically depressed employee's request for "stress free" work environment was not reasonable; 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 Dep't of Health & Mental Hygiene,* 2011 U.S. App. LEXIS 16569 (2d Cir. N.Y. 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.) The court provided examples of accommodation that the employer could consider including transferring the plaintiff back to her prior worksite, 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. *See*, *e.g.*, *Reeves v. Johnson Controls World Servs*, 140 F.3d 144 (2d Cir. 1998) (panic disorder with agoraphobia did not rise to disability under ADA because it did not limit a major life activity; court refused to recognize "everyday mobility," such as moving around in crowds, as a major life activity). However, 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." 29 C.F.R. § 1630.2(j)(3)(iii). Additionally, the EEOC regulations provide that interacting with others is a major life activity. 29 C.F.R. § 1630.2(i)(1)(i).

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.

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) (anger and unacceptable behavior threatening safety of others attributable to attention deficit and hyperactivity disorder rendered individual not qualified, even if individual were 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. *Petzold v. Borman's, Inc. d/b/a Farmer Jack*, 241 Mich. App. 707 (Mich. Ct. App. 2000) (firing grocery story "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) (offensive, racist outbursts by supermarket employee with Tourette's Syndrome rendered individual not qualified for job), *aff'd,* 2003 WL 23186025, 2003 U.S. App. LEXIS 27230 (11th Cir. Dec. 17, 2003).

In a similar vein, accommodations need to be tailored to the needs of the job, and not necessarily the perceptions of the mentally impaired individual. In *Tyler v. Ispat Inland, Inc.*, 245 F.3d 969 (7th Cir. 2001), an individual requested a transfer as an accommodation because he thought his co-workers were conspiring against him. The court held that if the individual's mental illness "manifests itself in the form of delusions or hallucinations, it is difficult to argue that an employer should have accommodated the disability by addressing working conditions that are the product of the employee's imagination."

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, 1998 U.S. Dist. LEXIS 1737 (E.D. Pa. Feb. 18, 1998) (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 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 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) (no violation for discharging employee with depression who threatened a co-worker; employer has a right to protect itself from potentially violent employees); *Borgialli v. Thunder Basin Coal Co.*, 235 F.3d 1284 (10th Cir. 2000) (discharging mine blaster who threatened suicide and displayed symptoms of depression and anxiety that created unnecessary risks in inherently dangerous job did not violate ADA); *EEOC Guidance on the Americans with Disabilities Act and Psychiatric Disabilities,* available at: http://www.eeoc.gov/policy/docs/psych.html.

Additionally, the ADA is not violated when an employer 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 Fed. Appx. 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." 42 U.S.C. § 12114(a). 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); "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: (1) 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; (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or (3) is erroneously regarded as engaging in such use, but is not engaging in such use . . . .42 U.S.C. § 12114(b); *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; 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.") The ADA contains other specific exclusions as well. Conditions specifically excluded from coverage by the ADA nevertheless may be protected under state law.

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 Shafer v. Preston Memorial Hosp. Corp.*, 6 A.D. Cas. (BNA) 682 (4th Cir. 1997) (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"). *See also 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); *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; requested accommodation was unreasonable; her discharge for stealing drugs was not pretextual, her drug dependency did not excuse this illicit conduct); *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182 (9th Cir. 2001) (employee 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 U.S. Supreme Court has held that the federal Controlled Substances Act prevents the local cultivation and use of marijuana even if the drug is used in accordance with the

 

state's medical marijuana laws. *Gonzales v. Raich,* 545 U.S. 1 (2005). The Court's decision did not overturn state laws that permit the medical use of marijuana, but may strengthen an employer's argument that it is not required to accommodate the medical use of marijuana in the workplace because that conduct is illegal under federal law.

