



Chapter Nineteen

**THE AMERICANS WITH DISABILITIES
ACT AND OTHER DISABILITY
DISCRIMINATION LAWS**



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THE AMERICANS WITH DISABILITIES ACT AND OTHER DISABILITY DISCRIMINATION LAWS

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I. OVERVIEW OF DISABILITY DISCRIMINATION LAWS

A. The Americans with Disabilities Act of 1990 (ADA). The ADA, 42 U.S.C. §§ 12101-12213, prohibits discrimination against individuals with disabilities in employment, public accommodations, transportation, state and local government services, and telecommunications.

1. 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.

a. State Employees. The U.S. Supreme Court held that states are immune from employees' suits under Title I of the ADA in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001). The U.S. Equal Employment Opportunity Commission (EEOC), however, continues to advise its offices to investigate charges against state government employers and pursue injunctive relief against state governments and officials. Moreover, the Fifth Circuit in *United States v. Mississippi Department of Public Safety*, 321 F.3d 495 (5th Cir. 2003), held that federal government attorneys can still bring ADA actions on behalf of individual state employees.

b. Former Employees. Federal appeals courts are split on the issue of whether former employees may bring an action under Title I of the ADA. Following the U.S. Supreme Court's decision in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), however, the Eleventh Circuit in *Johnson v. K Mart Corporation*, 281 F.3d 1368 (11th Cir. 2002), held that a former employee is an "employee" and a "qualified individual with a disability" within the ADA's definitions, and is eligible to file an ADA action challenging limitations on his post-employment (long-term disability) benefits. *See also* Section XIV, below, Insurance Issues Under the ADA.

c. Shareholders as Employees. In *Clackamas Gastroenterology Associates v. Wells*, 538 U.S. 440 (2003), the U.S. Supreme Court addressed the question of 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. The Court held that the common-law element of control is the principal guidepost that should be followed in making this determination. The Court also adopted the guidelines set forth in the EEOC's Compliance Manual for determining when an individual is subject to an organization's control. The Court reversed and remanded the case for determination in accordance with EEOC standard that it adopted.

d. Training Programs. The Fifth Circuit has held that a plaintiff enrolled in a training program designed to enable the plaintiff to obtain employment upon completion had no standing to sue a company that provided funding to the training program where no employment relationship existed between the company and the plaintiff. *See Brennan v. Mercedes Benz USA*, 388 F.3d 133 (5th Cir. 2004).

2. 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*



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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.

3. 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. “Accessibility” may include the creation of “handicapped” parking areas and installation of ramps and accessible aisles and doorways. In a much publicized but fact-specific Title III case, *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), the U.S. Supreme Court held that competing golfers are protected under Title III and that the PGA Tour may be obligated to allow golfers with disabilities to compete by using a golf cart. The Court also held that using a golf cart did not “fundamentally alter” the nature of the golf tour or its qualifying events.

B. The Rehabilitation Act of 1973. Section 503 of the Rehabilitation Act, 29 U.S.C. § 793 states:

Any contract in excess of \$10,000 entered into by any federal department or agency . . . shall contain a provision requiring that . . . the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals. . . . The provisions of this section shall apply to any subcontract in excess of \$10,000 . . .

The law applies to: federal contractors with contracts in excess of \$10,000 and to federal subcontractors with subcontracts in excess of \$10,000. Interpretive Regulations by the Office of Federal Contract Compliance Programs Appear at 41 C.F.R. § 60-741 (1996).

The ADA has largely eclipsed the Rehabilitation Act. The ADA, however, grew from the Rehabilitation Act. The U.S. Supreme Court has looked to both agency and court interpretations of the Rehabilitation Act in many important cases. *See Bragdon v. Abbott*, 524 U.S. 624 (1998) (holding that an individual’s asymptomatic HIV is a disability under the ADA).

Section 503 of the Rehabilitation Act does not pre-empt causes of action brought under state disability discrimination laws that seek to enforce obligations independent of § 503. A cause of action can, therefore, be brought against a federal contractor under state disability laws. *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270 (1st Cir. 1993).

Section 504 applies to federal executive agencies and to recipients of federal financial assistance, regardless of whether the primary objective of the aid is to provide employment. *See CONRAIL v. Darrone*, 465 U.S. 624 (1984), *superseded by statute as stated in Butts v. New York Dep’t of Hous. Preservation & Dev.*, 990 F.2d 1397 (2d Cir. 1993). It applies only to the “program or activity” that receives assistance. *Doyle v. University of Alabama*, 680 F.2d 1323 (11th Cir. 1982). Payments for obligations incurred by the federal government as a market participant are not federal “assistance.” *Arline v. School Board*, 772 F.2d 759 (11th Cir. 1985), *aff’d*, 480 U.S. 273 (1987).



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Sovereign Immunity. 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*, 37 Fair Empl. Prac. Cas. (BNA) 1024 (M.D. Ala. 1983), *aff'd*, 742 F.2d 1465 (11th Cir. 1984).

Interpretive Regulations. Each agency that administers federal funds has its own regulations interpreting the Rehabilitation Act. See 29 C.F.R. § 32 (Department of Labor); 45 C.F.R. § 84 (Department of Health and Human Services). Under Executive Order 12250 (45 C.F.R. § 72995), however, coordinating authority for regulations under § 504 was given to the Department of Justice, which issued guidelines appearing at 28 C.F.R. § 41 (1984).

Jury Trials. The Eleventh Circuit has held that an employee is entitled to a jury trial even though the Rehabilitation Act does not indicate whether a jury trial is available in a private action, based on the right to a jury trial embodied in the Seventh Amendment. *Waldrop v. Southern Co. Sys.*, 24 F.3d 152 (11th Cir. 1994).

C. State Restrictions on Disability Discrimination. 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 standards governing employers. State laws are discussed and summarized below.

II. PROTECTED “PERSONS WITH A DISABILITY” AND “HANDICAPPED” INDIVIDUALS

A. Definition of Disability: ADA. The ADA defines disability as “[a] physical or mental impairment that substantially limits one or more of the major life activities of [an] individual.” This is a fact-specific and individualized inquiry that has sometimes led to inconsistent results in court decisions. See *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (each stressing individualized inquiry). Courts have held that there is no “laundry list” of *per se* disabilities. *EEOC v. Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001); *Ennis v. National Ass'n of Business & Educ. Radio*, 53 F.3d 55, 60 (4th Cir. 1995). See also 29 C.F.R. § 1630, App. § 1630.2(j) (“some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors”).

An impairment or diagnosis alone, without a showing of a substantial limitation on the individual's major life activities, will not confer protection under the ADA. See *Ristrom v. Asbestos Workers Local 34 Joint Apprenticeship Committee*, 2003 WL 366587, 2003 U.S. Dist. LEXIS 2335 (D. Minn. Feb. 18, 2003) (attention deficit disorder), *aff'd*, 370 F.3d 763 (8th Cir. 2004). Furthermore, mere knowledge of an impairment is insufficient to show that an employee is “regarded as” having a disability. *Robinson v. Lockheed Martin*, No. 06-1707, 2007 U.S. LEXIS 331 (3d Cir. January 8, 2007); *Kelly v. Drexel University*, 94 F.3d 102 (3d Cir. 1996).

A “physical or mental impairment” is a physiological or mental disorder. “Impairment” has also been defined as a condition having a diminishing effect on an individual. Temporary conditions, impairments, or transitory injuries have not been considered to be “disabilities.” *Pollard v. High's of Baltimore, Inc.*, 281 F.3d 462 (4th Cir. 2002). The EEOC's interpretive guidelines do not consider a temporary condition, such as a broken leg, to qualify as a disability. 29 C.F.R. § 1630, App. § 1630.2(j).

B. Substantially Limited: The Effects of Medication. In June 1999, the U.S. Supreme Court decided a trio of ADA cases, concluding that the determination of whether an individual with an impairment is “disabled” under the ADA should be made with reference to the effects of mitigating measures. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. UPS*, 527



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U.S. 516 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999). These rulings interpreted the ADA narrowly. The Supreme Court cautioned, however, that each inquiry remains individualized and that some individuals can remain “disabled” within the definition of the ADA even with mitigating measures. This could occur if, for example, the mitigating measures have disabling consequences themselves (for example, medication makes the individual unable to sleep or to perform a broad range of jobs). With these rulings, the Court took a position contrary to the EEOC, which had maintained that a protected, disabled person could be someone who “could be” substantially limited if corrective measures were not taken. The Court held that the phrase “substantially limits” should be viewed in the present tense, meaning the person must be presently, not hypothetically, “substantially limited” to have a protected disability under the ADA. See Petesch, P., “Supreme Court Holds That Mitigating Measures Belong in ADA’s Disability Equation,” *HR Legal Report* (SHRM) July-August 1999; *Orr v. Wal Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002) (dismissing ADA claim of insulin dependant diabetic where the plaintiff failed to show he was currently substantially limited in any major life activity, considering the mitigating measures taken); *Duncan v. Washington Metro. Area Transit Auth.*, 240 F.3d 1110 (D.C. Cir. 2000) (Impairments must actually and presently limit one or more of the individual’s major life activities, and not simply be a theoretical limitation.) Although a substantial limitation need not amount to an “utter inability,” (see *Bragdon*), the *Kirkingburg*, *Sutton*, and *Murphy* decisions held that the limitations must be substantially limiting and not trivial.

The U.S. Supreme Court re-emphasized this point in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) (discussed below). In the aftermath of the 1999 U.S. Supreme Court decisions, the EEOC issued additional guidelines on how the EEOC evaluates who is an individual with a disability under ADA. Under these guidelines, and consistent with the Supreme Court decisions, both the positive and negative effects of medications must be taken into account. The EEOC broadly interpreted the decisions, and takes the position that if a medication or mitigating measure causes fatigue, it “substantially limits” the major life activity of caring for one’s self. If a medication imposes substantial dietary restrictions, the major life activity of eating is substantially limited. If medicine causes drowsiness or insomnia, the individual’s major life activity of sleeping or thinking might be substantially limited. See EEOC “Instructions for Field Offices: Analyzing ADA Charges After U.S. Supreme Court Decisions Addressing ‘Disability’ and ‘Qualified.’” <http://www.eeoc.gov/policy/docs/field-ada.html>. See also Bland, T. and Petesch, P., “A Battle of Wills,” *HR Magazine* (SHRM) December 1999. Other cases have looked to such major life activities as sex (as a result of impotence), *McAlindin v. County of San Diego*, 201 F.3d 1211 (9th Cir. 2000); eating (complicated food restrictions for insulin-dependent diabetic), *Lawson v. CSX Transportation, Inc.*, 245 F.3d 916 (7th Cir. 2001) and *Fraser v. Goodale*, 342 F.3d 1032 (9th Cir. 2003); and socializing, *Garvey v. Jefferson Smurfit Corp. U.S.*, 2000 WL 1586077, 2000 U.S. Dist. LEXIS 15468 (E.D. Pa. Oct. 24, 2000), in deciding whether an individual has an ADA disability.

In managing workplace situations having potential ADA-related implications, employers should not assume that a condition will not be held to be a “disability,” and should instead consider erring on the side of pursuing the accommodation process (if requested), as described below. In all cases, employees’ medical information and situations should be kept confidential.

C. Major Life Activities. Under the ADA, a disability is “a physical or mental impairment that substantially limits one or more . . . major life activities.” 42 U.S.C. § 12102(2)(A). Major life activities are enumerated by EEOC regulations as “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 29 C.F.R. § 1630(2)(i). In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), the U.S. Supreme Court equated major life activities to “tasks central to most people’s daily lives,” and held that a particular task associated with an individual’s job is not



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necessarily a “major life activity.” *See also Holt v. Grand Lake Mental Health Ctr., Inc.*, 443 F.3d 762 (10th Cir. 2006) (plaintiff with mild form of cerebral palsy who had difficulty performing certain manual tasks requiring fine motor skills and difficulty chewing and swallowing food was not disabled because her limitations were narrow and specific; the record did not indicate she was limited in her ability to perform a broad range of manual tasks and a rational factfinder could not conclude that she was prevented from caring for herself); *Mack v. Great Dane Trailers*, 308 F.3d 776 (7th Cir. 2002) (applying *Williams*, holding that an employee’s alleged lifting limitations did not extend into nonwork life and were merely a work related limitation or perceived work-related limitation; individual therefore was not disabled or regarded as disabled).

