Chapter 3

Employment

A. Introduction and Overview

This chapter deals with Title I of the Americans with Disabilities Act, which prohibits discrimination in employment against applicants and employees with disabilities. It demonstrates, through case law, how the courts interpret the definition of a qualified person with a disability, the essential functions of the position in question, whether an applicant or employee poses a direct threat to the health or safety of the individual or others, and the requirement that the employer make a reasonable accommodation to the individual unless it imposes an undue burden on the employer. It explains the types of medical examinations and questions that an employer may require of applicants and employees and at what stage and under what conditions these tests may be administered. It discusses the effect of the use of alcohol and/or illegal drugs on the individual's potential discrimination claim. It also deals with the ADA and Rehabilitation Acts' prohibition of disability-based harassment and retaliation. Finally, it discusses the other federal statutes such as the Family and Medical Leave Act, the Genetic Information Nondiscrimination Act, and state worker's compensation statutes, and how those laws interrelate to the ADA.

[1] Chapter Goals

The goals for this chapter are to:

- Know the three prongs of the definition of a person with a disability and understand how they apply in the employment context
- Know what information a lawyer needs to litigate the question of whether an individual with a disability is qualified to perform a particular job
- Understand the law's treatment of alcohol and drug abusers
- Know what actions by employers constitute illegal discrimination
- Understand the defenses to a claim of disability discrimination in employment
- Be able to identity the arguments for and against a claim of disability discrimination in the litigation context
- Be familiar with enforcement of the different disability statutes and how the disability laws, the Family and Medical Leave Act, and the worker's compensation statutes protect employees with disabilities

[2] Key Concepts and Definitions

Americans with Disabilities Act of 1990 (“ADA”)

Enacted in 1990, the ADA prohibits discrimination against a qualified person with a disability in employment, public services and programs, education, health care, transportation, and public accommodations. The ADA defines a person with a disability as an individual who: 1) has a physical or mental impairment that substantially limits a major life activity; 2) a record of such an impairment; or 3) is regarded as having such an impairment. In determining whether a person is qualified, the court considers whether there is a reasonable accommodation that would permit the

individual to qualify.

Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”)

In 2008, Congress passed the ADAAA in order to overturn decisions of the U.S. Supreme Court that had narrowed the definition of “disability” in the ADA. The new ADAAA broadened the coverage of the ADA and the Rehabilitation Act.

Definition of disability

Under the ADA, as amended by the ADAAA, a disability is a physical or mental impairment that substantially limits a major life activity, a record of such impairment, or being regarded as having an impairment. The statute lists examples of “major life activities” such as caring for oneself, performing manual tasks, seeing, hearing, etc. It also states that “major life activities” includes “major bodily functions” such as functions of the immune system, normal cell growth, digestive, bowel, and reproductive functions, etc. Being regarded as having an impairment requires only that the plaintiff prove that the employer regarded him or her as having an impairment. It does not require that the plaintiff prove that the employer regarded the impairment as substantially limiting a major life activity. In determining whether an impairment substantially limits a major life activity, the ameliorative effects of mitigating measures such as medications and medical supplies should not be taken into account.

Disability-based harassment

Under the ADA, an employer is responsible for a hostile work environment based on the individual's disability that is sufficiently severe or pervasive to alter the terms or conditions of the employee's work environment. Liability standards depend on whether the harasser is a supervisor, a co-worker, or customer.

Direct threat to the health or safety of the individual or others

An individual who has a disability will not be considered qualified for the position if the individual when performing the job poses a direct threat to the health or safety of himself or others.

Disparate treatment and disparate impact

An employee may bring an ADA claim, using both the disparate treatment and the disparate impact theories. The disparate treatment theory requires a showing that the employer intended to discriminate on the basis of the individual's disability. A disparate impact case exists if the plaintiff proves that the employer uses a neutral policy or practice that imposes a disparate effect on persons with disabilities and the employer cannot prove that the policy or practice is job-related and consistent with business necessity.

Duty to engage in interactive process

Employers have the responsibility to engage in an interactive process with the employee or applicant who seeks a reasonable accommodation. This means that the employer does not have to adopt the employee's proposed reasonable accommodation but may suggest alternatives that would reasonably accommodate the employee.

Essential functions of the job

The essential functions of the job are not the marginal functions. The employer may have a job description that lists the essential functions, and the court will take that into account, but it will also consider the functions performed by the plaintiff and other employees in the position itself.

Family and Medical Leave Act (“FMLA”)

The FMLA permits employees who are ill, who have a new baby by birth or adoption, or who

have close family members who are ill to take up to 12 weeks unpaid family leave in a given year, if the person works for an employer that qualifies for coverage, and the individual qualifies for coverage under the statute.

Genetic Information Nondiscrimination Act ("GINA")

GINA prohibits employers and insurers from discriminating against an individual based on his or her genetic makeup.

Medical examinations and questions

Whether an employer can ask medical questions or require medical examinations depends on the stage of the hiring/employment process. During the interview, an employer may not subject an applicant to medical examinations or questions. After the interview and after an offer of employment has been made but before the applicant begins work, the employer may condition employment on the applicant's submission to a medical exam or questions. Once the individual is an employee, the employer may ask medical questions or require a medical examination only if the medical inquiries are job-related and consistent with business necessity.

Qualified individual with a disability

A qualified individual with a disability is an applicant or employee who can perform the essential functions of the job either with or without reasonable accommodation.

Reasonable accommodation

Unlike most civil rights statutes, the ADA and the Rehabilitation Act require more than nondiscrimination. They also require reasonable accommodation. Some of the requirements are spelled out in regulatory and statutory language (although generally not as all inclusive listings). Reasonable accommodations include changes to workplace schedules, assignment to vacant positions, and changes in physical surroundings, working at home, etc. This requirement is not intended to require unduly burdensome (administratively or financially) accommodations. Case law highlights that the burden is generally on the employer to demonstrate that a requested accommodation is not reasonable or an undue burden. It also demonstrates that federal statutes contemplate individualized determinations and an interactive process in deciding what accommodations would be reasonable. Individuals seeking accommodations are not entitled to their preferred or a best accommodation. The accommodation should be reasonable and effective.

Rehabilitation Act, Section 504

Section 504 prohibits discrimination against persons with disabilities in places of employment receiving federal financial assistance.

Retaliation

Under the ADA and the Rehabilitation Act, it is illegal to discriminate against any individual because such individual has opposed any act or practice made unlawful by the Acts or because the individual has made a charge, testified, or otherwise participated in an investigation, hearing, or proceeding under the acts.

Undue hardship

Even if a requested accommodation is reasonable in the general scheme of things, the employer may avoid providing such accommodation if it proves that the accommodation is an undue hardship to the employer's business.

B. Applicability of Title I of the Americans with Disabilities Act and the Rehabilitation Act

Until the 1990 passage of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 et seq., individuals with disabilities had little comprehensive protection against employment discrimination on the basis of disability. Most states had statutes, but the definition of who was protected, which employers were covered, and the rights and remedies varied significantly from state to state. The Rehabilitation Act of 1973 covered only federal government employers, federal contractors, and programs receiving federal financial assistance. 29 U.S.C. §§791, 793, 794. This left the majority of employees and job applicants without any protection against discrimination, or with state laws that might be ineffective.

[1] Which Employers Are Covered?

Title I of the ADA provides that employers with 15 or more employees may not discriminate against their employees and applicants on the basis of disability against qualified individuals with disabilities. Title II of the ADA applies to state and local governmental agencies and prohibits those entities from discriminating in the provision of services and, perhaps, in the employment practices of the agency. The advantage of seeking redress for employment discrimination under Title II instead of Title I is that individuals are not required to exhaust administrative (i.e., Equal Employment Opportunity Commission) remedies under Title II. There has developed, however, a split in the circuits regarding whether employees and applicants may sue public employers under Title II for disability discrimination. Many courts have decided that Title I provides the exclusive remedy for employment discrimination. Moreover, because of Eleventh Amendment immunity, money damages in employment cases against state entities brought under Title I and, likely, Title II are not available, according to the Supreme Court in *Board of Trustees v. Garret*, discussed in Section [H][2], *infra*. Under Title I, however, combined compensatory and punitive damages up to $300,000 may be awarded against *non-state* defendants. The range of damages available depends on the size of the employer. Beyond damages, non-state defendants may also be responsible for backpay and front pay. Title III, which prohibits discrimination by private providers of services considered to be public accommodations, does not cover employment discrimination.

Under the Rehabilitation Act, there are three major categories of employers prohibited from discriminating on the basis of disability. Section 501 applies to federal government employers; Section 503 applies to federal contractors with contracts in excess of $10,000 (increased from $2,500 in the original statute); Section 504 applies to recipients of federal financial assistance.

In 1984, the Supreme Court held, in *Grove City College v. Bell*, 465 U.S. 555 (1984), that statutes like Section 504 do not subject an entire institution to their mandates when only one program within an institution receives federal financial assistance. Only the program receiving the federal support would be subject to the nondiscrimination requirements. In 1987, Congress overturned *Grove City* by enacting the Civil Rights Restoration Act, which provides that if any part of an institution receives federal financial assistance, all of its programs are subject to Section 504. 29 U.S.C. §794(b).

There is some confusion about whether federal employers are subject to both Sections 501 and 504. The weight of authority is that both statutes apply. See LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §4.03 (2012 and cumulative supplement).

Notes

1. *Individual Liability:* Title I makes an employer liable in respondeat superior for the discriminatory acts of its supervisory employees. It defines an employer as a "person engaged in an industry affecting commerce ... and any agent of such person...." Despite this language, the courts of appeals are fairly settled that there is no individual liability under the anti-discrimination provisions of Title I of the ADA. The First, Seventh, Ninth, Tenth and Eleventh Circuits have declined to find individual liability. The courts reason that because Title I of the ADA is based on Title VII of the 1964

Civil Rights Act and there is no individual liability under Title VII, there is no individual liability under Title I of the ADA for discrimination. See, e.g., *Roman-Oliveras v. Puerto Rico Elec. Power Auth.*, 655 F.3d 43, 45 (1st Cir. 2011); *Walsh v. Nevada Dept. of Human Res*., 471 F.3d 1033 (9th Cir. 2006). While at least the Second, Fourth, Seventh, Ninth, and Eleventh Circuits apply this same reasoning to the anti-retaliation provisions of Title I, it has not been clearly settled whether or not there is individual liability where a person retaliates against an individual based on disability, because a number of the other courts of appeals have not yet ruled on this issue. See Jonathan R. Mook, *Jonathan R. Mook on Individual Liability Under Disability Discrimination Laws*, 2008 EMERGING ISSUES 797 (Oct. 26, 2007). See also *Spiegel v. Schulmann*, 604 F.3d 72, 79 (2d Cir. 2010) (no individual liability under the retaliation provisions of the ADA). Despite the lack of individual liability under federal law, a number of state anti-discrimination laws hold individuals personally liable for discriminating in the workplace based on disability. States finding an individual liable for disability discrimination in employment include New York, Massachusetts, Pennsylvania, and West Virginia. *Id.* Compare *Lales v. Wholesale Motors Co.,* 328 P.3d 341 (Haw. 2014) (declining to impose individual liability, but imposing aider and abettor liability on employees).

2. *Standing: Former Employees—Standing to Sue under Title I of the ADA?* There is a split in the circuits as to whether former employees who collect disability insurance have standing to sue their employers under the ADA for provision of fringe benefits in discriminatory fashion. Those opposing standing argue that the statute requires that a former employee be a "qualified individual," and former employees who are collecting benefits are not qualified to work. In *McKnight v. GM Corp.*, 2008 U.S. App. LEXIS 24373 (6th Cir. Dec. 4, 2008), the plaintiffs were former employees who sued, alleging that the employer discriminated against them based on their disability with respect to payment of post-employment fringe benefits. The lower court granted summary judgment to the defendant. The Sixth Circuit affirmed, concluding that former employees are not qualified individuals and therefore do not have standing to sue. The Seventh and Ninth Circuits agree. See *Morgan v. Joint Admin. Bd*., 268 F.3d 456, 457–58 (7th Cir. 2001); *Weyer v. Twentieth Century Fox Film Corp*., 198 F.3d 1104, 1110 (9th Cir. 2000). The Second and Third Circuits, however, have ruled that former employees are "qualified individuals" under the statute and have standing to challenge discriminatory benefits. See *Ford v. Schering-Plough Corp*., 145 F.3d 601 (3d Cir. 1998); *Castellano v. City of New York*, 142 F.3d 58 (2d Cir. 1998). Because the statute covers discriminatorily granted fringe benefits, would it not obviate the purpose of the Act to prohibit former employees who are collecting those benefits from suing? On the other hand, how can those former employees argue that they are "qualified individuals" either with or without reasonable accommodation? Assuming its applicability, could the ADAAA help plaintiffs make their argument?

Zone of Interest: In *Foote v. Folks, Inc.*, 864 F. Supp. 1327 (N.D. Ga. 1994), an employee's former wife, covered by the employee's health plan, was held not to have standing to challenge the plan as discriminatory. The court held that because she was not an employee, former employee, or a job applicant, but rather a beneficiary of her husband's employment benefits, she did not fall within the "zone of interest" envisioned by the ADA. *Id.* at 1329.

3. *State Disability Laws:* Individuals not protected under federal law may, in many states, be covered by state law. The majority of states and the District of Columbia cover employers with fewer than fifteen employees. State laws may also apply to a wider range of conditions than the ADA or the Rehabilitation Act. Conditions such as genetic predisposition, obesity, or substance abuse may be covered. State laws also may be more restrictive with respect to preemployment hiring practices. For a listing of relevant state laws, see MARK A. ROTHSTEIN, CHARLES B. CRAVER, ELINOR P. SCHROEDER & ELAINE W. SHOBEN, EMPLOYMENT LAW §3.15 (5th ed. 2014).

Chapter 2, *supra*, focused on the issue of who is protected under the various disability discrimination statutes in a variety of contexts, including the employment context. After the *Sutton* trilogy and *Toyota* were decided by the Supreme Court, lower courts became much less likely to find

a variety of conditions to be substantially limiting in covered major life activities. As a consequence, litigants began to bring more actions under the "regarded as" prong of the definition. The Americans with Disabilities Act Amendments Act of 2008 ("ADAAA") has changed the law, expanding the definition of disability, and, consequently, has likely affected litigants' behavior. Litigants are more successful now in arguing that they have a disability under the first prong of the definition.

• "Record of an impairment"

The second prong of the definition protects individuals with a "record of an impairment." Congress intended that individuals with a history of major illness should be protected from discrimination after recovery. There has not been a great deal of judicial interpretation of this definition, but what case law exists has generally not favored plaintiffs. In earlier case law, the fact that an individual had a record of medical treatment in the personnel or other record, did not usually establish such a "record of impairment." But see *Adams v. Rice*, 531 F.3d 936 (D.C. Cir. 2008) (holding that a woman who had a mastectomy for breast cancer had a record of a disability).

Since the passage of the ADAAA, the regulations on the definition of "record" of a disability make clear that whether an individual has a record of a disability should be construed broadly "to the maximum extent possible and should not demand extensive analysis." A person will be considered to have a record of a disability if he or she has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having a disability. Persons with a record of a disability are entitled, under some circumstances, to a reasonable accommodation. *See* 29 C.F.R. Part 1630.2(k). See *Williams v. AT & T Mobility Servs., LLC*, 2016 U.S. Dist. LEXIS 63895, 2016 WL 2858930 (W.D. Tenn. May 16, 2016) ("Plaintiff also contends that her severe depressive disorder and anxiety are disabilities covered by the ADA because AT & T had a record of Plaintiff's impairments. A plaintiff has a 'record of impairment' if she 'has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.' This prong includes 'people who have recovered from previously disabling conditions ... but who may remain vulnerable to the fears and stereotypes of their employers'"). The plaintiff needs to show only that 'at some point in the past' she had a substantially limiting impairment; *Fortkamp v. City of Celina*, 2016 U.S. Dist. LEXIS 11613, 2016 WL 375075, at *8 (N.D. Ohio Feb. 1, 2016) ("I agree with Fortkamp that the records documenting his back injury in 2003, his physical condition thereafter, and his ensuing multi-year absence are evidence of a 'record of impairment.' Because this evidence would permit a jury to find Fortkamp 'disabled,' summary judgment is unwarranted on this issue"); *Ferrari v. Ford Motor Co*., 96 F. Supp. 3d 668, 674–75 (E.D. Mich. 2015) ("Plaintiff's records demonstrate a history of a neck injury that substantially limited at least one major life activity. However, the record also shows unequivocally that plaintiff, his doctors, and defendant all regarded the neck-based disability as entirely resolved at the time the adverse employment decision was made. Accordingly, plaintiff qualifies as disabled based on the record of his neck-based disability"); *Carper v. TWC Servs.*, 820 F. Supp. 2d 1339, 1354 (S.D. Fla. 2011) (holding that the employer must be aware of and must rely on the record in question).

• "Regarded as" having an impairment

29 C.F.R. Part 1630.2(l) establishes the regulations for determining whether a person will be "regarded as" having a disability. 29 C.F.R. §1630.15(f) establishes how an employer may prove a defense to a "regarded as" claim that the impairment or perceived impairment is transitory and minor.

Before the ADAAA, one was "regarded as having an impairment" when the individual was considered to be substantially limited in a major life activity, even though the impairment did not actually limit the individual. After the ADAAA, the individual will meet the requirement of "being regarded as having such an impairment" by establishing that he or she has been subjected to an action prohibited by the ADA or the Rehabilitation Act because of an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived as limiting a major life activity. See

Chapter 2, *supra*.

Some of the cases that follow in this chapter were decided before the *Sutton* trilogy in 1999. Consequently, the courts were not as likely to focus on whether certain conditions (such as epilepsy or HIV) were actual disabilities. Instead, the focus was on the substantive application of the statutory provisions. After *Sutton*, the courts narrowed the definition of disability, often dismissing cases based on the individual's failure to prove that he or she had a disability. Because of the ADAAA, the courts have again begun to decline to focus extensively on whether the plaintiffs' impairments constitute disabilities and are paying more attention to the substantive application of the ADA and the Rehabilitation Act. Thus, many of the pre-1999 cases are good law once again. For additional cases, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §4:8 (2012 and cumulative supplement).

4. *Definition of Employee:* The Supreme Court in *Clackamas Gastroenterology Associates v. Wells*, 538 U.S. 440 (2003), addressed the definition of "employee" for purposes of determining whether a medical clinic was subject to the ADA. The clinic had four physicians who were actively involved in practicing medicine and who were shareholders and directors of the clinic corporation. Whether the clinic employed 15 or more employees depended on whether these individuals were considered to be "employees" under the ADA. The Court in a 7–2 opinion remanded for further proceedings, providing the standard for lower courts. The Court concluded that the common-law element of control should be the primary guideline. In *Clackamas*, the Court adopted the EEOC guidelines on the issue of control in which six factors are considered. These factors include: whether the organization can hire or fire individuals or set rules and regulations for work; supervision of individual work; whether individuals report to someone higher in an organization; the ability of individuals to influence organizations; the intent of the parties as evidenced by written agreements or contracts; and whether individuals share in profits, losses, and liabilities of the organization. The dissent by Justice Ginsburg (joined by Justice Breyer) focused more on the physicians' employment contracts, that they worked at the facilities owned or leased by the corporation, and the requirement that they conform to standards set by the corporation.

5. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), the Supreme Court held unanimously that the First Amendment Establishment and Free Exercise Clauses create a broad "ministerial exception" to the ADA. In *Hosanna-Tabor*, the EEOC alleged that the defendant had violated the ADA's anti-retaliation provision by firing a teacher with narcolepsy in a church school because she had threatened to bring an ADA lawsuit against the defendant. The Supreme Court held that the First Amendment to the U.S. Constitution precluded a lawsuit brought under the ADA because the ADA should not apply to the employment relationship between a church and its ministers. The Court sanctioned a broad definition of the term "minister" for purposes of the exception. Even though the teacher was not an ordained minister of the church, the Court categorized her as a "minister," and held that she did not have a cause of action under the ADA.

[2] Applicability of the Three-Prong Definition of Disability to Employment

In *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015), the Supreme Court held that the Pregnancy Discrimination Act requires an employer to grant a reasonable accommodation to a pregnant woman with a 20 pound lifting restriction if she can prove that other employees who were not pregnant with similar inability to work were given accommodations, that the employer's policy created a significant burden on pregnant women, and that the employer's "legitimate non-discriminatory reason" was not sufficiently strong to justify the burden on pregnant women.

The Court noted that the facts in *Young* occurred before the enactment of the Americans with Disabilities Act Amendments Act ("ADAAA"), which went into effect in 2009. It raised, but did not

decide, the question of whether the new Title I regulations under the 2009 Amendments, if applicable to Young, would grant a right to a pregnant woman to accommodate her lifting restrictions. The regulations to the ADAAA state that a disability does not have to last six months or longer to be considered a disability and the EEOC guidance gives the example of an employee with a bad back with a 20 pound lifting restriction that lasts for a number of months. The guidance notes that this person would have an impairment that substantially limits the major life activity of lifting and would therefore be covered by the ADA. Thus, the reasonable accommodations provisions of the ADA would apply. See 29 C.F.R.1630.2(j)(1)(ix) and 29 C.F.R.1630.2(j)(1)(ix) App. (interpretive guidance). It appears that a pregnant woman who has similar lifting restrictions due to her pregnancy may be a person with a disability under the ADA and therefore have a right to reasonable accommodation.

For an individual to be protected against employment discrimination on the basis of disability under the ADA, the individual must be one who has an impairment that substantially limits one or more of the individual's major life activities, has a record of such an impairment, or is regarded as having such an impairment. 29 U.S.C. §121101. These definitions are virtually identical to language under the Rehabilitation Act. Under Title I of the ADA, a qualified individual with a disability is one "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. §12111(8).

The ADA contemplates consistency with the Rehabilitation Act. Most cases addressing substantive issues would be decided similarly under either the ADA or the Rehabilitation Act. 29 C.F.R. 1630.1(c) states that in general this part (which applies to the ADA) does not apply a lesser standard than that imposed by Title V of the Rehabilitation Act of 1973 or its regulations.

Notes and Questions

1. *Employees with Family Members with Disabilities*: The Rehabilitation Act does not specifically provide protection based on "associational disability" (i.e., protection for individuals who are associated with someone with a disability), although the ADA does provide this protection. 42 U.S.C. §12112(b)(4). Although it is generally appropriate to incorporate interpretations of Section 504 of the Rehabilitation Act into the ADA, it is less clear that interpretations of the ADA should be incorporated into Section 504. This question is presented in the case of James Patterson, a federal employee (who is thus not covered by the ADA), who has a family member with a chronic medical condition. The federal agency where he was employed did not want to send him to a position outside the United States because of the high cost and risks associated with providing treatment for his daughter's congenital heart problem. Barbara Presley Noble, Promotions and Family Matters, N.Y. TIMES p. 23 (Jan. 22, 1995). In Den Hartog v. Wasatch Academy, 129 F.3d 1076 (10th Cir. 1997), the plaintiff was discharged as a teacher at a boarding school. The discharge was a result of Den Hartog's son's behavior, which had included attacks and threatening behavior towards individuals in the boarding school community. Den Hartog's son had bipolar disorder. Den Hartog requested that he and his family be allowed to live off campus to minimize the threat. The court held that there is no requirement to reasonably accommodate an individual who is associated with someone with a disability, rather than having a disability himself or herself.

2. *Short Term and Minor Impairments:* A number of judicial decisions have addressed conditions of short duration or where there was not a substantial limitation and have held that individuals are not disabled within the ADA and other disability discrimination statutes. See *Boren v. Wolverine Tube, Inc.*, 966 F. Supp. 457 (N.D. Miss. 1997) (chemical allergy not covered); *Cehrs v. Northeast Ohio Alzheimer Research Ctr.*, 959 F. Supp. 441 (N.D. Ohio 1997) (psoriasis not covered); *Williams v. City of Charlotte*, 899 F. Supp. 1484 (W.D.N.C. 1995) (seasonal affective disorder not covered); *Dutton v. Johnson County Bd. of Comm'rs*, 859 F. Supp. 498 (D. Kan. 1994) (fact question whether migraine headache substantially limits major life activities); *Huffman v. Ace Elec. Co.*, 1994 U.S. Dist. LEXIS

15165, 3 A.D. Cases 1347 (D. Kan. 1994) (temporary cough resulting from hypersensitivity to unknown substances is not a disability); *Schultz v. Spraylat*, 866 F. Supp. 1535 (C.D. Cal. 1994) (sinus condition preventing air travel not a disability under state law); *Shaw v. Citicorp Credit Servs.*, No. C93-3696 (N.D. Cal., Aug. 3, 1994) (offensive body odor is not a disability); *Laurence v. Metro-Dade Police Dep't*, 3 A.D. Cases 1396 (S.D. Fla. 1993) ("hammer toes" not a disability).

The ADAAA states that temporary and minor impairments do not create liability under the "regarded as" prong of the definition of disability. It defines temporary impairments as those lasting 6 months or fewer. The test is objective. P.L. 110-325 §3(3)(B). See 29 C.F.R. §1630.15(f) and the accompanying appendix; *Gaus v. Norfold Southern Ry. Co*., 2011 U.S. Dist. LEXIS 111089, 2011 WL 4527359 (W.D. Pa. Sept. 28, 2011) (employee is "regarded as" having a disability even if the employer subjectively believed that the impairment was transitory and minor).

3. *Mental Conditions:* A number of cases have addressed a variety of mental conditions from bipolar disorder to panic attacks and mood swings. While a few of these cases have been resolved by finding that the condition does not constitute a disability, most of the cases focused on other issues, such as whether the individual is otherwise qualified (i.e., because of behavior problems in the workplace, chronic attendance problems, or dangerous or threatening conduct) or whether the accommodation sought by the individual is reasonable. After the 1999 *Sutton* narrowing of who is protected, courts looked at mitigating measures with respect to a number of mental health conditions. Conditions such as bipolar disorder and severe depression were often found not covered when medication alleviates the symptoms. For example, in *Rohan v. Networks Presentations*, 375 F.3d 266 (4th Cir. 2004), an actress/singer with post-traumatic stress disorder and depression was not covered, because her psychological episodes were sporadic and short-lived.

The regulations list a number of impairments that in most if not all cases will substantially limit a major life activity. The regulations state that depressive disorder and bipolar disorder substantially limit the major life activity of brain function. 29 C.F.R. §1630.2(g)(3)(iii).

The dilemma in these cases was that the mitigating measures might cause side effects that need to be accommodated, but the individual is not entitled to an accommodation unless there is a disability. For example, some medications taken for mental health conditions cause "dry mouth." An employee might want to have water at the work station. An employer might have a "no exceptions" policy of not allowing food or water at the work station. The reasons might be for appearance, or they might be for safety or similar reasons. At a computer station, spilling water could damage a keyboard. Not allowing an exception, however, could be burdensome for the individual taking the medication. Under *Sutton*, while on the medication, the employee is not currently substantially limited, so the case would not go forward on the issue of reasonable accommodation. If the employee stops taking the medication, however, the individual may not longer be "otherwise qualified." The ADAAA attempted to resolve this problem. Under the ADAAA, may the courts consider the side effects of medications in determining whether the employee's impairment substantially limits a major life activity? If not, will the individual with mental health conditions still be covered by the Act? Will the employer be required to provide a reasonable accommodation to the side effects of the medicine? See U.S. Equal Employment Opportunity Commission, *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm (last visited June 11, 2012).

4. *Statistics on Employment and Disabilities:* As Chapter 2 indicates, it is extremely difficult to determine with precision just how many individuals meet the definition of disability under the various discrimination statutes. In the area of employment, however, it was estimated by the Centers for Disease Control and Prevention in 2008 that approximately 19 million Americans have a work disability, i.e., a disability lasting six or more months. (U.S. Census Bureau, CPS, March 2008). The U.S. Census Bureau discontinued collecting date on "work disabilities" in 2008. See

http://www.disabilitycompendium.org/docs/default-source/2014-compendium/disability-statistics-from-the-u-s-census-bureau-in-2014.pdf (slide 6). The Center for Disease Control ("CDC") reports that 53 million adults in the U.S. have disabilities. See Elizabeth A. Courtney-Long et al., *Prevalence of Disability and Disability Type Among Adults—United States*, 2013, 64 MORBIDITY AND MORTALITY WEEKLY REPORT 78 (2015), available at http://www.cdc.gov/media/releases/2015/p0730-us-disability.html.

5. *Major Life Activity of Working and Back Problems:* Before the ADAAA was enacted, it was settled that for a plaintiff to prove that she was substantially limited in the major life activity of working, she would have to demonstrate that her impairment significantly restricted her "ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." The inability to perform a single, particular job was insufficient to prove a substantial limitation in the major life activity of working. 29 C.F.R. §1630.2(j)(3). The ADAAA instructed the EEOC to rewrite its regulations that previously defined "substantially limits" as "significantly restricted" because this standard, which was based on *Toyota*, was too high. The ADAAA also includes "working" in the definition of "major life activity." The EEOC regulations specifically refer to the "class of jobs or broad range of jobs in various classes" test, so it still has a place under the ADAAA. However, the EEOC guidance calls for applying the test in a "more straightforward and simple manner than they were applied by the courts prior to the Amendments Act." See 29 D.F.R. pt, 1630, App. See also U.S. Equal Employment Opportunity Commission, *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm (last visited June 11, 2012). Cases decided since the passage of the ADAAA continue to use the "class of jobs or broad range of jobs in various classes test." *Nurriddin v. Bolden*, 818 F.3d 751 (D.C. Cir. 2016); *Carothers v. County of Cook*, 808 F.3d 1140, 1147 (7th Cir. 2015).

A high number of complaints to the EEOC based on disability involve back problems. From 1997 to 2008, 12.2% of charges filed with the EEOC were orthopedic and structural impairments of the back. See *ADA Charge Data by Impairments/Bases-Receipts*, FY 1997–FY2008, EEOC. A good example of a case addressing this issue is *Partlow v. Runyon*, 826 F. Supp. 40 (D.N.H. 1993), which involved an auto mechanic with an extensive history of back problems. When Mr. Partlow applied for a position as a mechanic with the United States Postal Service, he was rejected (after passing the pre-employment road-test) when his pre-employment medical exam led to a conclusion that his long history of chronic back problems was incompatible with the demands of the job. In the case, the court addresses the claim that he was covered by the Rehabilitation Act because the Postal Service "regarded him" as disabled. The critical fact in deciding that Partlow did not meet the statutory definition was that there was still a wide range of employment available to him. However, courts have disagreed about whether lifting restrictions substantially limit a major life activity. In *Thompson v. Holy Family Hosp.*, 121 F.3d 537 (9th Cir. 1997), the court found that lifting restrictions did not substantially limit a major life activity. However, in *Frix v. Florida Tile Indus., Inc.*, 970 F. Supp. 1027 (N.D. Ga. 1997), the court found that lifting restrictions prevented an employee from performing an entire class of jobs and therefore substantially limited the major life activity of working. There is a new regulation since the passage of the ADAAA that states that lifting is a major life activity. 29 C.F.R. §1630.2(i). In fact, the EEOC guidance to the regulation states that a person with a back impairment who has a 20-pound lifting restriction that lasts for several months is a person with a disability under the first prong of the definition. See 29 C.F.R. pt. 1630, App. §1630.2(j)(1)(ix).

For additional cases, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §4.9 (2012 and cumulative supplement).

6. *HIV/AIDS as Per Se Disability:* After *Bragdon v. Abbott*, *supra*, it was not as easy as one would have thought to prove that a person with asymptomatic HIV was a person with a disability because *Abbott* relied on proof from the plaintiff that she was substantially limited in the major life activity of

reproduction. Many other plaintiffs were not able to provide this proof. Because the ADAAA has amended the ADA to define "major life activity" to include bodily functions and includes the immune system as a "bodily function," courts should consider HIV as a per se disability. The regulations state that HIV substantially limits immune function. 29 C.F.R. §1630.2(g)(3)(iii). See *Horgan v. Simmons*, 704 F. Supp. 2d 814, 2010 U.S. Dist. LEXIS 36915 (N.D. Ill. 2010) (plaintiff's allegation that he was HIV positive was sufficient to withstand defendant's motion to dismiss because if proven, plaintiff was a person with a disability under the ADAAA because HIV substantially limits immune function). But see *Rodriguez v. HSBC Bank USA, N.A.*, No. 8:14-cv-945-T-30TGW, 2015 U.S. Dist. LEXIS 157883 (M.D. Fla. Nov. 23, 2015) (HIV creates only a rebuttable presumption of affecting a major life activity, and concluding that there was no evidence that the plaintiff was limited in a major life activity by HIV); *Baptista v. Hartford Bd. of Educ.*, 427 F. App'x 39 (2d Cir. 2011) (affirming summary judgment against the plaintiff for neglecting to allege *how* HIV limited a major life activity).

7. *ADA Employment Cases Often Fail on Definitional Issues:* A 1998 survey by the American Bar Association concluded that employers prevail in 92 percent of the court rulings where a final decision was reached. Of significance in the survey is the conclusion that the judiciary was defining disability in a very restrictive manner, one that was probably not intended by the drafters and supporters of the ADA. *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403 (May–June 1998). Later studies found the plaintiffs' win rates range between 2% and 7.9%. This information relating to judicial outcomes may underestimate the success of the ADA. In a study of EEOC resolutions, settlement statistics and survey responses by Human Resources personnel, Professor Sharona Hoffman concluded that employers are "reasonably responsive" to claimants' informal internal requests for accommodation, EEOC conciliations, and settlement requests. See Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?* 59 ALA. L. REV. 305 (2008). The ADAAA has amended the ADA and the Rehabilitation Act to encourage courts to define disability broadly. See Ch. 2, *supra*. For a study of the impact of the amendments, see Kevin Barry, Brian East, and Marcy Karin, *Pleading Disability After the ADAAA*, 31 HOFSTRA LABOR & EMPLOYMENT L. J. Issue 3 (2013) http://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1565&context=hlelj (reviewing how disability is being treated by courts after the 2008 amendments and determining that the amendments were having their intended effect).

8. The regulations state that an employer may not use a qualification standard for uncorrected vision unless the employer can prove that the qualification is job related and consistent with business necessity. 29 C.F.R. Part 1630.10.

Questions

1. *Traynor v. Turnage*, 485 U.S. 535 (1988), involved eligibility for a government benefit where distinctions are based on whether the disability is self imposed. The Court treated differing types of alcoholism differently. Would the courts be likely to apply similar reasoning to cases involving obesity? What about impairments resulting from cigarette smoking? What about a mobility impairment that resulted from skydiving? Should it matter whether the issue is eligibility for a benefit as compared to discrimination in employment? What are the costs of sorting out the levels of individual fault in these cases?

2. In *Bragdon v. Abbott*, in Chapter 2, the Supreme Court held that the plaintiff who was HIV-positive, but asymptomatic, was protected because she had demonstrated that she was substantially limited in the major life activity of reproduction. Does the *Bragdon* holding apply to employment, or is it limited to discrimination in health care services? Also, does it protect all individuals with HIV or only that particular individual?

[3] Drug and Alcohol Users and Persons with Contagious and Infectious

Diseases

Hypothetical Problem 3.1

Read the following hypothetical problem before reading the materials that follow on alcohol and illegal drug use and the ADA, as well as the conduct/disability distinction. After reading the materials, analyze this problem.