In *Ross v. RagingWire Telecommunications, Inc.*, 174 P.3d 200 (Cal. 2008), the California Supreme Court held that the California Fair Employment and Housing Act does not require an employer to accommodate the use of illegal drugs. The court also held that marijuana is an illegal drug under federal law, even though state law permits its use for certain medicinal purposes. According to the Court, "nothing in the text or history of the Compassionate Use Act suggests the voters intended the measure to address the respective rights and obligations of employers and employees." In addition to finding that the plaintiff's discharge did not violate the state antidiscrimination law, the Court held that the discharge did not violate public policy. The Court held that the Compassionate Use Act does not address employment and, therefore, does not articulate a public policy concerning marijuana use in the employment context.

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).

An alcoholic or recovering alcoholic, however, can be held to the same standards as any employee with respect to alcohol use at work. *See Burch v. Coca-Cola Co.*, 119 F.3d 305 (5th Cir. 1997); *superseded by statute on other grounds as noted in Patton v. eCardio Diagnostics LLC,* 793 F. Supp. 2d 964 (S.D. Tex. 2011); *Roig v. Miami Federal Credit Union*, 353 F. Supp. 2d 1213 (S.D. Fla. 2005) (even if individual's alcoholism could constitute a disability – though this individual failed to show how his alcoholism substantially impaired any of his major life activities – the individual can be held accountable for his absenteeism even if it is related to alcoholism). 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).

The U.S. 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).

## 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." 42 U.S.C. § 12112(d)(2)(A). An employer may, however, inquire "into the ability of an applicant to perform job-related functions." 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. The text of this guidance can be found at 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. The guidance, however, 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 job function with or without reasonable accommodation. For example, "this job requires an employee to transport twenty pound bags of frozen frog legs from a loading dock, down two flights of steps, to a processing machine. Can you perform this function 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: (a) provide a reasonable accommodation that does not create an undue hardship so the applicant can demonstrate job performance; or (b) 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 many times 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) (applicant not hired because he did not truthfully respond to unlawful medical inquiry in employment application), a

 

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 Court of Appeals 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. 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. 42 U.S.C. § 12112(b)(6) and (7).

**C. Pre-Employment Physicals and Other Medical Opinions.**

**1. Conditions of Requiring a Pre-Employment Physical.** Under the ADA, employers are expressly prohibited from requiring medical examinations or making inquiries about disabilities in the pre-offer stage. 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 OFCCP's 1992 changes to Section 503 to comply with the ADA allow such physicals only postoffer, pre-employment, and only if it is 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); *Bentivegna 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), *amended by* 38 Fair Empl. Prac. Cas. (BNA) 1517 (9th Cir. 1985).

**D. 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, results 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). 42 U.S.C. § 12112(d)(3). The inquiries need not even be job-related. 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). The EEOC issued enforcement guidance on disability-related inquiries and medical examinations directed toward current employees on July 27, 2000. *EEOC Enforcement Guidance on Disability-related Inquiries and Medical Examinations of Employees Under the ADA*. The *Guidance* is available at 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 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 their job will be impaired by a medical condition (or medical treatment); or the employee may pose a direct threat to the safety or health of others or of the employee. 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). *See also Pittari v. American Eagle Airlines, Inc.,* 468 F.3d 1056 (8th Cir. 2006) (an employer does not perceive an employee as disabled because it imposes restrictions based upon the recommendations of physicians. Such recommendations "are not based upon myths or stereotypes about the disabled and thus do not demonstrate a perception of disability.") *superseded by statute as stated in Osborn v. BNSF Ry. Co.,* 2011 U.S. Dist. LEXIS 41678 (D. Neb. Apr. 11, 2011); *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, 798 (9th Cir. 2001) (when an employer takes steps to accommodate an employee's restrictions, it is not thereby conceding that the employee is disabled under the ADA or that it regards the employee as disabled), *supplemented by* 292 F.3d 1045 (9th Cir. 2002). Finally, if medical inquiries are made, employers need to take care to ensure confidentiality and to keep medical information separate from other personnel information.