1. Reproduction. In *Blanks v. Southwestern Bell Communs., Inc.*, 310 F.3d 398 (5th Cir. 2002), the court held that an individual with HIV did not have a disability where the individual failed to show how his HIV status limited any of his major life activities. The court held that the plaintiff did not show that his HIV status substantially limited his major life activity of reproduction, particularly since he and his spouse had decided not to have any more children, and his wife had undergone sterilization surgery.

2. Driving. *Chenoweth v. Hillsborough County*, 250 F.3d 1328 (11th Cir. 2001) (inability to drive is not a limitation of a major life activity; driving is “is conspicuously different in character from the activities that are listed”).

3. Impaired Liver Function. *Furnish v. SVI Systems, Inc.*, 270 F.3d 445 (7th Cir. 2001) (impaired liver function from hepatitis B was not a “major life activity”); *but see Heiko v. Colombo Sav. Bank*, 434 F.3d 249 (4th Cir. 2006) (addressing claim under state disability law that tracks ADA in all relevant respects and relying on cases interpreting the ADA; holding that the ability to eliminate bodily waste is a major life activity under the Americans with Disabilities Act, noting that it is not only of central importance to daily life but is of life-sustaining importance), *cert. dismissed*, 127 S. Ct. 34, 165 L. Ed. 2d 1013 (2006); *Fiscus v. Wal Mart Stores, Inc.*, 385 F.3d 378 (3d Cir. 2004) (a physical impairment that limits an individual’s ability to cleanse and eliminate body waste impairs a major life activity; remanding for a determination of whether dialysis eliminated any substantial limitation on these major life activities).

4. Inability to Use Key Board or Write. *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789 (9th Cir. 2001) (plaintiff’s inability to keyboard and write by hand did not substantially limit her ability to perform manual tasks generally and did not fall within the ADA’s protection), *opinion clarified*, 292 F.3d 1045 (9th Cir. 2002).

5. Eating. *Fraser v. Goodale*, 342 F.3d 1032 (9th Cir. 2003) (in evaluating claim by employee with type 1 insulin-dependent diabetes, held eating is a major life activity, though eating certain types of foods or specific portions at specific times may or may not be a major life activity).

6. Ability to Learn. *Ristrom v. Asbestos Workers Local 34, Joint Apprentice Committee*, 370 F.3d 763 (8th Cir. 2004) (individual with attention deficit disorder and depression was not substantially limited in ability to learn simply by virtue of inability to pass various specialized courses in an advanced program).

7. Interacting With Others. *Rohan v. Networks Presentations, LLC* ., 375 F.3d 266 (4th Cir. 2004) (former employee with depression and post traumatic stress disorder was not “substantially limited” in major life activity of interacting with others; the limiting manifestations of her illness were intermittent); *Jacques v. DiMarzio, Inc.*, 386 F.3d 192 (2d Cir. 2004), the Second Circuit, in a “regarded as” disability case, held that a plaintiff is substantially limited in the major life activity of interacting with others when a mental or



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physical impairment severely limits the fundamental ability to communicate with others. This standard is not satisfied by a plaintiff whose basic ability to communicate with others is merely inappropriate, ineffective, or unsuccessful.)

8. Working. ADA plaintiffs often rely on their inability to “work” to satisfy their burden of proving that they were substantially limited in performing a “major life activity.” The EEOC and most federal courts, however, have required these plaintiffs to prove that they are prevented from performing a class or broad range of jobs as opposed to one or a limited number of jobs. In *Toyota Motor Manufacturing of Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), the U.S. Supreme Court did not directly rule on whether working is a major life activity. The Court held that an individual’s substantial limitation in performing certain manual tasks as a result of carpal tunnel syndrome did not, on its own, amount to a substantial limitation in a major life activity. The Court clarified that “[w]hen addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people’s daily lives, not whether the claimant is unable to perform the tasks associated with her specific job.”

Based on this decision, courts will look at a broader range of activities, rather than limitations associated with a particular job, in deciding whether an individual has an ADA-recognized “disability.” See, e.g., *Mohr v. Hoover Co.*, 2004 WL 1098748, 2004 U.S. App. LEXIS 9689 (6th Cir. May 14, 2004) (unpublished decision) (diabetic employee’s inability to work as “high rider” and operate forklift did not render her unable to work a broad range of jobs – only her particular job); *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1168-69 (1st Cir. 2002) (the plaintiff’s alcoholism did not limit his major life activity of working; there was no evidence he was precluded from performing a broad range of jobs when he was not incarcerated and his current incarceration was short-term in nature and not a substantial limitation); *Conant v. City of Hibbing*, 271 F.3d 782 (8th Cir. 2001) (laborer with lifting restriction did not have a “disability” because he was not precluded from working a whole range or class of jobs); *Duncan v. Washington Metropolitan Area Transit Authority*, 240 F.3d 1110 (D.C. Cir. 2001) (individual needs to show jobs available and range of jobs that cannot be performed in relevant job market before showing substantial limitation in major life activity of working a broad range of jobs).

Lifting Restrictions. In very few cases has a work-related condition or injury such as a lifting restriction rendered an individual so substantially limited in the activity of working as to be disabled. In fact, the Eighth U.S. Circuit Court of Appeals has held that “[a] lifting restriction, without more, is not a disability.” *Wenzel v. Missouri-American Water Co.*, 404 F.3d 1038 (8th Cir. 2005); see also *Taylor v. Federal Express Corp.*, 429 F.3d 461 (4th Cir. 2005) (plaintiff with 30 pound lifting restriction was not substantially limited in working); *Olds v. United Parcel Svs., Inc.*, 2005 WL 742804, 2005 U.S. App. LEXIS 5501 (6th Cir. April 1, 2005) (unpublished decision) (“the general rule in this circuit is that a weight restriction alone is not considered a disability under the ADA”). But see *Webner v. Titan Distributing, Inc.*, 267 F.3d 828 (8th Cir. 2001) (individual’s back problems limited ability to perform all but light duty tasks and, therefore, substantially limited major life activity of working).

The following decisions hold that specific lifting restrictions are not disabilities, at least with regard to the plaintiffs in those cases:

- *Brunko v. Mercy Hosp.*, 260 F.3d 939 (8th Cir. 2001) (forty-pound lifting restriction);
- *Marinelli v. City of Erie, Pa.*, 216 F.3d 354 (3d Cir. 2000) (ten-pound lifting restriction);



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- *Hilburn v. Murata Electronics of North America, Inc.*, 181 F.3d 1220, 1227 (11th Cir. 1999) (ten-pound lifting restriction and diminished activity tolerance);
- *Gutridge v. Clure*, 153 F.3d 898 (8th Cir. 1998) (forty-five-pound lifting restriction);
- *Snow v. Ridgeview Med. Ctr.*, 128 F.3d 1201 (8th Cir. 1997) (twenty-five-pound lifting restriction);
- *Gordon v. MCG Health, Inc.*, 301 F. Supp. 2d 1333, 1340 (S.D. Ga. 2003) (ten-pound lifting restriction and restriction from repetitive bending and squatting);
- *Glozman v. Retail, Wholesale & Chain Store Food Employees Union, Local 338*, 204 F. Supp. 2d 615, 622 (S.D.N.Y. 2002) (inability to lift in excess of ten pounds or sit for extended period of time).

In response to the volume of decisions either narrowing or defining the scope of protection under the ADA, the National Council on Disability, a President-appointed body, recommended sweeping changes to the ADA intended to broaden the coverage of persons protected under the law. At this time, however, there are no imminent legislative changes to the ADA.

D. Knowledge of Condition. The ADA “does not require clairvoyance.” 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., 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); *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928 (7th Cir. 1995); *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.

E. A Record of Impairment. Persons with a “record” of a physical or mental impairment that substantially limits a major life activity are also protected from discrimination (though not necessarily entitled to “reasonable accommodation”). 42 U.S.C. § 12102(2)(B). In *Sweet v. Electronic Data Systems, Inc.*, 5 A.D. Cas. (BNA) 853 (S.D.N.Y. 1996), the court held that to prove a claim, the plaintiff must prove that the employer actually relied on the plaintiff’s alleged record of a disability in making the challenged job decision. In *Anderson v. Gus Mayer Boston Store*, 924 F. Supp. 763 (E.D. Tex. 1996), however, the court held that proof of the employer’s constructive knowledge of the claimant’s record of impairment is sufficient to state an ADA claim in most circumstances. The plaintiff meets the burden by showing the employer had the record in question in its possession. Thus, if other federal courts follow the lead of Texas and not New York, the mere possession of medical documentation showing a record of a disability may be enough to send the case to a jury to determine whether the employer’s decision was unlawfully based on the employee’s disability record.

F. Associational Protections. The ADA also forbids “excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.” 42 U.S.C. § 12112(b)(1).

The Seventh Circuit has identified three categories of situations in which association claims arise: expense; disability by association; and distraction. *Larimer v. International Business Machines Corp.*, 370 F.3d 698 (7th Cir. 2004). The court gave the following examples of these categories: an employee is fired (or suffers some other adverse personnel action) because: (1) (“expense”) his spouse has a disability that is costly to the employer because the spouse is covered by the company’s health plan; (2a) (“disability by association”) the employee’s homosexual partner is



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infected with HIV and the employer fears that the employee may also have become infected through sexual contact with the companion; (2b) (another example of disability by association) one of the employee's blood relatives has a disabling ailment that has a genetic component and the employee is likely to develop the disability as well (maybe the relative is an identical twin); (3) ("distraction") the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his employer's satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours. The qualification concerning the need for an accommodation (that is, special consideration) is critical because the right to an accommodation, being limited to disabled employees, does not extend to a nondisabled associate of a disabled person. *Id.* at 700. The court dismissed the plaintiff's claims in *Larimer*, holding that the premature birth of twin daughters who appeared healthy at the time the case was filed but who may develop disabilities in the future fit none of the above categories. *Id.* at 701.

Associational cases are fairly rare. Courts have limited protections under this theory to persons with a close familial, social, or physical relationship with disabled persons. *See, e.g., Wascura v. South Miami*, 257 F.3d 1238 (11th Cir. 2001) (employee must also show link between association and adverse job action); *O'Connell v. Isocor Corp.*, 56 F. Supp. 2d 649 (E.D. Va. 1999) (barring associational claim by work colleague not considered to be allied with another employee with a disability); *Hilburn v. Murata Electronics of North America*, 17 F. Supp. 2d 1377 (N.D. Ga. 1998), *aff'd*, 181 F.3d 1220 (11th Cir. 1999). *But see Foster v. Time Warner Entertainment Co.*, 250 F.3d 1189 (8th Cir. 2001) (ADA protects worker fired because she made scheduling accommodations for employee with epilepsy (decided on associational and retaliation for protected activity grounds)). In addition, persons simply associated with persons with disabilities are not entitled to reasonable accommodations. *See Kennedy v. Chubb Group of Insurance Companies*, 60 F. Supp. 2d 384 (D.N.J. 1999); *Hilburn*, 17 F. Supp. 2d 1377 (N.D. Ga. 1998).