Janet Jones and Sam Sneck work for Duosoftcorp, a company that develops software for personal computers. Janet and Sam develop software for university online courses. They are good friends and occasionally go out for beers after work. Janet develops a serious drinking problem. She drinks in bars every evening after work for four or five hours. She then goes home and drinks well into the night. Sam does not drink much when he accompanies Janet to the bars. Sam had suffered from bouts of depression for two years before meeting Janet, and takes medication daily. At times, Sam's medication makes him sleepy, and he finds it difficult to get to work on time. At other times, Sam is irritable at work because of his depression. On at least two occasions, Sam has snapped at the supervisor, Louisa Lopez, when she asked how his work was coming along. On occasion, Janet finds it difficult to get to work on time. She is also very tired at work, occasionally nodding off at her desk. She never drinks at work or before going to work.

Louisa Lopez tells Janet and Sam that they have to arrive at work on time. She tells Sam that she does not appreciate his irritable moods, and that he will be on probation if he arrives late again or continues to show irritability. She tells Janet that she must come to work better-rested, and that the company does not tolerate employees' falling asleep at work. She says that the company will place Louisa on probation if she arrives late again or if she falls asleep at her desk again. Sam tells Janet that he suffers from depression, that the medication makes it difficult for him to arrive on time, and that his depression makes him irritable. Janet tells Louisa that she thinks she has a drinking problem.

1. Assume that the meetings with Louisa occurred after the effective date of the ADAAA. Analyze whether Sam and Janet are individuals with disabilities under the ADA.

2. Assuming that Janet is an individual with a disability under the ADA, consider the options open to Louisa Lopez and Duosoftcorp. Discuss whether Louisa can place Janet on probation if she arrives late to work or falls asleep again. What information would you like to know before answering this question? Should Louisa explore the possibility of rehabilitation with Janet? If Janet goes to her lawyer after the meeting and Louisa has not explored rehabilitation with Janet, what advice should the lawyer give Janet?

3. Assuming that Sam is an individual with a disability under the ADA, consider the options open to Louisa Lopez and Duosoftcorp. Discuss whether Louisa can place Sam on probation if he arrives late or snaps at her again. What information would a lawyer need to know before answering this question? Should Louisa explore the possibility of a reasonable accommodation with Sam? If Sam went to his lawyer after the meeting above with Louisa, what advice should the lawyer give him?

4. Sam gets upset at Louisa and brings a gun to work. What advice should the in-house counsel at Duosoftcorp give Louisa about her options with Sam?

Use of Illegal Drugs and Alcohol

The ADA, 42 U.S.C. §12114(a), states that the "term 'qualified individual with a disability' shall not include 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." Exceptions to this exclusion include an individual who has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs or is one who is participating in a drug rehabilitation program and is no longer using illegal drugs.

Section 12114(c) permits a covered entity to prohibit the illegal use of drugs and the use of alcohol at work, to require that employees not be under the influence of alcohol or engage in illegal use of drugs at work, to require that employees behave in conformance with the requirements of the Drug Free Workplace Act of 1988, and to hold "an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee...." 29 C.F.R. Part 1630.16 gives a list of permitted activities for an employer.

The Rehabilitation Act has a similar exclusion for current illegal drug users. 29 U.S.C. §705(10). It also excludes from the definition of "individual with a disability" an alcoholic whose current use of alcohol prevents the individual from performing the duties of the job or whose presence would constitute a direct threat to the property or safety of others. 29 U.S.C. §705(2)(D).

Contagious and Infectious Diseases

Except for food handlers, the ADA does not have a specific provision that exempts employers from employing persons with infectious or communicable disease. 42 U.S.C. §12113(d)(1), (2) & (3). It does, however create a defense that an individual shall not pose a direct threat to the health or safety of others in the workplace. 42 U.S.C. §12113(b).

The Rehabilitation Act states that for employment under federal contracts and federal grant programs, an individual is excluded from protection of the Act if he or she has a currently contagious disease or infection and would constitute a direct threat to the health or safety of others or by virtue of the disease or infection would not be able to perform the job duties. 29 U.S.C. §705(20)(D).

Theoretically, there is no reason for any of the statutes to separately define how users of drugs and alcohol and individuals with communicable and infectious diseases are to be treated for purposes of discrimination. That is because someone who is unable to perform the essential requirements of the job or who is a threat to the health or safety of self or others would be considered not to be otherwise qualified and thus would not be protected against adverse treatment.

Mostly for political reasons, Congress has developed statutory clarifications of how users of drugs and alcohol and individuals with communicable diseases are to be treated. These separate definitions began in 1974 with an amendment to the Rehabilitation Act and evolved to the current definition. The ADA treatment is similar to that of the Rehabilitation Act. Chapter 2 discusses this issue. Some of the cases in this chapter will illustrate how these definitions have been applied.

The decision in *Burch v. Coca-Cola Co*., 119 F.3d 305 (5th Cir. 1997), demonstrates the difference between alcohol addiction (which is covered) and inebriation (which is not). The Supreme Court has also addressed whether a neutral no-rehire policy has a discriminatory impact on rehiring of rehabilitated drug addicts. See *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003), *infra*.

The *Maddox* case excerpt is an interesting fact setting that clarifies when an individual who is alcoholic is not protected from adverse employment action. The case should be kept in mind when considering defenses, later in this chapter.

Maddox v. University of Tennessee

62 F.3d 843 (6th Cir. 1995)

BAILEY BROWN, CIRCUIT JUDGE.

I. *Facts*

On February 17, 1992, Doug Dickey, acting as UT's athletic director, extended to Maddox an offer of employment as an assistant football coach. The position did not carry tenure and was terminable at will in accordance with the policies of the Personnel Manual. As part of the hiring process, Maddox

completed an application. On the line after “Describe any health problems or physical limitations, which ... would limit your ability to perform the duties of the position for which you are applying,” Maddox wrote “None.” In response to the question “have you ever been arrested for a criminal offense of any kind?” Maddox replied “No.” These responses were not accurate. According to what Maddox alleges in this lawsuit, he suffers from the disability of alcoholism. Also, Maddox was arrested three times before 1992, once for possession of a controlled substance, and twice for driving a motor vehicle under the influence of alcohol. As to the first answer, Maddox claims that it is in fact correct because “it has never affected my coaching ability ... I never drank on the job.” As to the second question, Maddox claims that another university employee, Bill Higdon, advised him not to include the information concerning his prior arrests on the application.

On May 26, 1992, after Maddox began working at UT, a Knoxville police officer arrested Maddox and charged him with driving under the influence of alcohol and public intoxication. According to newspaper reports, the accuracy of which is not contested, Maddox backed his car across a major public road at a high rate of speed, almost striking another vehicle. When stopped by the officer, Maddox was combative, his pants were unzipped, and he refused to take a breathalyzer. He also lied to the arresting officer, stating that he was unemployed. This incident was highly publicized, and UT was obviously embarrassed by the public exposure surrounding the event.

Maddox entered an alcohol rehabilitation program at a UT hospital after his arrest. UT first placed Maddox on paid administrative leave. In June 1992, however, Dickey and then Head Coach Johnny Majors determined that the allegations were accurate and jointly issued a letter notifying Maddox that his employment was being terminated. They testified that termination was necessary because of: 1) the criminal acts and misconduct of Maddox; 2) the bad publicity surrounding the arrest; and 3) the fact that Maddox was no longer qualified, in their minds, for the responsibilities associated with being an assistant coach.[8] Both Dickey and Majors deny that they were aware that Maddox was an alcoholic or that Maddox's alcoholism played any part in the decision to discharge him. Nevertheless, Maddox brought this action alleging that the termination was discriminatory on the basis of his alcoholism in violation of his rights under the Rehabilitation Act and the ADA.

II. *Analysis*

[O]ur analysis focuses on whether Maddox is “otherwise qualified” under the Act and whether he was discharged “solely by reason of” his disability. The burden of making these showings rests with Maddox.

In support of its motion for summary judgment, UT contended that both factors weighed in its favor. First, Dickey and Majors contended that they did not even know that Maddox was considered an alcoholic in making both the decision to hire and fire him. Moreover, they contended that Maddox was discharged, not because he was an alcoholic, but because of his criminal conduct and behavior and the significant amount of bad publicity surrounding him and the school. UT alternatively contended that Maddox is nevertheless not “otherwise qualified” to continue in the position of assistant football coach.

The district court granted UT's motion for summary judgment, specifically holding that UT did not discharge Maddox solely by reason of his disability. The court found it beyond dispute that Maddox's discharge resulted from his misconduct rather than his disability of alcoholism.... The affidavit testimony of Mr. Dickey and Mr. Majors is clear on the point that it was this specific conduct, not any condition to which it might be related, which provoked the termination of Mr. Maddox's employment. As a result, the court found it unnecessary to decide the alternative ground of whether Maddox was “otherwise qualified.”

Maddox contends that the district court erred in distinguishing between discharge for misconduct and discharge solely by reason of his disability of alcoholism. Maddox claims that he has difficulty

operating a motor vehicle while under the influence of alcohol and therefore he characterizes drunk driving as a causally connected manifestation of the disability of alcoholism. Thus, Maddox contends that because alcoholism caused the incident upon which UT claims to have based its decision to discharge him, UT in essence discharged him because of his disability of alcoholism. In support, Maddox relies on *Teahan v. Metro-North Commuter R.R., Co.*, 951 F.2d 511, 516–17 (2d Cir. 1991), in which the Second Circuit held that a Rehabilitation Act plaintiff can show that he was fired "solely by reason of" his disability, or at least create a genuine issue of material fact, if he can show that he was fired for conduct that is "causally related" to his disability. In *Teahan*, the defendant company discharged the plaintiff because of his excessive absenteeism. The plaintiff responded by claiming that his absenteeism was caused by his alcoholism and therefore protected under the Rehabilitation Act. The district court disagreed and granted summary judgment for the employer because, the court found, Teahan was fired for his absenteeism and not because of his alcoholism. The Second Circuit reversed the district court's grant of summary judgment on appeal, however, rejecting the court's distinction between misconduct (absenteeism), and the disabling condition of alcoholism. The court presumed that Teahan's absenteeism resulted from his alcoholism and held that one's disability should not be distinguished from its consequences in determining whether he was fired "solely by reason" of his disability. Thus, Maddox argues that, in the instant case, when UT acted on the basis of the conduct allegedly caused by the alcoholism, it was the same as if UT acted on the basis of alcoholism itself.

We disagree and hold that the district court correctly focused on the distinction between discharging someone for unacceptable misconduct and discharging someone because of the disability. As the district court noted, to hold otherwise, an employer would be forced to accommodate all behavior of an alcoholic which could in any way be related to the alcoholic's use of intoxicating beverages; behavior that would be intolerable if engaged in by a sober employee or, for that matter, an intoxicated but non-alcoholic employee.

Despite *Teahan*, a number of cases have considered the issue of misconduct as distinct from the status of the disability. In *Taub v. Frank*, 957 F.2d 8 (1st Cir. 1992), the plaintiff Taub, a heroin addict, brought suit against his former employer, the United States Postal Service, alleging discriminatory discharge under the Rehabilitation Act. The Post Office discharged Taub after he was arrested for possession of heroin for distribution.... The First Circuit ... held that Taub could not prevail on his Rehabilitation Act claim because his discharge resulted from his misconduct, possession of heroin for distribution, rather than his disability of heroin addiction. The court reasoned that addiction-related criminal conduct is simply too attenuated to extend the Act's protection to Taub.

The conduct/disability distinction was also recognized by the Fourth Circuit in *Little v. F.B.I.*, 1 F.3d 255 (4th Cir. 1993). In *Little*, the F.B.I. discharged the plaintiff, known by his supervisors to be an alcoholic, after an incident in which he was intoxicated on duty.... The Fourth Circuit affirmed [the district court], noting as an additional basis that the plaintiff's employment was not terminated because of his handicap. The court noted, "based on no less authority than common sense, it is clear that an employer subject to the ... [Rehabilitation] Act must be permitted to terminate its employees on account of egregious misconduct, irrespective of whether the employee is handicapped."

Moreover, language within the respective statutes makes clear that such a distinction is warranted. Section 706(8)(C) of the Rehabilitation Act states: "'[I]ndividuals with a disability' does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others." Likewise, the ADA specifically provides that an employer may hold an alcoholic employee to the same performance and behavior standards to which the employer holds other employees "even if any unsatisfactory performance is related to the alcoholism of such employee." These provisions clearly contemplate distinguishing the issue of misconduct from one's status as an alcoholic.

At bottom, we conclude that the analysis of the district court is more in keeping with the purposes and limitations of the respective Acts, and therefore, we decline to adopt the Second Circuit's reasoning in *Teahan*. Employers subject to the Rehabilitation Act and ADA must be permitted to take appropriate action with respect to an employee on account of egregious or criminal conduct, regardless of whether the employee is disabled. In the instant case, for example, while alcoholism might compel Maddox to drink, it did not compel him to operate a motor vehicle or engage in the other inappropriate conduct reported. Likewise, suppose an alcoholic becomes intoxicated and sexually assaults a coworker? We believe that it strains logic to conclude that such action could be protected under the Rehabilitation Act or the ADA merely because the actor has been diagnosed as an alcoholic and claims that such action was caused by his disability.

Maddox alternatively contends that even if UT has successfully disclaimed reliance on his disability in making the employment decision, the district court nevertheless erred in determining that Maddox had produced no evidence that the reasons articulated by UT were a pretext for discrimination. A Rehabilitation Act plaintiff may demonstrate pretext by showing that the asserted reasons had no basis in fact, the reasons did not in fact motivate the discharge, or, if they were factors in the decision, they were jointly insufficient to motivate the discharge.

Maddox first alleges that Dickey and Majors knew that Maddox was an alcoholic. Setting aside for a moment the legal significance of this statement, it is not supported factually in the record. Dickey and Majors, the district court found, had no knowledge of Maddox's previous criminal history prior to the DUI arrest involved here. In fact, Dickey states that if he had known of the prior arrests, he would not have hired him. More importantly, however, assuming that Dickey and Majors did know of Maddox's alcoholism, as we must do on a summary judgment motion, that knowledge does not translate into evidence that alcoholism was the basis for the termination. To the contrary, the university stated that the criminal conduct and the bad publicity surrounding it formed the basis of the termination, which we conclude is sufficient to motivate the discharge.

Maddox also claims that he knew of other coaches in the football program who drank alcohol in public and who were arrested for DUI but who were not discharged. This point is also irrelevant. Whether Maddox had such knowledge is immaterial. There is no evidence in the record establishing that Majors or Dickey had knowledge of the public intoxication of any other coach, or failed to reprimand or terminate any coach who they knew to have engaged in such behavior.

Maddox finally contends that UT's conclusion that he is no longer qualified to be an assistant coach at UT is without merit. Maddox claims that his misconduct did not affect his “coaching” responsibilities because an assistant coach's duties are limited to the practice and playing fields, and do not comprise of (sic) serving as a counselor or mentor to the players or serving as a representative of the school. Maddox relies on the fact that none of these functions were explained to him in his formal job description.

We first note that this allegation seems more appropriate for determining whether he was “otherwise qualified” rather than whether he was discharged because of his disability. Nevertheless, Maddox's position is simply unrealistic. It is obvious that as a member of the football coaching staff, Maddox would be representing not only the team but also the university. As in the instant case, UT received full media coverage because of this “embarrassing” incident. The school falls out of favor with the public, and the reputation of the football program suffers. Likewise, to argue that football coaches today, with all the emphasis on the misuse of drugs and alcohol by athletes, are not “role models” and “mentors” simply ignores reality.

The district court's grant of summary judgment in favor of the defendants is AFFIRMED.

Notes

1. In *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312, 317 (6th Cir. 2012), the court held

that the causation standard of disability of "sole cause" applies to the Rehabilitation Act and not to the ADA. Under the ADA, the test is whether discrimination occured "because of" the individual's disability. The "motivating factor" test used in Title VII does not apply to the ADA, either. *Id*. at 318.

2. *History of Falling Off the Wagon*: Courts have been consistent that individuals with records of recently using illegal drugs are not protected under the ADA. In *McDaniel v. Mississippi Baptist Med. Ctr*., 869 F. Supp. 445 (S.D. Miss. 1994), the court held that an individual who has a relapse of a drug abuse problem within two months of treatment violated the employer's official policy and was not covered under the ADA. See also *Wormley v. Arkla, Inc*., 871 F. Supp. 1079 (E.D. Ark. 1994). The courts also have been fairly consistent in upholding employer policies that employees can be discharged or otherwise disciplined for violating rules about drinking on the job or working under the influence of alcohol.

The court in *Wormley v. Arkla, Inc.*, 871 F. Supp. 1079 (E.D. Ark. 1994), held that merely entering into a rehabilitation program does not convert a current drug user into a person with a disability who is protected under Section 12210(b)(2) of the ADA. Further, the court in *Wolfe v. Jurczyski*, 241 A.D.2d 88 (N.Y. 3d Dep't 1998), held that an employer did not violate the ADA by discharging an employee who had agreed to obtain treatment for alcoholism but had failed to do so. Also, as in *Peyton v. Otis Elevator Co.*, 72 F. Supp. 2d 915 (N.D. Ill. 1999), an employer was not liable for firing an employee who is an alcoholic, if the same conduct by another employee would result in discharge. Neither was the employer liable for failure to rehire him after he voluntarily completed an alcoholism treatment program.

What is not clearly resolved is to what degree an employer is obligated to reasonably accommodate an employee with a drug or alcohol problem. In *Gallagher v. Catto*, 778 F. Supp. 570 (D.D.C. 1991), the court held that an individual with a substance abuse problem first must be offered counseling, then must be given a "firm choice" between rehabilitation and discipline if the counseling offer was rejected, and may be terminated only if that is the only viable option and other measures fail. It is far from certain that all courts would apply this standard. The obligation to accommodate may depend on what conduct led up to the disciplinary action in the first place. For example, in *Sizemore v. Department of Rehabilitation & Corrections*, 63 Ohio Misc. 2d 319, 629 N.E.2d 1096 (1992), the court held that the employer did not have a duty to accommodate the employee's alcoholism where the discharge was based on driving under the influence of alcohol. Employers controlled by the ADA, rather than Ohio state law, may have greater duties. See 1 LITTLER MENDELSON'S THE NATIONAL EMPLOYER §5.2.14 (2014) for in depth discussion on this issue. See also *Drug and Alcohol Programs and the ADA*, BLOOMBERG BNA AMERICANS WITH DISABILITIES ACT MANUAL §20:651; *What Constitutes Currently Engaging in Illegal Use*, 2 AMERICANS WITH DISAB.: PRACT. & COMPLIANCE MANUAL §7:114; *Shirley v. Precision Castparts Corp*., 726 F.3d 675 (5th Cir. 2013) (discussing exclusion for "currently engaging in the illegal use of drugs" and the safe harbor for rehabilitation program participants).

In *Vandenbroek v. PSEG Power Conn., L.L.C.*, 2009 U.S. Dist. LEXIS 18320 (D. Conn. 2009), the court held that under the ADA, employers are not required to make reasonable accommodation for employees who are illegal drug users or alcoholics if the disability affects job performance. Employers may, however, enter into "last chance agreements" in which the employer agrees not to terminate the employee in exchange for the employee's agreement to receive substance abuse treatment, refrain from further use of alcohol or illegal drugs, and avoid workplace issues. See EEOC, *The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities*, https://www.eeoc.gov/facts/performance-conduct.xhtml#alcohol. The right to participate in an alcohol or drug rehabilitation program as a reasonable accommodation may exist under state law. See, e.g., *Lamke v. Sunstate Equip. Co.*, 387 F. Supp. 2d 1044 (N.D. Cal. 2004).

For citations to other cases on this issue, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND

THE LAW §4.09 (2012 and cumulative supplement).

3. *Conduct/Disability Distinction*. The court in *Maddox* states that courts recognize a difference between discrimination based on conduct related to a disability and discrimination based on the disability itself. Not all courts would agree to so general a proposition. In *Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128 (9th Cir. 2001), *infra*, the plaintiff had obsessive compulsive disorder (OCD) and had difficulty arriving at work on time and many absences. With reference to the conduct/disability distinction, the court stated:

> In this case, MHA's stated reason for Humphrey's termination was absenteeism and tardiness. For purposes of the ADA, with a few exceptions, conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination. The link between the disability and termination is particularly strong where it is the employer's failure to reasonably accommodate a known disability that leads to discharge for performance inadequacies resulting from that disability. Humphrey has presented sufficient evidence to create a triable issue of fact as to whether her attendance problems were caused by OCD. In sum, a jury could reasonably find the requisite causal link between a disability of OCD and Humphrey's absenteeism and conclude that MHA fired Humphrey because of her disability.

The court wrote, in footnote 18:

> The text of the ADA authorizes discharges for misconduct or inadequate performance that may be caused by a "disability" in only one category of cases—alcoholism and illegal drug use: "[An employer] may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee." 42 U.S.C. §12114(c)(4). In line with this provision, we have applied a distinction between disability-caused conduct and disability itself as a cause for termination only in cases involving illegal drug use or alcoholism. In *Newland*, however, we suggested that an additional exception might apply in the case of "egregious and criminal conduct" regardless of whether the disability is alcohol- or drug-related. Any such exception would not be applicable to Humphrey's absences or tardiness.

To what extent does the conduct/disability distinction make sense in *Maddox* and the other cases it cites precisely because they deal with misconduct relating to alcohol or illegal drug use and because there is a statutory provision permitting employers to hold employees to the same performance or behavior standards to which the employer holds other employees "even if any unsatisfactory performance is related to the alcoholism of such employee"? Should there be a judge-created exception for egregious criminal conduct that *Humphrey* mentions in its discussion of *Newland*? If there is an egregious criminal conduct exception, does that undercut the argument that the conduct/disability distinction should be limited to the statutory-based exceptions (i.e., the provisions on employees' use of drugs and alcohol)?

4. *HIV/AIDS as a Disability:* The Supreme Court in *School Board v. Arline*, 480 U.S. 273 (1987), expressly declined to decide whether AIDS or AIDS-related conditions constitute disabilities under the Rehabilitation Act. Congress resolved this issue when it passed the Americans with Disabilities Act, which not only addressed the issue with respect to the ADA, but also amended the Rehabilitation Act to clarify coverage on this issue. The legislative history makes it clear that individuals with contagious and infectious diseases were to be protected. The ADA and the Rehabilitation Act provide that individuals who pose a direct threat to the health or safety of others in the workplace are not protected. 42 U.S.C. §12113(b); 29 U.S.C. §706(8)(D).

The ADA also provides for the Secretary of Health and Human Services to study infectious and communicable diseases and list those that present a risk in the food handling industry. Individuals with these conditions may be legally excluded from food handling jobs. 42 U.S.C. §12113(e). HIV has not been found to be a risk in the food handling industry. The ADA specifically states that it will

not preempt state, county, or local laws regarding food handling by persons with infectious or communicable diseases. However, such local laws must be made pursuant to the list from the Secretary of Health and Human Services, and must include the requirement of reasonable accommodation. 42 U.S.C. §12113(e).

In *Bragdon v. Abbott*, 524 U.S. 624 (1998), the Court held that the plaintiff was covered because reproduction is a major life activity, and that this plaintiff had demonstrated that her HIV status substantially limited her in that activity. The Court did not hold that all individuals with asymptomatic HIV are covered, so that issue had yet to be decided by the Supreme Court after *Bragdon*. The ADAAA makes bodily functions "major life activities" for purposes of the ADA, and most courts have decided under the ADAAA that HIV is either a per se disability or close to one. The regulations state that HIV substantially limits immune function. 29 C.F.R. §1630.2(g)(3)(iii). The case of *Bragdon v. Abbott* is referenced in Chapter 2.

Later in this chapter, the issues of direct threat and reasonable accommodation are discussed in the context of cases involving employees with HIV and other contagious and infectious diseases. For citations to other employment cases involving individuals with impairments, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §4.09 (2012 and cumulative supplement).

C. Qualification Standards under the ADA and Rehabilitation Act: Technical Standards and Medical Examinations at the Hiring Stage

Section D of this chapter contains a discussion of when an individual with a disability is qualified to perform the essential job functions. This section focuses on evaluative mechanisms for making that determination. The issues are what tests and evaluations may be performed and when. The question of what must be done with the evaluation results in the case of medical information is also addressed.

This section addresses three stages of the employment process. At the *preemployment* stage the individual is a mere applicant. At this stage the ADA prohibits all medical inquiries into whether the individual has a disability or the nature and extent of the disability. Medical questionnaires and examinations are not permitted. The *post-offer* or *preplacement* stage occurs after a conditional offer of employment has been made. At this stage medical examinations and inquiries are permitted. The examinations are referred to as *employment entrance examinations* or *preplacement* examinations. Once the employee has been hired, this stage is referred to as the *post-hiring stage*. The employer may conduct limited examinations at this point. The specifics of these provisions are discussed below. See 42 U.S.C. §12112(d). See 29 C.F.R. §1630.13 and .14 and the Appendix provisions that correlate to them. Also see the EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), EEOC Notice No. 915.002 (July 27, 2000), https://www.eeoc.gov/policy/docs/guidance-inquiries.html.

Hypothetical Problem 3.2

Read the following hypothetical problem before reading the materials on preemployment and postemployment medical examinations and inquiries. After reading the materials, analyze this problem.

Risa Kim applies for a job as a teacher's aide at the public school district in Fallow, Ohio. Her interviewer explains that there is a job open in the first grade classroom. She tells Risa, a 48-year-old woman, that "you have to be very energetic to do this job" and asks Risa if she has any disabilities that would prevent her from "chasing first graders around." Is this question legal at this stage? If not, explain how the interviewer could have posed a legal question?

1. Assume that the interviewer does not ask the question above, but instead offers Risa a job conditioned upon the principal's approval and her passing the security check and the medical

examination. The interviewer sends Risa to get a blood test for the medical exam. Is this legal?

2. Assume that the interviewer offers Risa a job conditioned upon taking a blood and a urine test for drugs. When the blood test comes back, it shows that Risa is a hemophiliac. The school district refuses to hire Risa. Is it legal to ask Risa to take a drug test at this stage? Why? Why not? Is it legal to ask Risa to take the blood test at this stage? Why? Why not? Once the school district has the information about Risa's hemophilia, is it legal to refuse to hire her because of her hemophilia? Explain. See 29 C.F.R. §1630.14(b)(3).

3. Assume that Risa has been employed as a teacher's aide and she is diagnosed with HIV. The school has a mandatory blood test for all employees at the end of each school year. Is the mandatory blood test for all employees legal? Under what conditions might it be legal? Assume that Risa has been employed as a teacher's aide in a private school and her son, who is 15 years old and lives with her, is diagnosed with HIV. The school hears about Risa's son's diagnosis because Risa had told the teacher she worked with who then told her principal. Is it legal for the school to refuse to renew her contract because of the fear that Risa will be absent many days caring for her son? See 42 U.S.C. §12112(b)(4), 29 C.F.R. §1630.8, and 29 C.F.R. pt. 1630, App. §1630.8.

[1] Preemployment

Issues at the preemployment stage include whether the qualification standards, tests, and other criteria are discriminatory; the administration of tests required for employment; and preemployment inquiries. Before hiring for a specific position, it is useful in many situations for employers to develop and maintain written job descriptions listing essential functions. The ADA does not require employers to do this, however. 29 C.F.R. §1630.2(n). See also 56 Fed. Reg. 35,743 (July 26, 1991) (Interpretive Guidance on Title I of the ADA).

Essential functions are fundamental job duties considered to be essential for reasons such as the following: 1) the position exists to perform that function; 2) a limited number of employees are available among whom that responsibility can be distributed; 3) the function is so specialized that the person is being hired for the expertise to perform the job. 29 C.F.R. §1630.2(n)(2).

It is unlawful for employers to use standards, criteria, or methods of administering evaluations that are not job-related and consistent with business necessity, where such practices have the effect of discriminating on the basis of disability or perpetuate such discrimination. 29 C.F.R. §1630.7. Related to this requirement is the mandate that covered employers may not use qualification standards, tests, and 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 criteria can be shown to be job-related and consistent with business necessity. 29 C.F.R. §1630.10. Employment tests are to be administered to reflect abilities that are intended to be measured, and they may not reflect impairments except where such skills are the factors to be measured. 29 C.F.R. §1630.11.

Related to the issue of qualification standards is the question of what employer inquiries and medical examinations are permitted at the preemployment stage. The following case involves a discussion of the types of qualifications employers can set with respect to a particular position. Following this case, the issue of preemployment inquiries is addressed.

Stutts v. Freeman

694 F.2d 666 (11th Cir. 1983)

FAY, CIRCUIT JUDGE:

Facts

The uncontroverted facts show that in 1971, Mr. Stutts was hired by TVA as a laborer at TVA's Colbert Steam Plant in Colbert County, Alabama where he worked temporarily until 1973 when he

was hired on a permanent basis. In 1979, Mr. Stutts applied for an opening with TVA in an apprenticeship training program to become a heavy equipment operator. His application was denied on the basis of a "low" score on the General Aptitude Test Battery (GATB), a test used by TVA to predict the probability of success of an applicant in the training program.

Mr. Stutts has been diagnosed as having the condition of dyslexia, which impairs his ability to read. The record indicates that this disability renders Mr. Stutts incapable of reading beyond the most elementary level, and leads to an inability to perform well on written tests such as the GATB. There is evidence that Mr. Stutts was evaluated by doctors and tested with non-written tests after receiving results of his GATB test and was judged to have above average intelligence, coordination and aptitude for a position as a heavy equipment operator. TVA tried to obtain the results of these non-verbal tests in connection with Mr. Stutts' application for the apprenticeship training program, but was unable to do so. Attempts to persuade the testing service to give Mr. Stutts an oral GATB were unsuccessful because scoring on the written GATB is based on standardized and uniform testing conditions and cannot be accurately translated from an oral test. Despite TVA's knowledge of and unsuccessful efforts to obtain alternate forms of evaluation, Mr. Stutts' nonselection was based solely on his low score on the written GATB test.

Discussion

The policy underlying the Rehabilitation Act of 1973 is clear—"to promote and expand employment opportunities in the public and private sectors for handicapped individuals." 29 U.S.C. §701(8). Both parties agree that Mr. Stutts is a handicapped individual and that the main hiring criteria—the GATB test—could not accurately reflect Mr. Stutts' abilities. There is considerable evidence supporting Mr. Stutts' contention that he is fully capable of performing well as a heavy equipment operator and we find a genuine issue as to whether or not he could successfully complete the training program, either with the help of a reader or by other means. Congress has clearly directed entities in its sphere of control to make efforts to expand employment opportunities for handicapped persons. TVA has not satisfied its obligation under the statute by merely asking for results of alternate testing methods and accepting a rejection.

We do not hold that Mr. Stutts must be given a position as a heavy equipment operator, nor do we hold that he must be admitted into the training program. We do hold that when TVA uses a test which cannot and does not accurately reflect the abilities of a handicapped person, as a matter of law they must do more to accommodate that individual than TVA has done in regard to Mr. Stutts. TVA argues that their efforts on behalf of Mr. Stutts showed that he received better treatment than a non-handicapped applicant. TVA sought to have a non-written GATB test given to Mr. Stutts. They tried to obtain the results of other examinations and tests given Mr. Stutts after his dyslexic condition was discerned. But the fact remains that these efforts were not successful. In the final analysis TVA made its decision based on the GATB test. TVA's unsuccessful efforts do not amount to "reasonable accommodation" of the handicapped as required by 45 C.F.R. §84.12 (1981).

When an employer like TVA chooses a test that discriminates against handicapped persons as its sole hiring criterion, and makes no meaningful accommodation for a handicapped applicant, it violates the Rehabilitation Act of 1973.

The summary judgment is set aside and the case *Remanded* for further proceedings consistent with this opinion.

Notes and Questions

1. Are courts more likely to be deferential to the employer when the employment position involved is a professional one, such as teaching or the practice of medicine, than where the employment position is skilled labor? Why or why not?

2. In *Ricci v. DeStefano,* 557 U.S. 557 (2009), the city of New Haven used a written test to count 60% toward selection of firefighters for promotions. Although black firefighters passed the test, they did not perform well enough to earn any of the promotions, according to the formula that was previously agreed upon with the union. The city refused to promote the white and Latino firefighters who were successful in the promotion process because it feared that the test had a disparate impact on black firefighters and that the black firefighters would sue the city. The city had not had the test validated before administering it, but it had hired a consultant to establish the test who spent time studying the responsibilities of the positions to which the successful test takers would be promoted. The white and Latino firefighters then sued the city under Title VII of the 1964 Civil Rights Act for race discrimination because the city failed to promote them because of their race. The United States Supreme Court held that once a city gives a test, it cannot decide not to promote the successful candidates because of their race merely because it fears that the test had a disparate impact on members of another race. It may, however, refuse to promote based on the test if it can demonstrate that it has a strong basis in evidence that it would lose a disparate impact suit. What behavior on the part of cities and other defendants using employment tests do you believe this opinion will evoke? Should employers discontinue the use of written tests for jobs such as firefighters? Does this opinion affect the decision in *Stutts* where the plaintiff was applying for a job as a heavy equipment operator? How should Stutts' lawyer distinguish *Ricci*? What arguments will the employer make in response?

3. The ADA prohibits an employer from asking an applicant disability-related questions or conducting medical examinations before making a conditional offer of employment. After a conditional offer of employment, the employer may require that the applicant submit to disability-related questions and medical examinations if all applicants for that particular position are treated the same way. Once the information is gleaned, it must be kept confidential. While the employer does not have to prove that the disability-related questions and medical examinations of an applicant are job-related for the job in question and consistent with business necessity, the employer may not use the information to discriminate on the basis of the individual's disability.

4. In response to these provisions, the EEOC promulgated a regulation that states:

> A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions, and/or may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions.

29 C.F.R. §1630.14(a).

5. On October 10, 1995, the EEOC provided guidance of this issue in the *EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations*. http://eeoc.gov/policy/docs/preemp.html. One of the most difficult complex issues is what questions may be asked at the pre-employment stage. While some have criticized the guidance as exceeding the scope of the statute, and the guidance does not have the force of law, many courts give EEOC guidances some deference.

6. The guidance defines a disability-related question by stating:

> At the pre-offer stage, an employer cannot ask questions that are likely to elicit information about a disability. This includes directly asking whether an applicant has a particular disability. It also means that an employer cannot ask questions that are closely related to disability.
>
> On the other hand, if there are many possible answers to a question and only some of those answers would contain disability-related information, that question is not disability-related.

7. *Questions the Employer May Ask*. At the pre-offer stage, the Guidance states that the employer may ask:

- Whether the applicant can perform the job functions
- To describe or demonstrate how the applicant would perform a job function (as long as all

applicants are asked this question)

- If not all other applicants for the job category are asked to describe or demonstrate how they would perform the job function, the employer may ask a person with a known disability how he or she would perform the job function. The applicant has a "known" disability if it is obvious or if the applicant has told the employer that he of she has a disability.

8. The Guidance covers the permissibility of a number of other types of questions the employer may ask such as whether the individual will need a reasonable accommodation, attendance records, drug use, third party inquiries about medical conditions, etc.

9. The Guidance also defines a "medical examination" as a procedure or test that seeks information about an individual's physical or mental impairments or health. The Guidance provides factors to be considered in determining whether a procedure falls within the definition of a medical examination. It further clarifies that physical agility and physical fitness tests, where the applicant demonstrates a job-related task, are not considered medical examinations. Therefore, such tests may be administered at the preoffer stage.