Employers should carefully review medical inquiries that occur after an individual begins employment to ensure that they do not violate the ADA. For example, a court has held that an employer's policy that required employees to disclose their use of prescription medicine violated the ADA because it would force employees to reveal their disabilities (or perceived disabilities) to their employer as part of the employer's drug and alcohol testing policy. *Roe v. Cheyenne Mt. Conf. Resort*, 124 F.3d 1221 (10th Cir. 1997). Requiring disclosure of harmful side effects, and not the medication or underlying condition itself, may be a safer alternative for safety-sensitive jobs. *See also Transport Workers Union v. New York City Transit Authority,* 341 F. Supp. 2d 432 (S.D.N.Y. 2004) (blanket requirement to provide medical diagnosis as precondition for approving sick leave may violate the ADA; requirement geared toward reducing sick leave abuse may apply to employees with chronic absentee problems or to safety-sensitive employees).

**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.

On May 21, 2008, the President signed into law the Genetic Information Nondiscrimination Act (GINA) (H.R. 493), which 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 the federal Genetic Information Nondiscrimination Act (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. Some of the highlights are provided below:

- A person with an occupational injury is not necessarily disabled under the ADA.
- Employers may not make any inquiries or conduct any medical examinations to obtain information about prior occupational injuries prior to making a conditional offer of employment.
- Occupational injury information about an employee generally must be kept confidential except in limited circumstances.
- Employers may not refuse to hire a person with a disability merely because that person may pose some increased risk of occupational injury.
- An employer may not discharge an employee who is temporarily unable to work because of a disability-related occupational injury unless it would impose an undue hardship to provide leave as a reasonable accommodation.
- An employer that reserves light duty positions for employees with occupational illnesses must consider reassigning an employee with a nonoccupational injury disability to such positions.
- The exclusive remedy provisions in workers' compensation statutes do not bar an employee from pursuing ADA claims.

**C. Preventive Measures for Employers.** All leaves, including those necessitated by job injuries, should require written approval as to specific duration, subject to extension if necessary. Employers should uniformly enforce such rules requiring written leaves and keep records of enforcement. Additionally, employers may want to monitor the disability and send form "reminders" to employees' homes, even after a job-related injury. Keep all medical information confidential and separate from personnel files.

**D. The National Labor Relations Act (NLRA) and the ADA.** Possible conflicts between the goals of the ADA and considerations underlying the National Labor Relations Act (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 U.S. 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). *See* the discussion of this case 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 violate the NLRA by its unintentional implementation of an accommodation even though such accommodation is arguably required by the ADA. In an August 7, 1992, memorandum, then NLRB General Counsel Jerry Hunter stated, "if an employer unilaterally implements a reasonable accommodation for a disabled employee, . . . its actions may give rise to an 8(a)(5) charge." Memorandum GC 92-9. However, Hunter opined that a violation will only occur if the accommodation effects a "material, substantial or significant change" in working conditions. Thus, 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. 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 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 ten 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 (1) preserve confidentiality of medical information and (2) 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.

**5. Arbitration of Minor Disputes under the Railway Labor Act.** In *Brown v. Illinois Central Railroad Co.*, 254 F.3d 654 (7th Cir. 2001), the court dismissed an ADA claim because the plaintiff's claim depended on the interpretation of a collective bargaining agreement (because the plaintiff sought an accommodation involving the creation of a new position subject to seniority bidding under the labor contract). The court held that the ADA did not override the Railway Labor Act's requirement that minor disputes involving interpretation of a collective bargaining agreement be resolved through arbitration in a system board of adjustment.

## 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. 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 Office of Federal Contract Compliance Programs (OFCCP) enforces this law. The OFCCP's interpreting regulations are found at 41 C.F.R. § 60-741.1, *et seq.* 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." 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. *Alabama v. Pugh*, 438 U.S. 781 (1978); *Patton v. Thomson*, 1983 U.S. Dist. LEXIS 13715, 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. *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." 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 of the job. 29 U.S.C. § 706(8)(c).

## 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 lawsuits 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 Rehabilitation Act. *Howard v. Uniroyal, Inc.*, 719 F.2d 1552 (1983). The OFCCP conducts compliance reviews under § 503b. 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 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. 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.*

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