G. Regarded as Having an Impairment.

1. ADA. Under the ADA, an individual is protected if she or he is "perceived" or "regarded" as disabled. 42 U.S.C. § 12102(2)(C). ADA regulations protect an individual if the employer treats the person as impaired or as limited in major life activities. 29 C.F.R. § 1630.2(l). Thus, an employee who suffers from known mental or physical impairments that do not rise to the level of a protected disability at the time of the challenged employment decision may nevertheless be protected if he or she can prove that the employer based its decision on the perception that the individual was disabled. *See Sutton*, 119 S. Ct. at 2139; *Murphy*, 119 S. Ct. at 2133; *Kirkingburg*, 119 S. Ct. at 2388.

The U.S. Supreme Court in *Sutton* emphasized that, in order to belong within the ADA's protection of persons "regarded as" having a disability, the defendant must believe (erroneously) that the individual has a physical impairment that substantially limits one or more major life activities, or believe that an actual, nonlimiting impairment substantially limits the individual's major life activities. In *Murphy*, the employer did not regard the employee – whose hypertension was ameliorated by medication – as being "substantially limited" in the major life activity of working. He was simply regarded as not meeting DOT health certification requirements. According to the Court, the employee therefore did not belong within the ADA's protection of persons "regarded as" having disabilities. *See also Wenzel v. Missouri-American Water Co.*, 404 F.3d 1038 (8th Cir. 2005) ("Regarded as" disability can occur in two ways: (1) the employer mistakenly believes that the employee has an impairment (which would substantially limit one or more major life activities), or (2) the employer mistakenly believes that an actual impairment substantially limits one or more major life activities); *Nese v. Julian Nordic Const. Co.*, 405 F.3d 638 (7th Cir. 2005) (to establish a regarded as claim of disability, the plaintiff must show the employer perceived



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him as unable to perform a broad class or range of jobs), *cert. denied*, 126 S. Ct. 623, 163 L. Ed 2d 505 (2005); *Collins v. Saia Motor Freight Lines, Inc.*, 2005 WL 1140777, 2005 U.S. App. LEXIS 8622 (5th Cir. May 16, 2005) (unpublished opinion) (to succeed on a “regarded as” disability claim, the plaintiff must show that the employer perceived a disability that substantially limited him in one or more major life activities – where the major life activity is working, the plaintiff must show that the perception of disability would limit him from a broad class of jobs).

Merely being regarded as having a limiting condition does not bring an individual within the protection of the “regarded as” provision of the ADA. *See, e.g., Pittari v. American Eagle Airlines, Inc.*, 468 F.3d 1056 (8th Cir. 2006) (employer did not perceive employee as disabled because of side effects of medication; if employer regarded plaintiff as unable to perform a specific position, it did not perceive him as unable to perform a broad range of jobs, thus it did not perceive him as substantially limited in the major life activity of working. Additionally, employer regarded plaintiff’s impairment as temporary since it permitted him to be reevaluated and return to work upon successful completion of a neuropsychological exam.); *Kupstas v. City of Greenwood*, 398 F.3d 609 (7th Cir. 2005) (plaintiff’s failure to provide evidence as to a class or broad range of jobs for which he was qualified but from which the employer perceived him to be excluded was “fatal to his case”; evidence that the employer had offered to accommodate him was insufficient to support the inference that it did so because it believed he had a substantially limiting impairment); *Knutson v. Ag Processing, Inc.*, 394 F.3d 1047 (8th Cir. 2005) (Reversing judgment for the plaintiff after a jury verdict in his favor, the court ruled that a reasonable jury could not have concluded that the employer regarded plaintiff as substantially limited in working, given that the employer had reassigned plaintiff from his regular job of boiler operator to other duties at the same plant for the same pay); *Sullivan v. Neiman Marcus Group*, 358 F.3d 110 (1st Cir. 2004) (termination from one job, by itself, did not establish that the employer believed the employee could not perform the essential functions of either a class of jobs or a broad range of jobs in various classes); *Jacques v. DiMarzio, Inc.*, 386 F.3d 192 (2d Cir. 2004) (reversing a jury verdict for the plaintiff, holding that to prevail under the “regarded as” provision of the ADA, a plaintiff must show more than “that the employer regarded that individual as somehow disabled; rather, the plaintiff must show that the employer regarded the individual as disabled within the meaning of the ADA.”); *Coons v. Secretary of the U.S. Dep’t of the Treasury*, 383 F.3d 879 (9th Cir. 2004) (supervisor’s letter to employee stating that he may be eligible for disability retirement if he is unable to work was insufficient to establish that the employer regarded the employee as substantially limited in working); *Collins*, 2005 WL 1140777 at *2 (plaintiff’s “perceived as” disability claim failed because, at the most, he demonstrated that his alleged perceived disability – the inability to lift over fifty pounds on a regular basis – affected only a narrow range of jobs); *Carruthers v. BSA Advertising, Inc.*, 357 F.3d 1213 (11th Cir. 2004) (ad agency did not perceive former art director as being limited in performing manual tasks or working on a long-term basis, and therefore was not “regarded as” having a disability).

Even an employee “harassed” and called names surrounding his physical appearance and characteristics was not necessarily regarded as being substantially limited in a major life activity. As such, he could not sustain a disability-based harassment claim. *Roberts v. Dimension Aviation*, 319 F. Supp. 2d 985 (D. Ariz. 2004).

However, if an individual is regarded as being substantially limited in the ability to perform a broad range of jobs, he or she may be protected by the “regarded as” provision. *See Taylor v. USF-Red Star Express, Inc.*, 2006 U.S. App. LEXIS 31599 (3d Cir. Dec. 21, 2006) (affirming jury verdict in favor of plaintiff who claimed employer regarded him as disabled; there was evidence that the employer discovered that the plaintiff suffered seizures and then *sua sponte*



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prevented him from working at all until a medical diagnosis could clear him to do so. Additionally there was evidence that the employer believed the plaintiff was disqualified from a broad range of work and the jury found that the employer regarded him as disabled): *Moorer v. Baptist Mem. Health Care System*, 398 F.3d 469 (6th Cir. 2005) (employer who perceived that plaintiff was an alcoholic and that his “incurable alcoholism would inevitably result in his death permitted the inference that [the decision-maker] regarded [the plaintiff] as substantially limited in his ability to perform any life activity at all, let alone the major life activity of working”); *Josephs v. Pacific Bell*, 432 F.3d 1006 (9th Cir. 2005) (Affirming jury verdict in favor of terminated telephone service technician on discriminatory failure-to-rehire claim, the court found that a reasonable jury could conclude the employer regarded plaintiff as having a mental impairment that substantially limited his ability to work in a broad range of jobs where employer relied on its knowledge that he had been found not guilty of attempted murder by reason of insanity in 1985, and considered him unemployable because he had spent time in a mental hospital between 1982 and 1985 and might “go off” on a customer. Employer ignored evidence that employee had performed well for the employer and had ten years of experience in the same job with another company, and would not agree to union representative’s suggestion that employee be offered a position not involving unsupervised access to customers’ homes); *Doebele v. Sprint/United Management Co.*, 342 F.3d 1117 (10th Cir. 2003) (employee with bi-polar disorder may be “regarded as” having a disability if she can show managers believed she was substantially limited in a broad range of jobs); *Ollie v. Titan Tire Corp.*, 336 F.3d 680 (8th Cir. 2003) (employer who misinterpreted doctor’s restriction that the plaintiff might have difficulty working near dust and fumes to mean that he could not work around in the employer’s plant perceived the plaintiff 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.

Accommodation for “Regarded As” Disabled Individuals. There is a split of authority among the federal appeals courts regarding whether an individual who is regarded as disabled is entitled to a reasonable accommodation. Currently, the First, Third, Tenth, and Eleventh Circuits have held that such individuals are entitled to a reasonable accommodation. See *D’Angelo v. ConAgra Foods*, 422 F.3d 1220 (11th Cir. 2005) (“Because a review of the plain language of the ADA yields no statutory basis for distinguishing among individuals who are disabled in the actual-impairment sense and those who are disabled only in the regarded-as sense, we join the Third Circuit in holding that regarded-as disabled individuals also are entitled to reasonable accommodations under the ADA.”); *Kelly v. Metallics West, Inc.*, 410 F.3d 670 (10th Cir. 2005) (“an employer who is unable or unwilling to shed his or her stereotypic assumptions based on a faulty or prejudiced perception of an employee’s abilities must be prepared to accommodate the artificial limitations created by his or her own faulty perceptions.”); *Williams v. Philadelphia Housing Authority Police Department*, 380 F.3d 751, 775 (3d Cir. 2004) (“the conclusion seems inescapable that ‘regarded as’ employees under the ADA are entitled to reasonable accommodation in the same way as are those who are actually disabled), *cert. denied*, 125 S. Ct. 1725 (2005); *Katz v. City Metal Co.*, 87 F.3d 26, 33 (1st Cir. 1996) (a regarded as disabled employee is entitled to be accommodated).

However, the Fifth, Sixth, Eighth, and Ninth Circuits have held that such individuals are not entitled to reasonable accommodation. See *Kaplan v. City of North Las Vegas*, 323 F.3d 1226, 1231-33 (9th Cir. 2003) (regarded as disabled employees are not entitled to a reasonable accommodation); *Weber v. Strippit, Inc.*, 186 F.3d 907, 916-17 (8th Cir. 1999)



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(same); *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999); *Newberry v. E. Texas State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998).

2. Other Laws. It is unclear under other laws whether the “perception” of disability must be general or that of the individual employer. Some courts hold that the perception must be general or societal. *See, e.g., Advocates for the Handicapped v. Sears*, 21 Fair Empl. Prac. Cas. (BNA) 506. Other courts hold that the perception is that of the individual employer. *See, e.g., E. E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Haw. 1980); Dept. of Justice Guidelines, 28 C.F.R. § 41-31(b)(4).

H. Definition of Disability/Handicap: Rehabilitation Act. The ADA and the Rehabilitation Act use essentially the same definition of disability. Although it was amended by § 512 of the ADA, the Rehabilitation Act does not specify the same exclusions and still contains a somewhat different exclusion with respect to drugs and alcohol. The statute provides:

. . . [T]he term “individual with handicaps” 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. § 706(8)(B). 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).

I. 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”). 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). In *Pence*, the Fourth Circuit affirmed summary judgment in favor of an employer who fired an employee it believed had made remarks threatening the lives of other employees. The plaintiff claimed his comment was misunderstood and that the employer actually terminated him because it believed he had an untreated mental condition of paranoia. The court rejected these arguments, holding that “no rational factfinder could conclude that this passing reference to a belief that Pence was paranoid was the reason for his termination, as opposed to evidence that Tenneco thought the death threat was caused by paranoia.” Additionally, relying on *Jones*, the court held that the employer’s belief that the plaintiff made a death threat was a permissible nondiscriminatory reason for his termination, even if the employer believed that a mental condition had caused the employee to make the threat.

Other well-publicized decisions under the ADA have involved employees and the potential for violence in the workplace. In *Hindman v. GTE Data Services, Inc.*, 3 A.D. Cas. (BNA) 641 (M.D. Fla. 1994), the court denied the employer’s motion for summary judgment in a case in which an employee stated that a psychological disability caused him to carry a firearm to work. At trial, however, a different judge held that the employer was entitled to a directed verdict. The EEOC issued an opinion letter arguing against the court’s rationale for denying summary judgment. *See also 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).



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J. Smoking. Smoking is not protected under the ADA. However, in *Lipson v. Fortunoff Fine Jewelry and Silverware, Inc.*, Case No. 2-E-D-84-99582 (N.Y. Human Rights Division 1984), the N.Y. Human Rights Division issued a cause determination against an employer who refused to hire smokers when a job applicant was denied employment because she smoked. The Division believed that the condition of addiction to cigarettes or, alternatively, the employer's perception of smoking as an addiction or disabling condition was a "disability" under state law.