Psychological examinations that are not medical in nature are permitted. A psychological test is medical if it "provides evidence that would lead to identifying a mental disorder or impairment." Personality and intelligence tests are considered medical exams, and may not be permitted at the preoffer stage. Whether other, more general tests of aptitude, interest, and personality are considered medical examinations depends on a number of factors, such as whether the test is intended to identify underlying psychological conditions and whether trained health professionals are needed to administer and interpret the results of the test. See EEOC Enforcement Guidance on Preemployment Disability-Related Questions and Medical Examinations (1995). Polygraphs, which purport to measure whether individuals are telling the truth, are not generally considered to be medical examinations. Some inquiries made before polygraphs are given, however, such as asking about prescription medications taken, are impermissible inquiries. In a separate piece of legislation, however, preemployment polygraph testing has been made illegal in all but a few situations. See the Employee Polygraph Protection Act of 1988, 29 U.S.C. §§2001–2009. Whether a vision test to diagnose the ability to see is a medical examination depends on the type of test and the circumstances.

In a case involving medical exams, the Seventh Circuit in *Karraker v. Rent-A-Center, Inc*., 411 F.3d 831 (7th Cir. 2005), held that the MMPI test (which is intended in part to identify mental illness) is a medical exam, subject to the ADA requirement that it be administered to current employees only if it is job-related and consistent with business necessity. In *Kroll v. White Lake Ambulance*, 691 F.3d 809 (6th Cir. 2012) (*Kroll I*), the court held that there was a genuine issue of material fact as to whether psychological counseling, which was required of the plaintiff for her to return to work, constituted a medical exam under the ADA. In a subsequent appeal in the same case, *Kroll v. White Lake Ambulance Authority*, 763 F.3d 619 (6th Cir. 2014) (*Kroll II*), the court held that to sustain its burden of proving job-relatedness and business necessity, an employer who requires a medical exam (psychological counseling in this case) must demonstrate that the employee's ability to perform the essential functions of the job is impaired or that the employee poses a direct threat to himself or others. The employer who decides to require a medical examination must have a reasonable belief based on objective evidence that the employee's behavior threatens a vital function of the business.

Drug tests are not considered medical examinations under the ADA, and therefore may be given at any time, including the preoffer stage. 42 U.S.C. §12114(d)(1). The problem with drug tests is that to account for "cross-reactivity" (i.e., the positive test results caused ingestion of substances other than illegal drugs), it is necessary to inquire into the prescription medications taken by the individual. Although inquiry into what prescription medications an individual is taking is generally prohibited at the preoffer stage (because they often indicate a medical disability), the EEOC has taken the position that after an initial positive result on a drug test, an employer may ask an applicant about any

prescription medications that he or she is taking. Alcohol tests are considered medical examinations if they are invasive, i.e., when such tests would require the drawing of blood, urine, or breath. Another issue that courts are confronting is the use of marijuana for medicinal purposes. Even in states where marijuana is legal for medicinal purposes, the state courts have held that the employee has no right to use medical marijuana, even outside of the workplace, and even if it does not impair the employee's ability at work. Thus, employers are permitted to discipline or discharge these employees for their use of marijuana. See, e.g., *Coats v. Dish Network LLC*, 350 P.3d 849 (Colo. 2015). Although these rulings appear to violate the ADA, federal criminal law continues to rate marijuana as a Schedule I narcotic, whose use is prohibited by federal law. Federal criminal law, then, is supreme to state law where there is a conflict. As of today, no courts have concluded that the ADA overruled federal criminal law in this regard.

10. If a third party is asked to respond to questions about disabilities, what is the potential liability? For example, if a prior employer is asked whether the individual has any impairments that may interfere with the job, how should that third party respond if the party is aware that the employee had undergone treatment or therapy, but is unaware whether there are any current performance problems as a result? Are there confidentiality issues under the ADA? Are there privacy issues protected by tort law? If so, what are they? What possible causes of action might the plaintiffs have?

11. Would the questions asked of Maddox when he was hired be permissible preemployment practices under the ADA?

12. In *Armstrong v. Turner Industries, Inc.*, 141 F.3d 554 (5th Cir. 1999), an applicant for a pipefitter's position was given a written, skill-based qualification exam. In addition, he was required to fill out paperwork, which included a question about whether he had any of approximately seventy ailments. General questions about medical history were also included. Worker's compensation history was also requested. Applicants were then given medical exams while background checks to verify medical information were conducted. During Armstrong's background check, it was determined that he had possible asbestos exposure about three years before the application. Turner Industries rejected Armstrong's application because he had falsified the questionnaire asking about asbestos exposure.

While it was determined in judicial proceedings that the questions were impermissible preemployment inquiries in violation of the ADA, the appellate court declined to award damages or injunctive or declaratory relief. The court found that there was no compensable injury. Under the "make whole" purpose of civil rights statutes, the court found that the violation of preemployment inquiry prohibitions does not give rise to an action for damages. With respect to the injunctive relief, the court found that the plaintiff had not demonstrated a likelihood that he would seek employment with Turner again.

Given this court's reluctance to remedy monetarily this violation, are there any incentives for employers to eliminate such impermissible inquiries and activities, if the potential remedies are so limited? What incentives are there for plaintiff attorneys to take cases involving these facts? Remember that prevailing plaintiffs in ADA cases are entitled to attorney's fees. To prevail, however, the plaintiff must at least get declaratory or injunctive relief.

[2] Preplacement Examinations

The cases regarding preplacement examinations involve situations where the employer has made an initial determination that an individual is eligible for the job and has made a conditional offer. At this stage, the employer often wishes to conduct medical examinations and drug, psychological, or intelligence testing. The EEOC Guidance referred to previously addresses Post-Offer, Preemployment Examinations and Inquiries. The Guidance states:

> [T]he ADA permits employers to make disability-related inquiries and to require medical examinations after a conditional offer of employment has been extended, but before the individual

has started work.

The statutory language of the ADA provides:

> [A] covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination.

42 U.S.C. §12112(d)(3).

To be permissible, such employment entrance exams must meet the following requirements: 1) all entering employees are subject to such exams regardless of disability; 2) information on the medical condition or history is collected and maintained on separate forms and in separate medical files and is treated confidentially; and 3) the results of such exams are used only for job-related reasons. 42 U.S.C. §§12112(d)(3), 12112(b)(6).

Exceptions to the confidentiality requirements are permitted where supervisors and managers need to be informed because of necessary work restrictions or accommodations, where first aid and safety personnel need to be informed because of potential emergency treatment concerns, and where government officials investigating compliance request such relevant information. 42 U.S.C. §12112(d)(3)(B).

An incongruous result of the language in the ADA seems to permit preplacement exams that are *not* job-related to be given, so long as the results of such exams are not used to discriminate. 29 C.F.R. §1630.14(b)(3). For example, HIV testing appears to be permitted at the preplacement stage, although the results could not be used to exclude an employee.

Because drug testing is specifically excluded from the definition of "medical examination," it can occur at any stage. 42 U.S.C. §12114(d)(1) & (2).

Note

Non-ADA Preplacement Tests: For a discussion of laws applicable to preplacement medical examinations, see MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW §1.22 (4th ed. 2009). This discussion includes constitutional law, the Occupational Safety and Health Act, Title VII of the Civil Rights Act of 1964, state statutes, and common law.

The following case explains the policy behind requiring an offer of employment before conducting a medical exam, and demonstrates the importance of timing of medical examinations at the pre-employment stage.

Leonel v. American Airlines

400 F.3d 702 (9th Cir. 2005)

FISHER, CIRCUIT JUDGE:

Appellants Walber Leonel, Richard Branton and Vincent Fusco, who all have the human immunodeficiency virus ("HIV"), applied for flight attendant positions with American Airlines ("American"). American interviewed them at its Dallas, Texas, headquarters and then issued them conditional offers of employment, contingent upon passing both background checks and medical examinations. Rather than wait for the background checks, American immediately sent the appellants to its on-site medical department for medical examinations, where they were required to fill out medical history questionnaires and give blood samples. None of them disclosed his HIV-positive status or related medications. Thereafter, alerted by the appellants' blood test results, American discovered their HIV-positive status and rescinded their job offers, citing their failure to disclose information during their medical examinations.

The appellants now challenge American's medical inquiries and examinations as prohibited by the

Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101 *et seq.* (1999). They argue that American could not require them to disclose their personal medical information so early in the application process—before the company had completed its background checks such that the medical examination would be the only remaining contingency—and thus their nondisclosures could not be used to disqualify them.

I.

Leonel, Branton and Fusco all participated in American's standard application process for flight attendant positions. They first responded to questions in telephone surveys and then provided more extensive information about their language abilities, previous employment and educational backgrounds in written applications. Based on these initial screening forms, American selected the appellants to fly to the company's headquarters in Dallas, Texas, for in-person interviews. Leonel, Branton and Fusco flew to Dallas at American's expense. There, they participated first in group interviews, and then, having been chosen to progress in the application process, in individual interviews. Immediately after these interviews, members of the American Airlines Flight Attendant Recruitment Team extended the appellants conditional offers of employment.

After making the offers, American Airlines representatives directed the appellants to go immediately to the company's medical department for medical examinations.

There, the appellants were instructed to fill out series of forms. One informed them that they would be asked to provide a urine specimen which would be tested for certain specified drugs, and solicited their written consent for the testing. This form also required them to list all medications they were taking at the time. None of the appellants listed the medications he was taking for HIV.

American also required the appellants to complete medical history forms that asked whether they had any of 56 listed medical conditions, including "blood disorder." Here, too, none of the appellants disclosed his HIV-positive status.

At some point during the appellants' medical examinations, nurses drew blood samples. Unlike the urinalysis procedure, American did not provide notice or obtain written consent for its blood tests. Nor did any of the company's representatives disclose that a complete blood count would be run on the blood samples. When Fusco explicitly asked what his blood would be tested for, a nurse replied simply, "anemia."

A few days after the appellants' medical examinations, American's medical department ran CBC tests on their blood samples and discovered that they had elevated "mean corpuscular volumes" ("MCV"s). The appellants' expert, Dr. Shelley Gordon, testified that approximately 99% of individuals with HIV have elevated MCV levels. As nothing in any of the appellants' medical histories indicated cause for an elevated MCV level, American wrote the appellants and requested explanations for the results. All of the appellants, acting through their personal physicians, then disclosed their HIV-positive status and medications.

After learning that the appellants had HIV, American's medical department sent forms to the company's recruiting department stating, as final dispositions, that the appellants "[did] not meet AA medical guidelines." The forms also specified the ground on which the appellants had failed to meet the medical guidelines as "nondisclosure." The recruiting department then wrote the appellants and rescinded their conditional offers of employment.

Upon learning that their offers had been rescinded, the appellants brought individual suits against American. [T]he United States District Court for the Northern District of California ... consolidated the appellants' cases and, in April 2003, granted summary judgment for American on all claims.

II.

We review de novo the district court's summary judgment order. We must determine "whether,

viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law."

III.

The federal Americans with Disabilities Act regulate[s] the *sequence* of employers' hiring processes. [It] prohibit[s] medical examinations and inquiries until *after* the employer has made a "real" job offer to an applicant. *See* 42 U.S.C. §12112(d) (1999). "A job offer is real if the employer has evaluated all relevant non-medical information which it reasonably could have obtained and analyzed prior to giving the offer." Equal Employment Opportunity Commission, ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, 17 (1995) ("EEOC's ADA Enforcement Guidance"). To issue a "real" offer under the ADA, therefore, an employer must have either completed all non-medical components of its application process or be able to demonstrate that it could not reasonably have done so before issuing the offer.

This two-step requirement serves in part to enable applicants to determine whether they were "rejected because of disability, or because of insufficient skills or experience or a bad report from a reference." When employers rescind offers made conditional on both non-medical and medical contingencies, applicants cannot easily discern or challenge the grounds for rescission. When medical considerations are isolated, however, applicants know when they have been denied employment on medical grounds and can challenge an allegedly unlawful denial.

The two-step structure also protects applicants who wish to keep their personal medical information private. Many hidden medical conditions, like HIV, make individuals vulnerable to discrimination once revealed. The ADA allow[s] applicants to keep these conditions private until the last stage of the hiring process. Applicants may then choose whether or not to disclose their medical information once they have been assured that as long as they can perform the job's essential tasks, they will be hired.

American's offers to the appellants here were by their terms contingent not just on the appellants successfully completing the medical component of the hiring process but also on the completion of a critical *non-medical* component: undergoing background checks, including employment verification and criminal history checks. Other courts have found offers not real, and medical examinations thus unlawfully premature, when an offer remained contingent upon a polygraph test, personal interview and background investigation. Here, it is undisputed that American's offers were subject to both medical and non-medical conditions when they were made to the appellants and the appellants were required to undergo immediate medical examinations. Thus the offers were not real, the medical examination process was premature and American cannot penalize the appellants 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.

As justification for accelerating the medical examinations, American's Manager of Flight Service Procedures, Julie Bourk-Suchman, explained that the company found it important to minimize the length of time that elapsed during the hiring process in order to compete for applicants. But competition in hiring is not in itself a reason to contravene the ADA's mandates to defer the medical component of the hiring process until the non-medical component is completed. The appellants' expert, Craig Pratt, a management consultant, testified that it is "the accepted practice for employers to complete such [background] checks *prior to* conducting a preemployment medical examination of the job applicant." American has not established that there are no reasonable alternatives that would address its asserted need for expedited hiring of flight attendants that would avoid jumping medical exams ahead of background checks.

American also suggests that it conducted the medical examinations before completing the background checks for the convenience of the applicants. As Bourk-Suchman put it, "it's not a business reason. It just has to do with the applicants and trying to have it be convenient for them." Not

only does this testimony undercut American's meeting-competition rationale, applicants' supposed convenience does not justify reordering the hiring process in a manner contrary to that set out by the ADA. Congress [has] determined that job applicants should not be required to undergo medical examinations before they hold real offers of employment. American—even if well-intentioned—cannot avoid that mandate simply because it believes doing so will be more convenient for its applicants.

In short, at the summary judgment stage, American has failed to show that it could not reasonably have completed the background checks and so notified the appellants before initiating the medical examination process. It might, for example, have performed the background checks before the appellants arrived in Dallas, kept them in Dallas longer, flown them to Dallas twice, performed the medical examinations at satellite sites or relied on the appellants' private doctors, as it did for explanation of the CBC results. American may be able to prove that alternatives such as these were not feasible and that it could not reasonably have implemented the sequence prescribed by the ADA, but on this record it has not. Without such proof, American cannot require applicants to disclose personal medical information—and penalize them for not doing so—before it assures them that they have successfully passed through all non-medical stages of the hiring process.

American argues in the alternative that even if the offers were not real, the company did not violate the ADA because it *evaluated* the appellants' non-medical information before it considered their medical information. Bourk-Suchman asserted that American's recruiting department actually performed the background check for each appellant before receiving the medical department's disposition of "does not meet AA guidelines." As we have explained, however, the statutes regulate the sequence in which employers collect information, not the order in which they evaluate it.

The words of the ADA plainly address when employers can make medical inquiries or conduct medical examinations. *See* 42 U.S.C. §12112(d)(3) (1999) ("A covered entity may require a medical examination after an offer of employment has been made ... and prior to the commencement of the employment duties."). As the EEOC has stated explicitly, "an employer may not ask disability-related questions or require a medical examination, *even if* the employer intends to shield itself from the answers to the questions or the results of the examination until the post-offer stage." EEOC's ADA Enforcement Guidance, 2.

The focus on the collection rather than the evaluation of medical information is important to the statute's purposes. [T]he ADA deliberately allow[s] job applicants to shield their private medical information until they know that, absent an inability to meet the medical requirements, they will be hired, and that if they are not hired, the true reason for the employer's decision will be transparent. American's attempt to focus on the evaluation rather than the collection of medical information squares with neither the text nor the purposes of the statutes. Whether or not it looked at the medical information it obtained from the appellants, American was not entitled to get the information at all until it had completed the background checks, unless it can demonstrate it could not reasonably have done so before initiating the medical examination process. As to that question, we hold that there are material issues of fact that require reversal of summary judgment on the appellants' claims that American's hiring process violated the ADA. We therefore reverse summary judgment....

Notes and Questions

1. Why was the timing of the medical test important?

2. The Swine Flu, also known as the H1N1 virus, has caused considerable concern around the world and has been named a pandemic. See http://pandemicflu.gov. The EEOC has written advice for employers to explain legal ways to react to the H1N1 virus under the ADA. See http://eeoc.gov/factsh1n1flu.html

3. *Back Problems and EEOC Complaints.* In *City of Lacrosse Police & Fire Comm'n v. Labor &*

Industry Rev. Comm'n, 139 Wis. 2d 740, 407 N.W.2d 510 (1987), the plaintiff sued the police department for failing to hire him after making a conditional offer of employment. After accepting the offer, he underwent a physical examination in which his back strength was tested on a "Cybex" machine. The purpose of the test was to measure his back strength and flexibility of his back muscles. He received a "B" rating based on the Cybex test which recommended an exercise program before beginning heavy labor. The defendant refused to hire him because of the "B" rating. He subsequently retook the Cybex test and received an "A" rating, but the police department refused to hire him despite notice of the "A" result and notice that the Cybex test had not been validated for certain back movements. In plaintiff's lawsuit, the defendant argued that it had a right to establish tests and to assure that the individual applying for a job would not constitute a direct threat to health of the individual or of others. The Wisconsin Supreme Court, however, rejected these arguments, holding that the issue was whether the defendant perceived the plaintiff as an individual with a disability. The Court held that the plaintiff was a qualified individual for the job. It held that there was no evidence that demonstrated that the plaintiff could not adequately perform his job as a police officer because there was insufficient evidence in the record that the Cybex machine was a reliable indicator of the adequacy of performance.

The decision in this case is significant, because back problems account for a large percentage of complaints filed with the EEOC. See Note 5 in Section [B][2], *supra*. Employer costs for back injuries are the highest workers' compensation expense, and therefore, employers have a great incentive to try to screen out individuals with the potential for back problems, even though doing so may be unlawful in most instances. After *Sutton* and *Toyota*, most individuals claiming they were individuals with disabilities who had back injuries were not successful in proving that they have a disability.

Courts appear more open to finding that back injuries qualify as a "disability" under the ADAAA. However, disability discrimination claims for individuals with back pain still may fail because the employee does not meet the other requirements for such claims (i.e., cannot perform an essential function of the job or cannot prove that he/she was fired because of the disability). See, e.g., *Mazzeo v. Color Resolutions Int'l*, 746 F.3d 1264 (11th Cir. 2014) (finding that affidavit by doctor that employee's "disc herniation problems and resulting pain—which had existed for years and were serious enough to require surgery—substantially and permanently limited Mr. Mazzeo's ability to walk, bend, sleep, and lift more than ten pounds" was enough to present a *prima facie* ADA case in light of the "new standards and definitions put in place by the ADAAA."); *Lindsey v. St. Mary Med. Ctr*., 2016 U.S. Dist. LEXIS 29180, 2016 WL 878307 (E.D. Pa. Mar. 7, 2016) (in evaluating claims by an ultrasound technician with a herniated disk, the court stated, "In light of the ADAAA's liberalized definition of 'disability,' Plaintiff has offered sufficient evidence to raise a genuine issue of fact as to whether she had a disability during the relevant period."); *Adair v. City of Muskogee*, 823 F.3d 1297 (10th Cir. May 26, 2016) (firefighter with back injury "might be able to show that the City regarded him as having an impairment under the ADAAA, [but his] disability-discrimination claim would still fail because [he] was not qualified for the position of firefighter."). Compare *Scruggs v. Pulaski County*, *Ark*., 817 F.3d 1087 (8th Cir. 2016) (finding that employee who "suffers from fibromyalgia and degenerative disc and cervical disease" was not a "qualified individual with a disability" because she could not perform the essential function of lifting or carrying 40 pounds)*; Palmieri v. City of Hartford*, 947 F. Supp. 2d 187 (D. Conn. 2013) (holding that a police officer with degenerative disc disease with herniated disc and lumbar instability was not disabled because he had fully recovered from surgery and had no medically-imposed work restrictions within year of surgery); with *Kravits v. Shinseki*, 2012 U.S. Dist. LEXIS 24039, 2012 WL 604169 (W.D. Pa. 2012) (allowing a case involving an intern with back problems and fibromyalgia to move forward on the issue of reasonable accommodations and causation).

4. *Job-relatedness. Genetic testing.* In *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135

F.3d 1260 (9th Cir. 1998), the plaintiffs sued the defendant alleging violations of privacy and the ADA based on pre-employment blood and urine testing in which the employer tested for intimate medical conditions such as syphilis, sickle cell trait and pregnancy without the plaintiffs' consent. When alleging an ADA violation, the plaintiffs argued that the employer was permitted to use only tests that were job related and consistent with business necessity. The Ninth Circuit rejected this argument, holding that at the pre-employment stage, the employer may engage in testing after the conditional offer of employment, and such testing does not have to be job related and consistent with business necessity. The job-related and business necessity test is applied, however, when testing of current employees takes place. *Norman-Bloodsaw* is interesting because the testing for sickle cell trait would likely constitute testing for genetic information. Subsequent to this case, Congress passed the Genetic Information Nondiscrimination Act (GINA), which prohibits testing for genetic information. A number of state laws also prohibit testing for genetic information. See *infra*, Section [I][4] for a description of GINA.

[3] Posthiring

Once an individual has been hired, there are two circumstances under which medical examinations may be given. These are where the exam is job-related, such as OSHA-mandated medical examinations, and where it is voluntary, including employee assistance programs. 42 U.S.C. §12112(d)(4). The provisions regarding the treatment of medical information that were discussed in the previous section also apply at this stage.

Many employers, especially large ones, have employee assistance programs (EAPs). Employees are encouraged to avail themselves of these voluntary programs. Although the programs may differ in specifics, they often feature health promotion activities (e.g., exercise, weight loss, smoking cessation), counseling (e.g., marital, stress reduction), and substance abuse treatment (e.g., drugs and alcohol). Employers have found that EAPs are cost-effective by contributing to a happier, more stable, and healthier work force. Nevertheless, there are concerns that EAPs may run afoul of the ADA and other discrimination laws. Employees are told that information provided to EAP counselors will be kept "confidential." Nevertheless, when information is learned that could threaten public safety or the employer's business, such as a drug abuse problem in an employee with a safety-sensitive job, the counselor is faced with a dilemma. If confidentiality is breached, then the employee trust on which the EAP is built may be irrevocably lost. If confidentiality is not breached, then a tragedy could result. One possible solution is for the EAP counselors to advise employers about their disclosure policies in advance. As yet, there have been few cases.

The following case discusses when employers may make medical inquiries of their employees, and sets the standard for the employer's proof of business necessity.

Conroy v. New York State Dept. of Correctional Services

333 F.3d 88 (2d Cir. 2003)

POOLER, CIRCUIT JUDGE:

Defendants the New York State Department of Correctional Services ("DOCS") appeal from the judgment of the District Court denying DOCS's motion for summary judgment and granting Plaintiff-Appellee Belinda Fountain's motion for summary judgment. The DOCS sick leave policy requires employees to submit general diagnoses as part of a medical certification procedure following certain absences. Fountain challenged the policy as violating Americans with Disabilities Act ("ADA") prohibitions against inquiries into the disabilities of a current employee. She sought a declaratory judgment that the relevant parts of DOCS's policy violates (sic) the statute and injunctive relief preventing DOCS from requiring her to comply with the general diagnosis requirement. Although we

agree with the district court that the policy falls within the ADA's general prohibition, we find that genuine issues of material fact preclude summary judgment on the issue of the business necessity defense provided for in the statute. We therefore affirm in part and vacate and remand in part.

BACKGROUND

This case involves a DOCS Sick Leave Directive ("the Directive" or "the Policy") which Plaintiff contends violates the ADA's prohibition against inquiry into the disabilities of current employees. DOCS is the New York State agency responsible for the maintenance of correctional facilities throughout the state.

Under some circumstances, the challenged Directive requires that an employee bring medical certification upon returning to work after an absence. The certification must include a brief general diagnosis that is "sufficiently informative as to allow [DOCS] to make a determination concerning the employee's entitlement to leave or to evaluate the need to have an employee examined by [the Employee Health Service] prior to returning to duty." Certification is usually not required for absences of less (sic) than four days. However, the Directive indicates that "in exceptional cases, a supervisor may exercise the right to request certification for any absence charged to sick leave or family sick leave regardless of duration." The Directive then references another DOCS directive, Controlling Unexcused and Unauthorized Absences, which reads "medical certification may be required of any employee who requests to charge an absence to sick leave credits." However, this second directive may limit the reach of the requirement by clarifying that only "employees suspected of attendance abuse may be required to furnish medical certification for all absences which they seek to charge to sick leave." In addition to these directives, a memorandum indicates that when an employee has an attendance problem, and informal discussions have not remedied the problem, the supervisor should have a formal discussion with the employee, and instruct the employee that certification will be required for all future absences regardless of the duration of the illness. The guidelines for identifying attendance abusers explicitly leave a great deal of discretion in the hands of lower management.

Fountain is a Corrections Officer employed by DOCS since 1989. Fountain suffers from asthma and severe pulmonary obstructive disease. She has asked DOCS for accommodation because of these conditions in the past. Fountain filed a complaint about the Policy with the Equal Employment Opportunity Commission ("EEOC") in August of 1998. She sought declaratory relief that the general diagnosis requirement violates the ADA and an injunction prohibiting DOCS from requiring her to submit a general diagnosis.

The District Court denied DOCS's motion for summary judgment, and granted Fountain's cross-motion for summary judgment. Thus, the court concluded that the certification requirement was an "inquiry" under the ADA. The court then interpreted the Policy as "allowing inquiry after only a single day's absence from work." It found that because the Policy was not "based upon a reasonable expectation that the inquiry into the protected information would reveal that the employee was unable to perform work related functions or was a danger to the health and safety of the workplace," the Policy did not fall within the ADA's business necessity exception.

This appeal followed.

DISCUSSION

Fountain brings her challenge under a provision of the ADA which provides:

> A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

42 U.S.C. §12112(d)(4)(A).

I. Fountain Has Standing To Challenge the Policy under 42 U.S.C. §12112(d)(4)(A)

We agree with our sister circuits that a plaintiff need not prove that he or she has a disability unknown to his or her employer in order to challenge a medical inquiry or examination under 42 U.S.C. §12112(d)(4)(a). In contrast to other parts of the ADA, the statutory language does not refer to qualified individuals with disabilities, but instead merely to "employees." 42 U.S.C. §12122(d)(4)(A). Moreover, we agree with the Tenth Circuit that "it makes little sense to require an employee to demonstrate that he has a disability to prevent his employer from inquiring as to whether or not he has a disability." We also note that EEOC enforcement guidance supports this interpretation. See Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), (EEOC, July 27, 2000), available at http://www.eeoc.gov/docs/guidance-inquiries.html ("This statutory language makes clear that the ADA's restrictions on inquiries and examinations apply to all employees, not just those with disabilities."). Even when they are not formally promulgated as regulations, such agency publications are "at least a body of experience and informed judgment to which courts and litigants may properly resort for guidance."

We conclude that Fountain has sufficiently alleged that she has suffered and will continue to suffer the injury prohibited by the ADA's prohibition against inquiries into disability. She is therefore an appropriate plaintiff to bring this challenge to the Policy under 42 U.S.C. §12112(d)(4)(A).

II. The Policy Falls within the ADA's General Prohibition

DOCS contends that requiring medical certification is not an "inquiry" prohibited under 42 U.S.C. §12112(d)(4)(A). The ADA does not forbid all medical inquiries, but only those "as to whether such employee is an individual with a disability or as to the nature or severity of the disability." DOCS argues that because the Policy only requires a "general" diagnosis, its inquiries are insufficient to reveal whether the employee has a disability. Fountain argues that the Policy falls within the statute, because the inquiries would tend to reveal an employee's disability.

It is clear that even what DOCS refers to as a "general diagnosis" may tend to reveal a disability. We hold that requiring a general diagnosis is sufficient to trigger the protections of the ADA under this provision and that summary judgment in Fountain's favor was appropriate on this element.

Few courts have interpreted this provision, but one court has found that a requirement that employees disclose what prescription drugs they use is a prohibited inquiry, since such a policy would reveal disabilities (or perceived disabilities) to employers. Similarly, we believe that since general diagnoses may expose individuals with disabilities to employer stereotypes, the Policy implicates the concerns expressed in these provisions of the ADA.

Even where a diagnosis alone is not sufficient to establish that an employee is disabled, the diagnosis may give rise to the perception of a disability, and discrimination on the basis of a perceived disability is also prohibited by the ADA.

The EEOC's own definition of a "disability-related inquiry" further undercuts DOCS's argument:

> *What is a "disability-related inquiry"? (Question 1)*
>
> A "disability-related inquiry" is a question that is likely to elicit information about a disability, such as asking employees about: whether they have or ever had a disability; the kinds of prescription medications they are taking; and, the results of any genetic tests they have had.
>
> Disability-related inquiries also include asking an employee's co-worker, family member, or doctor about the employee's disability.
>
> Questions that are not likely to elicit information about a disability are always permitted, and they

include asking employees about their general well-being; whether they can perform job functions; and about their current illegal use of drugs.

See Questions and Answers: Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), (EEOC, July 27, 2000), available at http://www.eeoc.gov/docs/qanda-inquiries.html (emphasis in original). DOCS's requirement of a general diagnosis is much more akin to the examples of prohibited inquiries than to inquiries into general well-being or ability to perform job functions.

III. Genuine Issues of Material Fact Exist as to whether the Policy Is Job-related and Consistent with Business Necessity

The ADA creates an exception to generally prohibited inquiries when "such ... inquiry is shown to be job-related and consistent with business necessity." 42 U.S.C. §12112(d)(4)(A). DOCS contends that, based on this exception, summary judgment for Fountain was inappropriate and that we should instead grant summary judgment in its favor. We agree that the facts, when viewed in the light most favorable to DOCS, create genuine issues of material fact with respect to the business necessity defense. On the other hand, we do not think that the facts, viewed in the light most favorable to Fountain, can support a grant of summary judgment for DOCS. Therefore, we remand for further discovery and, if necessary, for trial.

A. The business necessity standard

Relatively little case law concerns the proper interpretation of business necessity in this context. Even fewer cases involve generally applicable policies like DOCS's rather than individualized inquiries. Faced with this limited case law, the district court reasoned:

> In order to fall within the [business necessity] exception..., the employer must demonstrate some reasonable basis for concluding that the inquiry was necessary. That is, the employer must show that it had some reason for suspecting that the employee, or class of employees, would be unable to perform essential job functions or would pose a danger to the health and safety of the workplace.

The court concluded that "no reasonable factfinder could conclude that an inquiry triggered by a single day's absence from work is the type of reasonable expectation" that it had described.

We believe that the district court's approach here was generally sound. Nonetheless, because we find that material issues of genuine fact exist, a remand is necessary to allow the district court to reconsider DOCS's business necessity defense.

The Ninth Circuit has held that the "the business necessity standard is quite high, and is not [to be] confused with mere expediency." We endorse the views of the Ninth Circuit and hold that in proving a business necessity, an employer must show more than that its inquiry is consistent with "mere expediency." An employer cannot simply demonstrate that an inquiry is convenient or beneficial to its business. Instead, the employer must first show that the asserted "business necessity" is vital to the business. For example, business necessities may include ensuring that the workplace is safe and secure or cutting down on egregious absenteeism. The employer must also show that the examination or inquiry genuinely serves the asserted business necessity and that the request is no broader or more intrusive than necessary. The employer need not show that the examination or inquiry is the only way of achieving a business necessity, but the examination or inquiry must be a reasonably effective method of achieving the employer's goal.

The case law on inquiries directed towards individual employees thus demonstrates that courts will readily find a business necessity if an employer can demonstrate that a medical examination or inquiry is necessary to determine 1) whether the employee can perform job-related duties when the employer can identify legitimate, non-discriminatory reasons to doubt the employee's capacity to perform his or her duties (such as frequent absences or a known disability that had previously affected the employee's work) or 2) whether an employee's absence or request for an absence is due to

legitimate medical reasons, when the employer has reason to suspect abuse of an attendance policy. These two business necessity justifications are merely illustrative, and an employer may be able to demonstrate other business necessities. For example, here, DOCS has suggested that it must guard against the severe disruption that would result from infectious diseases being spread through the staff or inmate population. On remand, DOCS will have the chance to submit evidence that it has a legitimate and vital need to protect against this occurrence, and that its general diagnosis requirement helps to alleviate the concern.

Questions

1. What are DOCS' legitimate reasons for making medical inquiries?

2. Why would it be more difficult to prove business necessity if the policy affects a broad group of "attendance abuses"?

In the following case, the court addressed whether an employer could inquire into matters other than technical qualifications at the postemployment stage.

Roe v. Cheyenne Mountain Conference Resort, Inc.

124 F.3d 1221 (10th Cir. 1997)

HOLLOWAY, CIRCUIT JUDGE.

I

Plaintiff-appellant Jane Roe ... is an accounts manager for the defendant-appellee Cheyenne Mountain Conference Resort (hereinafter CMCR or simply defendant).... In the summer of 1995, CMCR adopted a new Drug and Alcohol Testing Policy (the Policy). On July 7, 1995, CMCR's employees, including plaintiff, were given copies of the Policy and told that their written consent to the Policy and their adherence to its requirements were mandatory for their continued employment.

Preceding its provisions on drug and alcohol testing, the Policy contained these provisions:

The following rules on alcohol, drugs and illegal substances are the policy of CMCR. Adherence to these rules is a condition of employment:

1. Employees are strictly prohibited from possessing, consuming, or being under the influence of alcohol during work hours or on company property.
2. Employees are strictly prohibited from possessing, consuming, or being under the influence of any illegal drugs, controlled substance, any prescribed or over the counter drug or medication that has been illegally obtained or is being used in an improper manner.
3. Employees must report without qualification, all drugs present within their body system [sic]. Further, they must remain free of drugs while on the job. They must not use, possess, conceal, manufacture, distribute, dispense, transport, or sell drugs while on the job, in CMCR vehicles or on CMCR property or to the property to which they have been assigned in the course of their employment. Additionally, prescribed drugs may be used only to the extent that they have been reported and approved by an employee supervisor and that they can be taken by the employee without risk of sensory impairment and/or injury to any person or employee.

The Policy provided further for drug and alcohol testing of employees in various situations.... As it pertains to this lawsuit, the only significant aspect of the drug and alcohol testing under the Policy is a provision for random testing to which any employee might be subjected. The Policy does not state whether blood or urine testing is contemplated, nor how samples will be taken.

Plaintiff refused to sign the consent form. Alleging that some of the requirements of the Policy

were so unreasonable and intrusive as to violate her legal rights, she instead initiated this action to enjoin its implementation.... Plaintiff ... alleged that the prescription drug disclosure provisions violated section 102 of the Americans With Disabilities Act, 42 U.S.C. §12112(d)(4), which prohibits a medical examination or inquiries as to whether an employee is an individual with a disability, unless shown to be job-related and consistent with business necessity.

B

Defendant also contends that federal jurisdiction is lacking because Roe has no standing to pursue an ADA claim. This is so, defendant argues, because Roe has not shown that she is a person with a "disability" as that term is defined in the Act. This argument has no merit. The argument is miscast because it actually does not go to plaintiff's standing, and the particular challenge plaintiff has brought does not require her to meet the statutory definition of a person with a disability.