III. "QUALIFIED INDIVIDUAL WITH A DISABILITY" UNDER THE ADA

A. ADA Protection of Qualified Individual with a Disability. The ADA protects a "qualified individual with a disability." As defined by the ADA, such an individual is "an individual with a disability that, 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).

1. 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).

In *Phelps v. Optima Health*, 251 F.3d 21 (1st Cir 2001), the First Circuit Court of Appeals addressed the issue of whether the essential functions of a job should be determined without considering the effects of arrangements made to accommodate an employee's disability. In *Phelps*, the plaintiff argued that lifting was no longer an essential function of her job because she had been able to do her job with help from co-workers through a series of informal arrangements. The court rejected the plaintiff's claim, holding that that "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.'" In another case, the Eighth Circuit Court of Appeals held that an 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. *Stafne v. Unicare Homes*, 266 F.3d 771 (8th Cir. 2001); *but see Turner v. Hershey Chocolate, U.S.A.*, 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 the function is highly specialized and the incumbent is hired due to his or her expertise or ability to perform that function.

The frequency of a particular function, however, does not necessarily affect whether the function is "essential." The EEOC's interpretive regulations on the ADA 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. § 1630.2 (n) App.



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Employers should keep in mind that, with respect to the “qualified individual” inquiry, the appropriate focus is the individual’s present ability to do the job with or without a reasonable accommodation – not on speculation as to how the condition may affect the individual later. *See Sutton*, 119 S. Ct. at 2139; *Murphy*, 119 S. Ct. at 2133; *Kirkingburg*, 119 S. Ct. at 2388. In evaluating “essential functions,” the focus should be on what must get done and not necessarily how the job is conventionally done. For example, in *Sprague v. United Air Lines*, 2002 WL 1803733, 2002 U.S. Dist. LEXIS 14519 (D. Mass. Aug. 7, 2002), the court held that a deaf airline mechanic was entitled to a job offer even though he could not communicate in the manner traditionally used by other United mechanics in the course of their duties.

2. 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). Many cases hold that the ADA plaintiff bears the initial burden of proving that he or she is “qualified.” *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. at 578 (Thomas, J., concurring); *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.

Certain neutral physical criteria for employment (i.e., vision standards, etc.) may be imposed by employers and determine “qualification,” so long as employers do not make employment decisions based on impairments that are regarded as “substantially limiting.” *See Murphy, Sutton, and Kirkingburg*. For example, meeting an across-the-board qualification standard, such as certain physical requirements outlined in Department of Transportation safety standards, may be a valid qualification that is “job related and consistent with business necessity.” *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. at 567-68; *see also EEOC v. United Parcel Service, Inc.*, 306 F.3d 794 (9th Cir. 2002) (standard barring drivers with monocular vision does not violate ADA because drivers with monocular vision are not necessarily regarded as being substantially limited in a major life activity), *amended by* 311 F.3d 1132 (9th Cir. 2002).

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 Transport 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); *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).

B. Absenteeism. Disciplining an arguably disabled employee for excessive absenteeism can involve difficult decisions for an employer. Many courts will enforce absenteeism policies, even



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as applied to individuals who are disabled (as long as the absences are not protected under the Family and Medical Leave Act) (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 *Mason v. Avaya Communications*, 357 F.3d 1114 (10th Cir. 2004) (“other circuits have recognized physical attendance in the workplace is itself an essential function of most jobs”) (citing *Hypes v. First Commerce Corp.*, 134 F.3d 721, 727 (5th Cir.1998) (per curiam) (collecting cases)); *Brenneman v. MedCentral Health System*, 366 F.3d 412 (6th Cir. 2004) (diabetic plaintiff was not qualified to perform the essential functions of pharmacy tech position because of excessive absenteeism), *cert. denied*, 543 U.S. 1146 (2005); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1047 (6th Cir.1998) (“An employee who cannot meet the attendance requirements of the job at issue cannot be considered a ‘qualified’ individual protected by the ADA”); *Tyndall v. Nat’l Educ. Centers Inc.*, 31 F.3d 209, 213 (4th Cir.1994) (even when an employee can satisfactorily perform the essential functions of her position, the employee “must be willing to demonstrate these skills by coming to work on a regular basis” and “a regular and reliable level of attendance is a necessary element of most jobs”); *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); *Walton v. Mental Health Ass’n*, 1997 U.S. Dist. LEXIS 18224, 1999 WL 637219 (E.D. Pa. Nov. 17, 1997) (“I cannot hold as a matter of law that attendance – or more precisely that a particular level of attendance – was an essential element of plaintiff’s job”), *aff’d*, 168 F.3d 1661 (3d Cir. 1999); *Dutton v. Johnson County Bd. of County Comm’rs*, 859 F. Supp. 498 (D. Kan. 1994) (involving unscheduled absences due to migraine condition).

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):

1. The employee’s excessive absenteeism renders him or her no longer qualified to perform the essential function of regular attendance. See, e.g., *Brenneman*, 366 F.3d at 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).
2. 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).



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Notwithstanding the 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.

Impact of the FMLA. 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. Diffe-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 Family Medical Leave Act permitted). *See* the discussion in § 9(E) 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.

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. *Cleveland v. Policy Mgmt. Sys. Corp.*, 523 U.S. 1070 (1998). *Cleveland* resolved the split in the federal circuit courts as to whether an individual who had filed for SSDI benefits was estopped from bringing suit under the ADA. Differentiating between the Social Security Act (SSA) and the ADA, the Court reasoned that the SSA did not take into account the possibility of “reasonable accommodation.” It also noted that because an individual’s capacities change over time, statements made when applying for SSDI benefits may no longer be true at the time of the employment decision prompting the ADA suit. The Court also concluded that plaintiffs were traditionally allowed to plead in the alternative. 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); *Lane v. BFI Waste Systems of North America*, 257 F.3d 766 (8th Cir. 2001) (failure to address inconsistency between assertion of “qualified individual” status and later assertion to SSA of total disability rendered individual not “qualified”); *DiSanto v. McGraw Hill, Inc.*, 220 F.3d 61 (2d Cir. 2000) (affirmed overturning \$1.2 million verdict for HIV-positive former salesman; plaintiff failed to explain his unqualified statement to the Social Security Administration that he was unable to work before his discharge).

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”



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differs from the definitions used in the SSA, state workers' compensation laws, disability insurance plans, and other disability benefits programs. See the EEOC's Enforcement Guidance at <http://www.eeoc.gov/policy/docs/qidreps.html>.

IV. DISABILITY AS A THREAT OF INJURY TO SELF OR OTHERS

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 press Rehabilitation Act claim over 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).

A. The ADA and Direct Threat Defense. 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).

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. Ford & Harrison LLP attorneys Peter Petesch and John Duvall filed a friend-of-court (*amicus curie*) brief in the case on behalf of the Society for Human Resource Management (SHRM).

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



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asthma based on assumption that exposure to dust and fumes would render individual unable to perform the job).

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.” EEOC TAM on Title I of ADA, § 4.5(1). The following four factors should be considered in identifying the risk: the deviation 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. EEOC TAM on Title I of ADA, § 4.5(2). 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.

B. 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).

C. Exclusion Due to Other Federal Safety Regulations. An employer can justify excluding an employee or applicant due to compliance with other federal safety regulations without having to prove that the individual poses a threat to safety. The existence of the federal regulation (i.e., a Federal Aviation Administration regulation) creates a presumption of a threat to safety. 29 C.F.R. App. § 1630.15(e) (compliance with federal law or regulation is a defense to ADA claim); *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).

This reasoning was unchanged by the recent *Kirkingburg* decision, in which the U.S. Supreme Court found that the defendant had justifiably relied on government DOT safety standards regardless of the existence of an “experimental” waiver program. *Kirkingburg*, 119 S. Ct. at 2388.

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 with 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.

D. 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:



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1. Evaluate all situations on a case-by-case basis.
2. Inform the employee of the health or safety risks of the job and get the employee's input on those risks.
3. Determine whether there are any reasonable accommodations that can be made to reduce the risks involved.
4. Make sure the individual can perform the essential functions of the job.
5. Consider whether the individual is a threat to others or only to himself or herself.

V. THE ADA AND HIV/AIDS

ADA cases involving HIV/AIDS continue to be litigated and employers encounter daily personnel decisions fraught with legal repercussions in managing employees with HIV/AIDS. For example, a Cleveland, Ohio jury awarded \$5 million under state law to a former manager of a McDonald's restaurant. The plaintiff was stripped of his management duties after disclosing his medical condition. More recently, Cirque de Solei entered into a well-publicized settlement involving a terminated performer with HIV. And, in *Taylor v. Rice*, 451 F.3d 898 (D.C. Cir. 2006), the U.S. Court of Appeals for the District of Columbia allowed a Rehabilitation Act challenge against the State Department's policy barring the hiring of HIV-positive individuals as foreign service officers.

Reassigning, accommodating, reducing or restructuring benefits, and dealing with other employees' fears and concerns raise legal and moral issues that challenge businesses affected by, and employees infected with, HIV/AIDS. The U.S. Supreme Court's ruling in *Bragdon v. Abbott*, 524 U.S. 624 (1998), concluded that one individual's asymptomatic HIV is a disability under the ADA. *But see Blanks v. Southwestern Bell Corp.*, *supra*. 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 Svs., Inc.*, 247 F.3d 229 (5th Cir. 2001).

Despite promising treatments, AIDS remains among the top killers of Americans between the ages of twenty-five and forty-four, the same age group that comprises over half the workforce. The U.S. Centers for Disease Control and Prevention (CDC) estimates that nearly one million Americans is HIV-positive. While death rates decline, the CDC confirmed that HIV-infection rates are once again increasing, with approximately 40,000 new infections in the U.S. each year. These infections increasingly diversify into all segments of the population. Better medical therapies prolonging the survival of HIV patients (and increasing their productive lives in some cases) force greater emphasis on day-to-day management of employees with HIV/AIDS and their co-workers. *See Petesch, P.*, "HIV/AIDS: Still in Business," *Mosaics* (SHRM November 2001); "Firms Juggle Stigma, Needs of More Workers with HIV," *USA Today*, September 7, 2000, 1-B. Employers also confront a new phenomenon from improved AIDS treatments: employees returning to work (either to their former employer or a new employer) from long-term disability status. Medical advances underscore the challenge to address both ongoing accommodations of employees and acceptance of those employees by the workforce. *See Petesch, P.*, "The ADA, HIV and Risk Management Strategies," *Legal Report* (SHRM, Summer 1998); Greene, J., "Employers Learn to Live With AIDS," *HR Magazine* (SHRM February 1998). For additional information and resources regarding AIDS in the workplace, see the CDC's Business Responds to AIDS Program, located at <http://www.hivatwork.org/> and The Society for Human Resource Management's HIV/AIDS Workplace Toolkit <http://www.shrm.org/diversity/aidsguide>.

Threat of Injury to Self or Others as a Defense. The ADA recognizes that an employer may defend a charge of disability discrimination by proving that the hiring or retention of a disabled employee poses a substantial risk of serious injury to others. Employers should recognize, however, 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



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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); *Estate of Mauro by & Through Mauro v. Borgess Med. Ctr.*, 137 F.3d 398 (6th Cir. 1998) (surgical technician performing exposure-prone procedures). *But see Holiday v. City of Chattanooga*, 206 F.3d 637 (6th Cir. 2000) (upholding disability discrimination claim of police applicant with HIV where there was evidence that offer was withdrawn because of fears that plaintiff would transmit HIV on the job); *Doe v. Attorney General of U.S.*, 5 A.D. Cas. (BNA) 1096 (9th Cir. 1995) (medical facility director who was suspected of having AIDS was otherwise qualified under § 504 of the Rehabilitation Act to perform routine physical exams of FBI agents, where FBI conceded that it was told that there was no risk to agents because infection control procedures were being followed). These decisions illustrate that the employer must show that the employee's condition posed more than an "elevated" risk to other employees or to customers; rather, a "reasonable probability of substantial harm" supported by medical evidence is required. As with any condition treated by medication, however, employers should also be mindful of side effects of medication that may cause an objective threat to safety.

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.

Employee/Customer Fears Are Not a Defense. 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).

Protecting the Employee's Privacy. The ADA mandates that employees' medical information be kept confidential. When an employer employs an individual with HIV, the employer must take steps to protect the confidentiality of the person or the employer may be sued for ADA violations, defamation or invasion of privacy. *See Doe v. United States Postal Service*, 317 F.3d 339 (D.C. Cir. 2003) (employer revealing employee's HIV-positive status to co-workers in aftermath of medical leave request gives rise to Privacy Act and Rehabilitation Act claims); *Doe v. Southeastern Pennsylvania Transportation Authority*, 1994 DLR No. 237:A-14 (12/13/94) (awarding damages of \$125,000 to a worker who claimed his privacy was violated when a top manager learned of his HIV infection during a review of prescription drug utilization reports and revealed the information to others at the agency).

National Labor Relations Act (NLRA). Employees acting in "concert" with each other in refusing to work may argue that they have a right to refuse to work with a person with HIV. The NLRA protects the right of employees to engage in "concerted" activity for mutual aid and protection. This protection extends to work stoppages in protest over terms and conditions of employment. *See Colorado Forge Corp.*, 260 N.L.R.B. 25 (1982) (employees complained that workplace was "too hot, too smoky, too dangerous"), *decision supplemented by Colorado Forge Corp.*, 285 N.L.R.B. No. 63 (1987). However, a refusal to work based on imminent danger to health and safety must be grounded in a good faith belief and be objectively reasonable. The NLRA protects protesting an unsafe working condition, but only if the employees have a good faith, reasonably held belief that an unsafe condition exists. *See, e.g., Daniels Constr. Co.*, 267 N.L.R.B. 1213 (1983); *Johnson-Stewart-Johnson Mining Co.*, 263 N.L.R.B. 123 (1982). Even if uninfected employees do not assert any legal claims, the practical consequence of a group of fearful and discontented employees, uneasy with working with a colleague with HIV, provides temptation



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to break the law and isolate the perceived “problem” – the infected employee. This situation can be avoided through workplace education.

Testing. Under the ADA, AIDS testing (of current employees) is allowed only if job related and consistent with business necessity. As discussed below medical testing of applicants is never allowed. Several state legislatures have passed statutes in recent years that regulate AIDS testing, including California, Florida, Illinois, Massachusetts, New York, and Texas.

VI. 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). 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.

The EEOC amended its guidance on psychiatric disabilities in 1999 to incorporate the U.S. Supreme Court decisions in *Sutton v. United Air Lines*, 527 U.S. 471 (1999), *Murphy v. UPS*, 527 U.S. 516 (1999), and *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999). In accordance with these decisions, the EEOC guidance now states that whether a person has an ADA disability is determined by taking into account the positive and negative effects of mitigating measures used by the individual. The EEOC also issued instructions for its field officers based on the *Sutton* trilogy, instructing the agents to obtain information about any mitigating measures used by the complaining party. *See* “Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing ‘Disability’ and ‘Qualified,’” available at <http://www.eeoc.gov/policy/docs/field-ada.html>.

The EEOC guidance explains that an employer may discipline an employee with a mental disability, just as anyone else, for violating job-related workplace conduct standards. Courts have reached the same conclusion. *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*, (No. 211567) (Mich. Ct. App. 2000) (firing grocery store “courtesy clerk” whose Tourette Syndrome resulted in employee’s use of racial slurs and obscenities with customers was not disability discrimination); *Ray v. Kroger Co.*, 264 F. Supp. 2d 1221 (S.D. Ga. 2003) (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 (11 Cir. Dec. 17, 2003). *But see Bennett v. Unisys Corp.*, 2000 WL 33126583, 2000 U.S. Dist. LEXIS 18143 (E.D. Pa. Dec. 8, 2000) (worker with depression, causing her to be belligerent and hypersensitive to criticism, was substantially limited in major life activity of interacting with others and may have right to reasonable accommodation under ADA).

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.”



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Dangers occur when employers attempt to “diagnose” the underlying causes of workplace behavior and attach labels such as “paranoid.” *See, e.g., 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”). *But see 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”). “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.

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.

VII. 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 contains other specific exclusions as well. Conditions specifically excluded from coverage by 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); *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*, 125 S. Ct. 2195 (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.

However, an employee legally using marijuana for medical purposes sustained a claim under Oregon’s disability discrimination law after being fired for testing positive for marijuana metabolites. The employee had asserted a “failure to accommodate” claim. *See Washburn v. Columbia Forest Products, Inc.*, 104 P.3d 609 (Ore. Ct. App. 2005). The court did not opine on whether medical use of marijuana still constituted illegal drug use under the federal controlled substances laws or the ADA.

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., Moorner v. Baptist Mem. Health Care System*, 398 F.3d 469 (6th Cir. 2005); *Miners v. Cargill Communs.*, 113 F.3d 820 (8th Cir. 1997).



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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); *Roig v. Miami Federal Credit Union*, 353 F. Supp. 2d 1213 (S.D. Fla. January 25, 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*, 124 S. Ct. 513 (2003). In reaching this decision, the Court overruled a decision by the Ninth U.S. Circuit Court of Appeals, 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).

VIII. THEORIES OF DISABILITY DISCRIMINATION

A. Disparate Treatment. “Disparate treatment” analysis is applicable unless there is direct evidence of discrimination. *See Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173 (6th Cir. 1996) (burden shifting method of proof is not applicable when the employer admits taking employee's disability into account in making an employment decision and instead attempts to defend the decision on ground that the employee is not otherwise qualified, because employer has admitted its intent, which is the issue for which the burden shifting method of proof was designed, and employee has direct evidence of bias on basis of his disability). Otherwise, ADA plaintiffs demonstrate disparate treatment by establishing a *prima facie* claim just as under other Title VII cases. The claim survives if the plaintiff can successfully rebut any legitimate explanations for an adverse employment action articulated by the employer 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 with a disability because of the individual's 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.

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.

Another court found that some actions, although not materially adverse, may still violate ADA. In *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568 (7th Cir. 2001), the court held that denial of training available to (but not required of) other employees to an otherwise qualified employee may violate the ADA. The court held that if the refusal is because of preconceptions over an individual's disability, then refusal to allow the employee to undertake available training is unlawful.

Additionally, many ADA discrimination claims involve benefits issues. For example, the EEOC has brought (and won or settled on favorable terms) numerous cases challenging health benefit



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plans that have severely capped or eliminated benefits for a particular condition, such as AIDS. *See, e.g., Estate of Kadinger v. International Bhd. of Elec. Workers, Local 110*, 1993 WL 597548, 1993 U.S. Dist. LEXIS 18982 (D. Minn. Dec. 21, 1993). On October 3, 2000, the EEOC issued a new section to its Compliance Manual that provides the agency's analysis of employee benefits issues, including an analysis of "disability-based distinctions." The Compliance Manual can be found at <http://www.eeoc.gov/policy/compliance.html>.

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)(1).

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(c). 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 (May 19, 1994 and revised October 10, 1995) and its Enforcement Guidance on Disability-Related Inquiries and Medical Examinations Of Employees Under the ADA (July 26, 2000). 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 postoffer 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. For more information, see section XI below and Petesch, P. "Popping the Disability-Related Question," *HR Magazine* (SHRM) (November 2000).

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). For example, a physical agility test may not be "facially neutral" with respect to disabled persons. *See Perez v. Philadelphia Hous. Auth.*, 677 F. Supp. 357 (E.D. Pa. 1987) (rule calling for termination of employees after one year on disability leave has adverse impact on the handicapped), *aff'd*, 841 F.2d 1120 (3d Cir. 1988). A court of appeals recently reached the opposite result, however, in *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042 (6th Cir. 1998). The court rejected a disparate impact claim under the ADA



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challenging a rule providing for termination of employees taking over a year off to recover from an injury.

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); *Jackson v. Lake County, Illinois*, 2003 U.S. Dist. LEXIS 16244 (N.D. Ill. Sept. 15, 2003) (permitting nondisabled individual to go to trial on ADA claim based on employer’s requirement that he submit to a psychological examination) individual refusing to take an ordered psychiatric exam before consulting with a lawyer may proceed with retaliation claims under ADA). A jury later returned a verdict in favor of the employee in the amount \$325,000 in compensatory damages; however, the judge reduced the amount to \$100,000 because the jury verdict lacked a “rational connection to the evidence” which did not show any physical symptoms related to the plaintiff’s alleged emotional distress or any evidence of medical treatment or counseling. *Jackson v. Lake County*, 2005 U.S. Dist. LEXIS 16697 (N.D. Ill. Aug. 11, 2005).

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*, 9 Am. Dis. Cases (BNA) 1409 (7th Cir. 1999); *Reno v. Baird*, 957 P.2d 1333 (1998). Parallel state or local laws, however, may impose individual liability.



IX. THE “REASONABLE ACCOMMODATION” CONCEPT

A. General “Reasonable Accommodation” Principles. The ADA requires employers to make “reasonable accommodations” to give otherwise qualified disabled persons equal opportunity to work. 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 Eighth Circuit in *Wood v. Crown Redi-Mix, Inc.*, 339 F.3d 682, 687 (8th Cir. 2003), held that where the requested accommodation is unrelated to the limitation “we do not believe an ADA action may lie.” The court further stated, “[p]ut another way, there must be a causal connection between the major life activity that is limited and the accommodation that is sought.” *Id.* In *Wood*, the court held that the plaintiff had failed to create a genuine issue of material fact as to whether his work-related injuries substantially limited any major life activity other than procreation. Because his ability to procreate bore no connection to the accommodation he sought (transfer to a different type of truck), the court held that he had failed to establish a *prima facie* case of discrimination.

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.



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The duty to make reasonable accommodations applies only with respect to legally “disabled” employees. It does not apply to persons associated with disabled persons, such as caregivers. Moreover, 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). *See Kratzer v. Rockwell Collins, Inc.*, 398 F.3d 1040 (8th Cir. 2005) (“A mere assertion that an accommodation needed is insufficient; the employee must inform the employer of the accommodation needed.”); *Amadio v. Ford Motor Company*, 238 F.3d 919 (7th Cir. 2001) (employer cannot be held liable for failure to accommodate if employer did not know of employee's alleged disability and employee did not request accommodation; employee cannot keep disability a secret and wait until after termination to request a reasonable accommodation; employer has no duty to consider additional accommodations after dismissal); *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). Additionally, some state laws may differ. In *Downey v. Crowley Marine Svcs.*, 236 F.3d 1019 (9th Cir. 2001), the court held that, under Washington state law, the duty to accommodate is triggered by awareness of the need and not the employee's request.

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 issued a comprehensive guidance on reasonable accommodations. *See Revised Enforcement Guidance Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (update October 2002), <http://www.eeoc.gov/policy/guidance.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. *See also* Petesch, P. “Are the Newest ADA Guidelines ‘Reasonable?’ ” *HR Magazine* (SHRM June) 1999.

The EEOC also issued a recent guidance addressing the allocation of responsibilities with respect to contingent workers. *See* <http://www.eeoc.gov/policy/docs/guidance-contingent.html>. According to the EEOC, staffing firms and their clients may each be responsible for providing and implementing accommodations and liable for refusals to accommodate. The guidance addresses when a person on a staffing firm's roster becomes an employee (and therefore when certain medical inquiries may be made). It also suggests that staffing firms and their clients execute agreements specifying who bears the responsibility and expense for reasonable accommodations (though an agreement may not necessarily insulate any one party from possible liability for refusals to accommodate).



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B. Foundation of Reasonable Accommodation in Various Laws.