First, whether a plaintiff suing under the ADA comes within the definition of a person with a disability is simply not a question of standing but of whether an essential element of the claim can be established. Standing concerns whether the plaintiff "is entitled to have the court decide the merits of the dispute or of particular issues." Thus,

> [a] plaintiff has standing when (1) she has suffered an injury in fact, (2) there is a causal connection between the injury and the conduct complained of, and (3) it is likely that the injury will be redressed by a favorable decision.

Plaintiff has sufficiently alleged each of these elements.

Second, plaintiff's ability to maintain the particular ADA claim she has alleged does not require her to prove that she is an individual with a disability. As the district judge aptly observed, adopting defendant's position would defeat the very purpose of prohibiting disability related inquiries: "It makes little sense to require an employee to demonstrate that he has a disability to prevent his employer from inquiring as to whether or not he has a disability." We also agree with the district court's reasoning that this common sense rejection of defendant's argument is consistent with the statutory language.

The ADA explicitly prohibits employers from making disability-related inquiries of employees, unless the inquiry is job-related or consistent with business necessity. 42 U.S.C. §12112(d)(4)(A). This provision applies to all employees. Unlike suits based on a failure to provide a reasonable accommodation, this provision is not limited to qualified individuals with disabilities. Cf. 42 U.S.C. §12112(b)(5)(A).

Defendant further argues that plaintiff lacks standing because she faced no real or immediate threat of injury due to the fact that defendant suspended enforcement of the policy pending the district court's determination of the controversy. This argument does indeed address one of the elements of standing, but we believe that plaintiff has at all times been threatened with injury in fact. We note that this argument is essentially the same as defendant's third purportedly jurisdictional argument, which is that jurisdiction is lacking because the controversy is moot. We reject both of these arguments. It is well settled that voluntary cessation of illegal conduct by itself does not make the case moot. As will be made clear in discussing the issues raised by the plaintiff-appellant in this appeal, we believe that under the particular circumstances presented here, the controversy was not mooted. Defendant's voluntary suspension of its unlawful policy did not completely remove the threat of injury; consequently plaintiff's standing is unaffected by defendant's suspension of the Policy.

In sum, the arguments made by defendant do not show a lack of jurisdiction in the district court.

Notes and Questions

1. *Job Relatedness.* One of the best judicial decisions illustrating how testing must be job-related is *Crane v. Dole*, 617 F. Supp. 156 (D.D.C. 1985). The employee had been an air traffic control

specialist for several years, a position that required in-flight communications with pilots and handling air traffic emergencies. Toward the end of this ten year period, it was determined that he had a hearing loss requiring a hearing aid, and that the stringent hearing requirements for air traffic control specialists could no longer be met. In the course of his application for another position with the Federal Aviation Administration (which required no in-flight communications with pilots), the agency decided to develop a "test" which basically consisted of being able to listen to information and write down what was heard. The test therefore purported to measure not only hearing, but also speed writing. The test had not been validated, it had been developed by individuals with no experience in test development, and the FAA did not seek any professional advice on test development. The court held the test was not job-related.

2. *Standing*. The issue of standing was raised in both *Conroy* and *Roe* in different ways. Explain. Also explain the courts' holdings concerning standing in both cases.

3. *Grenier v. Cyanamic Plastics, Inc*., 70 F.3d 667 (1st Cir. 1997), is one of the early circuit court opinions interpreting the ADA and EEOC Enforcement Guidance. The employee was a shift electrician who had worked at a plant for nine years, at which time his behavior became unusual. He reacted in a highly emotional and irrational manner to questioning about vandalism, and was reported to have other behavior concerns. He was placed on medical leave and was informed that he would have to be cleared to return through the company doctor. He refused voluntary termination and remained on indefinite disability until his employment automatically terminated. When he reapplied for the position, he was requested to provide medical certification from a physician that he was prepared to return to work without restrictions or identifying accommodations. He was eventually denied the position.

The court recognized that the position's essential functions were not limited to technical ability and experience as an electrician. Because the employee had himself claimed disability and inability to perform the job because of a mental psychiatric treatment, it was reasonable to raise questions about his ability to do the job. The court noted

> The EEOC regulations ... [provide] that an employer can ask an applicant with a known disability to describe or demonstrate how "with or without reasonable accommodation" the applicant will be able to do the job.... We hold that this employer did not violate the [ADA] [prohibition] by inquiring into Grenier's ability to function effectively in the workplace and to get along with his co-workers and supervisor, rather than just his technical qualifications as an electrician.

The court held that an employer does not violate the ADA

> by requiring a former employee with a recent known disability applying for re-employment to provide medical certification as to ability to return to work with or without reasonable accommodation, and as to the type of any reasonable accommodation necessary, as long as it is relevant to the assessment of ability to perform essential job functions.

D. What Constitutes Discrimination?

[1] Prohibited Activities Related to Wages, Hours, and Conditions of Employment

The ADA defines discrimination in employment as:

> (1) 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.
>
> (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination

prohibited by this title ...

(3) utilizing 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;

(4) 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;

(5)

(A) not making reasonable accommodations ...; [or]

(B) denying employment opportunities ...

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability ... unless ... shown to be job related ... and consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that ... such test results accurately reflect the skills, aptitude, or whatever other factor ... that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

42 U.S.C. §12112(b).

Employers are prohibited from such conduct in employee selection, upgrading, promotion, transfer, layoff, compensation, job assignment, seniority, and a variety of other aspects. See 29 C.F.R. §1630.4.

The following case excerpt is an early decision under the ADA. If such a fact setting arose after *Sutton* and *Toyota*, the case would probably be dismissed because cancer was rarely found to be a disability. After the ADAAA, it is more likely that the courts will find cancer to be a disability.

U.S. Equal Employment Opportunity Commission v. AIC Security Investigations, Ltd.

820 F. Supp. 1060 (N.D. Ill. 1993)

GUZMAN, UNITED STATES MAGISTRATE JUDGE:

Background Facts

This action is brought pursuant to Title I of the Americans with Disabilities Act of 1990, and Title I of the Civil Rights Act of 1991. The EEOC and the Intervening Plaintiff, Charles Wessel ("Wessel"), allege that AIC discriminated against Wessel on the basis of his disability, terminal cancer, by discharging him from his position as Executive Director at AIC.

AIC is a wholly owned subsidiary of AIC International. AIC has been and is currently engaged in the business of providing commercial security services, hardware, and investigative services to customers in the Chicago area. The security guard business, as compared to other service industries, is highly competitive; it is a dynamic, unpredictable business that requires continual and prompt adaptations to the clients' needs as they arise.

Wessel was hired by Victor Vrdolyak [AIC's owner] in February 1986 and reported to Victor Vrdolyak until his death on June 6, 1992, and to David Pack, President of AIC International, until Pack's termination on July 6, 1992. In his position of Executive Director, Charles Wessel was the Chief Executive of the security guard division. The Executive Director position which Wessel held was at all times during his employment the highest management position in AIC, and accordingly,

Wessel was responsible for the overall management and profitability of AIC. The position of Executive Director required, as an essential function, overall management and direction of the 300 plus employees of the company, from all management level personnel to watch commanders and ultimately hundreds of security guards employed by AIC. This position also required, as an essential function, dealing with labor unions, supervising investigations, tracking litigation AIC was involved in, the development of policy, site walk throughs, handling labors matters, establishing price rates and monitoring and disciplining subordinates.

Wessel is a widely recognized leader in the security guard industry, having worked in the industry for approximately thirty years. He is licensed as a private detective and a private security contractor by the State of Illinois and the State of Florida....

When Wessel started with AIC, he had emphysema caused by smoking 2–4 packs of cigarettes a day for approximately 25 years and 8–10 cigars a day for 15 years, and he had a back injury rendering him 20 percent disabled under his V.A. disability. In June, 1987, Wessel was diagnosed with lung cancer. Following surgery and recuperation Wessel returned to work at AIC. In July, 1991, Wessel suffered pneumothorax during a biopsy and went into respiratory arrest. Thereafter, Wessel was again diagnosed with lung cancer, this time affecting his right lung. Surgery was performed, and following a period of treatment and recuperation, Wessel again returned to work as Executive Director of AIC. In April, 1992, Wessel was initially diagnosed ... with 2 tumors, and subsequently, in June, 1992, with 2 additional tumors, for a total of 4. Wessel's doctors considered his condition to be terminal and he was told sometime in April, 1992 that he had six to twelve months to live. Wessel has received radiation treatments since this diagnosis but these treatments have been palliative, that is, not for the purpose of a cure, but to prolong and assure some quality of Wessel's life.

Wessel continued to work at AIC throughout the course of the treatments, although on the days when the radiation treatments were scheduled in the afternoon, he had to leave work at approximately 2:30 p.m. The amount of time Wessel was absent from work is disputed. The EEOC and Wessel allege that Wessel had two treatments in July of 1992 and he did not miss a full day of work on either of those two days nor did he miss any other work in July of 1992. AIC claims that he missed 15 workdays in April and May of 1992, several days in June, 1992 and 2 days in July, 1992. Further, between July 29th and August 13th, 1991 Wessel missed 16 days of work when he experienced a pneumothorax during his routine one-day biopsy. He missed 2 half days and one full day in August of 1991, and he missed approximately 33 days between October 3rd and November 4th, 1991 for surgery to remove his right lung. Dr. Nomanbhoy, Wessel's primary treating physician, restricted Wessel's driving because of lesions in the occipital lobe of the brain and in December of 1992 Wessel experienced seizures. Dr. Petras, a radiation oncologist treating Wessel, informed Ruth Vrdolyak in a telephone conversation that Wessel had been advised not to drive. Larry Roberts, the Executive Vice President of AIC's Systems Division, offered Wessel a driver which Wessel refused.

On or about June 10, 1992, Mrs. Vrdolyak hired Beverly Kay to work for AIC. On July 28, 1992, Kay had a meeting with Wessel. During that meeting, Kay apprised Wessel that Mrs. Vrdolyak had decided that it was time for Wessel to retire. On July 30, 1992, Kay advised Wessel by telephone that his employment at AIC was terminated effective July 31, 1992. Wessel was paid through July 31, 1992. Prior to his termination from AIC, Wessel was never subject to any warnings relating to his performance, his attendance, or any disciplinary action.

Discussion

AIC first contends that Wessel cannot meet his initial burden of proof that he was a qualified individual with a disability. In particular, AIC argues that regular, predictable, full-time attendance was an essential function of the position of Executive Director which Wessel could not perform regardless of any reasonable accommodations.

To support this contention AIC points to the deposition testimony of Wessel in which Wessel stated

as follows:

Q. When you went to work on a given day, did you typically know everything that, every issue that you were going to confront that day, or did things come up a daily basis?

A. Absolutely, I did not know what was going to come up. We're in a business that is subject to surprises. Nothing is routine. There is no day-to-day "do this," "do that."

Q. Hectic pace, your workplace?

A. Sometimes.

Q. Need for quick decisions?

A. Often.

Q. Is the industry highly competitive in your estimation?

A. Probably one of the most highly competitive service industries.

Likewise, Wessel testified that a "normal" workday had been 8:00 to 8:30 a.m. to 6:00 to 6:30 p.m. at night, but this changed significantly in 1991 and 1992. AIC also points to Wessel's testimony regarding the search for his replacement in which Wessel stated: "No, Ed was one who came in at five to ten after 9 and left at five to ten before 5. And then once I told him that I was terminal and he'd either better get in shape or they were going to look elsewhere, he did make an effort.[“] This testimony[,] AIC argues, clearly indicates that AIC, and indeed, Wessel himself, would exclude individuals from any consideration for the Executive Director position unless they could put in the necessary long hours.

AIC claims that during the last 12 months of his employment at AIC, Wessel was absent approximately 25 percent of the time. In consideration of the responsibilities of Executive Director and the heavy day-to-day demands of the Guard Division, attendance was an extremely important essential function which Wessel was unable to perform.

The EEOC's response to these arguments puts forth the counter-argument that while it is undisputed that Wessel was required to miss a certain amount of work for surgery and treatment of his cancer during his employment at AIC, there remains a genuine issue of material fact as to whether Wessel's absence resulted in his not being able to perform the essential functions of the position of Executive Director. The EEOC points to the deposition testimony of David Pack, Wessel's supervisor for all but one month of his employment, who stated the following:

Q. Did it affect the hours he put in at work?

A. No. He put in quite a few hours.

Thereafter, Pack stated that although Wessel missed time for surgery and treatment, it was no different than instances when other employees at AIC had to take time off for surgery. In addition Pack elaborated that typically Wessel worked long hours and Saturdays and did "a ton of work at home."

Similarly, Kenneth Bartels, an AIC customer who dealt with Charles Wessel for years[,] testified that his ability to contact Wessel at AIC did not change at all in 1992, from what it had been in prior years. Bartels further stated that whenever he needed to talk to Wessel he was able to do so up to and including 1992.

The EEOC finally argues that perhaps the most telling indication that a genuine issue of fact remains as to whether Wessel's absences, necessitated by surgery and treatment, resulted in his inability to perform the essential functions of the position of Executive Director is the complete absence of any evidence in the record that Wessel was ever advised by anyone at AIC that his lack of attendance was interfering with the performance of his duties.

The disposition of this action is, of course, controlled by Title I of the Americans with Disabilities

Act (“ADA”). Although the ADA is relatively new law, Section 504 of the federal Rehabilitation Act of 1973, and many state handicap laws form the basis of parallel decision which will assist with questions of law in this action. In fact, the ADA expressly contemplates that the voluminous precedent arising out of Section 504 of the Rehabilitation Act may serve as guidance for determinations involving the ADA.

Accordingly, only those persons who are qualified—that is, able, with or without reasonable accommodation, to perform the essential functions of a particular job—may state a claim under the ADA.

The record demonstrates that there remains a factual dispute as to whether Wessel's absences rendered him “unqualified” for purposes of the ADA. As the EEOC has argued, Pack's deposition testimony clearly indicates that he, as Wessel's immediate supervisor, was completely satisfied with Wessel's attendance and performance, despite the time that Wessel had to be absent for [from] work for his surgery and treatment. Likewise, there is no evidence that Wessel was given notice that his attendance was unsatisfactory.

In light of these disputed facts a genuine issue remains as to whether as of July 29, 1992, Wessel was a “qualified individual with a disability” as that term is defined. To be sure, attendance is necessary to any job, but the degree of such, especially in an upper management position such as Wessel's, where a number of tasks are effectively delegated to other employees requires close scrutiny. Further, an executive such as Wessel more than likely handled a number of his business matters through customer contact, and this usually is done by phone or in person at the customer's site. Whether a phone call is made from the office, a car phone, or a home is immaterial. Whether a contract is negotiated in the office or out of the office is immaterial. What is material is that the job gets done. Therefore, a genuine issue of fact remains as to whether Wessel was meeting that threshold of both attendance and regularity necessary to perform his job successfully at the time he was discharged. This is necessarily a fact intensive determination.

AIC's next argument raises the allegation that Wessel was unable to perform his job because of alleged short term memory problems. This allegation is supported by Wessel's deposition testimony that in part stated “My short-term memory is somewhat limited, but by the—an hour from now I remember everything.”

AIC also contends that the people who worked with Wessel on a daily basis during his course of employment with AIC during 1992 observed Wessel exhibiting severe short-term memory loss directly related to his performance of the functions of this job as Executive Director. AIC also emphasizes that in July of 1992, Wessel was involved in a serious problem with one of AIC's largest accounts. Apparently a contract renewal was mistitled when mailed to a renewal account and in a second instance an incorrect estimate was submitted to an AIC customer. It is undisputed that if this estimate had not been corrected, it would have caused AIC an account loss.

AIC claims that in order to insure the survival of the company, Wessel's job responsibilities were being transferred to other AIC personnel as his condition deteriorated. Further, the pace of these transfers was hastened once Wessel was diagnosed in April, 1992 with inoperable brain tumors and given 6 to 12 months to live. Finally, AIC points out that Wessel upon his termination immediately became qualified for total disability Social Security benefits.

Once again, I agree with the EEOC that Mr. Wessel's alleged short-term memory loss and its effect on Mr. Wessel's qualification to perform his job as Executive Director is a disputed issue of fact. It is important to note that Wessel's own testimony was “[m]y short-term memory is somewhat limited, but the—an hour from now I remember everything.” The fact that Wessel admits to some limitation of his short-term memory is not evidence of the severity of such or that the limitation had any impact on Wessel's performance. In fact, deposition testimony reveals that the lobes of Mr. Wessel's brain where the tumors were located were not the lobes where the short-term memory function takes place. Rather,

the functions of balance and possibly some visual coordination had the potential to be affected. Further, AIC's contentions that "there is simply no accommodation for memory loss" is contradicted by AIC's own expert witness, Dr. Peter Lewitt who stated in his deposition that if memory is a problem, for example writing things down and keeping logical notes is one strategy to improve a deficient memory. In addition, Dr. Lewitt acknowledged that experience and expertise could also aid in overcoming memory loss. It is undisputed that Mr. Wessel has such substantial experience and expertise.

As to the two errors that AIC has alleged, Wessel acknowledges that he failed to catch both and explained that they were the result of clerical error. Wessel further indicated, and AIC does not dispute that the estimate error was rectified shortly thereafter, and AIC did not suffer any adverse consequences, financial or otherwise. Further, AIC has failed to establish that the above errors have any connection whatsoever to short-term memory loss.

Therefore a factual question exists, as to whether Wessel's errors can lead to a finding that Wessel could not perform the essential functions of this position of Executive Director. As the EEOC has persuasively argued, if perfection is to be the standard for qualification under the ADA, very few individuals would be qualified.

As to AIC's assertion that over time, Wessel's job responsibilities were being transferred to other AIC employees because of Wessel's alleged inability to perform such, this assertion is refuted by the testimony of David Pack and Larry Roberts. Specifically, Pack stated in his affidavit that "Wessel maintained overall responsibility for all of these essential functions throughout his employment." Pack further testified that to the extent that Wessel began to delegate and transfer some of his functions to others, the reasons for the transfer were unrelated to Wessel's illness. Rather, Pack stated that he wanted Wessel to transfer his duties to others, so that Pack could promote Wessel and begin to delegate some of his own duties to Wessel. Roberts confirmed that the discussion to transfer some of Wessel's job responsibilities preceded Wessel's illness. In addition, Pack acknowledged the terminal nature of Wessel's illness, indicating that he wanted to take advantage of Wessel's experience and knowledge for purposes of selecting and training a successor.

Finally, there is substantial evidence in the record to create a genuine issue on the question of whether Wessel could perform the essential functions of his job. AIC's audited financial's show that the profits of AIC's division under Wessel's direction increased from July 31, 1991 to July 31, 1992, while the overall profits of AIC decreased. Likewise, there is disputed evidence to refute the allegation that Wessel was unable to perform the "essential functions" of labor negotiations, supervising investigations, tracking litigation and development of policy. Therefore, there exists disputed material issues of fact and summary judgment must be denied.

AIC's final argument contends that Wessel could not perform his job without risk to himself and others, regardless of any reasonable accommodation. This argument stems from Wessel's treating physician's recommendation that he not drive a car because of his potential to suffer a seizure. Wessel's refusal to discontinue driving, AIC argues[,] poses a direct threat to other AIC employees, the public at large, as well as exposes to (sic) AIC to potential liability.

Direct threat is defined as "a significant risk of substantial harm to the health and safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." A "direct threat" defense is to be evaluated on a individualized assessment of the individual's present ability to safely perform the essential functions of the job.

AIC's direct defense obviously fails for purposes of this motion. AIC cannot establish that driving was an essential function of the position of Executive Director of AIC. Therefore, any inability to drive could not serve as the basis for asserting the defense. In order to rely on a safety requirement to screen out disabled individuals the employer must demonstrate that the requirement, as applied to the individual, satisfies the direct threat standard under the ADA in order to show that the requirement is

job related and consistent with business necessity.

In the instant case, AIC does not assert and cannot demonstrate that driving is an essential function of Wessel's job. Even if they had, an accommodation, i.e. alternative mode of transportation could be provided. In fact, one such accommodation was offered voluntarily by AIC prior to this lawsuit. AIC offered Wessel a driver. So the company determined of its own accord that such an accommodation was reasonable. Further, the deposition testimony of Dr. Nomanbhoy, indicates that he has on occasion initiated proceedings to have patients' licenses suspended due to their being a risk to the public at large behind the wheel. Mr. Wessel was not one of those patients.

AIC in their reply brief primarily argue that the record is clear that all four physicians who are to give expert medical testimony at trial have declared Wessel unable to perform his former position of Executive Director for AIC. Allegedly this conclusive medical testimony is not disputed anywhere.

At the outset, I disagree with AIC's statement that this medical testimony is not disputed anywhere. Dr. Nomanbhoy in his deposition clearly stated that he had never observed Mr. Wessel suffering from memory problems and that up until a few weeks ago when Mr. Wessel fell he had no qualms in answering that Mr. Wessel could still perform his job. Further, as to the information that Dr. Nomanbhoy supplied to Social Security, Dr. Nomanbhoy clearly stated that this information was premised on the fact that Mr. Wessel had been fired from his job and that he should be able to get some compensation because no one is going to hire him. Further, I don't agree that Dr. Petras has stated that Mr. Wessel was not capable of performing his job. In fact, Dr. Petras went into great detail explaining that the tumors were located in areas of the brain that did not affect mental functions. As to Dr. Lewitt and Dr. Milner's testimony the weight to be afforded to such is for the trier of fact to determine.

Although the excerpted *AIC* decision is included here for purposes of defining discrimination (in this case discrimination in the form of termination of employment), the case also addresses themes that recur in many of the decisions in this area, i.e., whether the individual is qualified to perform the requirements of the position and whether there are reasonable accommodations that could have been provided that would allow the individual to be able to carry out the job functions.

In *AIC*, the jury ultimately awarded $22,000 in back pay, $50,000 in compensatory damages, and $500,000 in punitive damages (reduced to $150,000 by the court). *United States EEOC v. AIC Security Investigations, Ltd.*, 823 F. Supp. 571 (N.D. Ill. 1993).

Questions

If a professional job such as the one in *AIC* is involved, should it be permissible to inquire at the hiring stage whether the individual will be able to perform the job for two or three years? What if the search for such a professional position is an expensive process? Does that justify such a preemployment inquiry? For example, would it make a difference if the position were superintendent for a large urban school district, college president, a fourth grade teacher, or the school custodian?

[2] Disparate Treatment and Disparate Impact

Hypothetical Problem 3.3

Read the following hypothetical problem before reading the materials on disparate treatment and disparate impact. After reading the materials, analyze this problem.

Review the following from the perspective of an attorney specializing in plaintiff's employment discrimination cases. Ruben Allen is considering a possible lawsuit. He tells his attorney that he works as a lawyer in a small law firm. The firm just recently denied him partnership based on a

longstanding assumption that all associates in the law firm must bill a minimum of 2,000 hours a year. Ruben has worked for the firm for five years. He billed 2,000 hours the first three years, but in years four and five, Ruben billed 1,900 and 1,875 respectively. At the end of each year, the partners have evaluated Ruben. His evaluations were always very positive. Nothing was said about his failure to meet the 2,000 hour goal in his last two years. Ruben was diagnosed with fibromyalgia two years ago, which made him very tired, and it was impossible to meet the 2,000 hour goal. Nonetheless, Ruben worked diligently during the past two years, and came to work often when he did not feel well. About six months before his partnership vote, a young partner asked Ruben if he was "ok" and told him that he had been looking very tired and sick recently. Ruben told the partner that he had fibromyalgia, but that he was determined to ignore it. There was a woman who was up for partnership in the same year. She had been pregnant during her fourth year, and told Ruben that because she had morning sickness, she was only able to bill 1,800 hours that year. In her fifth year, she took a 12 week maternity leave, which prevented her from meeting the 2,000 hour goal. She was elected to the partnership.

1. Consider the possible theories under which Ruben could bring a lawsuit under the ADA. Explain whether Ruben can make out a prima facie case under the disparate treatment theory. If so, explain how the case would proceed from there.

2. Discuss whether Ruben has a potential disparate impact cause of action against the firm. Analyze that cause of action and the employer's defense.

3. Consider what evidence would be needed to prove both the disparate treatment and the disparate impact cases. Make a discovery plan for the case.

Note

Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e, et seq., prohibits discrimination in employment based on a person's race, color, national origin, sex and religion. The ADA, in many respects, was modeled on Title VII and the courts apply Title VII law to the ADA, where it is relevant. In particular, Title VII permits an employee or applicant to prove two different types of discrimination. First, the employee can prove disparate treatment. Proof of disparate treatment requires proof that the covered entity intended to discriminate against the individual because of his or her protected characteristic. A plaintiff who brings a cause of action for disparate treatment is entitled to a jury and, if the party proves intentional discrimination, backpay, frontpay, injunctive and declaratory relief and compensatory and punitive damages may be awarded. Because backpay, frontpay and injunctive and declaratory relief are equitable in nature, the judge decides what backpay and other equitable relief will be granted. The jury determines what damages will be awarded. Damages are capped, however, depending on the size of the employer. See 42 U.S.C. §1981a(a) & (b). Under Title VII, an individual may also prove that the employer uses a neutral practice that creates a disparate impact on a protected group. Disparate impact cases do not require proof of intentional discrimination. Rather, they require proof that the employer uses the particular employment practice and that the practice caused the disparate impact. Once the employee proves the disparate impact, the employer can defeat the suit by demonstrating that the practice is job related and consistent with business necessity. Even if the employer makes this proof, the plaintiff can still prevail if she proves that there are less discriminatory alternatives to the employment practice that the employer refused to adopt.

Like Title VII, the ADA also permits employment discrimination actions based on disparate treatment and disparate impact. The disparate treatment cases, as in Title VII, require a showing of discriminatory intent. The caps for compensatory and punitive damages under 42 U.S.C. §1981a apply expressly to the ADA and the Rehabilitation Act as well as to Title VII. The disparate impact cases, like those brought under Title VII, do not require a showing of discriminatory intent. Recall that *Alexander v. Choate*, excerpted in Chapter 1, established that intentional discrimination is not

always required to find a violation of the Rehabilitation Act. It is also clear that a disparate impact cause of action exists under the ADA. While a plaintiff proving disparate impact may receive equitable relief such as backpay, declaratory and injunctive relief, she is not entitled to damages.

Proving Disparate Treatment under Title VII and the ADA

The courts have created different mechanisms to prove intent in Title VII cases. The most commonly known method is that set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). That case and its progeny set up a three step process for proving intentional discrimination. First, the plaintiff proves a prima facie case by demonstrating in a failure to hire case that: 1) the plaintiff is a member of a protected class; 2) the plaintiff is qualified for the job; 3) the plaintiff applied for the job; and 4) the plaintiff was rejected and a person who is not a member of the protected class was hired or the job remained open after plaintiff's application was rejected. When neither of these situations exists, if sufficient facts exist to create an inference of discrimination, the courts will ordinarily conclude that the plaintiff has made out a prima facie case. Once the plaintiff produces evidence to support a prima facie case, the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse employment action. Once the defendant produces this evidence, the burden of production shifts back to the plaintiff and at this point, the burden of production merges with the plaintiff's ultimate burden of persuasion. The plaintiff must now demonstrate that the defendant's articulated reason is a pretext for discrimination. Ordinarily, the plaintiff can meet this burden by demonstrating that the defendant's articulated reason is either untrue or is not the real reason for the adverse employment action. The courts have adjusted this proof to discharge and failure to promote cases as well.

A second method of proving discriminatory intent under Title VII is to demonstrate that the protected characteristic is a "motivating factor" in the employment decision. Once this proof is made under the 1991 Civil Rights Act, the plaintiff prevails. The employer, however, can limit the remedies by proving that there were other legitimate reasons for the discrimination and because of those legitimate reasons, it would have taken the adverse employment action against the employee even without the illegitimate motivating factor. This method of proof is often called the "mixed motives" proof method. See §703(m) of the 1991 Civil Rights Act.

Courts hold that the *McDonnell Douglas* methodology applies to ADA cases as well as Title VII cases. But this methodology *should be used only when the issue is whether the employer intentionally discriminated against a person with a disability because of the disability*. While the ADA may also use the mixed motives method of proof, it is unclear whether Section 703(m) applies to the ADA, because the 1991 Civil Rights Act does not expressly apply to the ADA. The ADA, however incorporates the "powers, remedies, and procedures" set forth in Title VII. Consequently, a number of courts have found §703(m) applicable to the ADA. See MICHAEL J. ZIMMER, ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 565 (7th ed. 2008). Nonetheless, a recent Supreme Court case, *Gross v. FBL Financial Servs., Inc.*, 129 S. Ct. 2343 (2009), suggests that mixed motives methodology may not be applicable to ADA and Rehabilitation Act cases. *Gross* held that neither the 1991 Act mixed motives method nor the method applied before the 1991 Act applies to age discrimination cases. By analogy, the courts may also decide that ADA plaintiffs may not employ a mixed motives proof method. See e.g., *Lewis v. Humboldt Acquisition Corp*., *Inc*., 681 F.3d 312, 317 (6th Cir. 2012) (holding that the "motivating factor" test does not apply to the ADA). For a description of methods of proving intentional discrimination with examples, see Ann C. McGinley, *Viva la Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J. L. & PUB. POL'Y 415, 447–66 (2000).

Proving Disparate Impact Under Title VII and the ADA

The 1991 Civil Rights Act also codified the disparate impact cause of action in Title VII cases.

Once again, while the 1991 Civil Rights Act does not expressly apply to the ADA, the courts ordinarily conclude that Title VII disparate impact analysis does apply. The ADA itself expressly provides for liability in a disparate impact employment discrimination case. It states that "the term 'discriminate' includes ... using 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).

The following case demonstrates the importance of knowing the difference between disparate treatment and disparate impact causes of action and pleading the proper cause of action.

Raytheon Co. v. Hernandez

540 U.S. 44 (2003)

JUSTICE THOMAS delivered the opinion of the Court.

The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §12101 *et seq.*, makes it unlawful for an employer, with respect to hiring, to "discriminate against a qualified individual with a disability because of the disability of such individual." §12112(a). We are asked to decide in this case whether the ADA confers preferential rehire rights on disabled employees lawfully terminated for violating workplace conduct rules. The United States Court of Appeals for the Ninth Circuit held that an employer's unwritten policy not to rehire employees who left the company for violating personal conduct rules contravenes the ADA, at least as applied to employees who were lawfully forced to resign for illegal drug use but have since been rehabilitated. Because the Ninth Circuit improperly applied a disparate-impact analysis in a disparate-treatment case in order to reach this holding, we vacate its judgment and remand the case for further proceedings consistent with this opinion.

I

Respondent, Joel Hernandez, worked for Hughes Missile Systems for 25 years. On July 11, 1991, respondent's appearance and behavior at work suggested that he might be under the influence of drugs or alcohol. Pursuant to company policy, respondent took a drug test, which came back positive for cocaine. Respondent subsequently admitted that he had been up late drinking beer and using cocaine the night before the test. Because respondent's behavior violated petitioner's workplace conduct rules, respondent was forced to resign. Respondent's "Employee Separation Summary" indicated as the reason for separation: "discharge for personal conduct (quit in lieu of discharge)."

More than two years later, on January 24, 1994, respondent applied to be rehired by petitioner. Respondent stated on his application that he had previously been employed by petitioner. He also attached two reference letters to the application, one from his pastor, stating that respondent was a "faithful and active member" of the church, and the other from an Alcoholics Anonymous counselor, stating that respondent attends Alcoholics Anonymous meetings regularly and is in recovery.

Joanne Bockmiller, an employee in the company's Labor Relations Department, reviewed respondent's application. Bockmiller testified in her deposition that since respondent's application disclosed his prior employment with the company, she pulled his personnel file and reviewed his employee separation summary. She then rejected respondent's application. Bockmiller insisted that the company had a policy against rehiring employees who were terminated for workplace misconduct. Thus, when she reviewed the employment separation summary and found that respondent had been discharged for violating workplace conduct rules, she rejected respondent's application. She testified, in particular, that she did not know that respondent was a former drug addict when she made the employment decision and did not see anything that would constitute a "record of" addiction.

Respondent subsequently filed a charge with the Equal Employment Opportunity Commission

(EEOC). Respondent's charge of discrimination indicated that petitioner did not give him a reason for his nonselection, but that respondent believed he had been discriminated against in violation of the ADA.

Petitioner responded to the charge by submitting a letter to the EEOC, in which George M. Medina, Sr., Manager of Diversity Development, wrote:

> "The ADA specifically exempts from protection individuals currently engaging in the illegal use of drugs when the covered entity acts on the basis of that use. Contrary to Complainant's unfounded allegation, his non-selection for rehire is not based on any legitimate disability. Rather, Complainant's application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation."

This response, together with evidence that the letters submitted with respondent's employment application may have alerted Bockmiller to the reason for respondent's prior termination, led the EEOC to conclude that petitioner may have "rejected [respondent's] application based on his record of past alcohol and drug use." The EEOC thus found that there was "reasonable cause to believe that [respondent] was denied hire to the position of Product Test Specialist because of his disability." The EEOC issued a right-to-sue letter, and respondent subsequently filed this action alleging a violation of the ADA.

Respondent proceeded through discovery on the theory that the company rejected his application because of his record of drug addiction and/or because he was regarded as being a drug addict. In response to petitioner's motion for summary judgment, respondent for the first time argued in the alternative that if the company really did apply a neutral no-rehire policy in his case, petitioner still violated the ADA because such a policy has a disparate impact. The District Court granted petitioner's motion for summary judgment with respect to respondent's disparate-treatment claim. However, the District Court refused to consider respondent's disparate-impact claim because respondent had failed to plead or raise the theory in a timely manner.

The Court of Appeals agreed with the District Court that respondent had failed timely to raise his disparate-impact claim. In addressing respondent's disparate-treatment claim, the Court of Appeals proceeded under the familiar burden-shifting approach first adopted by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).[3] First, the Ninth Circuit found that with respect to respondent's prima facie case of discrimination, there were genuine issues of material fact regarding whether respondent was qualified for the position for which he sought to be rehired, and whether the reason for petitioner's refusal to rehire him was his past record of drug addiction. The Court of Appeals thus held that with respect to respondent's prima facie case of discrimination, respondent had proffered sufficient evidence to preclude a grant of summary judgment.

The Court of Appeals then moved to the next step of *McDonnell Douglas*, where the burden shifts to the defendant to provide a legitimate, nondiscriminatory reason for its employment action. Here, petitioner contends that Bockmiller applied the neutral policy against rehiring employees previously terminated for violating workplace conduct rules and that this neutral company policy constituted a legitimate and nondiscriminatory reason for its decision not to rehire respondent. The Court of Appeals, although admitting that petitioner's no-rehire rule was lawful on its face, held the policy to be unlawful "as applied to former drug addicts whose only work-related offense was testing positive because of their addiction." The Court of Appeals concluded that petitioner's application of a neutral no-rehire policy was not a legitimate, nondiscriminatory reason for rejecting respondent's application:

> "Maintaining a blanket policy against rehire of *all* former employees who violated company policy not only screens out persons with a record of addiction who have been successfully rehabilitated, but may well result, as [petitioner] contends it did here, in the staff member who makes the employment decision remaining unaware of the "disability" and thus of the fact that she is

committing an unlawful act.... Additionally, we hold that a policy that serves to bar the reemployment of a drug addict despite his successful rehabilitation violates the ADA."