1. Section 503 of the Rehabilitation Act. Affirmative action and the OFCCP's interpretive regulations require "reasonable accommodation" . . . unless the contractor can demonstrate that such an accommodation would impose an undue hardship on the conduct of the contractor's business." 41 C.F.R. § 60-741.6(d).

2. Section 504 of the Rehabilitation Act. The statute does not explicitly require affirmative action or reasonable accommodation (except by federal agencies under § 501). Department of Justice Guidelines (28 C.F.R. § 41.53) assert that there is a reasonable accommodation requirement under Section 504, but in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), the U.S. Supreme Court held that § 504 of the Rehabilitation Act does not require recipients of federal funds to take "affirmative action" to employ the handicapped. In *Davis*, however, the Court stated that there may be instances in which a refusal to accommodate may amount to discrimination. In any event, the Court held that the accommodation requirement does not require "major adjustments" that would "substantially lower" the institution's standards. The Court implied that if interpretive regulations require such, they may be invalid.

3. The ADA. The ADA specifically requires 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).

4. State Laws. Most state laws require that employers reasonably accommodate individuals with disabilities. The law of the individual state should be reviewed.

C. Reasonable Accommodation Process. 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). 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).

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; 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.



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Some courts have held that the ADA requires employers to engage in the interactive process. *See, e.g., Kratzer v. Rockwell Collins, Inc.*, 398 F.3d 1040 (8th Cir. 2005) (“If the employee needs an accommodation, the employer must engage in an interactive process.”); *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000) *cert granted in part on other issues* 121 S. Ct. 1600 (2001), *reversed on other grounds*, 122 S. Ct. 1516 (2002) (finding the interactive process mandatory and citing other circuit court cases reaching the same conclusion; holding that an employer will not prevail if there is a genuine dispute over whether the organization engaged in good faith in the interactive process); *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789(7th Cir. 2005) (plaintiff’s notice to the employer of her disability and her request for accommodation were sufficient to trigger the employer’s statutory duty to engage the employee in an interactive process). *But 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).

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. *Ammons v. Aramark Uniform Svs.*, 368 F.3d 809, 820 (7th Cir. 2004) (“there is no requirement that an attorney and/or vocational expert need to participate” in the interactive process under the ADA). 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).

The Eighth Circuit has noted that an employer impedes the interactive process when: the employer knows of the employee’s disability; the employee requests accommodations or assistance; the employer does not in good faith assist the employee in seeking accommodations; and the employee could have been reasonably accommodated but for the employer’s lack of good faith. *Kratzer*, 398 F.3d at 1045 (finding that the employee, not the employer, in this case impeded the interactive process because she failed to provide an updated evaluation to the employer after claiming she had additional restrictions and needed further accommodations).

In *Tobin v. Liberty Mutual Insurance Co.*, 433 F.3d 100 (1st Cir. 2005), the court held that the employer was not liable for failing to engage in the interactive process to determine an appropriate reasonable accommodation for the plaintiff, an insurance salesman with bipolar disorder who was ultimately terminated for failing to meet sales quotas. The court noted that the employer had offered plaintiff several accommodations, including a nurse to assist with his return to work following the second of two short-term leaves of absence, computer trainings, and numerous meetings to help plaintiff create the skills and plans necessary to improve his sales performance.

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. The ADA does not require employers to be clairvoyant about an employee’s disability. *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 933 (7th Cir. 1995). Only if the employer knows of the disability, or if the symptoms are “so obviously manifestations of a disability that it would be reasonable to infer the employer actually knew of the disability” do the nondiscrimination (and reasonable accommodation) provisions of the ADA apply. *Id. See also Amadio v. Ford Motor Co.*, 238 F.3d 919 (7th Cir. 2001) (employee



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cannot wait until time of termination to request accommodation and disclose disability); EEOC Guidance on Reasonable Accommodations (encourages persons with disabilities requiring accommodations to request accommodations prior to any performance problems).

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 an employer cannot require an employee to see a company doctor to support a request for accommodation unless the employee has been given the opportunity to provide appropriate documentation and has failed to do so.

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. See also *Kratzer*, 398 F.3d at 1045 (plaintiff’s failure to obtain an updated physical evaluation precluded the employer from providing an appropriate accommodation); *Allen v. Pacific Bell*, 348 F.3d 1113 (9th Cir. 2003) (employee’s failure to provide additional requested medical information or cooperate in functional test and in exploration of other accommodation alternatives relieved employer of any further obligation to participate in interactive process); *EEOC v. Prevo’s Family Mkt.*, 135 F.3d 1089 (6th Cir. 1998) (an employee has a duty to cooperate with reasonable requests for medical information in the posthire and accommodation processes); *Templeton v. Neodata Servs.*, 162 F.3d 617 (10th Cir. 1998) (employee who refused to provide employer with information from physician in response to employer’s reasonable request was precluded from ADA recovery).

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 accommodation guidelines and regulations under the ADA list the following as sample accommodations:

- Modifications to the job application processes;
- Modifications to the work environment that enable the individual to perform “essential” functions of the job;
- Making facilities accessible. Satisfying Title III public accommodation obligations is not enough; employers need to consider each protected individual’s needs on an individual basis. See EEOC TAM on Title I of ADA § 3.10(1);
- Job restructuring. Trading off “nonessential” functions of the job with other employee(s) who can perform the tasks; “essential” functions of the job do not have to be traded off with other employees. However, it may be a reasonable accommodation to change when or how an essential function is performed. EEOC TAM on Title I of ADA § 3.10(2);
- Part-time or modified work schedules. May include flexibility in work hours or the workweek, or part-time work. EEOC TAM on Title I of the ADA § 3.10(3);



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- Reassignment to vacant positions. EEOC suggests that reassignment should be considered only after other modifications to the current job have been considered. The employee with the disability must show that a vacant position exists for which he or she is qualified. *Ozowski v. Henderson*, 237 F.3d 837 (7th Cir. 2001);
- Acquisition or modification of equipment. Sources include the free consulting service on accommodations, Job Accommodation Network at 1-800-ADA-WORK, and other sources listed under the EEOC's Resource Directory. EEOC TAM on Title I of the ADA § 3.10(6). Beware of ADA consultants who state they will assist in modifications and state they are "ADA certified" or "ADA approved." There is no formal certification or approval process for ADA consultants;
- Modification of examinations, training materials, or policies. Tests and examinations must measure actual ability of individual to perform job functions; consider alternate training materials and have flexible policies to assist protected individuals. EEOC TAM on Title I of the ADA § 3.10(7);
- Provision of readers or interpreters. *Cf.* Dept. of Justice Regulations at 28 C.F.R. § 42.511; and
- Rearranging shifts. *See Gile v. United Airlines, Inc.*, 213 F.3d 365 (7th Cir. 2000) (upholding \$200,000 verdict against employer for denial of a shift change as an accommodation for employee's psychological disorders).

1. 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



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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).

2. Examples of Modification of Facilities/Making of Expenditures. Refusing to allow a one-armed driver to use a tractor with power-steering amounted to a denial of a reasonable accommodation. *Masterson v. Yellow Freight System, Inc.*, 166 F.3d 347 (table), 1998 U.S. App. LEXIS (10th Cir. Dec. 11, 1998). Provision of a parking place near work was not an unreasonable accommodation. *Lyons v. The Legal Aid Society*, 1995 BNA DLR No. 213:E-6 (2d Cir. 1995).

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*, 1995 BNA DLR No. 118:A-1 (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). A jury subsequently awarded the plaintiff \$165,000 in compensatory damages on her ADA claim. See *Burnley v. City of San Antonio*, 465 F.3d 191 (5th Cir. 2006) (because city failed to timely appeal from judgment on the merits, Fifth Circuit had no jurisdiction over that judgment and dismissed appeal; Fifth Circuit affirmed award of attorney fees to plaintiff).

3. 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.

4. Job Restructuring and/or Light Duty. Transfer of a disabled employee to 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).

5. 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); *Rehrs v. Iams Co.*, 2006 U.S. Dist. LEXIS 6301 (D. Neb. Feb. 7, 2006), (diabetic warehouse worker had no right to an accommodation of straight shift work when all of his counterparts had rotating shifts; court determined that the policy was “standard operating procedure” and the company was not obligated to give plaintiff a different work schedule). 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



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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.

6. Transfers to Other Jobs. Employers may consider reassignments or transfers as a reasonable accommodation. The EEOC Guidelines assert 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.

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*); *EEOC v. United Parcel Service, Inc.*, 249 F.3d 557 (6th Cir. 2001) (transfer obligation is nationwide). In *Burns v. Coca-Cola Enterprises, Inc.*, 222 F.3d 247, 257 (6th Cir. 2000), the Sixth Circuit also held that an employer has a duty under the ADA to consider transferring a disabled employee who can no longer perform his old job, even with accommodation, to a new position for which the employee is qualified. The court also noted, however, that the employer is not required to transfer the employee to a job for which he is not qualified nor is it required to waive “legitimate, nondiscriminatory employment policies or displace other employees’ rights” to accommodate the disabled individual. *See also Burchett v. Target Corp.*, 340 F.3d 510 (8th Cir. 2003) (employee with depression did not qualify for transfer because of deteriorating job performance in current job; employee did not show that she was unable to perform existing job and that she therefore needed transfer); *Rehling v. City of Chicago*, 207 F.3d 1009 (7th Cir. 2000) (“employer need only transfer the employee to a position for which the employee is otherwise qualified,” and “an employee who requests a transfer cannot dictate the employer’s choice of alternative positions” because an employer is obligated to provide a reasonable accommodation, but not necessarily the accommodation the employee would prefer). The EEOC’s Accommodations Guidelines also claim 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. *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998); *Davoll v. Webb*, 194 F.3d 1116, 1131-32 (10th Cir. 1999).

In *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir. 2000), however, the Seventh Circuit rejected 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.” The court envisioned the precarious situation of a person from another protected group (or even another person with a disability) with superior qualifications losing out on a vacancy to a less-qualified person (even if the poorer qualifications have nothing to do with disability) requesting reassignment as a reasonable accommodation. Passing over the more qualified person, the court explained, transforms the ADA from a nondiscrimination statute into a mandatory preference law imposing unreasonably on co-workers. *See also Boykin v. ATC/VanCom of Colorado*, 247 F.3d 1061 (10th Cir. 2001) (bus company did not violate ADA in requiring former employee with disability to compete with other applicants



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for vacant alternative position); Petesch, P. “Whose Rights Matter More?” *Mosaics* (SHRM) January 2001.

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); *Burns*, 222 F.3d at 257 (“[e]mployers are not required to create new jobs, displace existing employees from their positions, or violate other employees’ rights under a collective bargaining agreement or other nondiscriminatory policy in order to accommodate a disabled individual”). 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*, 122 S. Ct. 1516 (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). Ford & Harrison attorneys filed an *amicus* brief in this case. 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.

c. Promotion/Additional Training. An employer is not required to offer a promotion to an employee as a reasonable accommodation. *See, e.g., Hendrick v. W. Reserve Care Sys.*, 355 F.3d 444 (6th Cir.); *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). EEOC guidance also suggests that employees with disabilities are not entitled to any *more* training than afforded or available to other employees.

7. Examples of Granting Leave. 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



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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.