In other words, while ostensibly evaluating whether petitioner had proffered a legitimate, nondiscriminatory reason for failing to rehire respondent sufficient to rebut respondent's prima facie showing of disparate treatment, the Court of Appeals held that a neutral no-rehire policy could never suffice in a case where the employee was terminated for illegal drug use, because such a policy has a disparate impact on recovering drug addicts. In so holding, the Court of Appeals erred by conflating the analytical framework for disparate-impact and disparate-treatment claims. Had the Court of Appeals correctly applied the disparate-treatment framework, it would have been obliged to conclude that a neutral no-rehire policy is, by definition, a legitimate, nondiscriminatory reason under the ADA. And thus the only remaining question would be whether respondent could produce sufficient evidence from which a jury could conclude that "petitioner's stated reason for respondent's rejection was in fact pretext."

II

This Court has consistently recognized a distinction between claims of discrimination based on disparate treatment and claims of discrimination based on disparate impact. The Court has said that "'[d]isparate treatment' ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or [other protected characteristic]." Liability in a disparate-treatment case "depends on whether the protected trait ... actually motivated the employer's decision." By contrast, disparate-impact claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." Under a disparate-impact theory of discrimination, "a facially neutral employment practice may be deemed [illegally discriminatory] without evidence of the employer's subjective intent to discriminate that is required in a 'disparate-treatment' case."

Both disparate-treatment and disparate-impact claims are cognizable under the ADA. See 42 U.S.C. §12112(b) (defining "discriminate" to include "utilizing standards, criteria, or methods of administration ... that have the effect of discrimination on the basis of disability" and "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability"). Because "the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes," courts must be careful to distinguish between these theories. Here, respondent did not timely pursue a disparate-impact claim.

Petitioner's proffer of its neutral no-rehire policy plainly satisfied its obligation under *McDonnell Douglas* to provide a legitimate, nondiscriminatory reason for refusing to rehire respondent. Thus, the only relevant question before the Court of Appeals, after petitioner presented a neutral explanation for its decision not to rehire respondent, was whether there was sufficient evidence from which a jury could conclude that petitioner did make its employment decision based on respondent's status as disabled despite petitioner's proffered explanation. Instead, the Court of Appeals concluded that, as a matter of law, a neutral no-rehire policy was not a legitimate, nondiscriminatory reason sufficient to defeat a prima facie case of discrimination. The Court of Appeals did not even attempt, in the remainder of its opinion, to treat this claim as one involving only disparate treatment. Instead, the Court of Appeals observed that petitioner's policy "screens out persons with a record of addiction," and further noted that the company had not raised a business necessity defense, factors that pertain to disparate-impact claims but not disparate-treatment claims. By improperly focusing on these factors, the Court of Appeals ignored the fact that petitioner's no-rehire policy is a quintessential legitimate, nondiscriminatory reason for refusing to rehire an employee who was terminated for violating workplace conduct rules.

The Court of Appeals rejected petitioner's legitimate, nondiscriminatory reason for refusing to rehire respondent because it "serves to bar the re-employment of a drug addict despite his successful rehabilitation." We hold that such an analysis is inapplicable to a disparate-treatment claim. Once respondent had made a prima facie showing of discrimination, the next question for the Court of Appeals was whether petitioner offered a legitimate, nondiscriminatory reason for its actions so as to demonstrate that its actions were not motivated by respondent's disability. To the extent that the Court of Appeals strayed from this task by considering not only discriminatory intent but also discriminatory impact, we vacate its judgment and remand the case for further proceedings consistent with this opinion.

Notes and Questions

1. This case was remanded to the lower court to determine whether there was a genuine issue of material fact concerning whether the employer intentionally refused to rehire the plaintiff because of his disability. On remand, the Ninth Circuit held that there were genuine issues of material fact as to whether the employer had refused to re-hire the plaintiff because of his status as an alcoholic rather than in reliance upon a neutral no-rehire policy. 362 F.3d 564 (9th Cir. 2004).

2. *Raytheon* did not reach the question of whether a no-rehire policy creates a disparate impact on persons with disabilities. How should the plaintiff's lawyer argue that such a policy does create a disparate impact on persons with disabilities? Assuming that it creates a disparate impact, the employer may still escape liability if it can prove that the policy is job related and consistent with business necessity. Plaintiff worked for Hughes Missile Systems, a company that made defense air missiles, as a Calibration Service Technician. 298 F.3d 1030 (9th Cir. 2002). Raytheon Company subsequently acquired Hughes. Given this information, what arguments should the defendant make concerning job-relatedness and business necessity? How should plaintiff's counsel respond to these arguments?

3. *Wellness Programs:* To reduce health benefits costs, many companies have recognized the value of preventive medicine and have implemented a variety of "wellness" programs to encourage good health. These programs take the forms of exercise equipment and incentives for participating in exercise and other "good health" type programming. To what extent could such programs be challenged as violative of the ADA? Suppose employees are given cash bonuses if they lose weight, stop smoking, or lower their cholesterol levels?

What about reduced insurance premiums as an incentive to participate in a wellness program? What if the reduction required the employee to provide and update health related information? What assurance should the employee seek that this information would remain confidential and not be used as the basis for discrimination?

On May 17, 2016, EEOC issues final rules regarding wellness programs, applicable by January 1, 2017. The regulations clarify what is considered a "voluntary" program, allows limited incentives to answering disability-related questions or medical exams as part of wellness programs, requires notice about how medical information will be obtained and used, allows employers only to receive aggregated (not individually identifiable) information, and prohibits employers from requiring employees to allow this information to be sold or exchanged. In addition, there is clarification about how spousal information can be used. See, e.g., https://www.federalregister.gov/agencies/equal-employment-opportunity-commission.

4. *Employment Benefits.* Employer subsidized health insurance is the primary means by which people in the United States receive health care. Individual insurance policies are often quite expensive, and before passage of the Affordable Care Act ("ACA" or "Obamacare"), individuals with preexisting conditions were often denied coverage for individual policies. For this reason, access to health insurance benefits is an important issue in employment discrimination cases. Chapter 9

addresses health insurance issues generally. Chapter 4 also includes cases involving insurance benefits. It should be noted here, however, that in 2000, the EEOC issued guidance on employer provided health benefits. EEOC Compliance Manual Section 627 (2000). The guidance covers distinctions in health benefit plans and how actuarial principles are to be used in setting benefits. One of the most controversial issues is the differential benefits provided for physical disabilities and mental disabilities. Most courts have upheld these differentials as being permissible under the ADA. *See* LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW Ch. 10 (2012 and cumulative supplements). The Mental Health Parity and Addiction Act applies to group insurance offered by employers, and mandates that if employer's insurance grants mental health benefits, there must be equality in coverage and costs. See *infra*, Section [I][5]. For an outline of how the Act relates to the ACA, see Chapter 9.

5. *Differential Coverage.* Under Section 501 of the ADA, insurers or other medical service providers may offer differential coverage for different health conditions based on medical risks. 42 U.S.C. §12201(c). The EEOC issued enforcement guidance in 2000.

6. Would it violate the ADA to give smaller payouts for accrued, unused sick leave to employees who retired on the basis of disability than for those who retired on some other basis? See *Felde v. City of San Jose*, 839 F. Supp. 708 (N.D. Cal. 1994).

E. Qualifications

Under the ADA, employers are free to establish "qualification standards" for jobs. As interpreted by the EEOC, "qualification standards" means:

> the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.

29 C.F.R. §1630.2(q).

This issue was previously discussed in the context of hiring. This section focuses primarily on employees already in the work setting who either become unable to do the job or who are found to be unable to do the job after being hired as qualified.

[1] Fundamental and Essential Functions

"Essential functions" under the ADA mean "the fundamental job duties of the employment position of the individual with a disability.... [It] does not include marginal functions of the position." 29 C.F.R. §1630.2(n)(1).

Job functions are considered essential for reasons such as the following: the position exists for the performance of that function, there are a limited number of employees available among whom the job function can be distributed, and/or it is highly specialized, and the person has been hired because of the expertise to perform the function. 29 C.F.R. §1630.2(n)(2).

Evidence of whether something is an essential function includes factors such as employer's judgment, written job descriptions prepared in advance of hiring, amount of time performing the function, consequences of not requiring the employee to perform the function, collective bargaining agreement terms, and work experience of previous employees in that position. 29 C.F.R. §1630.2(n)(3).

The cases in this section do not all address each of these issues. Some of the cases involve Rehabilitation Act claims, rather than ADA claims, but the standards applied on these issues are generally the same.

[a] Attendance Requirements

Tyndall v. National Education Centers

31 F.3d 209 (4th Cir. 1994)

WILKINSON, CIRCUIT JUDGE:

Plaintiff Mary Tyndall suffers from lupus erythematosus, an autoimmune system disorder that causes joint pain and inflammation, fatigue, and urinary and intestinal disorders. In 1989, Tyndall enrolled in a career training program in medical assisting at the Kee Business College Campus ("Kee"), a school in Richmond, Virginia owned by defendant National Education Centers ("NEC"). Tyndall successfully completed her coursework in January 1990. At that time, Dale Seay, the head of Kee's Allied Health Department, hired Tyndall as a parttime instructor in the medical assisting program. Seay and the other Kee staff members knew of Tyndall's disability when she was hired.

During Tyndall's tenure at Kee, the school made every effort to accommodate her lupus condition. Kee permitted Tyndall to take sick leave, to come into work late or leave early, and to take breaks from ongoing classes whenever she felt ill. If Tyndall became ill during the work day, Seay and other colleagues would accompany her to the rest room to help her, and would offer her a ride home. Indeed, Tyndall admitted that she never made a request for accommodation of her lupus condition that Kee refused.

In 1992, Tyndall began missing work with increasing frequency. From January until July 15, 1992, she missed nineteen days of work: one day to help a friend with legal work, ten days because of her lupus condition, and eight days to take care of her son, Kevin, who suffered from gastro-esophageal reflux disease. Kee approved each of those absences. However, Seay mentioned in a meeting with Tyndall that she had been missing a lot of work.

In mid-July, Tyndall submitted a request for a leave of absence from July 23 to August 17, 1992, because her son was undergoing surgery in Birmingham, Alabama. Again, Kee approved the leave of absence. On August 10, after returning home from Birmingham, Tyndall called Seay to confirm that she would return to work on August 17 as scheduled. However, she informed Seay that she would need to take off more time in order to take care of her son's post-operative problems. Seay responded by asking Tyndall to meet with her and Zoe Thompson, the Executive Director of Kee, regarding the additional leave of absence. That meeting took place on August 12.

At the meeting, Tyndall stated that she could teach for a week beginning August 17 before taking more time off to accompany her son on a post-operative trip to Birmingham. Tyndall said she was not sure how long she would be gone on that trip. Seay told Tyndall that she could return to work on August 17 as scheduled and continue to work, but that she could not take additional time off. Seay explained that the additional leave of absence would cause Tyndall to miss the beginning of an instructional cycle for the third time in a row. Because students in Tyndall's classes and teachers who had to work overtime to cover her classes had complained about her absences, Seay was concerned that another absence would further disrupt the operations of the school. When Tyndall insisted that she had to take her son to Birmingham, Seay suggested that Tyndall resign because of everything that was going on in her life. Seay prepared a report explaining that the separation was "mutual," and Tyndall signed it. Before Tyndall left the meeting, Thompson encouraged her to apply to Kee for re-employment when she was ready to return to work.

[Lower court proceedings omitted.]

II.

Tyndall first challenges her termination under the Americans with Disabilities Act. In order to establish a violation of this section, three criteria must be met: first, Tyndall must have a "disability"; second, Tyndall must be "qualified" for the job; and third, Kee's termination of Tyndall must

constitute an unlawful "discrimination" based on her disability. Because it is undisputed that Tyndall's lupus condition constituted a "disability" under the ADA, we need address only the latter two elements.

A.

Under the ADA, only persons who are "qualified" for the job in question may state a claim for discrimination. The ADA defines "qualified individual with a disability" as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C. §12111(8). The Supreme Court has interpreted this provision to mean that a "qualified" person must be "able to meet all of a program's requirements in spite of his handicap." Accordingly, to determine whether Tyndall was qualified for the teaching position, we must decide (1) whether she could "perform the essential functions of the job, i.e., functions that bear more than a marginal relationship to the job at issue," and (2) if not, whether "any reasonable accommodation by the employer would enable [her] to perform those functions." Plaintiff bears the burden of demonstrating that she could perform the essential functions of her job with reasonable accommodation.

Tyndall contends that she was qualified for her job because she could perform all of her teaching duties and received "excellent" and "good" performance evaluations at Kee. We agree, and NEC does not dispute, that the quality of Tyndall's performance when she was working was more than adequate. However, an evaluation of the quality of Tyndall's performance does not end our inquiry. In addition to possessing the skills necessary to perform the job in question, an employee must be willing and able to demonstrate these skills by coming to work on a regular basis. Except in the unusual case where an employee can effectively perform all work-related duties at home, an employee "who does not come to work cannot perform any of his job functions, essential or otherwise." Therefore, a regular and reliable level of attendance is a necessary element of most jobs. An employee who cannot meet the attendance requirements of the job at issue cannot be considered a "qualified" individual protected by the ADA.

Here, Tyndall held a job that could not be performed away from the Kee campus; her position required that she teach the assigned courses during the scheduled class times and spend time with her students. Despite this obvious need for regular attendance, Tyndall missed almost forty days of work during a seven-month period. Moreover, she missed the beginning of an instructional cycle twice in a row and requested permission to be absent for yet a third time, even though the start of an instructional period is a crucial time for Kee's operations. Accordingly, regardless of the fact that she possessed the necessary teaching skills and performed well when she was at work, Tyndall's frequent absences rendered her unable to function effectively as a teacher.

Furthermore, Kee's extensive accommodations of Tyndall's lupus condition did not improve her attendance level. From the beginning of Tyndall's tenure at Kee, Seay permitted her to take sick leave, come into work late, leave early, and take mid-class breaks when necessary to alleviate her condition. Despite the numerous attempts to assist her, Tyndall continued to miss an excessive number of days from work. Indeed, Kee's accommodations of Tyndall's disability could not have significantly improved Tyndall's attendance level, as a majority of her absences were not related to her own disability. Rather, they were caused by her personal need to tend to her son's disability, which an employer is not obligated to accommodate through scheduling modifications. See 29 C.F.R. §1630, App. ("[A]n employee would not be entitled to a modified work schedule as an accommodation to enable the employee to care for [a family member] with a disability."). Because Tyndall's attendance problems rendered her unable to fulfill the essential functions of her job, and because these problems occurred even with Kee's more than reasonable accommodations for her own disability, we hold that she was not a "qualified individual with a disability," as required by §12112(a) of the ADA.

B.

Even if Tyndall were a "qualified" employee covered by the ADA, she nonetheless could not recover under the Act because she has failed to show that Kee in any way discriminated against her. Tyndall alleges that Kee discriminated against her in two different ways, but neither of her claims has merit.

First, Tyndall contends that Kee's termination constituted discrimination based on her association with her disabled son. The ADA prohibits employers from taking adverse employment action "because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 42 U.S.C. §12112(b)(4). More specifically, the Interpretive Guidelines to the ADA provide that an employer may not make decisions based on the "belie[f] that the [employee] would have to miss work" in order to take care of a disabled person. Tyndall contends that Seay's decision to terminate her stemmed from the assumption that Tyndall would have to take additional time off in order to take care of her disabled son, Kevin.

We find no merit in this argument. Seay did not make an unfounded assumption that Tyndall would have to miss work to take care of Kevin. Rather, Seay responded to Tyndall's record of extended absences in connection with Kevin's care and her actual statement that she would, in fact, have to miss additional work in order to be with her son. It is undisputed that when Seay informed Tyndall she could not take another leave of absence at the start of an instructional cycle, Tyndall replied that she had to take Kevin back to Birmingham for post-operative treatment. The ADA does not require an employer to restructure an employee's work schedule to enable the employee to care for a relative with a disability. Because Tyndall's termination was not based on any assumption regarding future absences related to Kevin's care, but instead resulted from her record of past absences and her clear indication that she needed additional time off, we hold that Kee's actions did not constitute discrimination based on Tyndall's association with a disabled individual.

Second, Tyndall maintains that even if Kee did not discriminate against her based on her association with her son, Kee's termination violated §12112(b)(5)(B), which prohibits employers from taking adverse employment action "based on the need of [the employer] to make reasonable accommodation to the physical or mental impairments of the employee or applicant." 42 U.S.C. §12112(b)(5)(B). In evaluating Tyndall's claim that her disability was a motivating factor for her termination, we must focus on the undisputed fact that Seay, the person responsible for terminating Tyndall, is the same person who hired Tyndall with full knowledge of her disability. At least two other circuits have taken [the view that] employees who were discharged by the same person who had earlier hired or promoted them were not victims of age discrimination.

Here, Seay not only hired Tyndall, but actively encouraged her to apply for the teaching position at Kee, despite having full knowledge of her lupus condition. Seay fully accommodated Tyndall's disability during her employment with Kee, and discharged Tyndall only when informed that she had to take an indefinite amount of time off just a week after returning from a leave of absence nearly a month long. These undisputed facts create a strong inference that Tyndall's termination was not motivated by bias against disabled workers or by a desire to avoid making reasonable accommodations for Tyndall's disability.

Viewed against this strong presumption of nondiscrimination, Tyndall's evidence is plainly inadequate to establish that discrimination motivated her termination. Tyndall relies on three pieces of evidence to argue that considerations of her disability played a role in Kee's decision: (1) after Tyndall returned from a sick leave in July, Seay warned Tyndall that she was missing a lot of time from work; (2) at the August 12 meeting at which Tyndall was terminated, Seay commented that Tyndall "didn't sound too great" and asked if she was doing okay; and (3) at the same meeting, Thompson told Tyndall that her health and the health of her family seemed more important than her job. Far from disclosing discriminatory motive, however, these statements are unexceptional remarks regarding Tyndall's work performance or general welfare. Seay's comment about Tyndall "not sounding great,"

for example, was prompted by Tyndall's cold symptoms, not by her disability. More basically, an employer must feel free to explore workplace problems with an employee without fear of making actionable statements at every turn. The civil rights laws prohibit discrimination, not discussion. The ADA does not discontinue the dialogue on problems such as substandard job performance or absence from work.

[Discussion of state discrimination claim omitted.]

For the foregoing reasons, the judgment of the district court is Affirmed.

Notes and Questions

1. In *Tyndall*, the employee had lupus and other health conditions. The court stated that "it is undisputed that Tyndall's lupus condition constituted a 'disability.'" See LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §4.9 *Orthopedic and Mobility Impairments* (2012 and cumulative supplement). Is lupus likely to be found to be a disability under the ADAAA?

2. *Application of Family and Medical Leave Act:* The court notes that the employer has no obligation to accommodate an employee's needs to care for a family member. This case was decided before the Family and Medical Leave Act (FMLA), 29 U.S.C. §§2601–2654, was passed in 1993. The FMLA requires employers with 50 or more employees to provide up to 12 weeks of unpaid leave to care for an immediate family member with a serious health condition and for several other family and medical reasons. Would this statute have had any impact on the decision in the *Tyndall* case?

3. *Job Reassignment and Other Accommodations in Response to Attendance Requirements:* The *Tyndall* decision demonstrates the issue of attendance as a legitimate requirement for employment. In *Carr v. Reno*, 23 F.3d 525 (D.C. Cir. 1994), the employee had an ear disability causing periodic dizziness, nausea, and vomiting. Ms. Carr worked for the Department of Justice as a data transcriber on a flexible schedule. Although she performed her work satisfactorily, she began missing a great deal of work, and because her dizzy spells were unpredictable, she was often unable to call in to advise her employer. She accumulated an extensive number of hours (477 hours in her first seven months of work) of leave. The Department attempted to accommodate her by providing a sofa in a nearby office, but this did not help. The court noted that:

> If the Office falls behind in [its data transcribing], it must expend considerable resources to catch up. When Ms. Carr, without advance warning or prompt explanation, did not show up for work, the Office was forced to rely on a single clerk because it could not know when a replacement (assuming one could be found) would be needed.

Ms. Carr failed to produce a detailed doctor's report in response to the employer's request for documentation. When at one point she was allowed to work on her own schedule, she received an "outstanding" performance rating, but she still did not put in an eight-hour day. After over four years of poor attendance, she was discharged.

In response to her challenges under Sections 501 and 504 of the Rehabilitation Act, the court noted the following requirements under the Rehabilitation Act:

[T]he "model employer" standard requires that:

> (1) An agency shall make reasonable accommodation to the known physical or mental limitations of an applicant or employee who is a qualified individual with handicaps unless the agency can demonstrate that the accommodation would impose an undue hardship on the operations of its program.
>
> (2) Reasonable accommodation may include, but shall not be limited to:
>
> (i) Making facilities readily accessible to and usable by individuals with handicaps; and
>
> (ii) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of

readers and interpreters, and other similar actions.

29 C.F.R §1614.203(c).

Currently, the model employer requirement appears at 29 C.F.R. §1614.203(a), and the standards are those set forth in the EEOC's ADA regulations at 29 C.F.R. part 1630. See 29 C.F.R. §1614.203.

The court addressed the question of "whether any reasonable accommodation would have allowed Ms. Carr to perform all the essential functions of her job without creating an undue hardship for the agency."

> Ms. Carr asked for the following accommodation: a flexible arrival time (between 8:00 a.m. and noon); release from the requirement of continually providing doctors' reports; and job restructuring to ensure that the time-sensitive portions of her job were taken care of when she was unable to attend. But the district court considered this an unsatisfactory solution. Because of Ms. Carr's erratic (at best) attendance record and her inability to inform the Office when she could not attend, the court found that the U.S. Attorney's Office could not function normally without having others do her work on a daily basis. The U.S. Attorney's Office has demonstrated that its 4:00 p.m. deadline renders a flexible schedule an undue hardship. Its chosen accommodation, to allow Ms. Carr as-needed access to the health unit and to a sofa in a nearby office, did not result in improved attendance. As for giving Ms. Carr a flexible schedule, the court noted, even for the short period in 1986 when this was tried Ms. Carr could not work a full eight-hour day. With or without reasonable accommodation, then, she could not perform the "essential function" of coming to work regularly.
>
> We are reminded that section 501 demands a great deal from federal employers in the way of accommodation. Indeed, in appropriate cases, that section requires an agency to consider work at home, as well as reassignment in another position, as potential forms of accommodation. But under the facts of this case the U.S. Attorney's Office properly rejected these options. Ms. Carr concedes that she could not work as a Coding Clerk at home, as the job involves tight 4:00 p.m. deadlines. Even if a job could be found for her that allowed her to work at home, there is no reason to think her periodic dizziness and nausea would allow her to work regular hours on a consistent basis.
>
> Although reassignment in another job may be one form of reasonable accommodation, and the regulations specifically provide that "job restructuring" or "part-time or modified work schedules" should be considered, 29 C.F.R. §1614.203(b)(2), the district court held that Ms. Carr's attendance was so erratic as to make her unqualified for any position. We agree with the proposition that an essential function of any government job is an ability to appear for work (whether in the workplace or, in the unusual case, at home) and to complete assigned tasks within a reasonable period of time. Ms. Carr's record demonstrates that the Office could not count on her to fulfill these minimum expectations. If it is unreasonable to ask the Office to continue to put up with Ms. Carr's poor attendance, it is equally unreasonable to require the Office to refer an unqualified employee to another government agency for employment.

4. *Other Cases Involving Attendance: Jackson v. Veterans Admin.*, 22 F.3d 277 (11th Cir. 1994), involved a housekeeping aide with rheumatoid arthritis whose condition resulted in excessive and unpredictable absences. Although he performed his custodial tasks satisfactorily while he was at work, the employer argued that his "presence on a routine basis is also an essential element of the job that he has failed to satisfy." The court agreed, and found that:

> [u]nlike other jobs that can be performed off site or deferred until a later day, the tasks of a housekeeping aide by their very nature must be performed daily at a specific location....

The heart of the problem was the "unpredictable nature" of the absences which would unduly burden the employer to accommodate.

Guice-Mills v. Derwinski, 967 F.2d 794 (2d Cir. 1992), involved a head nurse at a Veterans Administration hospital. The complainant's position was an administrative one, with job duties such as participating in major administrative activities concerning her unit, meetings near the beginning of

her shift, and reviewing and modifying scheduling for patient care. The court noted that "the hospital's standard requirement is that a head nurse be present and fulfill the prescribed tasks during the designated administrative shift" and to work different shifts and cover more than one unit if other head nurses are absent.

When she requested a number of accommodations to her position as head nurse related to scheduling, including being able to arrive late, she was denied this request. The court agreed with the district court's finding that: "[A]n administrative work week tour of duty was a critical requirement for the position of Head Nurse at the Hospital." Testimony at trial had indicated that "an administrative shift commencing at 7:30 or 8:00 a.m. was an essential requirement of the head nurse position."

> The fact that occasional exceptions were made to the shift requirements does not undermine the district court's finding that compelling the hospital to place appellant permanently in a head nurse position with a 10:00 a.m. starting time would affect the services offered by the hospital to patients in the particular unit and thus constitute an undue burden. Because Guice-Mills' ailments prevented her from fulfilling the justified requirements of a head nurse position, she was not "otherwise qualified" for that position.
>
> Moreover, with regard to an offer of reasonable accommodation, the hospital offered Guice-Mills a position as a staff nurse with the hours requested and with no reduction in remuneration. In addition to making changes in job requirements that do not create undue hardship for the employer, an employer may reassign the handicapped employee as a "reasonable accommodation." When an employer offers an employee an alternative position that does not require a significant reduction in pay and benefits, that offer is a "reasonable accommodation" virtually as a matter of law. Accordingly, the offer of a staff nurse position—a position at the requested hours, for which appellant was qualified by training and experience, without loss of grade or salary—constituted a "reasonable accommodation."

In *Mason v. Avaya Communications*, Inc., 357 F.3d 1114 (10th Cir. 2004), the plaintiff, who suffered from post traumatic stress disorder, requested for the right to work at home after a coworker pulled a knife on another coworker and threatened her. The court discussed whether being present was an essential function of the job:

> According to Avaya, Mason's physical attendance at the center is an essential function of the service coordination position because the low-level hourly position is administrative in nature and requires supervision. Furthermore, a service coordinator's duties require teamwork. Consistent with 29 C.F.R. §1630.2(n)(3), Avaya presented evidence to the district court demonstrating four of the evidentiary factors set forth by the EEOC regulations. Specifically, Avaya presented evidence that (1) it considers attendance at the administration center, supervision, and teamwork as essential functions of the service coordinator position, (2) all of its service coordinators work their entire shift at the administration centers, (3) it has never permitted a service coordinator to work anywhere other than an administration center, and (4) service coordinators cannot be adequately trained or supervised if they are not at the administration center.
>
> Mason responds that her physical attendance at the administration center was not an essential function of the service coordinator position because she can perform all of the essential functions of the job at home using a computer, telephone, and fax machine. In support of her argument, Mason relies on her own firsthand experience[.]
>
> Assuming Avaya had the technology to permit Mason to work from home, Avaya established it still could not adequately supervise Mason if she was at home. Although Avaya could tell if Mason was logged into her computer, Avaya's supervisors would not be able to ascertain what she was doing while logged into the computer. Mason could, for example, engage in any number of non-work related activities while logged into her computer without Avaya's knowledge. The EEOC regulations recognize that "the inquiry into essential functions is not intended to second guess an

employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards." See 29 C.F.R. §1630 App. at 356. At a time when employers are justifiably concerned with productivity at the workplace, we are in no position to second guess Avaya's desire to directly supervise its lower level employees.

Similarly, Avaya presented significant evidence demonstrating teamwork is an essential function of the service coordinator position because the coordinators typically assist and cover for one another in a job even Mason described as "very hectic."

Mason's own testimony that she could perform the essential functions of the service coordinator position from home is insufficient under Fed. R. Civ. P. 56(c) to create a "genuine" issue of material fact concerning the essential functions of the service coordinator position. [T]he only evidence Mason proffered in support of her argument that she could perform the essential functions of her job from home, other than her own self-serving testimony, was the absence of attendance, supervision, and teamwork from the service coordinator job description. We are not persuaded the absence of those functions from the job description demonstrates those functions were non-essential. [W]e find the omission of physical attendance, teamwork, and supervision from the job description entirely unremarkable. In cases arising under the ADA, we do not sit as "as a 'super personnel department' that second guesses employers' business judgments."

Additional cases involving attendance as a job requirement can be found at LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §4.11 (2012 and cumulative supplement).

In the following case, the court takes a different view of whether an employer should be required under the ADA to permit an employee to work at home. Consider the differences between this and the previous case.

Humphrey v. Memorial Hospitals Association

239 F.3d 1128 (9th Cir. 2001)

REINHARDT, CIRCUIT JUDGE:

Carolyn Humphrey brought suit against her former employer, Memorial Hospitals Association (MHA), under the Americans with Disabilities Act (ADA) for failure to reasonably accommodate her disability and wrongful termination. We reverse the district court's grant of summary judgment in favor of MHA.

I. BACKGROUND

Humphrey worked for MHA as a medical transcriptionist from 1986 until her termination in 1995. Throughout her employment at MHA, Humphrey's transcription performance was excellent and consistently exceeded MHA's standards for speed, accuracy, and productivity.

In 1989, Humphrey began to experience problems getting to work on time, or at all. She engaged in a series of obsessive rituals that hindered her ability to arrive at work on time. She felt compelled to rinse her hair for up to an hour, and if, after brushing her hair, it didn't "feel right," she would return to the shower to wash it again. This process of washing and preparing her hair could take up to three hours. She would also feel compelled to dress very slowly, to repeatedly check and recheck for papers she needed, and to pull out strands of her hair and examine them closely because she felt as though something was crawling on her scalp. She testified that these obsessive thoughts and rituals made it very difficult to get to work on time. Once she realized that she was late, she would panic and become embarrassed, making it even more difficult for her to leave her house and get to work.

Due to Humphrey's difficulties with tardiness and absenteeism, MHA gave her a "Level I" disciplinary warning in June 1994. This warning required her to call her supervisor before the time she was due to be at work if she was going to be late or absent. Humphrey's mental obsessions and

peculiar rituals only grew worse after the warning, and her attendance record did not improve; nor did her call-in rate. In December 1994, she received a "Level III" warning, which documented four tardy days and one unreported absence over a two week period.

When MHA gave Humphrey the Level III warning, she was told that she was expected to schedule and keep counseling appointments with the Employee Assistance Program (EAP). This counseling consisted of "tips," helpful hints such as getting up earlier and laying out clothes the night before. Humphrey found this somewhat helpful and attended several sessions, but her efforts to follow the "tips" were not particularly successful. In May, 1995, she asked MHA's EAP nurse, Elizabeth Pierson, if she could see a psychiatrist for an evaluation. Pierson agreed, and set up an appointment for a diagnostic evaluation and psychological testing with Dr. John Jacisin. MHA paid for the consultation through its EAP program.

Humphrey first saw Dr. Jacisin on May 12, 1995. Dr. Jacisin diagnosed her with obsessive compulsive disorder (OCD).[2] He sent a letter explaining that diagnosis to Pierson on May 18, 1995, telling her that Humphrey's OCD "is directly contributing to her problems with lateness." In addition, the letter stated:

> I believe that we can treat this, although, the treatment may take a while. I do believe that she would qualify under the Americans with Disability Act, although, I would like to see her continue to work, but if it is proving to be a major personnel problem, she may have to take some time off until we can get the symptoms better under control.

Humphrey sought treatment from Dr. Jacisin and from a psychologist, Dr. Litynsky. Dr. Litynsky, like Dr. Jacisin, diagnosed Humphrey with OCD and concluded that it was probable that the OCD caused her absenteeism and tardiness.

Humphrey had difficulty paying for the necessary services, however, because her insurance did not cover the treatment. In addition, due to the severe symptoms of her ailment, Humphrey had great difficulty showing up for appointments. Both doctors considered her inconsistency in treatment in 1995 and 1996 to be the result of the disorder as well as her financial problems.

On June 7, 1995, Humphrey met with Pierson and Humphrey's supervisor, Carol Evans-Bowlsby, to review Dr. Jacisin's letter. What happened at this meeting is disputed. MHA contends that Humphrey rejected the leave of absence alluded to in the doctor's letter. Humphrey says that she was never offered a leave of absence and never rejected one. Instead, she testified that "they asked if I would like to keep working. And I said yes." She did not remember anyone using the term "leave of absence." (As it turns out, this factual dispute is not material to our ruling on appeal.)

Humphrey did want to try to keep working, if possible, and Pierson offered a flexible start-time arrangement in which Humphrey could begin work any time within a 24 hour period on days on which she was scheduled to work. A few days later, Humphrey sent Pierson a letter accepting the flexible start time arrangement, and saying that she "would still do my best to be at my work station at the earliest possible hour."

Nevertheless, Humphrey continued to miss work. It is disputed whether Humphrey's supervisor warned her about her conduct during the remainder of that summer. It is undisputed, however, that no one from MHA broached the subject of modifying the accommodation during that period. On September 18, 1995, Humphrey, upset about her continuing problems, sent Pierson an e-mail message asking for a new accommodation because the then-current one seemed to be failing:

> Dear Liz:
>
> It has now been a few months since I sent you a memo regarding how my disability would best be accommodated as far as my job performance. I have since come to the conclusion that I would be able to put in considerable more hours [sic] and be much more productive if I were able to work from my home as a lot of other transcriptionists are doing.... I think this would be the ideal way to

accommodate my diagnosed disability.

MHA allows certain medical transcriptionists to work out of their homes. Dr. Jacisin was not asked by anyone at MHA for his opinion on the work-at-home request. After Humphrey's termination, Jacisin said that working at home "might accommodate some of her work issues" but might be "anti-therapeutic." He testified, in his deposition in this lawsuit, that he felt working at home was an accommodation which would have been worth trying because it was necessary for Humphrey to earn money and increase her self-confidence.

In any event, Humphrey's request was summarily denied. [Pierson wrote:]

> It is departmental policy that if you are involved in any disciplinary action you are ineligible to be a home based transcriptionist as per the AT HOME ARRANGEMENT FOR TRANSCRIPTIONISTS. Since you are currently involved in the discipline process, you are ineligible for being based at home. During our 6/7/95 meeting, you requested to be accommodated for your disability by having a flexible start time, stating that you would have no problems staying for a full shift once you arrived. You were given this flexible start time accommodation which continues to remain in effect. As for your productivity, your manager indicated that you consistently meet your hourly productivity requirements when you are at work.

Pierson's comment regarding Humphrey's productivity at work was typical of Humphrey's performance evaluations, which recognized her high level of competence but were tarnished by the problems caused by her disability.

Humphrey's evaluation indicates that were it not for her ailment, she would have been a model employee. The only negative ratings she received were in relation to the problems caused by the interference of her symptoms and the accommodation of flexible start time. Her evaluation stated that her recent unscheduled absences were "unacceptable," and advised that correcting her attendance problem was "a major goal for the upcoming year." During a meeting with her supervisor, Julie Vieira, to discuss her evaluation, Humphrey again raised the issue of working at home, but was told that she would have to be free of attendance problems for a year before she could be considered for an at-home transcriptionist position. Neither Humphrey nor her supervisor suggested a medical leave of absence at this meeting.

Humphrey was absent two more times, and on October 10, 1995, Vieira fired her. MHA's stated reason for the termination was Humphrey's history of tardiness and absenteeism. Humphrey testified that after learning of her termination, she went across the hall to Pierson's office and asked if she might take a leave of absence instead of lose her job, but that Pierson refused and told her that she had had her chance at accommodation. Pierson denies that Humphrey requested a leave of absence on the day of her discharge. MHA concedes that it would have granted the request if Humphrey had asked for a leave of absence prior to her termination, as MHA had a policy of permitting medical leaves of absence to employees with disabilities.

On September 6, 1996, Humphrey brought suit against MHA for violation of the ADA. The district court granted MHA's motion for summary judgment on the theory that MHA had satisfied its duty to reasonably accommodate Humphrey's disability.

II. DISCUSSION

Humphrey contends that MHA violated the ADA by failing to reasonably accommodate her disability and by terminating her because of that disability. The ADA provides that "no covered entity shall discriminate against a qualified individual with a disability because of the disability...." 42 U.S.C. §12112(a). Title I of the ADA insures full opportunities for people with disabilities in the workplace by requiring reasonable accommodation of employees' disabilities by their employers. Under the ADA, the term "discriminate" is defined as including "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with

a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. §12112(b)(5)(A). To prevail on a claim of unlawful discharge under the ADA, the plaintiff must establish that he is a qualified individual with a disability and that the employer terminated him because of his disability. The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. §12111(8). A "disability" is "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. §12102(2)(a).

A. QUALIFIED INDIVIDUAL WITH A DISABILITY

Because the district court granted summary judgment to MHA on the ground that it reasonably accommodated Humphrey, the court did not address whether Humphrey is a qualified individual with a disability.

MHA ... argues that Humphrey was not "qualified" for the medical transcriptionist position within the meaning of the ADA. A qualified individual is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. §12111(8). It is undisputed that Humphrey had the skills, training, and experience to transcribe medical records. MHA contends that Humphrey's inability to show up for work and to notify her employer when she would be absent renders her not otherwise qualified under the ADA because regular and predictable attendance is an essential function of the position. However, Humphrey is a "qualified individual" under the ADA so long as she is able to perform the essential functions of her job "with or without reasonable accommodation." 42 U.S.C. §12111(8). Either of two potential reasonable accommodations might have made it possible for Humphrey to perform the essential functions of her job: granting her a leave of absence or allowing her to become a "home-based transcriptionist."

A leave of absence for medical treatment may be a reasonable accommodation under the ADA. See 29 C.F.R. 1630 app. §1630.2(o). We have held that where a leave of absence would reasonably accommodate an employee's disability and permit him, upon his return, to perform the essential functions of the job, that employee is otherwise qualified under the ADA. MHA contends that Humphrey is not otherwise qualified because the results of the leave of absence were speculative. However, the ADA does not require an employee to show that a leave of absence is certain or even likely to be successful to prove that it is a reasonable accommodation.

The statements in Dr. Jacisin's letter that Humphrey's condition was treatable and that "she may have to take some time off until we can get the symptoms better under control" are sufficient to satisfy the minimal requirement that a leave of absence could plausibly have enabled Humphrey adequately to perform her job. We discuss in Section C below MHA's contention that it was not required to offer Humphrey a leave of absence or other accommodation unless she specifically requested it.

There is another reasonable accommodation that could also serve to render Humphrey a "qualified individual." There is at least a triable issue of fact as to whether Humphrey would have been able to perform the essential duties of her job with the accommodation of a work-at-home position. Working at home is a reasonable accommodation when the essential functions of the position can be performed at home and a work-at-home arrangement would not cause undue hardship for the employer. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, FEP (BNA) 405:7601, at 7626 (March 1, 1999) [hereinafter EEOC Enforcement Guidance on Reasonable Accommodation]. Humphrey does not dispute that regular and predictable performance of the job is an essential part of the transcriptionist position because many of the medical records must be transcribed within twenty-four hours, and frequent and unscheduled absences would

prevent the department from meeting its deadlines. However, physical attendance at the MHA offices is not an essential job duty; in fact, the record makes it clear that MHA permits some of its medical transcriptionists to work at home.

MHA denied Humphrey's application for a work-at-home position because of her disciplinary record, which consisted of Level I and Level III warnings for tardiness and absenteeism prior to her diagnosis of OCD. It would be inconsistent with the purposes of the ADA to permit an employer to deny an otherwise reasonable accommodation because of past disciplinary action taken due to the disability sought to be accommodated. Thus, Humphrey's disciplinary record does not constitute an appropriate basis for denying her a work-at-home accommodation.

Although Dr. Jacisin was less optimistic about Humphrey's working at home than he was about a leave of absence, Humphrey has submitted sufficient evidence to raise an issue of fact as to whether she could perform the job with the accommodation of a work-at-home position. She testified that her ailment interfered primarily with her ability to leave her house in the morning. Dr. Jacisin stated that working at home "might accommodate some of her work issues," and later testified that he felt working at home would have been worth trying because "her OCD really didn't interfere necessarily with her ability to do the work, that is to actually do the typing and transcription." A reasonable jury could conclude that if Humphrey was relieved of the stress of having to leave the house, she could perform her transcriptionist duties and thus was "qualified" under the ADA.

Accordingly, we hold that MHA is not entitled to summary judgment on the issue of whether Humphrey is a "qualified individual with a disability" for purposes of the ADA.

Notes and Questions

1. *Humphrey* is one of the only cases that holds that it may not be an essential function of the job to work at the office. Is this case inconsistent with the previous cases or can the cases be reconciled? How are the facts in *Humphrey* different? Do these different facts justify a different result, at least in response to a motion for summary judgment? Why? Why not? A case in the Ninth Circuit distinguished *Humphrey*. In *Samper v. Providence St. Vincent Medical Center*, 675 F.3d 1233 (9th Cir. 2012), the court held that regular attendance was an essential function of the job of a neo-natal nurse. In doing so, it stressed the differences between the job of a medical transcriptionist in *Humphrey* and that of a neo-natal nurse who must be present to provide care. In *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015) (en banc), the en banc Sixth Circuit overturned a 2–1 panel decision that had held that in the case of a resale steel buyer at Ford with irritable bowel syndrome, there was a jury question whether working from home up to four days per week was a reasonable accommodation. Even though the employee spent much of her time working by telephone and on the computer, the en banc court concluded as a matter of law that being in the workplace was an essential function because at least four of the employee's ten work responsibilities could not be performed from home, and two more could not be performed effectively from home. Finally, the court concluded, it was necessary to be available for face-to-face meetings with co-workers, stampers, and suppliers.

2. The EEOC has concluded that working at home can be a reasonable accommodation under Title I of the ADA. See http://www.eeoc.gov/facts/telework.html for a discussion of the EEOC's position on the matter. Many of the courts seem to have disregarded the EEOC's position. Which position is correct? Defend the argument by citing to the statute and the policies supporting it. Does the ADAAA add to either of the arguments? Explain.

3. What is the difference with respect to attendance requirements between a custodian, a college teacher, a head nurse, a data analyst, and a computer programmer?

[b] Employer-Provided Leaves

The EEOC has recently analyzed the effect of the ADA on employer-provided leaves. According to

the guidance, an employer may be required to provide additional *unpaid* leave (beyond that granted to other employees) to a person with a disability if that leave constitutes a reasonable accommodation. This determination must be made on an individual basis, and employers may not create absolute deadlines for the person with a disability to return to work unless the accommodation requested is unreasonable or the employer can prove that an extended leave would create an undue hardship. An employer may not require that its employee not return to work until the employee's health is 100% (a common practice because of employers' fears of liability under state worker's compensation statutes), as there may exist a reasonable accommodation that would permit employees to return to work without reaching 100% health. See *Employer-Provided Leave and the Americans with Disabilities Act* (May 9, 2016), https://www.eeoc.gov/eeoc/publications/ada-leave.cfm?utm_content=&utm_medium=email&utm_name=&utm_source=govdeliver%20y&utm_term.

[c] Working Overtime

In *Rohr v. Salt River Project Agric. Improvement and Power Dist.*, 2009 U.S. App. LEXIS 2856 (9th Cir. Feb.13, 2009), the plaintiff was an insulin-dependent type 2 diabetic who appealed the lower court's grant of summary judgment for the employer whom he sued alleging discrimination under the ADA. He tires easily especially when he has to drive long ways, has chronic high blood pressure and deteriorating vision. He works as a metallurgy specialist in the tech support group. The plaintiff was occasionally called upon to travel to another power plant and work long days. This occurred only on 12 occasions throughout his 23 years at the company. As his diabetes began to take more time to control, his doctor recommended that he not work more than nine hour days and that he not travel. After accommodating him for a while, the company told him that he would have to travel and be ready to work overtime. When he sued, one issue was whether the plaintiff could perform the essential functions of the job. The court overturned the lower court's summary judgment for the defendant, and held that there was a genuine issue of material fact as to whether the travel and long hours were essential functions of the job. The court noted that although consideration should be given to the employer's judgment as to what an essential function is, such evidence is not conclusive even if the function is included in a job description. See also *Hoffman v. Carefirst of Fort Wayne, Ind.,* 737 F. Supp. 2d 976, 2010 U.S. Dist. LEXIS 90879 (N.D. Ind. 2010) (holding that there were genuine issues of material fact concerning whether the plaintiff's illness that was in remission was a disability and whether the employer failed to grant a reasonable accommodation when it insisted that the plaintiff work at least eight hour days with three hours of commuting).

[d] Coping with Stress

A number of cases have addressed whether coping with stress is a fundamental requirement of the job. In other words, is stress so inherent in the position, that removal of stress is not a reasonable accommodation that can be made?

Johnston v. Morrison, Inc.

849 F. Supp. 777 (M.D. Ala. 1994)

EDWIN L. NELSON, DISTRICT JUDGE:

Ms. Johnston was hired as a food server in Morrison's L & N Seafood restaurant in Birmingham, Alabama, on September 18, 1992, and was employed there until December 31, 1992, as a food server. She contends that she suffers from mitral valve prolapse, dysautonomia, panic attack disorder, and hypoglycemia, rendering her unable to perform the duties of a food server. Morrison learned of the plaintiff's conditions after she began working as a food server and, thereafter, assigned her to the least busy work station in the restaurant where she was responsible for the fewest number of customers. On December 31, 1992, the restaurant became very crowded and Ms. Johnston stated that she suffered what she described as a “meltdown” because she was unable to handle the pressure of the work. Ms.

Johnston alleges that on December 31, 1992, while in the midst of her "meltdown," Mr. Mitchell "grabbed and twisted [her] arm and dug his fingernails into her skin, breaking the skin."

Under the ADA, "[n]o covered entity shall discriminate against a qualified individual with a disability." 42 U.S.C. §12112(a). A "qualified individual with a disability" is one "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. §12111(8)....

"The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires." 29 C.F.R. §1630.2(n)(1).... Morrison has the right to determine that an essential function of being a food server at its L & N Seafood restaurant includes knowing and being able to communicate the ingredients, portion sizes, and prices of items on the menu. See 42 U.S.C. §12111(8) ("consideration shall be given to the employer's judgment as to what functions of a job are essential") and 29 C.F.R. §1630.2(n)(3)(i) (an employer can determine which functions are essential). Plaintiff testified that Morrison constantly made changes in what she was required to know and be able to communicate to the customers. Morrison also has the right to determine whether changes in matters such as food ingredients, portion sizes, and pricing are necessary in order to stay competitive. See 29 C.F.R. §1630.2(n)(3)(i) and 29 C.F.R. §1630.2(n)(3)(iv) (the consequences of not requiring the incumbent to perform the function can be used to determine whether a function is essential).

However, Ms. Johnston testified that, because of her disability, she could not handle such changes. She testified that changes of the kind described caused "a panic attack all the time," and these attacks resulted in "constant headache, constant fear," and "confusion inside." She stated that "[t]he constant changes just screwed up [her] whole body." If Ms. Johnston were not required to perform the essential function of learning and communicating information concerning ingredients, portion sizes, and prices, then she would be something other than a food server as defined by the day-to-day operation at Morrison's L & N Seafood restaurant. "The essential functions are by definition those that the individual who holds the job would have to perform, with or without reasonable accommodation, in order to be considered qualified for the position." Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R.App. §1630.2(o).

Ms. Johnston also testified that her disability prevented her from performing her food server duties when Morrison's L & N Seafood restaurant became crowded. She stated that in order to accommodate her disability Morrison assigned her to the restaurant's least busy area where she was responsible for the fewest number of tables. Even with this accommodation, however, Ms. Johnston stated that she was unable to handle the work when the restaurant became crowded. She testified that on December 31, 1992, the restaurant was "packed" and that due to the pace of the work she suffered a "meltdown." Under the ADA, a reasonable accommodation may include "job restructuring, part-time or modified work schedules," 42 U.S.C. §12111(9)(B); however, "[a]n employer or other covered entity is not required to reallocate essential functions." Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R.App. §1630.2(o). Ms. Johnston's food server position required her to serve the customers in her work station. Morrison was not required to provide another employee to handle the plaintiff's food server duties. Morrison also was not required to simply remove plaintiff from her work station when her work station became crowded. In cases interpreting the Rehabilitation Act of 1973, courts have found that an employee's inability to work necessary hours justified an employee's termination.

Ms. Johnston contends that until December 31, 1992, she was able to perform her duties as a food server with the accommodation Morrison provided. Plaintiff would segregate her employment experience at Morrison's restaurant on December 31, 1992, from the remainder of her employment there, apparently conceding that she was unable on that evening to perform the essential functions of the job of food server. However, Ms. Johnston's position as a food server required her to perform her

duties during all times she was at her work station, whether the situation presented slow or busy periods. Ms. Johnston's employment at L & N Seafood during December 31, 1992, may not be viewed as a discrete incident in determining whether she is a qualified individual for purposes of the ADA. Her employment during December 31, 1992, is relevant, because it shows that her disabilities caused her to suffer a "meltdown" when her work station became busy, and thus, she was unable to perform the essential functions of the job.

In conclusion, Ms. Johnston's disability prevented her from performing the essential functions required of a food server at Morrison's L & N Seafood restaurant. Since she cannot perform the essential functions of the position, she is not a qualified individual for purposes of the ADA. Since the 42 U.S.C. §12112(a) requirement that plaintiff be a "qualified individual with a disability" has not been met, the Court need not address whether Morrison's pre-employment inquiries would otherwise have been in violation of 42 U.S.C. §12112(d)(2)(A).

Notes

In *Doe v. Region 13 Mental Health-Mental Retardation Commission*, 704 F.2d 1402 (5th Cir. 1983), a psychologist working for a state operated mental health center suffered from a variety of mental health problems that had become more serious over time. She was ordered not to see any more patients and was advised that she should consider employment elsewhere or long term leave for hospitalization, after which she might be considered for rehiring. Although she had an exemplary work record and her attendance, paper work, and interpersonal relationships with other staff members were all positive, she had exhibited serious suicidal tendencies over a long period of time. The court looked at the totality of the circumstances, including the potential adverse effect of a suicide or attempted suicide on patients, and determined that she was not otherwise qualified.

Relationship of Difficulty with Stress and Direct Threat Cases. A later section in this chapter includes cases and discussion of situations where mental health problems present a direct threat to the health or safety of others. Difficulty dealing with stress does not always result in violent or dangerous behavior. It can result in the person's not being able to carry out the job requirements. In *Carrozza v. Howard County*, 847 F. Supp. 365 (D. Md. 1994), the court held it was not discriminatory to discharge a clerk-typist with bipolar disorder who was rude and insubordinate and who had outbursts directed toward supervisors. Another court found that a customer service representative who was unable to answer customer telephone calls due to panic attacks and mood swings was not a qualified individual. *Larkins v. CIBA Vision Corp.*, 858 F. Supp. 1572 (N.D. Ga. 1994).

Assigning to Different Supervisor as a Reasonable Accommodation. In *Gaul v. Lucent Techs*, 134 F.3d 576 (3d Cir. 1998), the court held that the ADA did not oblige the employer to accommodate a worker with depression and anxiety by assigning him to work with different supervisors. The court concluded that the request for different supervisors was unreasonable. See also *Weiler v. Household Finance Corp*., 101 F. 3d 519 (7th Cir. 1996) (holding that the plaintiff, who suffered from anxiety and depression, was not entitled to the accommodation of changing her supervisor, because the ADA does not give the employee the right to make the employer's decision about terms and conditions of employment); *Poff v. Rockford Pub. Sch. Dist.*, 2009 U.S. Dist. LEXIS 16217 (N.D. Ill. Feb. 25, 2009) (same).

The discussion of reasonable accommodation later in this chapter, however, provides guidance on the fact that while major changes might not be required to reduce stress in certain situations involving individuals with mental impairments, there are nonetheless, a number of steps that can easily be taken in many employment settings. The issue of job reassignment as an accommodation is also important on this issue.

[e] Professional and Technical Competence

In the section on standards at the hiring stage, the issue of professional and technical competence to perform work requirements was discussed. This issue also is discussed in Chapter 6 (Higher Education). If the job is to drive a bus, the employee must be able to drive. If the position is that of a teacher, teaching skills are necessary.

Notes

1. *Teachers*. In *Pandazides v. Virginia Bd. of Educ*., 752 F. Supp. 696 (E.D. Va. 1990), the federal district court granted summary judgment to the defendant in a case alleging a violation of Section 504 of the Rehabilitation Act where the Board fired the plaintiff because she could not pass one portion of the National Teachers' Examination. The plaintiff presented expert testimony that she had three different learning disabilities that made it difficult for her to pass the communications portion of the examination under timed conditions. The lower court held that the plaintiff was not "otherwise qualified" to be a teacher because she could not pass the exam. On appeal, the Fourth Circuit panel overturned the lower court's grant of summary judgment to the defendant and stated that to determine whether the plaintiff was "otherwise qualified," the fact finder must consider whether she could perform the essential functions of the teaching job, and whether the Board's required test measured those essential functions. Even if the test does measure those essential functions, the court should also look to see if there are accommodations or modifications to the test or its administration that would measure the plaintiff's abilities to perform the essential functions of the job. 946 F.2d 345 (4th Cir. 1991). Other cases on testing go both ways. See *Kirkpatrick v. Department of Educ. of Com. of Pa*., 7 A.D.D. 399 (E.D. Pa. 1994) (Department of Education violated ADA by requiring passing a communications test administered by Educational Testing Service, a test which did not accurately measure teaching skills for visually impaired individual); *Falchenberg v. New York State Dept. of Educ*., 642 F. Supp. 2d 156 (S.D. N.Y. 2008), *aff'd*, 338 Fed. Appx. 11(2d Cir. 2009) (teacher testing service and state department of education did not violate ADA when employment was terminated after teacher failed to pass certification test; accommodations for her dyslexia were denied; waiver of math portion of exam not required; waiving spelling requirements would fundamentally alter exam which measures spelling, punctuation, and other skills important to teaching; great deference to be given to academic decision-makers). Compare these decisions to *Borkowski*, Section [F][1], *infra*; *Smith v. Perkins Bd. of Educ*., 2012 U.S. Dist. LEXIS 4039, 2012 WL 112606 (N.D. Ohio 2012), *aff'd* in part, *rev'd* in part, 708 F.3d 821 (6th Cir. 2013) (no obligation to accommodate teacher with diabetes by waking her up when she was sleeping; requirement that teacher be awake and alert in class); *Johnson v. Cleveland City School Dist*., 2010 U.S. Dist. LEXIS 10229, 2010 WL 522804 (N.D. Ohio 2010), *aff'd*, 443 Fed. Appx. 974 (6th Cir. 2011) (maintaining classroom discipline essential job function for teacher); *Moore v. Computer Associates Intern., Inc*., 653 F. Supp. 2d 955 (D. Ariz. 2009) (employee's proposed accommodation that teaching position be restructured to allow him to teach courses solely via internet would strip position of essential functions).

2. *Police Officers.* There have been a number of cases involving police officers who have become disabled (often in the line of duty), who are then no longer able to carry out the requirements of a police officer. These decisions usually involve a discussion of whether certain duties, such as effecting a forcible arrest, are essential, and whether transfer to light duty or a desk job is a reasonable accommodation that should be required. The majority of these decisions have resulted in substantial deference to the law enforcement agency regarding its job descriptions, but some recent cases have examined more closely whether a job reassignment should be considered. In August 1994, the Department of Justice issued a letter of finding in the case of *Davoll v. Webb*, 943 F. Supp. 1289 (D. Colo. 1995). It is the Department's position that job reassignment should be considered in cases involving police officers who can no longer carry out all the requirements of the position.

In *Simon v. St. Louis County*, 563 F. Supp. 76 (E.D. Mo. 1983), the court was required to decide on remand whether a police officer who had become paraplegic after a gunshot wound was qualified to

perform all of the "reasonable, legitimate, and necessary" requirements of a commissioned police officer. The ability to perform a forceful arrest and to work in all positions of the department were deemed to be essential technical requirements of the position. See also *Mathes v. Harris County, Tex.*, 96 F. Supp. 2d 650 (S.D. Tex. 2000) (requiring that person with hand deformity, applying for communication position in sheriff's department be certified as a peace officer did not rationally relate to the job functions under the ADA); *Kees v. Wallenstein*, 973 F. Supp. 1191 (W.D. Wash. 1997) (employees unable to be in direct, physical contact with inmates unable to perform essential functions of corrections officer); *Karbusicky v. City of Park Ridge*, 950 F. Supp. 878 (N.D. Ill. 1997) (a police officer with hearing loss in one ear is not qualified); *Siefken v. Arlington Heights*, 3 A.D. Cases (BNA) 1281 (N.D. Ill. 1994) (police officer with diabetes who was fired after driving erratically and then collapsing into a coma was not qualified). For additional case citations, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §4.11 (2012 and cumulative supplement).

3. Other cases involving physical qualifications for certain positions include *Cook v. Rhode Island*, 10 F.3d 17 (1st Cir. 1993) (whether mobility and lifting ability related to job of nursing); *Lowe v. Angelo's Italian Foods, Inc.*, 1994 LEXIS 17150, 3 A.D. Cases (BNA) 1654 (D. Kan. 1994) (restaurant employee with multiple sclerosis was not qualified because she was unable to perform lifting and carrying heavy objects, which were essential functions of the job).

4. *Health Care Professions*. The unique concerns of health care professionals make these positions subject to close scrutiny by the courts. See Laura F. Rothstein, *Health Care Professionals with Mental and Physical Impairments: Developments in Disability Discrimination Law*, 41 ST. LOUIS U. L.J. 973 (1997). See also LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW Ch. 10 (2012 and cumulative supplement). The Interpretive Guidance to the ADA regulations notes the following with respect to qualifications:

> It is important to note that the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards ... nor to require employers to lower such standards. If an employer requires its typists to be able to accurately type 75 words per minute, it will not be called upon to explain why an inaccurate work product, or a typing speed of 65 words per minute, would not be adequate. Similarly, if a hotel requires its service workers to thoroughly clean 16 rooms per day, it will not have to explain why it requires thorough cleaning, or why it chose a 16 room rather than a 10 room requirement. However, if any employer does [have such requirements] it will have to show that it actually imposes such requirements on its employees in fact, and not simply on paper. It should also be noted that, if it is alleged that the employer intentionally selected the particular level of production to exclude individuals with disabilities, the employer may have to offer a legitimate, nondiscriminatory reason for its selection.

56 Fed. Reg. 35,743–35,744 (July 26, 1991).

Many of the cases on qualifications also address the issue of reasonable accommodation, because in some instances, the person would have the technical or professional competence with reasonable accommodation. Examples of these cases are found later in this chapter.

[f] Marginal Functions

In the *AIC* decision, *supra*, the court addressed Mr. Wessell's ability to drive a car as a job requirement. The employer was unable to establish that this was an essential function of the position of Executive Director of AIC. The ADA regulations specifically note that "The term 'essential functions' does not include the marginal functions of the position." 26 C.F.R. §1630.2(n)(1). In the *AIC* case, it is questionable whether driving was a function of any kind; at most, it was only a marginal function.

Just because an activity is performed only occasionally does not make it marginal. "For example, although a firefighter may not regularly have to carry an unconscious adult out of a burning building, the consequences of failing to perform this function would be serious." 56 Fed. Reg. 35,743 (July 26,

1991). Therefore, being able to carry 180 pounds would not be a marginal function, although the firefighter may do this rarely. In contrast, if a person is hired as a receptionist, where the job functions are to answer the phone, make appointments, and greet clients, it might be found that typing is a marginal function, where the receptionist is called upon only rarely to perform this function, and where there are others in the workforce who can readily carry out this function.

The employer usually has the burden of demonstrating that functions are not marginal, but essential. In *Kuehl v. Wal-Mart Stores, Inc.*, 909 F. Supp. 794 (D. Colo. 1995), the employer had demonstrated that the ability to stand for a full shift was an essential function of the job of a door greeter. See also *Minnihan v. Mediacom Commc'ns Corp*., 987 F. Supp. 2d 918, 931 (S.D. Iowa 2013), *aff'd*, 779 F.3d 803 (8th Cir. 2015) ("While the plaintiff bears the burden of ultimately proving that he is qualified, an employer who disputes the plaintiff's claim that he can perform the essential functions must put forth evidence establishing those functions"). For additional cases and discussion, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §4.11 (2012 and cumulative supplement).

[2] Direct Threat

Hypothetical Problem 3.4

Read the following hypothetical problem before reading the materials on direct threat to the health and safety of the individual and of others. After reading the materials, analyze this problem.

Tala Rashad is a truck driver for a delivery service. She is diagnosed with diabetes. She is dependent on insulin to control her diabetic seizures. The insulin does a fairly good job but once over the past two years, Tala went into a diabetic coma while she was at home. Her husband gave her the proper medication to bring her back to consciousness. The employer requires that all truck drivers take and pass a medical examination every five years. Its stated purpose is to protect the safety of the driver and of others. When Tala had her most recent medical examination, the test demonstrated that her diabetes had worsened. The company doctor asked her questions about whether she had control over her diabetes. She told the doctor about the one incident two years ago. The employer fired Tala because of her diabetes. Consider whether Tala is a qualified individual with a disability. Assuming that she is, explain whether Tala has a cause of action under the ADA against her employer for 1) the medical testing; and/or 2) the discharge.

1. Look at Hypothetical Problem 3.2, *supra*. Can the school district refuse to renew Risa's contract because it fears she may pass the HIV on to the children in the playground if the children have injuries that cause bleeding? What if an assistant hockey coach has HIV and one of the duties of the assistant hockey coach is to play hockey during the practices with the children?

2. Look at the Genetic Information Nondiscrimination Act, *infra*, Section [I][4]. Would it be legal under GINA for the principal to call Risa in to ask about her son's condition?

It is clear that neither the ADA nor the Rehabilitation Act requires employment of individuals where such action would result in a direct threat to the health or safety of the individual or others in the workplace. Both statutes, however, intend that unfounded fears may not be the basis for denying employment.

Questions about direct threat arise in situations involving employees with contagious and infectious diseases, those who have mental disabilities where violent or dangerous behavior may occur, individuals with health impairments such as epilepsy or diabetes where sudden loss of consciousness or functioning may result in a safety problem to others, workers with limitations in jobs requiring physical strength or dexterity, and in a number of other settings.

The following cases illustrate some of these issues.

Mauro v. Borgess Medical Center

137 F.3d 398 (6th Cir. 1998)

JOHN R. GIBSON, CIRCUIT JUDGE.

Borgess [Medical Center] employed [William C.] Mauro from May 1990 through August 24, 1992 as an operating room technician. In June of 1992, an undisclosed source telephoned Robert Lambert, Vice President of Human Resources for Borgess Medical Center and Borgess Health Alliance, and informed Lambert that Mauro had "full blown" AIDS. Because of Borgess's concern that Mauro might expose a patient to HIV, Georgiann Ellis, Vice President of Surgical, Orthopedic and Clinical Services at Borgess, and Sharon Hickman, Mauro's supervisor and Operating Room Department Director, created a new full-time position of case cart/instrument coordinator, a position that eliminated all risks of transmission of the HIV virus. In July of 1992, Borgess officials offered Mauro this position, which he refused.

After Mauro's refusal of the case cart/instrument coordinator position, Borgess created a task force to determine whether an HIV-positive employee could safely perform the job responsibilities of a surgical technician. Lambert and Ellis informed Mauro by a letter dated August 10, 1992, that the task force had determined that a job requiring an HIV-infected worker to place his or her hands into a patient's body cavity in the presence of sharp instrumentation represented a direct threat to patient care and safety. Because the task force had concluded that an essential function of a surgical technician was to enter a patient's wound during surgery, the task force concluded that Mauro could no longer serve as a surgical technician. Lambert and Ellis concluded by offering Mauro two choices: to accept the case cart/instrument coordinator position, or be laid off. Mauro did not respond by the deadline stated in the letter, and Borgess laid him off effective August 24, 1992. Mauro filed this suit in January 1994.

[Lower court proceedings omitted.]

II.

Mauro argues that the district court erred in concluding that there was no genuine issue of material fact about whether the likelihood of him transmitting HIV in the course of his job posed a significant risk or direct threat to the health and safety of others, thus rendering him unqualified.

Mauro's first claim alleges that Borgess discriminated against him in violation of section 504 of the Rehabilitation Act....

Through the passage of the Rehabilitation Act, Congress intended to protect disabled individuals "from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns ... as avoiding exposing others to significant health and safety risks."

In order to recover under the Rehabilitation Act, a plaintiff must establish that he or she is "otherwise qualified" to do the job within the meaning of the Act. An "otherwise qualified" person is one who can perform the "essential functions" of the job at issue. In a situation regarding the employment of a person with a contagious disease, the inquiry should also include a determination of whether the individual poses "a significant risk of communicating the disease to others in the workplace."

Mauro's second claim alleges that Borgess discriminated against him in violation of the Americans with Disabilities Act....

To prevail under his Americans with Disabilities Act claim, Mauro must show that he is "otherwise qualified" for the job at issue. A person is "otherwise qualified" if he or she can perform the essential functions of the job in question. A disabled individual, however, is not "qualified" for a specific employment position if he or she poses a "direct threat" to the health or safety of others which cannot

be eliminated by a reasonable accommodation.

The "direct threat" standard applied in the Americans With Disabilities Act is based on the same standard as "significant risk" applied by the Rehabilitation Act. Our analysis under both Acts thus merges into one question: Did Mauro's activities as a surgical technician at Borgess pose a direct threat or significant risk to the health or safety of others?

[*School Board v.*] *Arline* laid down four factors to consider in this analysis:

> (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.

To show that one is "otherwise qualified," neither Act requires the elimination of all risk posed by a person with a contagious disease. In *Arline* the Supreme Court determined that a person with an infectious disease "who poses a significant risk of communicating an infectious disease to others in the workplace," is not otherwise qualified to perform his or her job. If the risk is not significant, however, the person is qualified to perform the job. The EEOC guidelines provide further insight:

> An employer, however, is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk, i.e. high probability, of substantial harm; a speculative or remote risk is insufficient.

29 C.F.R. §1630.2(r) (1996) (citations omitted). The legislative history further supports the premise that the risk does not have to be eliminated. "The plaintiff is not required to prove that he or she poses no risk." Thus, our analysis in the instant case must not consider the possibility of HIV transmission, but rather focus on the probability of transmission weighed with the other three factors of the *Arline* test.

III.

The parties agree that the first three factors of the *Arline* test: the nature, duration, and severity of the risk, all indicate that Mauro posed a significant risk to others. Mauro argues, however, that because the probability of transmission, the fourth factor of *Arline*, was so slight, it overwhelmed the first three factors and created a genuine issue of material fact.

In determining whether Mauro posed a significant risk or a direct threat in the performance of the essential functions of his job as a surgical technician, *Arline* instructs that courts should defer to the "reasonable medical judgments of public health officials." The Centers for Disease Control is such a body of public health officials. The Centers for Disease Control has released a report discussing its recommendations regarding HIV-positive health care workers.

The Report states that the risk of transmission of HIV from an infected health care worker to a patient is very small, and therefore recommends allowing most HIV-positive health care workers to continue performing most surgical procedures, provided that the workers follow safety precautions outlined in the Report. The Report, however, differentiates a limited category of invasive procedures, which it labels exposure-prone procedures, from general invasive procedures. General invasive procedures cover a wide range of procedures from insertion of an intravenous line to most types of surgery. Exposure-prone procedures, however, involve those that pose a greater risk of percutaneous (skin-piercing) injury. Though the Centers for Disease Control did not specifically identify which types of procedures were to be labeled exposure-prone, it supplies a general definition: "Characteristics of exposure-prone procedures include digital palpation of a needle tip in a body cavity or the simultaneous presence of the [health care worker's] fingers and a needle or other sharp instrument or object in a poorly visualized or highly confined anatomic site." The Report advises that individual health care institutions take measures to identify which procedures performed in their hospital should be labeled exposure-prone and recommends that HIV-infected health care workers

should not perform exposure-prone procedures unless they have sought counsel from an expert review panel and have been advised under what circumstances they may continue to perform these procedures. The Report further recommends that those health care workers who engage in exposure-prone procedures notify prospective patients of their condition.

We must defer to the medical judgment expressed in the Report of the Centers for Disease Control in evaluating the district court's ruling on whether Mauro posed a direct threat in the essential functions of his job.

Mauro stated in his deposition that during surgery his work did not include assisting in surgery, but instead handing instruments to the surgeon and helping the surgeon with whatever else he or she needed. During surgery, Mauro would at times hold a retractor with one hand in the wound area, and pass instruments as needed with his other hand. When asked if he would be actually inside a wound holding a retractor, Mauro answered "Me personally, no." But when questioned further about his hands in the wound area, he stated: "Usually if I have my hands near the wound, it would be to like, on an abdominal incision, to kind of put your finger in and hold—kind of pull down on the muscle tissue and that—where the two met in like a V shape at the bottom and the top, and pull that back. But it happened very, very rarely because they had retractors to do that." The purpose of this action was to give the surgeon more room and more visibility.

The continued questioning led to a distinction between the wound and the body cavity. Mauro was asked if he ever had his hands in a body cavity, described as being past the wound area, and Mauro stated that he personally never had his hand in a body cavity because the small size of the surgical incision prevented too many hands from being placed inside the body cavity.

Mauro was also questioned about the work of other surgical technicians at Borgess. When asked if other surgical technicians would have their hands in a wound, he could not give a definite answer because he did not work with other surgical technicians. Mauro further testified that he was told that some hospitals have their technicians assist, and that therefore no distinctions existed between the duties of surgical technicians and surgical assistants. Mauro believed, however, that Borgess did not allow technicians to assist because of union requirements, but he was not sure if this was correct.

Mauro explained that during his training, discussion had occurred indicating that nicks and cuts were always a possibility for a surgical technician. In fact, the record included two incident reports involving Mauro. One report indicated that Mauro had sliced his right index finger while removing a knife blade from a handle on June 25, 1991, and another report indicated that he had scratched his hand with the sharp end of a dirty needle while threading it on June 8, 1990.

Mauro further stated in his deposition that when Dr. Mark DeYoung, his family physician, first expressed concern that Mauro might have the HIV virus, he was of the impression that Mauro should refrain from working in surgery because of the possibility of a needle stick. Dr. DeYoung referred Mauro to Dr. David Davenport, an infectious disease specialist.

After examining Mauro, Dr. Davenport wrote a letter to Dr. DeYoung. The letter quoted Mauro as telling Dr. Davenport that he double gloved and wore orthopedic gloves when he worked, but that he still suffered cuts and needle sticks frequently with his job. Dr. Davenport's letter expressed concerns about Mauro's current job, but stated that he had told Mauro that the current consensus was that infected health care workers could continue to work in the surgical field provided that they had no underlying illnesses and used extraordinary care in their work. Dr. Davenport concluded by stating that he had suggested to Mauro that he may want to seek another type of job at Borgess that did not involve continuous direct exposure to blood and eventual needle sticks.