Other appeals courts have held, however, that indefinite medical leave could not be a reasonable accommodation. See *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 in the future, not a request for an accommodation that would enable him to work in the present); *EEOC v. Yellow Freight System*, 253 F.3d 943 (7th Cir. 2001) (*en banc*) (requests for unlimited sick days are not reasonable as a matter of law); *Amadio v. Ford Motor Co.*, 238 F.3d 919 (7th Cir. 2001) (the employee must at least demonstrate that the leave will "likely" enable him to return to work); *Mitchell v. Washingtonville Cent. School Dist.*, 190 F.3d 1, 9 (2d Cir. 1999) (ADA did not require employer to grant employee, who gave no indication of when he expected to be able to return to work, an indefinite leave of absence) *Walton v. Mental Health Ass'n of Southeastern Pennsylvania*, 168 F.3d 661, 671 (3d Cir. 1999) (although unpaid leave supplementing regular sick and personal days might, under other facts, present a reasonable accommodation, "a blanket requirement that an employer allow such leave is beyond the scope of the ADA when the absent employee simply will not be performing the essential functions of her position"); *Nowak v. St. Rita High School*, 142 F.3d 999 (7th Cir. 1998) ("The ADA does not require an employer to accommodate an employee who suffers a prolonged illness by allowing him an indefinite leave of absence."); *Monette v. EDS Corporation*, 90 F.3d 1173, 1187 (6th Cir. 1996) (unlimited leave is not a reasonable accommodation).

8. 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. In another case, an employee with apraxia, affecting his ability to concentrate, was entitled to computer training, a distraction free environment, and a reader, if necessary, as a reasonable accommodation. *Arneson v. Sullivan*, 946 F.2d 90, 92-93 (8th Cir. 1991). The court noted however, that if these efforts did not enable the employee to perform satisfactorily, the employer could discharge him for unsatisfactory performance.

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).

9. 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.

10. 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 *Memorial Hospitals Ass'n v. Humphrey*, 239 F.3d 1128 (9th Cir. 2001); *Langon v. Department of Health and Human Services*, 959 F.2d 1053 (D.C. Cir. 1992); *Nanzalone v. Allstate Insurance Co.*, Case No. 93-2248, BNA DLR No. 19, p. A-1 (E.D. La. 1995). *But see Mason v. Avaya Communications, Inc.*, 357 F.3d 1114 (10th Cir.



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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); *Spielman v. Blue Cross and Blue Shield of Kansas, Inc.*, 33 Fed. Appx. 439 (10th Cir. 2002) (particular nurse's request to work at home rejected due to disqualification for program from lagging performance); *Heaser v. Toro Co.*, 247 F.3d 826 (8th Cir. 2001) ("reasonable accommodation" did not include allowing a disabled employee to work from home when the employer was unable to provide the necessary software and equipment to allow the employee to perform the essential functions of the job); *Kvorjak v. Maine*, 259 F.3d 48 (1st Cir. 2001) (rejection of employee's request to work at home in order to avoid commute causing pain resulting from spina bifida did not violate ADA because employee needed to be present in office to perform certain essential job functions).

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.

11. Providing a Flexible Schedule. The U.S. Attorney's Office was not required to grant a clerical employee a flexible schedule. The court noted that 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. *Carr v. Reno*, 23 F.3d 525 (D.C. Cir. 1994). See also *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).

12. Separating Employees and Reducing Stress. The ADA does not require separation from a supervisor as an accommodation. See EEOC Guidelines; *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); *Mears v. Gulfstream Aerospace Corp.*, 905 F. Supp. 1075 (S.D. Ga. 1995), *aff'd*, 87 F.3d 1331 (11th Cir. 1996); *Snyder v. Medical Services Corp. of Eastern Washington*, 35 P.3d 1158 (Wash. 2001). But see *Strass v. Kaiser Foundation Health Plan of the Mid-Atlantic States*, 744 A.2d 1000 (D.C. App. 2000) (holding employer liable for failing to offer manager less demanding/stressful job under District of Columbia Human Rights Act).

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." An employer may, however, inquire "into the ability of an applicant to perform job-related functions." 42 U.S.C. § 12112(c)(2). Cf. DOJ Guidelines (28 C.F.R. § 41.55 and 28 C.F.R. § 42.513(b)) under the Rehabilitation Act, § 504. 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/guidance-inquiries.html>.



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In contrast, § 503 of the OFCCP Regulations (41 C.F.R. § 60-741.4(e)(1)) requires contractors to invite applicants who believe they are covered by § 503 to identify themselves to the contractor.

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 revised 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



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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. Steeltex, 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.

B. Pre-Employment Testing. Under § 504 of the Rehabilitation Act, DOJ Guidelines require employment tests to be "adapted for use by persons who have handicaps that impair sensory, manual or speaking skills." 28 C.F.R. § 41.54. See *Stutts v. Freeman*, 694 F.2d 666 (11th Cir. 1983) (employer failed to accommodate dyslexic applicant who was denied admission to a training program where it tried, unsuccessfully, to obtain the results of other tests the applicant had undergone and tried to persuade the testing service to give the individual a verbal examination; such efforts did not amount to a reasonable accommodation under the HSS Regulations). Under Section 503 of the Rehabilitation Act, contractors must ensure that job requirements that tend to screen out qualified, handicapped individuals are job-related and consistent with business necessity and safe performance of the job. 41 C.F.R. § 60-741.5.

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). In *Bates v. UPS*, 465 F.3d 1069 (9th Cir. 2006), the Ninth Circuit held that the employer's refusal to hire applicants who could not pass a hearing test violated the ADA. The Ninth Circuit's decision affirmed a lower court's determination that the company violated the ADA and affirmed the certification of a class action against UPS based on the ADA violation. In this case, a group of UPS employees and applicants claimed UPS violated the ADA when it excluded them from jobs as package car drivers because of their inability to pass the Department of Transportation's (DOT) hearing test. The package car positions are awarded only to UPS employees who meet certain criteria, including seniority, having a clean driving record, passing a road test, and passing a DOT physical, which includes the DOT hearing test. Although the DOT only requires drivers of vehicles with a gross vehicle weight rating (GVWR) of 10,001 pounds or more to pass the hearing test, UPS required drivers of all package cars, regardless of GVWR, to pass the test.

The Ninth Circuit held that the hearing test UPS used is a qualification standard that screens out individuals with disabilities. Relying, in part, on the ADA's legislative history, the court held that the prohibition on the use of screening criteria applies to all disabled individuals, not just qualified individuals with a disability. Therefore, the court held that the complaining employees were not required to show that they were qualified for the jobs in question by showing that they could perform the jobs safely even though they could not pass the hearing test. Instead, the court held that UPS had the burden of proving that the use of the hearing test is job related and consistent with business necessity.

The court held that UPS did not meet its burden under the business necessity defense. To meet this burden, UPS had to establish that either "(1) substantially all [deaf drivers] present a higher risk of accidents than non-deaf drivers," or (2) "there are no practical criteria for determining which deaf drivers present a heightened risk and which do not." The court held that the evidence that UPS presented, that a hearing driver is generally safer than a non-hearing driver with similar skills and characteristics, did not address the question of whether there are some deaf drivers who are as safe or safer than some or all hearing drivers that UPS employs. Because the concept of risk is an individual, not aggregate one, the court held that UPS cannot "decrease its overall risk



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by excluding all deaf drivers because of the incremental aggregate additional risk they assertedly pose, without showing any individualized risk that is beyond the risk already accepted for some hearing drivers.”

The court also held that UPS could not establish that there are no practical criteria for determining which deaf drivers present a heightened risk and which do not. The court noted that UPS uses driving records to help predict whether individuals will be safe drivers and refuses to consider those who have more than a specified number of moving violations or accidents in a specific time frame. The court found that UPS presented no persuasive explanation as to why similar criteria could not be used to separate safe from unsafe deaf drivers. The court also noted that UPS gives drivers tests and extensive training, presumably because it helps the company determine which applicants will drive safely. “Yet, the record does not address the reasons similar tests and training could not determine which deaf drivers, if any, present no greater risk of accidents than the risk UPS accepts for other drivers.”

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(c)(2)(A). The EEOC has issued a revised Enforcement Guidance on Pre-Employment Disability-Related Inquiries and Medical Examinations Under the ADA, in which it attempts to further explain what constitutes a “medical examination” under the ADA. Under the revised Guidance, the following factors are considered:

- 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)?

41 C.F.R. § 60-741.5(c)(3). 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 Opinion. 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



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finding of discrimination cannot be predicated on information the [employer] did not have before it at the time it made its decision.”); *Cook v. United States Dep’t of Labor*, 688 F.2d 669 (9th Cir. 1982) (where an employer’s information at the time of discharge was substantial and uncontradicted, it had no duty to investigate further.) *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 (c) (3). The inquiries need not even be job-related. 29 C.F.R. § 1630.14(b)(3).

However, the Ninth U.S. Circuit Court of Appeals has held that the ADA prohibits medical examinations until after a “real” job offer has been made. *See Leonel v. American Airlines*, 400 F.3d 702 (9th Cir. 2005). According to the Ninth Circuit, to issue a “real” offer under the ADA, an employer must have completed all non-medical components of its application process or be able to demonstrate that it could not have done so before issuing the offer. In this case, the plaintiffs did not reveal their HIV-positive status on the medical history questionnaire they completed after receiving their job offers. However, their conditions were revealed during subsequent employment-related medical examinations. The airline rescinded the plaintiffs’ job offers because the plaintiffs failed to provide complete and accurate information in the employment application process when they did not reveal their HIV-positive status on their medical history questionnaires. The plaintiffs sued and the trial court granted summary judgment to the airline. The Ninth Circuit reversed, holding that because the medical examinations were performed before the company performed any background checks on the plaintiffs, “the offers were not real, the medical examination process was premature and American cannot penalize the plaintiffs for failing to disclose their HIV-positive status – unless the company can establish that it could not reasonably have completed the background checks before subjecting the appellants to medical examinations and questioning. It has not done so.”

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 on disability-related inquiries of employees, the agency takes the position that restrictions on disability-related inquiries apply to both individuals with as well as



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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 states that an employer cannot require an employee who requests a reasonable accommodation to see a company doctor, unless the employee has failed to provide the necessary information from his or her own doctor after being given the opportunity to do so. *Id.* 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. *Id.*

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. *Id.* This means the person offered a new position can be required to take postoffer 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. *Id.*

The guidelines also permit 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. In *Harris v. Harris & Hart, Inc.*, 206 F.3d 838 (9th Cir. 2000), the court held that requiring a former employee to provide a medical release before rehire did not violate the ADA. The court reasoned that 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.



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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 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). Finally, if medical inquiries are made, employers need to take care to ensure confidentiality and to keep medical information separate from other personnel information. *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.”); *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); *Conant v. City of Hibbing*, 271 F.3d 782, 785-86 (8th Cir. 2001) (employer who rescinded conditional job offer after pre-employment physical resulted in work restrictions did not perceive applicant as disabled where letter rescinding offer stated merely that applicant did not meet the physical condition of the job for which he applied and there was no evidence that the employer regarded him as unable to perform a whole range or class of jobs); *Colwell v. Suffolk County Police Dep’t*, 158 F.3d 635, 646 (2d Cir. 1998) (granting a request for minor accommodations on the advice of the employee’s physician is not a stipulation to that employee’s record of a chronic disability).

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. Another case addressed – and concluded that the ADA barred – an employer’s requirement for a written doctor’s note *with diagnosis* after each sick leave absence. *Fountain v. New York State Corrections Services Department*, 190 F. Supp. 2d 335 (N.D.N.Y. 2002) (requiring diagnosis was not consistent with business necessity), *aff’d in part, vacated in part, Conroy v. New York State Dept. of Correctional Services*, 333 F.3d 88 (2d Cir. 2003). *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), *motion for interlocutory appeal granted*, 358 F. Supp. 2d 347 (S.D.N.Y. 2005).