Dr. Davenport testified in his deposition that even if HIV-infected health care workers followed universal precautions, methods designed to ensure that health care workers do not come into contact with blood, some risk of exposure existed when HIV-infected health care workers come into contact with patients. Dr. Davenport stated that this can happen because of human error, as health care

workers would not completely follow the precautions; through needle injuries; and because there was always potential for blood exposure in situations that could not be controlled, such as when surgical gloves tore.

Dr. Davenport identified the Centers for Disease Control Report as one of the best resources available on preventing transmission of the HIV virus. He stated that he was familiar with the theoretical model estimating that the risk of a patient being infected by an HIV-positive surgeon during a single operation as being somewhere between one in 42,000, and one in 420,000. He further stated that any patient who comes in contact with the HIV-infected blood of a health care worker has some risk of the virus being transferred to that patient. Though a few people infected with HIV suffer no consequences, Dr. Davenport stated that in general most people consider HIV a uniformly lethal disease. Dr. Davenport agreed that if a job required an HIV-infected worker to place his or her hands into a patient's body cavity in the presence of sharp instrumentation, it represented a real risk to patient care and safety because it could result in blood to blood contact which could lead to the transmission of the AIDS virus.

Sharon Hickman, a registered nurse, was the interim director of operating rooms at Borgess in June and July of 1992. While serving as interim director Hickman supervised the surgical technicians at Borgess, including Mauro. In her affidavit Hickman described a meeting of the Ad Hoc HIV Task Force for the hospital on July 23, 1992 and the statements she made at that meeting. Hickman stated that she told the task force that the duties of a surgical technician include preparing and maintaining the equipment used during surgery, but that:

> on an infrequent basis, the Surgical Technician is required to assist in the performance of surgery by holding back body tissue, with the use of either retractors or the Technician's hands, to assist the surgeon in visualizing the operative site. The Surgical Technician also may assist the surgeon with suturing and other duties related to the performance of the operation.

She also advised the task force that, although the need for a surgical technician's assistance in the performance of a surgical procedure arises infrequently, it is not possible to restructure the job to eliminate the surgical technician from performing such functions because this need arises on an emergency basis and cannot be planned in advance. In some cases, particularly on off-shifts, Hickman stated that the surgical technician is required to assist at the surgery because a registered nurse or surgical assistant is not available. In other surgical proceedings a nurse or surgical assistant may be present, but due to the complexity or other unexpected requirements of the procedure, another pair of hands may be needed in the operative site, and the surgical technician is then required to assist. Most often, the surgical technician is required to assist in the operative site because more hands are needed to visualize the surgical area. Finally, Hickman stated that Mauro had been involved in two incidents during the course of his employment, one of which might have resulted in patient exposure. [Two other Task Force members also confirmed the risk in this case.]

The written offer of an alternative employment position to Mauro provides further support for the task force's conclusion concerning a surgical technician's job responsibilities. This offer stated that an essential function of the O.R. surgical technician position is the ability to enter a patient's wound during surgery as directed by the attending surgeon. The offer concluded that because instruments such as needles and scalpels are used while the technician's hands are inside a patient's body cavity, potential exists for direct patient exposure to the surgical technician's blood.

The material issue as to whether Mauro was a direct threat or significant risk to the health and safety of others turns on whether his job duties require him, even on rare occasions, to have his hands in or near an operative site in the presence of sharp instrumentation where visibility is poor. Mauro's statement above, that at times he would place his finger in an incision in order to pull down on and pull back the muscle tissue, is consistent with Hickman's uncontradicted statement that the duties of a surgical technician require a surgical technician, on an infrequent basis, to hold back body tissue with

a retractor or his or her hands to assist the surgeon in visualizing the operative site. Mauro's statements that he never had his hands in the operative cavity are not material, in light of the fact that on infrequent occasions he might be required to engage in invasive, exposure-prone activities. Further, his technical reliance on the written job description is not persuasive, as it does not purport to enumerate all activities Mauro might be required to perform, and Hickman provided a more detailed description of his job duties, that was the basis of the hospital Ad Hoc HIV Task Force decision. This Task Force was an expert review panel such as recommended in the Centers for Disease Control Report to consider Mauro's continued placement in the operating room as a surgical technician.

We also reject Mauro's argument that Dr. Davenport and Dr. DeYoung both gave favorable testimony on the risk issue, because Dr. Davenport's testimony acknowledged a risk of transmission, and Dr. DeYoung, when asked if his opinion would change if he knew a surgical technician had to have his or her hands in the body cavity, said he would consider this information.

We conclude that the district court did not err in determining that Mauro's continued employment as a surgical technician posed a direct threat to the health and safety of others. The district court based this conclusion on both the description of a Borgess surgical technician's duties indicating the necessity for a surgical technician to place his or her hands upon and into the surgical incision to provide room and visibility for the surgeon, and the risk of sustaining a needle stick or minor laceration which Mauro had in the past sustained. All the evidence, together with the uncontradicted fact that a wound causing an HIV-infected surgical technician to bleed while in the body cavity could have catastrophic results and near certainty of death, indicates that Mauro was a direct threat.

Accordingly, we affirm the judgment of the district court.

Notes and Questions

1. What other medical jobs are likely to be affected by the holding in the previous case? What about optometry? Obstetrics and gynecology? See *Doe v. Attorney Gen.*, 34 F.3d 781 (9th Cir. 1994). Or the general practice of medicine? For cases involving health care workers with contagious and infectious diseases, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW Ch. 10 (2012 and cumulative supplement).

2. What if health care professionals were willing to disclose their HIV condition to patients and allow the patients to decide whether the health care profession should be permitted to participate in invasive procedures?

3. Should physicians or nurses be required to inform patients if they are HIV-positive? Is there a greater risk to patients from HIV than from drug or alcohol usage, stress and emotional problems, or general incompetence? For a discussion of this issue, see Mary Anne Bobinski, *Autonomy and Privacy: Protecting Patients from Their Physicians*, 55 U. PITT. L. REV. 291 (1994).

4. It is unclear who has the burden of persuasion on the issue of direct threat to the health and safety of others. Some courts conclude that it is an affirmative defense and that the employer has the burden of proving direct threat. See *Bates v. UPS*, 511 F.3d 974 (9th Cir. 2007). Other cases say that it may depend on the type of threat involved. If the job is to protect the health or safety of others, the plaintiff must prove that she does not pose a direct threat when demonstrating that she is qualified to occupy the position, but when the job is one that does not deal with the safety of others, the employer has the burden of proving that the plaintiff poses a direct threat. See *EEOC v. Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997); *Rizzo v. Children's World Learning Centers, Inc.*, 213 F.3d 209, 213 n.4 (5th Cir. 2000) ("It is unclear from the statutory scheme who has the burden on this issue. It may depend on the facts of the particular case. The EEOC suggested at argument that where the essential job duties necessarily implicate the safety of others, the burden may be on the plaintiff to show that she can perform those functions without endangering others; but, where the alleged threat is not so closely tied to the employee's core job duties, the employer may bear the burden."); *Justice v. Crown Cork &*

Seal Co., 527 F.3d 1080, 1091 (10th Cir. 2008) ("Though the burden of showing that an employee is a direct threat typically falls on the employer, where the essential job duties necessarily implicate the safety of others, then the burden may be on the plaintiff to show that [he] can perform those functions without endangering others").

5. *Infectious Diseases as Direct Threats:* Several other courts have addressed issues of contagious and infectious diseases as being a danger to others. For example, in *Roe v. District of Columbia*, 842 F. Supp. 563 (D.D.C. 1993), the court held that the District of Columbia Fire Department violated Section 504 by refusing to allow a firefighter infected with Hepatitis B to perform mouth-to-mouth resuscitation. Other cases involving firefighters have reached similar results.

In *Arline v. School Bd.*, 480 U.S. 273 (1987), the Supreme Court decision that first addressed the issue of contagious diseases, the Court remanded for a determination about the risk that a school teacher with inactive tuberculosis presented to her students. The district court found that she did not present a risk and ordered reinstatement with back pay. 692 F. Supp. 1286 (M.D. Fla. 1988).

For citations to cases on the issue of direct threat, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §4.12 (2012 and cumulative supplement).

The following case focuses on the issue of qualifications in the context of direct threat. In reading the excerpt, think about whether under the ADAAA the plaintiffs are individuals with disabilities.

Chandler v. City of Dallas

2 F.3d 1385 (5th Cir. 1993)

WIENER, CIRCUIT JUDGE:

In 1978, the City of Dallas, Texas (Dallas or the City) adopted a Driver Safety Program (the Program) to reduce the risk of vehicular collisions. The Program established certain physical standards for city employees who drive on public roads as an intrinsic part of their job duties. Employees of this type are referred to as Primary Drivers. The physical standards required by the Program were patterned on safety regulations promulgated by the United States Department of Transportation. If an employee did not meet these standards, he could not be certified as a primary driver and thus was ineligible for Primary Driver jobs.

Two of the medical standards for Primary Drivers are of particular importance to the instant appeal. A Primary Driver: (1) cannot have an established medical history of diabetes mellitus severe enough to require insulin for control; and (2) must have 20/40 vision (corrected) and a field of vision of at least 70 degrees in the horizontal meridian in each eye. Plaintiff Lyle Chandler has diabetes mellitus that requires insulin for control. Plaintiff Adolphus Maddox has impaired vision in his left eye that cannot be corrected to meet minimum standards. Both of these plaintiffs held positions with the City that were classified as Primary Driver jobs. Only 138 of the City's job classifications were considered Primary Driver jobs.

[Chandler required insulin to control his diabetes and had failed a driver's physical at one point because of his diabetes. He also had major and minor episodes at work related to hypoglycemia. Maddox failed an initial driver's physical because of uncorrectable vision. They filed suit against the City under a number of theories when they were denied certain Primary Driver positions.]

A. *The Rehabilitation Act*

Under the Program, the City established three distinct categories of drivers. Primary Drivers are those City employees who are certified to operate a motor vehicle on public thoroughfares for the City as an intrinsic part of their job duties. Only Primary Drivers are subject to the strict physical standards of the Program.

The plaintiffs do not seriously contest the City's assertion that driving is an essential function of

every Primary Driver position. Instead, they argue that they can safely perform all of the functions of their respective jobs, including driving, without accommodation. In taking that approach, the plaintiffs failed to adduce sufficient evidence that would support a finding that they were otherwise qualified for Primary Driver positions.

The Program is based on regulations promulgated by the Federal Highway Administration, Department of Transportation, to promote, *inter alia*, safe operation of motor vehicles.

These regulations, including the provisions relating to insulin dependent diabetes and impaired vision, have been in effect since 1970. Since that time, the Federal Highway Administration has had numerous opportunities to revisit these regulations, and to update and amend them if need be. Yet, the physical requirements regarding insulin dependent diabetes and impaired vision have remained unchanged. The statement of the Administrator of the Federal Highway Administration in the preamble to the proposed regulations remains valid to this day: "Accident experience in recent years has demonstrated that reduction of the effects of organic and physical disorders, emotional impairments, and other limitations of the good health of drivers are increasingly important factors in accident prevention."

After implementing these regulations, the Federal Highway Administration received several petitions for reconsideration. The Director of the Bureau of Motor Carrier Safety (acting under authority delegated to him by the Administrator) responded to objections that the medical qualifications of §391.41 were unduly stringent by stating: "In this area, however, the Director believes that the risks are so well known and so serious as to dictate the utmost caution. Hence, except as noted below, the physical qualifications are unchanged." The standards for diabetes and vision are not among those that were altered in response to these petitions for reconsideration.

The issue whether an insulin dependent diabetic is otherwise qualified for positions involving driving or other high risk activities has been addressed by several federal courts. Those courts have uniformly held that insulin dependent diabetics present an unacceptable risk, and are thus not otherwise qualified, to be employed as, *inter alia*, sanitation truck drivers or special agents with the Federal Bureau of Investigation. We are aware of no cases holding that insulin dependent diabetes does not present a significant risk in connection with the operation of motor vehicles on public highways.

We hold that, as a matter of law, a driver with insulin dependent diabetes or with vision that is impaired to the extent discussed in 49 C.F.R. §391.41 presents a genuine substantial risk that he could injure himself or others. We echo the sentiment expressed [previously] by this court: "Woe unto the employer who put such an employee behind the wheel of a vehicle owned by the employer which was involved in a vehicular accident."

As neither Chandler nor Maddox was otherwise qualified for Primary Driver positions in the absence of any employer accommodation, we must answer the second question of the analysis—whether any reasonable accommodation by the City would have enabled them to perform the essential functions of those positions. For if reasonable accommodation will not eliminate a significant safety risk, a handicapped person is not otherwise qualified.

The record is conspicuously devoid of any evidence from Chandler or Maddox that reasonable accommodation was possible, much less that it would eliminate any safety risk inherent in their driving. This evidentiary void is fatal to Plaintiffs' claims, given their burden of establishing that reasonable accommodation is possible so that they would be otherwise qualified for their respective positions if they were so accommodated. As we find that neither plaintiff was otherwise qualified, in the absence of accommodation, because they posed a substantial risk of injury, the absence of evidence that reasonable accommodation could be made precludes the possibility that either plaintiff was "otherwise qualified." ...

Notes and Questions

1. *Risks Related to Diabetes and Similar Conditions:* Several courts have addressed employment discrimination involving diabetes and other health related conditions. The courts are particularly deferential to the employer's determination relating to risk when the position involves potential danger to a large number of people, such as truck drivers and bus drivers. See *Wood v. Omaha Sch. Dist.*, 25 F.3d 667 (8th Cir. 1994) (insulin-dependent school van driver constituted safety risk). But see *Lawson v. CSX Transp. Inc.*, 245 F.3d 916 (7th Cir. 2001) (holding that the plaintiff, an insulin-dependent diabetic who sought a job as a train conductor, had created a prima facie case that he had a disability and was qualified).

After the *Sutton* trilogy in 1999, courts rarely found individuals with diabetes and similar conditions to be individuals with disabilities. The ADAAA seems to have changed the courts' analysis. See *Rednour v. Wayne Twp*., 51 F. Supp. 3d 799, 812 (S.D. Ind. 2014) (parties did not dispute that Type 1 diabetes constitutes a disability); *Tadder v. Bd. of Regents of Univ. of Wisconsin Sys*., 15 F. Supp. 3d 868, 884 n.9 (W.D. Wis. 2014) ("Post-ADAAA, the endocrine system is expressly listed as a 'major bodily function' and its operation as a 'major life activity.' This would appear to generally establish diabetes as an impairment imposing a substantial limitation on a major life activity"). The regulations state that diabetes substantially limits endocrine function. 29 C.F.R. §1630.2(g)(3)(iii).

2. *Seizure Disorders and Direct Threat.* The courts after the *Sutton* trilogy in 1999 were unlikely to find seizure disorders to be disabilities. See LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW, §4.9 *Epilepsy and Seizure Disorders* (2012 and cumulative supplement). After the passage of the ADAAA, most courts hold that seizure disorders are disabilities. See, e.g., *EEOC v. Rexnord Industries, LLC*, 966 F. Supp. 2d 829 (E.D. Wisc. 2013); *James v. James Marine, Inc.*, 805 F. Supp. 2d 340 (W.D. Ky. 2011). Nonetheless, if the employer proves that seizures would pose a direct threat to the health or safety of others, it may establish a defense. And, as noted above, if the job itself is one to protect the safety of others, it may be the employee's burden to prove that he is not a direct threat to the health or safety of others when he proves that he is qualified. A few earlier cases demonstrate the proper analysis for post-ADAAA cases.

In *Jansen v. Food Circus Supermarket's Inc*., 110 N.J. 363, 541 A.2d 682 (1988), the court placed the issue in context by noting the following:

> An estimated 2,135,000 Americans suffer from epilepsy. Nearly half that number eliminate or "control" epileptic seizures through medication; for another 30% medication significantly reduces the number of seizures.... The term "epilepsy" itself evokes stereotypical fears that perpetuate discrimination against its victims in all aspects of life, including employment. Epileptics are not all alike. Some may suffer one or two seizures in a lifetime; others suffer them more frequently. Accordingly, epileptics must be viewed not as fungible members of a class, but as individuals.

The court then addressed the discrimination claim of Mr. Jansen, whose condition was mild and generally controlled and who was hired as a meat cutter by a supermarket, with their knowledge of his condition. When he had a seizure while cutting meat, followed by comments that were not clear in their meaning, his employment was terminated because of concerns about the risk of injury to himself and others. This was based on medical evaluations and reports. In deciding whether the termination was justifiable, the court noted:

> The appropriate test is not whether the employee suffers from epilepsy or whether he or she may experience a seizure on the job, but whether the continued employment of the employee in his or her present position poses a reasonable probability of substantial harm.

The court further noted that the safety defense should be based on a "probability" rather than a "possibility" of injury. The opinion "that an employee might suffer a seizure at work does not necessarily support the conclusion that such a seizure would present a risk of injury." An

individualized assessment of the safety risk is required.

The court further noted that

> An employer may not rely on a deficient report to support its decision to fire a handicapped worker. If, however, the employer relies on an adequate report, courts should not second-guess its decision. [T]he employer should review not only the reports of its medical experts, but also relevant records such as the employee's work and medical histories.... In an appropriate case, an employer might reasonably be expected to communicate with its expert about the meaning of the report.

Here, the court found the medical report to be deficient to support the decision that Jansen could not safely work as a meat cutter.

Ross v. Beaumont Hosp., 687 F. Supp. 1115 (E.D. Mich. 1988), involved a surgeon with narcolepsy whose relationship with a hospital was terminated. The opinion discusses the plaintiff's abusive behavior and other conduct as the basis for the dismissal and finds no discrimination.

3. *Mental Illness as Presenting a Direct Threat:* There is much concern by employers about potential dangers presented by individuals with mental health problems, which may manifest in violent behavior. As with other conditions raising concern about a direct threat, it is essential that employers address these concerns on a case-by-case basis and make individualized determinations about the dangers in each situation. Employers should not base their actions on myths and beliefs about mental illness. The justification for the adverse employer action should be based on conduct, behavior, or some other reasonable basis for these concerns. Several cases involving mental health problems are discussed in Chapter 6 on Higher Education and in Chapter 8 on Housing. See also *Hindman v. GTE Data Serv.*, 1994 LEXIS 9522 (M.D. Fla. 1994) (whether employee with a mental condition who carried a gun to work constituted a direct threat); *Mazzarella v. Postal Serv.*, 849 F. Supp. 89 (D. Mass. 1994) (postal worker with personality disorder was legally discharged because of destructive behavior); *Kupferschmidt v. Runyon*, 827 F. Supp. 570 (E.D. Wis. 1994) (Postal Service employee with mental disability who threatened to kill her supervisor and fellow employees must be allowed to prove that she is qualified).

Are courts more likely to allow adverse treatment by employers where the employee with mental problems is in a position such as a school teacher or medical professional? It should be noted that in some cases involving employees with mental illness, the direct threat could be eliminated with reasonable accommodation. The unresolved issues are whether the employer can take adverse action if there is no evidence that the employee presents a threat of violence or harm. What evidence is enough? The factors for determining direct threat (i.e., duration, nature, and severity, likelihood that harm will occur, and imminence of harm) are found in the ADA regulations. 29 C.F.R. §1630.2(4). The Interpretive Guidance states that:

> Such consideration must rely on objective, factual evidence—not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes—about the nature or effect of a particular disability or of disability generally.

56 Fed. Reg. 35,745 (July 26, 1991). For a discussion of this issue, see Laura Rothstein, *The Employer's Duty to Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments Under Disability Discrimination Laws*, 47 SYRACUSE L. REV. 931 (1997).

4. *Threat to Self or Others:* The statutory language of the ADA states that individuals are not qualified if they are a direct threat, i.e., present a significant risk to the health or safety "of *others* that cannot be eliminated by reasonable accommodation." 42 U.S.C. §12111(3) (emphasis added). The regulations, however, state that: "direct threat means a significant risk of substantial harm to the health or safety of *the individual or others* that cannot be eliminated or *reduced* by reasonable accommodation." 29 C.F.R. §1630.2(r). Although the interpretation by the EEOC probably represents a more reasonable definition of this term, it is without textual support in the statute.

In 2002, the Supreme Court decided *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002), and adopted the EEOC's interpretations. Where an individual poses a direct threat to his or her own safety or health, that individual is not otherwise qualified. The Court emphasized that employers must make this determination not on "untested and pretextual stereotypes," but on "reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence." Furthermore, the evaluation must be one that is individualized.

In this case, the Court deferred to the EEOC interpretation, while it had rejected the EEOC interpretation in the *Sutton* trilogy decisions on defining who has a disability. The contrast between the two cases regarding deference to legislative history is noteworthy. In *Echazabal*, the Court adopts legislative history. In *Sutton*, the Court chooses to reject the legislative history that supported a broad interpretation of "disability."

5. *Future Risk and Predisposition.* Although the EEOC guidelines recognize that one of the factors in a direct threat case is the imminence of the harm, the courts have not focused on this issue extensively. One way in which the issue could arise is where a currently symptom-free individual is at a genetically increased risk of a condition that might manifest itself suddenly and constitute a direct threat to self or others. For example, the individual who had a genetic predisposition to hereditary cardiomyopathy is at risk of a sudden and severe heart attack. To what extent should such an individual be permitted to engage in a range of activities, such as driving a bus, working in a retail store, or being a professional athlete? See the discussion of GINA, The Genetic Information Nondiscrimination Act, Section [I][4]. Even if the ADA might permit an employer to discriminate based on a genetic predisposition, it is unlikely that GINA would permit such discrimination.

6. *Genetic Conditions:* The research done as part of the Human Genome Project continues to provide information about genetic markers and other genetic indicators of predisposition to a variety of conditions and diseases, such as cancer and Huntington's disease. This raises a variety of questions in the context of disability law. Is a genetic predisposition a "disability"? Is someone predisposed to certain genetically related conditions "regarded as" having a disability? How do we analyze the potential future risk that such a disease might have? For example, if an individual is working in a nuclear power plant in a sensitive position and it is learned that the individual has the gene for Huntington's disease (the first symptom of which is often dementia), is it permissible to terminate the employment? Huntington's disease usually has onset at about age 40 and results in significantly deteriorating mental capacity and ultimately death. Would it be permissible to not hire an applicant with the Huntington's gene who is age 25? Age 35? See the discussion of the Genetic Information Nondiscrimination Act, *infra* at Section [I][4].

7. *Other Conditions:* In addition to potential impairments relating to orthopedic or mobility problems and those related to genetic predispositions, another area of concern is the predictability of the future onset of mental illness. For a discussion of other cases addressing this issue and an analysis of future risk as a disability, see MARK A. ROTHSTEIN, MEDICAL SCREENING AND THE EMPLOYEE HEALTH COST CRISIS 128–131 (1989); Bryan P. Neal, *The Proper Standard for Risk of Future Injury under the Americans with Disabilities Act: Risk to Self or Risk to Others*, 46 S.M.U. L. REV. 483 (1992).

F. Reasonable Accommodation and Undue Hardship

There is no question that reasonable accommodation is required under both the Rehabilitation Act and the ADA. The Rehabilitation Act standard was established by the courts. The ADA, incorporating these interpretations, does not define reasonable accommodation in the statute, but gives a list of possible accommodations, including:

> (A) making existing facilities used by employees readily accessible to and usable by individuals

with disabilities; and

(B) 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 examination, 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). See also 29 C.F.R. §1630.2(o). The statute and the regulations also provide that reasonable accommodation is not required if it would result in undue hardship, defined as "an action requiring significant difficulty or expense." 42 U.S.C. §12111(10). See also 29 C.F.R. §1630.2(p). This is to be determined in light of factors such as the following:

1. The nature and cost of the accommodation.
2. The overall financial resources of the facility involved in providing the accommodation; the number of employees at that facility; the effect or impact on the facility operation.
3. The overall financial resources of the covered entity; the overall size of the business (number of employees); the number, type, and location of facilities.
4. The type of operation of the entity, including the composition, structure, and function of the workforce; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. §12111(10); 29 C.F.R. §1630.2(p)(2).

The cases in this section illustrate the variety of accommodations that may be considered. Individuals new to the issues of disability rights and accommodations often want a checklist of exactly what type of accommodation should be provided to individuals with specific disabilities. Such requests fail to recognize that the types and severity of disabilities vary dramatically, the manifestations and needs resulting even from the same disability also vary, and the type of job and the circumstances of the employer are different. Often, a common sense and interactive approach is most useful. The factors listed above are only a general guideline. For additional cases, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §4.20 (2012 and cumulative supplement).

There is no doubt that the cost in medical expenses and lost wages due to work disabilities is extremely high. "Cardiovascular disease alone was projected to cost America $216 billion in lost productivity in 2015; if current trends continue, this is projected to increase to $304 billion per year by 2030." *Health Economists from Across the U.S. Urge Presidential Candidates to Take on Chronic Disease and #Fight4Health*, BUSINESS WIRE, Mar. 8, 2016.). "Indirect costs (calculated as lost wages) related to MSDS [Musculoskeletal Disorders] from 2004 to 2006 were $373 billion, or 2.9% of GDP." Kate Summers et al., *Musculosketal Disorders, Workforce Health and Productivity in the United States* (June 2015), http://www.theworkfoundation.com/. Another study found in 2015 that the annual cost for loss of productivity for health-related reasons ranges between $226 and $260 billion. Elyssa Besen & Glenn Pranksy, *Examining the Relationship Between Productivity Loss Trajectories and Work Disability Outcomes Using the Panel Study of Income Dynamics*, 57 J. OCCUPATIONAL & ENVTL. MED. 829 (2015).

Accommodations in the workplace, on the other hand, cost very little. In a recent study, employers reported that 58% of accommodations cost nothing, while the rest cost only about $500. BETH LOY, JOB ACCOMMODATION NETWORK, WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT (original 2005, updated 2005, 2007, 2009, 2010, 2011, 2012, 2013, 2014 & 2015), http://askjan.org/media/lowcosthighimpact.html.

Hypothetical Problem 3.5

Read the following hypothetical problem before reading the materials on qualified individuals,

reasonable accommodations, and undue hardship. After reading the materials, analyze this problem.

Leon Katz has a heart condition entitled "bicuspid aortic valve." The aortic valve ordinarily has three flaps, but because of a genetic anomaly, some people are born with aortic valves with two flaps. Ordinarily people with bicuspid valves can live a long time without the condition's affecting their quality of life. Leon is 50 years old and has always been healthy, but within the past 8 months, he has begun noticing shortness of breath when he climbs stairs. He also gets dizzy easily. His cardiologist tells him that he will need aortic valve replacement surgery in about eight months because his valve is beginning to deteriorate, but that for now he should take it easy and get plenty of rest. He recommends that he not climb steps or engage in strenuous exercise. Leon is a tennis pro at a hotel. He ordinarily teaches children to play tennis, but he also plays with hotel guests who want a good game. While he can teach children without exercising strenuously, Leon tells the hotel management that he is not able to play tennis with hotel guests because that exercise would be too strenuous on his heart. Leon asks the hotel to give him more children's classes and teams to make up for his failure to play with hotel guests. He says that he knows that some of the other tennis pros at the facility who currently teach children and play with guests prefer playing with guests to teaching children's classes. Hotel management is concerned because it has fewer children whose parents want instruction for their children and fewer hotel guests asking for pros to hit balls with them. It would like to eliminate one of the positions of tennis pro at the hotel.

1. Hotel management tells its corporate attorney that it has less business all around calling for a tennis pro and asks whether it can fire Leon because of his inability to play with guests. How should the attorney explain to the hotel the legal issues involved with the decision? Is Mr. Katz a qualified individual with a disability and does he have a viable cause of action under the ADA if the hotel fires him? What is the possibility of a reasonable accommodation?

2. What are the burdens of persuasion and production on the issues of "reasonableness" of the proposed accommodation and whether the proposed accommodation poses an undue hardship on the hotel? How would this analysis differ depending on which circuit the hotel is in?

[1] Proving that the Plaintiff Is a Qualified Individual, Reasonable Accommodation, and Undue Hardship

All seem to agree that when it comes to proving that a plaintiff is a qualified individual with a disability, the burden of persuasion falls on the plaintiff. It is more complicated than this, however. Proving that an individual is qualified requires proof that the plaintiff can perform the essential functions of the job with or without reasonable accommodation. This requires a decision about what the essential functions of the job are, an analysis of the plaintiff's objective qualifications and of whether she is qualified to perform the essential functions of the particular job in question. It often also requires a discussion of whether a proposed accommodation is reasonable and, if so, whether the accommodation, even if reasonable, imposes an undue hardship on the defendant employer. Some cases demonstrate that the dividing line between essential function and reasonable accommodation is often unclear. For example, in the attendance cases above, many of the courts discussed attendance at work as an essential function of the job. If that is the case, working at home can not be a reasonable accommodation to that essential function. If, on the other hand, as in *Humphrey*, the court sees the attendance issue not as an essential function of the job, but rather as whether working at home is a reasonable accommodation, the case may come out differently. In this section, the courts struggle with the burdens of production and persuasion in reasonable accommodation and undue hardship. All courts seem to agree that the employer has the burden of persuasion on the issue of undue hardship. In other words, it is an affirmative defense. On the other hand, the courts of appeals disagree about who bears the burden of production and persuasion on the issue of reasonableness of accommodation. Consider the different viewpoints expressed by the courts below.

Barth v. Gelb

2 F.3d 1180 (D.C. Cir. 1993)

BUCKLEY, *CIRCUIT JUDGE*

Donald Barth, a severe diabetic, appeals a judgment in favor of his employer, the Voice of America, on his claim that the VOA illegally discriminated on the basis of handicap by failing to clear him for service at the VOA's overseas radio relay stations. The district court found that the agency was justified in denying Mr. Barth an overseas assignment because the special arrangements required to accommodate his medical condition would have imposed an undue burden on its operations. Mr. Barth's principal challenge is directed to the court's allocation to him of the ultimate burden of proof on that issue. Because a claim of undue burden is an affirmative defense in actions under the Rehabilitation Act of 1973, we find that the burden of proving it should have been placed on the VOA. But because we also find that this error was harmless, we affirm the district court's judgment.

I. Background

Donald Barth is a Washington-based computer specialist and employee of the VOA who applied for admittance into the permanent Foreign Service. Mr. Barth passed all requirements for admittance into the Service, except that he failed a State Department medical clearance examination designed to assess his availability for worldwide service. Mr. Barth suffers from an advanced and degenerative form of diabetes requiring the care of a skilled endocrinologist to control the diabetes, plus an array of other specialists (in ophthalmology, for example) to control its complications. The State Department found that Mr. Barth could not serve worldwide, but only in locations with advanced medical facilities.

After the denial of the medical clearance, Mr. Barth requested a medical waiver from the VOA. His particular suggestion was that the VOA grant a limited waiver restricting his assignments to posts with suitable medical facilities. After protracted deliberations, the VOA denied Mr. Barth's waiver request. Upon exhausting his administrative remedies, Mr. Barth brought suit under the Rehabilitation Act of 1973, as amended, 29 U.S.C. §701-796i (1988), asking the court to order his assignment to a suitable overseas relay station position and to award him backpay.

After a four-day bench trial, the district court found that Mr. Barth's diabetic condition was the sole reason for his exclusion from the VOA's Overseas Radio Relay Station Program and that the waiver panel had focused on whether a reasonable accommodation could be made to his handicap. The court noted that the entire corps of American overseas relay station engineers consists of only seventy persons divided among the twelve stations, most of which were located in remote, sparsely populated areas. It found that Mr. Barth "could function at only three or four posts" and that

> the thin staffing at each post required flexibility of assignment, put a premium on workers not subject to serious health risks, and offered few options for initial assignment of Mr. Barth. Accepting applicants who could basically only work at a few non-hardship posts would be considered unfair to other Specialists and detrimental to morale and success of the program.

The court concluded "as a matter of law" that accommodating Mr. Barth by limiting his assignments would "place an undue burden on the VOA program," and it granted judgment in favor of the agency. This appeal followed.

II. Analysis

A. The Burden of Proof

As a general matter, a reasonable accommodation is one employing a *method of accommodation* that is reasonable in the run of cases, whereas the undue hardship inquiry focuses on the hardships imposed by the plaintiff's preferred accommodation in the context of the particular agency's

operations. A grey area will arise where a proposed accommodation is so costly or of such a nature that it would impose an undue burden on the employer's operations. Thus, an accommodation would be both unreasonable and impose an undue burden "if it either imposes undue financial and administrative burdens on [an agency] or requires a fundamental alteration in the nature of [its] program."

3. The Burden of Proof in this Case

The VOA does not claim that limiting Mr. Barth's overseas assignments to posts at which adequate medical facilities are available would be unreasonable in the abstract. Rather, it asserts that the requested accommodation would result in undue hardship as a result of considerations peculiar to its operation; essentially, its need for flexibility in the difficult task of rotating a small number of radio engineering specialists among twelve far-flung relay stations, most of them "hardship posts," while trying to maintain the efficiency of its operation. The VOA notes that its non-hardship posts, the only ones at which Mr. Barth would be eligible to serve, function as short-term havens for its specialists. Yet, given the "thin staffing" of VOA posts, every transfer from, say, Liberia to Munich, Germany, implies the need for another transfer in the opposite direction. Mr. Barth, however, would be medically disqualified for such transfers, thereby imposing additional burdens on the remaining engineers. For these and other operational reasons, the VOA maintains that its staffing problems would be greatly compounded by admitting someone into the Service who from the outset had Mr. Barth's serious limitations on assignability.

The accommodation Mr. Barth seeks is assignment to one of three or four "non-hardship" posts in the VOA radio relay system. As the VOA admits that it restricts the assignments of certain of its current radio specialists for medical and family reasons, there can be no claim that such an accommodation would mark a "fundamental alteration" in the nature of the VOA's program. The agency argues instead that permanently assigning Mr. Barth to non-hardship postings would impose, in these particular circumstances, undue hardship on the VOA. This is an affirmative defense that the VOA had the burden of proving.

Our examination of the records satisfies us that the VOA introduced sufficient evidence to support a claim of undue hardship by virtue of the loss of essential operational flexibility that would have resulted from an attempt to accommodate Mr. Barth's medical needs.

B. Mr. Barth's Other Claims

Mr. Barth maintains that the court erred in allowing the VOA to refuse to offer an accommodation to an applicant for employment that it has extended to current employees. Mr. Barth notes that the VOA has made special accommodations for employees who have incurred medical problems while on duty overseas or whose children have particular educational needs. From this, he argues that (1) if such limitations on the assignment of an existing employee do not create an undue hardship, similar restrictions on the assignment of an applicant will not do so; and (2) if the VOA restricts the assignments of a current employee for medical or family reasons, it must be equally willing to restrict the assignment of a handicapped applicant.

These arguments overlook the benefits that agencies derive from accommodating the special needs of existing employees, which they do not gain from serving those of applicants. A willingness to accommodate incumbent employees increases the likelihood that they—and their knowhow—will be retained by the employing agency. It will also contribute to employee morale and, presumably, to productivity.

An agency is entitled both to take the measure of the burden imposed by an accommodation net of its benefits and to take account of the duty of care, whether legal or not, that is owed employees who develop problems while on the job. Accordingly, we decline to find that the disparate treatment Mr. Barth complains of constitutes handicap discrimination within the meaning of the Act.