A court overturned a jury award of \$125,000 to an employee whose HIV infection was revealed through disclosure of the company's review of its prescription records in its prescription drug plan. *Doe v. Southeastern Pennsylvania Transp. Auth.*, 1996 BNA DLR No. 2:AA-1 (3d Cir. 1995). The court held that the individual’s privacy interests gave way, in this context, to the interest of the employer to eliminate benefit plan abuse and contain costs. In this instance, the employer had a practice of reviewing prescription records under its health insurance plan to ensure that there was no abuse. The court held that when the information is disclosed only for the purpose of monitoring to those with a need to know, it outweighs an employee's interest in keeping his prescription drug purchases confidential. The court weighed seven factors when balancing the individual's privacy interest against the plan administration interests of the employer: (A) the type of record, (B) information included, (C) potential harm from nonconsensual disclosure, (D) injury resulting from disclosure, (E) adequacy of safeguards



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against unauthorized disclosure, (F) need for access, and (G) public interest favoring access. *Id.* 1996 BNA DLR No. 2:AA-1 (3d Cir. 1995).

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. The EEOC filed suit against the Burlington Northern Santa Fe Railroad, stemming from the railroad's use of genetic testing to measure employees' susceptibility to carpal tunnel syndrome. Shortly thereafter, the carrier stopped its testing. The parties ultimately reached a \$2.2 million settlement in May 2002. The EEOC's position on this issue is legally untested. At this time, Congress is considering additional legislation that would prohibit discrimination based on information about an individual's genetic makeup.

As with any medical testing issue under ADA, the issues surrounding genetic testing are likely to be whether any such testing of employees is justified as a matter of business necessity. If the testing measures the employee's qualification to perform the job, and perform the job safely, then the testing may arguably be "job-related and consistent with business necessity" within the meaning of the ADA. The second issue is how the employer acts upon the information, and whether a person with a certain genetic condition is an individual with a disability (substantially limited in any major life activities) or is regarded as such. *See E.E.O.C. v. Woodbridge*, 263 F.3d 812 (8th Cir. 2001) (discussed above) (court rejected the EEOC's claim that the employer regarded nineteen applicants as substantially limited in the major life activity of working, where employer rejected applicants from a particular manufacturing job based on test results showing likelihood of developing carpal tunnel syndrome from repetitive motion associated with the job; the employer did not regard the individuals as substantially limited in working a broad range of jobs – only unable to work a specific job).

Outside of the ADA, a number of states and local jurisdictions have legislation prohibiting genetic discrimination in employment, while other states also prohibit genetic bias in health insurance.

XII. CONFIDENTIALITY CONSIDERATIONS

Once an employer has medical information from employees, the information must be kept confidential. *See Doe v. United States Postal Service*, 317 F.3d 339 (D.C. Cir. 2003) (sustaining employee's Rehabilitation and Privacy Act claims for employer's disclosure of employee's HIV-positive status to co-workers). 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). Persons involved in the accommodation process and first aid personnel may have access to employee medical information.

Medical information must be kept in separate files, segregated and secured from general personnel files.

XIII. 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, attorney 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



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law, different remedies, and, in some cases, even the specter of individual liability. *See, e.g., Dichner v. Liberty Travel*, 141 F.3d 24 (1st Cir. 1998) (given the different evidentiary standards for proving disability discrimination under state and federal laws, a jury could rationally find conduct that violated Massachusetts law does not breach the ADA), *abrogation recognized by Lemire v. Silva*, 104 F. Supp. 2d 80 (2000); *Viscik v. Fowler Equipment Co.*, 800 A.2d 826 (N.J. 2002) (individual with obesity need not demonstrate substantial limitation in major life activity in order to establish physical handicap within meaning of New Jersey state law against discrimination); *Reeves v. Johnson Controls World Servs.*, 140 F.3d 144 (2d Cir. 1998) (under New York law, a person with a medical impairment is protected regardless of whether the impairment limits a major life activity); *see also* California Fair Employment and Housing Act (does not have ADA's "substantial limitation" requirement and includes HIV, cancer, epilepsy, and diabetes as disabilities *per se*). Some states also have differing interpretations of their definitions, such as whether to take mitigating measures into account.

The U.S. Court of Appeals for the Third Circuit recently underscored the significance of state laws governing disability discrimination. In *Gagliardo v. Connaught Laboratories, Inc.*, 311 F.3d 565 (3d Cir. 2002), the court held that the federal cap on damages for ADA claims did not apply to a \$2 million compensatory damages verdict awarded by a jury in a case involving both federal and state claims under the Pennsylvania Human Rights Act. The jury never apportioned the damages between the federal and state law claims. *See also Olsen v. Toyota Technical Center USA, Inc.*, 2002 WL 31958183, 2002 Mich. App. LEXIS 2323 (Mich. Ct. App. 2002) (affirming \$6.4 million verdict, plus costs and attorney fees, for employee who claimed he was harassed and denied accommodations for bad back).

B. Brief Summary of State Disability Discrimination Laws. This summary is available as an appendix to the Chapter on Ford & Harrison's web site, <http://www.fordharrison.com/sourcebooks.aspx>.

C. Relationship of the ADA to Workers' Compensation Law. On September 3, 1996, the EEOC issued guidance regarding the relationship of the ADA to workers' compensation laws. The guidance provided 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.

The text of these guidelines is located 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.



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- 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.

D. 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.

E. 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 US Airways v. Barnett*, 122 S. Ct. 1516 (2002). *See* the discussion of this case above. Note, however, that at least one court has held that a potential violation of a collective bargaining agreement did not make an employee's requested accommodation under the ADA unreasonable. *See Dilley v. SuperValu, Inc.*, 296 F.3d 958 (10th Cir. 2002).

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." 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.



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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, the NLRB held that an employer violated the NLRA by disciplining and directing employees not to talk about a co-worker's medical restrictions and the effects of granted accommodations on other employees. *Lockheed Martin Astronautics*, 330 N.L.R.B. No. 66 (Jan. 6, 2000), *opinion supplemented by* 332 N.L.R.B. No. 37 (2000).

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.

XIV. INSURANCE ISSUES UNDER THE ADA

A. Denial of Insurance Coverage. Denial of insurance coverage to a person with a disability may be discriminatory under the ADA and the Vocational Rehabilitation Act. Under the ADA, an employer may not deny health insurance coverage to an individual based on his or her diagnosis or disability. 42 U.S.C. § 12112(b)(2) and (4). Disability-based distinctions in benefit plans have generally been found to be illegal. For example, the EEOC became involved in numerous lawsuits over whether the ADA prevents restricting or eliminating AIDS-related coverage in employee benefit plans. Almost every case of this type has resulted in consent decrees and settled favorably to the HIV-infected plaintiff. *See, e.g., EEOC v. Cruz Azul de Puerto Rico, Inc.*, No. 99-1410 (D. P.R.) (consent decree approved November 29, 2000). Current EEOC guidelines on the ADA permit employers to make disability-based distinctions for employees covered by health insurance plans, but only if the employer proves that the distinction



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is justified by cost or actuarial data and is not a subterfuge to evade the ADA. *See* EEOC Enforcement Guidance on Benefit Plans, <http://www.eeoc.gov/>. This invites case-by-case analysis and, inevitably, litigation. In addition, all similarly situated employees must be eligible to participate in retirement and any long- or short-term disability plans on the same terms, regardless of the existence of a disability. *Id.*

The EEOC, however, generally has not been successful in using the ADA to challenge restrictions on long-term disability plans providing lower coverage for mental and emotional disabilities than for physical disabilities. *See, e.g., Lewis v. K Mart Corp.*, 180 F.3d 166 (4th Cir. 1999); *EEOC v. Staten Island Sav. Bank*, 207 F.3d 144 (2d Cir. 2000); *Ford v. Schering-Plough Corp.*, 14 F.3d 601 (3d Cir. 1998). In *Johnson v. K Mart Corp.*, 273 F.3d 1035 (11th Cir. 2001), however, the Eleventh Circuit held that a former employee may sue over the issue of whether a long-term disability plan violates the ADA if it provides less generous benefits for employees with mental disabilities as opposed to physical disabilities. The court held that the ADA not only covers discrimination between those with disabilities as compared with persons without disabilities, but it also prohibits discrimination among the protected class of disabled persons. *Id.* (citing *Olmstead v. L.C.*, 527 U.S. 581 (1999)). The Eleventh Circuit subsequently vacated this opinion and granted a rehearing en banc; however, because K Mart has filed bankruptcy, the court has stated that no decision will be rendered in this case until the automatic stay is lifted or it expires. *See Johnson v. K Mart Corp.*, 281 F.3d 1368 (11th Cir. 2002). If the case stands, the trial court will have to decide whether the plaintiff can demonstrate that the employer, in creating the lower mental health cap, specifically intended to discriminate based on disability, under the ADA's "safe harbor" provisions (42 U.S.C. § 12201(c)) governing bona fide benefit plans.

Provisions that cover a range of employees with and without disabilities, however, are not considered unlawful. For example, waiting periods for pre-existing conditions do not violate the ADA. *See* the "Employee Benefits" section of the EEOC Compliance Manual, <http://www.eeoc.gov/policy/docs/benefits.html>. *See also* Bland, T. "New EEOC Guidance on Discrimination in Employee Benefits," *Mosaics* (SHRM), December 2000.

B. Denial of Claims Under Pre-Existing Conditions Clauses. According to the EEOC regulations, the ADA was not intended to prevent normal underwriting practices by carriers and self-insured employers, as long as such practices are not used "as a subterfuge to evade" the Act. 29 C.F.R. § 1630.16(f). Presumably, the ADA will not affect pre-existing condition clauses included in health plans offered by employers. Employers may continue to offer policies with pre-existing condition exclusions even though such exclusions adversely affect people with disabilities, if the clauses are not used as a subterfuge to evade the purposes of the legislation.

C. Privacy Issues. Aside from the privacy issues under the ADA, discussed above, employers must also be aware of certain privacy rules under the Health Insurance Portability and Accountability Act. *See also* the *Employee Benefits* Chapter of the SourceBook.

XV. POSTING AND REPORTING REQUIREMENTS UNDER THE ADA AND AFFIRMATIVE ACTION PLANS

The ADA requires no reporting and no affirmative action plans, but it does require posting of notices describing the provisions of the ADA. 42 U.S.C. § 12115.

A. Contractors Subject to Rehabilitation Act, § 503. Employers must include an equal opportunity clause in covered contracts and subcontracts over \$10,000. *See* 41 C.F.R. § 60-741.5. If the size of contracts exceeds \$50,000, and the employer employs fifty or more employees, the employer must adopt a written program within 120 days of commencement of the contract, and review and update the same annually. *See* 41 C.F.R. § 60-741.5. *See also* Ford & Harrison Affirmative Action Desk Reference and the *Affirmative Action* Chapter of the SourceBook.



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B. Contractors Subject to the Vietnam Era Veteran's Readjustment Act. Annual reports are required. 38 U.S.C. § 4212(d)(1). For more detail regarding the obligations of government contractors under this Act, see the *Affirmative Action* Chapter in this SourceBook.

XVI. 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.*

XVII. REMEDIES UNDER THE ADA AND THE REHABILITATION ACT

The ADA incorporates, by reference, the remedies and procedures of Title VII. These remedies include reinstatement, back pay, and an award of attorney fees to the prevailing party. With passage of the 1991 Civil Rights Act, it includes claims for compensatory and punitive damages, and the right to demand a trial by jury. Violations of terms of federal contracts may result in withholding of payment on contracts, termination of contracts, or debarment. 41 C.F.R. § 60-741.28.

Several courts have held that individuals cannot be personally liable under the ADA. See discussion above entitled “Individual Liability Under the ADA.”

Damages Under the ADA and § 501 of the Rehabilitation Act of 1973 (“Rehabilitation Act”). Compensatory and punitive damages are also available under the ADA and § 501 of the Rehabilitation Act unless the employer demonstrates good faith efforts, in consultation with a person with a disability who has requested accommodation, to accommodate an individual’s disability. 42 U.S.C. § 1981a(a)(3), CRA § 102. However, the Sixth Circuit has held that punitive damages are not available under Section 504 of the Rehabilitation Act. *Moreno v. CONRAIL*, 99 F.3d 782 (6th Cir. 1996).