Mr. Barth also contends that even if the VOA had offered admissible evidence of an adverse effect on employee morale, it was inappropriate to take that factor into account. For support, he relies on cases holding, for example, that racial animus may not be used to defend race-based policies or practices.

This argument, however, confuses animus against the handicapped with the morale effects of a particular means of accommodating them. Consider an extreme example: An agency is asked to accommodate an employee with extra-sensitive eyes by moving operations underground. It seems clear that in considering this request, the agency could not properly take into account the other workers' animus against the handicapped or their resentment over the handicapped's protected legal status. But this does not mean the agency must ignore the probable effects of subterranean working conditions on the morale of other employees, however pure of heart.

An element of the undue hardship calculus cited in the EEOC regulation is the relationship between the number of employees and the size of the agency's program. 29 C.F.R. §1613.704(c). This factor is relevant, we presume, precisely because the degree of the imposition of a particular accommodation on non-handicapped employees as a group, and the effects of such impositions on a small work force, are legitimate concerns under the Rehabilitation Act.

Notes and Questions

1. In a portion of the *Barth* opinion not reproduced here, the court talks about the *McDonnell Douglas/Burdine* proof mechanism, which is used in Title VII race and sex discrimination cases. Although this proof mechanism is applicable in the ADA context when it is unclear whether the employer is motivated by the applicant's or employee's disability in refusing to hire him or in firing or demoting him, it is not appropriate to use in a reasonable accommodation/undue hardship case. This is because the purpose of the *McDonnell Douglas/Burdine* proof mechanism is to decide whether the employer had a discriminatory reason for its treatment of the applicant or employee. In a reasonable accommodation/undue hardship case, it is clear that the employer's motivation *is* the disability of the applicant or employee. The question is whether it is legal for the employer to refuse to accommodate the individual's disability. In *Barth*, whose burden is it to prove reasonable accommodation and undue hardship? Explain.

2. Employers sometimes attempt to justify discriminatory conduct on the basis of customer or coworker preference. For example, employers in the restaurant industry may be concerned that customers will not come to a restaurant where they know that employees are HIV positive. Using customer preference as a defense has been routinely struck down by the courts in the context of race and sex discrimination cases, and this defense is similarly likely to be struck down in disability discrimination cases.

3. *The ADA and Stigmatizing Appearance:* The EEOC's Interpretive Guidance, 29 C.F.R. pt. 1630, App. §1630.2(l) states,

> This provision is designed to restore Congress's intent to allow individuals to establish coverage under the "regarded as" prong by showing that they were treated adversely because of an impairment, without having to establish the covered entity's beliefs concerning the severity of the impairment...[u]nder the third prong of the definition of disability, an individual is "regarded as having such an impairment" if the individual is subjected to an action prohibited by the ADA because of an actual or perceived impairment that is not "transitory and minor." To illustrate how straightforward application of the "regarded as" prong is, if an employer refused to hire an applicant because of skin graft scars, the employer has regarded the applicant as an individual with a disability.

There are few reported cases involving stigmatizing appearance as disability discrimination. In a case decided under West Virginia state law, *Chico Dairy Co. v. West Virginia Human Rights*

Commission, 181 W. Va. 238, 382 S.E.2d 75 (1989), the assistant manager of a dairy mart store was blind in her left eye, which had been removed because of cancer when she was an infant. She wore an artificial eye, and the socket around it was somewhat sunken. She was denied promotion to manager, because her supervisor considered her appearance to be unacceptable for dealing with customers and vendors. The case was decided before the ADA took effect. Assuming this were a case brought under federal law today, would the Interpretive Guidance noted above be the basis for protection? What if an applicant who has a serious burn scar on her face applies for a waiter's position in an expensive restaurant? What if she applies to be a model?

In *Baldetta v. Harborview Med. Ctr.*, 116 F.3d 482 (9th Cir. 1997), a nurse's aide refused to cover a 1-inch red tattoo on his forearm reading "HIV POSITIVE." The court held that this refusal could be the basis for discipline because the interest in facilitating patient recovery outweighed First Amendment protections. For citations to other customer and coworker preference cases, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §4.14 (2012 and cumulative supplement).

Borkowski v. Valley Central School District

63 F.3d 131 (2d Cir. 1995)

CALABRESI, *CIRCUIT JUDGE:*

Can a teacher, whose disabilities directly affect her capacity to perform her job, insist that her employer provide a teacher's aide as a form of reasonable accommodation under Section 504 of the Rehabilitation Act, 29 U.S.C. §794? That question is at the heart of this appeal from the entry of summary judgment for the defendant Valley Central School District ("the School District"). We acknowledge that, on a proper factual showing, the answer may prove to be "no." But because we believe that issues of material fact have not been resolved, we vacate the entry of judgment in favor of the School District and remand the matter for further proceedings consistent with this opinion.

I.

In 1972, as a result of a motor vehicle accident, Kathleen Borkowski suffered a major head trauma and sustained serious neurological damage. During long years of difficult rehabilitative therapy, Ms. Borkowski's condition improved significantly. She was unable to make a complete recovery, however. According to her treating physician and to a psychologist who evaluated her in connection with this litigation, Ms. Borkowski has continuing difficulties with memory and concentration, and as a result has trouble dealing with multiple simultaneous stimuli. In addition, Ms. Borkowski's balance, coordination, and mobility continue to show the effects of her accident.

In the fall of 1987, Ms. Borkowski applied for the position of library teacher with the School District. During interviews with School District officials, Ms. Borkowski discussed her accident and its lingering consequences. Following these interviews, Ms. Borkowski was appointed to serve as a library teacher at two elementary schools within the school district. Ms. Borkowski's duties as a library teacher went beyond those of a librarian; she also was responsible for teaching library skills to classes of elementary school students.

Ms. Borkowski's appointment was for a probationary term. Under New York law, such a term may last up to three years. At the end of the third year, unless the teacher and the school district agree to extend the probationary term for a fourth year, a decision is made whether or not to grant the teacher tenure. If tenure is not granted, the teacher's employment is ended.

During her three years of probationary employment, Ms. Borkowski received regular performance evaluations. These were based on observations of Ms. Borkowski's work by the Superintendent of the School District, James Coonan, the district's Director of Elementary Education, Robert Schoonmaker, and the principals of the two schools at which Ms. Borkowski taught, Harvey Gregory and John Schmoll. While Mr. Gregory's evaluations generally were positive, those of Messrs. Schoonmaker and

Schmoll were not. Of particular significance was an unannounced observation of Ms. Borkowski's class by Mr. Schmoll during Ms. Borkowski's third and final year of probationary employment. Based on his observation, Mr. Schmoll found that Ms. Borkowski had difficulty controlling the class and noted that students had talked, yelled, and whistled without being corrected. Mr. Schmoll also criticized Ms. Borkowski for remaining seated during the lesson. He concluded that little learning had occurred during the observed class.

In the spring of 1990, Mr. Coonan, as Superintendent of the School District, determined that Ms. Borkowski should not be granted tenure. Mr. Coonan informed Ms. Borkowski of this decision on May 1, 1990. Two weeks later, replying to Ms. Borkowski's inquiry, Mr. Coonan set forth in writing the reasons for the denial of tenure. Mr. Coonan focused primarily on what he termed Ms. Borkowski's poor classroom management; he also noted that it was inappropriate for Ms. Borkowski to remain seated during class. In response, Ms. Borkowski, citing her disability, requested reconsideration of the tenure decision, but stated that if reconsideration was denied she would resign. Having received no answer from the School District, Ms. Borkowski submitted her resignation on June 1, 1990. Ms. Borkowski subsequently offered to provide the School District with a letter from her neurologist detailing her disability. The School District responded that Ms. Borkowski's disability "had absolutely nothing to do with" the decision to deny her tenure. The present action ensued.

II.

The basic framework of a claim of employment discrimination under Section 504 of the Rehabilitation Act is well settled. To prevail on her claim, Ms. Borkowski must establish that (1) she is an individual with a disability within the meaning of the Act, (2) she is otherwise qualified to perform the job in question, (3) she was excluded from the job solely because of her disability, and (4) her employer received federal funding.

For the purposes of its motion for summary judgment, the School District concedes that Ms. Borkowski is an individual with a disability within the meaning of the Act. It is also undisputed that the School District receives federal funds. The matter therefore turns on the second and third elements of the claim, namely, whether Ms. Borkowski was otherwise qualified for the position of tenured library teacher, and whether she was denied that position solely on the basis of her disability.

The School District and the district court misapprehend the nature of the inquiry into whether Ms. Borkowski was otherwise qualified and whether her termination was due to her disability. Ms. Borkowski claims, and the School District concedes, that she was otherwise qualified in a formal sense, in that she had the necessary educational background and certifications to be hired. By determining that Ms. Borkowski's performance was inadequate without considering whether her known disabilities could be accommodated reasonably, and by relying on that determination to justify denying her tenure, the School District in effect concluded that Ms. Borkowski was not otherwise qualified and that she could be dismissed. It is this decision that brings her claim within the bounds of Section 504, and requires us to examine whether, under the terms of that section, Ms. Borkowski (1) was, in fact, otherwise qualified for tenure, and (2) was denied tenure solely because of her disability.

1. Was Ms. Borkowski otherwise qualified for the position of tenured library teacher?

Although the phrase "otherwise qualified" is hardly unambiguous on its face, its meaning in the context of an employment discrimination claim is fairly clear: an individual is otherwise qualified for a job if she is able to perform the essential functions of that job, either with or without a reasonable accommodation. This definition plays off the regulatory language that requires an employer to "make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the [employer] can demonstrate that the accommodation would impose an undue hardship on the operation of its program." 34 C.F.R. §104.12(a); 45 C.F.R. §84.12(a).

a. The allocation of the burdens of production and persuasion

Under our approach, the plaintiff bears the burden of production and persuasion on the issue of whether she is otherwise qualified for the job in question. A plaintiff cannot be considered "otherwise qualified" unless she is able, with or without assistance, to perform the essential functions of the job in question. It follows that the plaintiff bears the burden of proving either that she can meet the requirements of the job without assistance, or that an accommodation exists that permits her to perform the job's essential functions.

Whether a proposed accommodation is *reasonable*, however, is another question. "Reasonable" is a relational term: it evaluates the desirability of a particular accommodation according to the consequences that the accommodation will produce. This requires an inquiry not only into the benefits of the accommodation but into its costs as well. We would not, for example, require an employer to make a multi-million dollar modification for the benefit of a single individual with a disability, even if the proposed modification would allow that individual to perform the essential functions of a job that she sought. In spite of its effectiveness, the proposed modification would be unreasonable because of its excessive costs. In short, an accommodation is reasonable only if its costs are not clearly disproportionate to the benefits that it will produce.[3]

As to the requirement that an accommodation be reasonable, we have held that the plaintiff bears only a burden of production. This burden, we have said, is not a heavy one. It is enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits. Once the plaintiff has done this, she has made out a *prima facie* showing that a reasonable accommodation is available, and the risk of nonpersuasion falls on the defendant.

At this point the defendant's burden of persuading the factfinder that the plaintiff's proposed accommodation is unreasonable merges, in effect, with its burden of showing, as an affirmative defense, that the proposed accommodation would cause it to suffer an undue hardship. For in practice meeting the burden of non-persuasion on the reasonableness of the accommodation and demonstrating that the accommodation imposes an undue hardship amount to the same thing.

Does Section 504 require, for example, that employers be driven to the brink of insolvency before a hardship becomes too great? We think not. Similarly, where the employer is a government entity, Congress could not have intended the only limit on the employer's duty to make reasonable accommodation to be the full extent of the tax base on which the government entity could draw.

What, then, does undue hardship mean? We note that "undue" hardship, like "reasonable" accommodation, is a relational term; as such, it looks not merely to the costs that the employer is asked to assume, but also to the benefits to others that will result. The burden on the employer, then, is to perform a cost/benefit analysis. In a sense, of course, that is what the plaintiff also had to do to meet her burden of making out a *prima facie* case that a reasonable accommodation existed. But while the plaintiff could meet her burden of production by identifying an accommodation that facially achieves a rough proportionality between costs and benefits, an employer seeking to meet its burden of persuasion on reasonable accommodation and undue hardship must undertake a more refined analysis. And it must analyze the hardship sought to be imposed through the lens of the factors listed in the regulations, which include consideration of the industry to which the employer belongs as well as the individual characteristics of the particular defendant-employer. If the employer can carry this burden, it will have shown both that the hardship caused by the proposed accommodation would be undue in light of the enumerated factors, and that the proposed accommodation is unreasonable and need not be made.[4]

Despite the ambiguities of the statutory and regulatory language, we believe that the resulting standards should not prove difficult to apply. First, the plaintiff bears the burden of proving that she is otherwise qualified; if an accommodation is needed, the plaintiff must show, as part of her burden of

persuasion, that an effective accommodation exists that would render her otherwise qualified. On the issue of reasonable accommodation, the plaintiff bears only the burden of identifying an accommodation, the costs of which, facially, do not clearly exceed its benefits. These two requirements placed on the plaintiff will permit district courts to grant summary judgments for defendants in cases in which the plaintiff's proposal is either clearly ineffective or outlandishly costly. Second, we do not at all intend to suggest that employers, in attempting to meet their burden of persuasion on the reasonableness of the proposed accommodation and in making out an affirmative defense of undue hardship, must analyze the costs and benefits of proposed accommodations with mathematical precision. District courts will not be required to instruct juries on how to apply complex economic formulae; a common-sense balancing of the costs and benefits in light of the factors listed in the regulations is all that is expected.

b. Ms. Borkowski's claim

With these standards in mind, we proceed to analyze Ms. Borkowksi's claim. Ms. Borkowski concedes that her performance was inadequate, and that she was unable to meet the School District's legitimate expectations without help. She maintains, however, that with the provision of a teacher's aide to assist her in maintaining classroom control, she would be able to perform all of the functions of a library teacher, and therefore was otherwise qualified. She further contends that the provision of a teacher's aide is not unreasonable.

i. Ms. Borkowski's ability to perform the essential functions of her job

In evaluating Ms. Borkowski's claim that she could perform all of the essential functions of a tenured library teacher, we encounter a difficulty: it is not immediately apparent what the essential functions of Ms. Borkowski's job were. In denying Ms. Borkowski tenure, the School District focused primarily on Ms. Borkowksi's poor classroom management. But is classroom management—the ability to maintain appropriate behavior among the students—an essential function of a tenured library teacher's job? We might intuitively think so. But Section 504 does not permit us to rely on intuition—indeed, unthinking reliance on intuition about the methods by which jobs are to be performed and how an individual's disabilities relate to those methods is among the barriers that the Rehabilitation Act was designed to overcome. To avoid unfounded reliance on uninformed assumptions, the identification of the essential functions of a job requires a fact-specific inquiry into both the employer's description of a job and how the job is actually performed in practice.

Determining what is an essential part of Ms. Borkowski's job and examining in detail the manner in which a teaching aide might assist Ms. Borkowski in maintaining classroom control are of critical importance to this case because those inquiries establish the framework for determining whether Ms. Borkowski has met her burden of showing that she is otherwise qualified. As we noted earlier, an individual who cannot perform the essential functions of a job, either with or without assistance, is not otherwise qualified within the meaning of Section 504. It follows that an employer is not required to accommodate an individual with a disability by eliminating essential functions from the job. And so we have held, for instance, that individuals whose physical condition precludes them from engaging in heavy lifting, and who seek jobs for which such lifting is shown to be an essential function, need not be accommodated by shifting responsibility for the lifting to other individuals.

Admittedly, then, having someone else do part of a job may sometimes mean eliminating the essential functions of the job. But at other times providing an assistant to help with a job may be an accommodation that does not remove an essential function of the job from the disabled employee. Thus, for example, a visually impaired administrator or clerk may be provided with a reader. What matters to that individual's job is not the ability to read *per se*, but rather the ability to take in, process, and act on information. The provision of a reader in these circumstances does not eliminate an essential function, but rather permits the individual with a disability to perform that essential function.

The accommodation suggested by Ms. Borkowski appears, at first blush, to resemble more closely

one that would eliminate an essential function of a library teacher in a classroom setting than one that would permit Ms. Borkowski to perform that function. Yet, viewing the record at this stage of the proceedings in the light most favorable to Ms. Borkowski, we cannot say that no reasonable jury could conclude otherwise. This is especially so since the regulations implementing Section 504 explicitly contemplate that teachers with disabilities may require the assistance of teachers' aides. *See* 45 C.F.R. Part 84 Appendix A at 376.

A number of factors might be relevant in the present case. One might be the age of the students that Ms. Borkowski taught. We know that they were elementary school students, but, within that category, children of different ages may require different degrees of supervision. Another would be the availability of teacher's aides within the School District. We know from the record that Ms. Borkowski was provided with an aide to assist her in the performance of her library duties, although not of her teaching duties. But were other teachers within the school system provided with teacher's aides to assist in maintaining appropriate student behavior? If so, then classroom management might not be considered an essential function.

Under the circumstances of this case, three conclusions are possible: either (a) classroom management was an essential function of Ms. Borkowski's job, and Ms. Borkowski's proposed accommodation would eliminate that function; or (b) classroom management was an essential function of Ms. Borkowski's job, but providing Ms. Borkowski with an assistant would permit *her* to perform that function, though with assistance; or (c) classroom management was not an essential function of Ms. Borkowski's job, and it does not matter whether Ms. Borkowski's proposed accommodation would result in her performing the function, albeit with assistance, or in the reassignment of that function to the teacher's aide. Only the first of these conclusions would support a grant of summary judgment in favor of the School District. And we cannot say that such a conclusion is required on the record as it currently exists.

Ms. Borkowski has introduced evidence that an accommodation—provision of an aide—is available and would allow her to perform the essential functions of a tenured library teacher. Ms. Borkowski therefore has established, as a *prima facie* matter, that an effective accommodation exists. The School District to date has not brought in any evidence that would permit a court to rule as a matter of law that Ms. Borkowski's performance would be inadequate even with the proposed accommodation or that the accommodation would eliminate the essential functions of the job. Accordingly, an issue of fact remains as to whether Ms. Borkowski's proposed accommodation would render her otherwise qualified.

ii. *Ms. Borkowski's prima facie showing of reasonableness*

Turning, then, to the reasonableness of Ms. Borkowski's proposed accommodation, we conclude that Ms. Borkowski has met her burden of production. The proposed accommodation plainly falls within the range of accommodations that may, in a general sense, be considered reasonable in light of their costs and benefits. Both the regulations implementing Section 504 and the cases applying the Rehabilitation Act contemplate the possibility that the use of assistants may be reasonable accommodations. Accordingly, we conclude that Ms. Borkowski has made a showing adequate to carry her burden of production on the reasonableness of her proposed accommodation.

c. The School District's claim of undue hardship

Since Ms. Borkowski has introduced enough evidence to raise a factual issue as to whether, with an accommodation, she is otherwise qualified, and also has made out a *prima facie* case that the proposed accommodation is reasonable, a summary judgment can be entered on this issue only if the School District has demonstrated, as a matter of law, that the accommodation is unreasonable or that it imposes an undue hardship. The School District, however, has thus far presented no evidence concerning the cost of providing a teacher's aide, its budget and organization, or any of the other factors made relevant by the regulations. Instead, the School District argues that the provision of an

assistant is unreasonable and creates an undue hardship as a matter of law, regardless of the particular facts of the case. This argument need not long detain us. As was noted above, there is nothing inherently unreasonable or undue in the burden that an employer would assume by providing an assistant to an employee with disabilities; the regulations clearly contemplate, and courts have held, that employers may be required to assume the cost of providing assistants for otherwise qualified individuals with disabilities absent a showing by the employer that the cost is excessive in light of the factors enumerated in the regulations. It may be that the School District can show that the benefits that an aide would give are too small in relation to the cost of an aide. It may also be that the District can demonstrate that in this and other districts provision of an aide would impact school budgets sufficiently as to be an unreasonable or undue burden. It may even be that the School District can show these so powerfully that a judgment as a matter of law would be appropriate. But in the absence of evidence regarding school district budgets, the cost of providing an aide of this sort, or any like kind of information, we are unable to conclude that unreasonableness or undue hardship has been established, and we certainly cannot say that either has been established as a matter of law.

Because Ms. Borkowski has raised a fact question on whether with the provision of an aide she would be able to perform the essential functions of a library teacher, and because she has met her burden of production on the issue of whether the provision of such an aide would be a reasonable accommodation, and finally because the School District has not established as an affirmative defense that the provision of such an aide would, as a matter of law, either be unreasonable or impose an undue hardship, a summary judgment on the question of whether Ms. Borkowski is "otherwise qualified" cannot issue on the present record.

Notes and Questions

1. How is the Second Circuit approach on the burdens of production and persuasion different from that in *Barth v. Gelb*?

2. Note that the court used a cost benefit analysis in determining reasonableness. What are the limits on that analysis?

Vande Zande v. Wisconsin Department of Administration

44 F.3d 538 (7th Cir. 1995)

POSNER, *CHIEF JUDGE.*

The concept of reasonable accommodation is at the heart of this case. The plaintiff sought a number of accommodations to her paraplegia that were turned down. The principal defendant as we have said is a state, which does not argue that the plaintiff's proposals were rejected because accepting them would have imposed undue hardship on the state or because they would not have done her any good. The district judge nevertheless granted summary judgment for the defendants on the ground that the evidence obtained in discovery, construed as favorably to the plaintiff as the record permitted, showed that they had gone as far to accommodate the plaintiff's demands as reasonableness, in a sense distinct from either aptness or hardship—a sense based, rather, on considerations of cost and proportionality —required. On this analysis, the function of the "undue hardship" safe harbor, like the "failing company" defense to antitrust liability is to excuse compliance by a firm that is financially distressed, even though the cost of the accommodation to the firm might be less than the benefit to disabled employees.

This interpretation of "undue hardship" is not inevitable—in fact probably is incorrect. It is a defined term in the Americans with Disabilities Act, and the definition is "an action requiring significant difficulty or expense," 42 U.S.C. §12111(10)(A). The financial condition of the employer is only one consideration in determining whether an accommodation otherwise reasonable would impose an undue hardship. See 42 U.S.C. §§12111(1)(B)(ii), (iii). The legislative history equates

"undue hardship" to "unduly costly." These are terms of relation. We must ask, "undue" in relation to what? Presumably (given the statutory definition and the legislative history) in relation to the benefits of the accommodation to the disabled worker as well as to the employer's resources.

So it seems that costs enter at two points in the analysis of claims to an accommodation to a disability. The employee must show that the accommodation is reasonable in the sense both of efficacious and of proportional to costs. Even if this prima facie showing is made, the employer has an opportunity to prove that upon more careful consideration the costs are excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health. In a classic negligence case, the idiosyncrasies of the particular employer are irrelevant. Having above-average costs, or being in a precarious financial situation, is not a defense to negligence. One interpretation of "undue hardship" is that it permits an employer to escape liability if he can carry the burden of proving that a disability accommodation reasonable for a normal employer would break him.

Lori Vande Zande, aged 35, is paralyzed from the waist down as a result of a tumor of the spinal cord. Her paralysis makes her prone to develop pressure ulcers, treatment of which often requires that she stay at home for several weeks. The defendants and the amici curiae argue that there is no duty of reasonable accommodation of pressure ulcers because they do not fit the statutory definition of a disability. Intermittent, episodic impairments are not disabilities, the standard example being a broken leg. But an intermittent impairment that is a characteristic manifestation of an admitted disability is, we believe, a part of the underlying disability and hence a condition that the employer must reasonably accommodate. Often the disabling aspect of a disability is, precisely, an intermittent manifestation of the disability, rather than the underlying impairment. The AIDS virus progressively destroys the infected person's immune system. The consequence is a series of opportunistic diseases which (so far as relevant to the disabilities law) often prevent the individual from working. If they are not part of the disability, then people with AIDS do not have a disability, which seems to us a very odd interpretation of the law, and one expressly rejected in the regulations. We hold that Vande Zande's pressure ulcers are a part of her disability, and therefore a part of what the State of Wisconsin had a duty to accommodate—reasonably.

Vande Zande worked for the housing division of the state's department of administration for three years, beginning in January 1990. The housing division supervises the state's public housing programs. Her job was that of a program assistant, and her tasks were of a clerical, secretarial, and administrative assistant character. In order to enable her to do this work, the defendants, as she acknowledges, "made numerous accommodations relating to the plaintiff's disability." As examples, in her words, "they paid the landlord to have bathrooms modified and to have a step ramped; they bought special adjustable furniture for the plaintiff; they ordered and paid for one-half of the cost of a cot that the plaintiff needed for daily personal care at work; they sometimes adjusted the plaintiff's schedule to perform backup telephone duties to accommodate the plaintiff's medical appointments; they made changes to the plans for a locker room in the new state office building; and they agreed to provide some of the specific accommodations the plaintiff requested in her October 5, 1992 Reasonable Accommodation Request."

But she complains that the defendants did not go far enough in two principal respects. One concerns a period of eight weeks when a bout of pressure ulcers forced her to stay home. She wanted to work full time at home and believed that she would be able to do so if the division would provide her with a desktop computer at home (though she already had a laptop). Her supervisor refused, and told her that he probably would have only 15 to 20 hours of work for her to do at home per week and that she would have to make up the difference between that and a full work week out of her sick leave or vacation leave. In the event, she was able to work all but 16.5 hours in the eight-week period. She took 16.5 hours of sick leave to make up the difference. As a result, she incurred no loss of income, but did lose sick leave that she could have carried forward indefinitely. She now works for another agency of the State of Wisconsin, but any unused sick leave in her employment by the housing

division would have accompanied her to her new job. Restoration of the 16.5 hours of lost sick leave is one form of relief that she seeks in this suit.

She argues that a jury might have found that a reasonable accommodation required the housing division either to give her the desktop computer or to excuse her from having to dig into her sick leave to get paid for the hours in which, in the absence of the computer, she was unable to do her work at home. No jury, however, could in our view be permitted to stretch the concept of "reasonable accommodation" so far. Most jobs in organizations public or private involve team work under supervision rather than solitary unsupervised work, and team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance. This will no doubt change as communications technology advances, but is the situation today. Generally, therefore, an employer is not required to accommodate a disability by allowing the disabled worker to work, by himself, without supervision, at home. [W]e think the majority view is correct. An employer is not required to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced. No doubt there are exceptions, but it would take a very extraordinary case for the employee to be able to create a triable issue of the employer's failure to allow the employee to work at home.

And if the employer, because it is a government agency and therefore is not under intense competitive pressure to minimize its labor costs or maximize the value of its output, or for some other reason, bends over backwards to accommodate a disabled worker—goes further than the law requires—by allowing the worker to work at home, it must not be punished for its generosity by being deemed to have conceded the reasonableness of so far-reaching an accommodation. That would hurt rather than help disabled workers. Wisconsin's housing division was not required by the Americans with Disabilities Act to allow Vande Zande to work at home; even more clearly it was not required to install a computer in her home so that she could avoid using up 16.5 hours of sick leave. It is conjectural that she will ever need those 16.5 hours; the expected cost of the loss must, therefore, surely be slight. An accommodation that allows a disabled worker to work at home, at full pay, subject only to a slight loss of sick leave that may never be needed, hence never missed, is, we hold, reasonable as a matter of law.

[Van Zande's] second complaint has to do with the kitchenettes in the housing division's building, which are for the use of employees during lunch and coffee breaks. Both the sink and the counter in each of the kitchenettes were 36 inches high, which is too high for a person in a wheelchair. The building was under construction, and the kitchenettes not yet built, when the plaintiff complained about this feature of the design. But the defendants refused to alter the design to lower the sink and counter to 34 inches, the height convenient for a person in a wheelchair. Construction of the building had begun before the effective date of the Americans with Disabilities Act, and Vande Zande does not argue that the failure to include 34-inch sinks and counters in the design of the building violated the Act. She could not argue that; the Act is not retroactive. But she argues that once she brought the problem to the attention of her supervisors, they were obliged to lower the sink and counter, at least on the floor on which her office was located but possibly on the other floors in the building as well, since she might be moved to another floor. All that the defendants were willing to do was to install a shelf 34 inches high in the kitchenette area on Vande Zande's floor. That took care of the counter problem. As for the sink, the defendants took the position that since the plumbing was already in place it would be too costly to lower the sink and that the plaintiff could use the bathroom sink, which is 34 inches high.

Apparently it would have cost only about $ 150 to lower the sink on Vande Zande's floor; to lower it on all the floors might have cost as much as $ 2,000, though possibly less. Given the proximity of the bathroom sink, Vande Zande can hardly complain that the inaccessibility of the kitchenette sink interfered with her ability to work or with her physical comfort. Her argument rather is that forcing her to use the bathroom sink for activities (such as washing out her coffee cup) for which the other

employees could use the kitchenette sink stigmatized her as different and inferior; she seeks an award of compensatory damages for the resulting emotional distress. We may assume without having to decide that emotional as well as physical barriers to the integration of disabled persons into the workforce are relevant in determining the reasonableness of an accommodation. But we do not think an employer has a duty to expend even modest amounts of money to bring about an absolute identity in working conditions between disabled and nondisabled workers. The creation of such a duty would be the inevitable consequence of deeming a failure to achieve identical conditions "stigmatizing." That is merely an epithet. We conclude that access to a particular sink, when access to an equivalent sink, conveniently located, is provided, is not a legal duty of an employer. The duty of reasonable accommodation is satisfied when the employer does what is necessary to enable the disabled worker to work in reasonable comfort.

Notes and Questions

1. How does the Seventh Circuit rule concerning proof of reasonableness differ from that of the Second Circuit?

2. Would this case have come out differently if the focus were on the issue of undue hardship rather than unreasonableness?

3. Like the court in *Borkowski*, Judge Posner assumes that it is proper to engage in a cost benefit analysis in determining the reasonableness of a requested accommodation and in determining whether the request is an undue hardship for the defendant. In a portion of the opinion that is not reproduced here, the court concludes that the fact that the defendant is wealthy or large, or as in this case, the state, and can therefore raise the money to make the accommodation through taxes, does not mean that it has a greater responsibility to provide all accommodations requested. Here, the cost of the accommodation is very low, but the court nonetheless rejected the request as unreasonable. Thus, although a defendant may defend on the reasonableness question by arguing that it would not be economically sound to spend the money on the accommodation, even if the accommodation requested is for a modest amount of money, the defendant is not necessarily required to make the accommodation. Why is this the case?

4. Note the tone of this opinion. What is the author's attitude toward the plaintiff? What is the basis for this conclusion? Does this attitude affect the result?

[2] Health Impairments and Reasonable Accommodations

The following case demonstrates the importance of considering not only the cost of the requested accommodation but also the feasibility of the accommodation given the job requirements.

Huber v. Howard County, Maryland

849 F. Supp. 407 (D. Md. 1994)

FRANK A. KAUFMAN, SENIOR DISTRICT JUDGE:

John Huber brings this suit under the Rehabilitation Act, 29 U.S.C. §794, claiming that Howard County, Maryland, unlawfully discriminated against him when the County refused to hire Huber as a full-time firefighter because he suffers from asthma.

Facts

In Howard County, Maryland, firefighting services are provided by both volunteer fire corporations and career employees of the County's Department of Fire and Rescue. Volunteer firefighters are not required to meet all the requirements established for career firefighters or to participate in County sponsored training or testing. Rather, they may choose to limit the functions which they perform during a fire emergency.

Huber applied and was accepted for membership in the Ellicott City Volunteer Fireman's Association, Inc. in March of 1986, and in the West Friendship Volunteer Fireman's Association, Inc. in February 1987.... As a volunteer firefighter, Huber successfully completed several training courses and also became certified as a cardiac rescue technician.

[Huber's condition and record of employment is omitted. He had asthma, which necessitated the use of an inhaler on occasion. This condition affected his ability to pass agility tests (running exercises) that were part of the recruit training. He was evaluated by his physician, who indicated that his performance of the duties of firefighter would require using his inhaler. His employment was terminated on grounds that without the inhaler he could not complete the agility requirements, and he would be a risk to himself and others. He brought suit under Section 504 of the Rehabilitation Act.]

The Rehabilitation Act

The County asserts that Huber cannot fulfill the essential functions of a firefighter because, as Dr. Hayes concluded, Huber's asthma poses the risk that he may be incapacitated at the scene of a fire when confronted in an outdoor environment with a variety of allergens, variable weather conditions, including cold weather, and hazardous and toxic fumes and substances. Huber does not contest Dr. Hayes' assessment of the risks involved in firefighting, but responds that he is otherwise qualified because he can and has performed the functions of a volunteer firefighter for eight years.

However, the position of a volunteer firefighter differs in several important ways from that of a career firefighter. To begin with, the volunteer corporations are funded separately from the County department and have their own membership standards. Most importantly, unlike County firefighters, volunteer firefighters have the discretion of not responding to a fire and Huber has stated in depositions that he has, on numerous occasions, declined from going on calls because he was not feeling well. Career firefighters simply do not have that discretion. Finally, Huber's performance as a volunteer is not necessarily indicative of his future performance given the unpredictable nature of asthma, which in Huber's case, according to his own expert, is cold and exercise induced, conditions which are faced by firefighters. Huber simply may not impose the standards of a volunteer firefighter upon the County in the light of the differences between the two jobs. Rather, he must demonstrate that he is qualified to serve in the specific job at issue.

As to the second level of the "otherwise qualified" inquiry, whether the employer's requirements are representative of the essential functions of the job, this Court concludes that the County's requirement that firefighters not have a chronic medical condition such as Huber's is directly linked to the duties which inhere in the position of a County firefighter. In the case now before us, the uncontradicted evidence in this record, ... serves only to confirm a fact that is self-evident—firefighting is strenuous, hazardous, demanding work. [Firefighters] must wear heavy protective gear in fighting fires, and are often required to lift heavy loads. Dependable firefighting services are crucial to the public, and the danger involved in the work requires that each firefighter be confident in the abilities and stamina of his fellow workers. Firefighting is simply a job for which physical fitness is a most basic qualification. Some conditions simply are not compatible with certain lines of work. Huber has not provided or even proffered evidence that he can perform a most essential function of a career firefighter, namely to be available, in a healthy physical condition at any, random moment during a shift—"in spite of his handicap." Thus, in terms of the Act, Huber is not "otherwise qualified" unless his would-be employer can reasonably accommodate him in the performance of the job.

Reasonable Accommodation

A disabled individual may be qualified under the Act if provided by his employer with reasonable accommodation in the handling of his disability. Thus, the question arises as to whether Huber can perform the essential functions of a firefighter with such accommodation and if so, whether the County has failed reasonably to accommodate him. "[P]laintiff bears the burden of demonstrating that

she could perform the essential functions of her job with reasonable accommodation." While plaintiff has produced evidence that he could perform most of the essential functions of the job with accommodation by the County, he has not shown that the type of accommodation which would be necessary would also be reasonable.

Huber states that the County failed to accommodate him when it denied him use of his inhaler during exercises at the academy. However, an exhibit provided by Huber, apparently from a Physician's Desk Reference, states that his brand of inhaler should not be used or stored near open flame and that exposure to high temperatures could cause bursting of the device. In the light of these facts, the County has not acted unreasonably in determining that such device would be improper if used at the scene of a fire. Further, Huber does not contest the fact that, in denying Huber use of his inhaler during exercises, the County was concerned with how a firefighter, at the scene of a fire, would use an inhaler, given the breathing apparatus, helmet, facepiece and gloves a firefighter wears, and that the County was also concerned with how long it would take for such medication to have effect. Thus, Huber has provided no evidence that the County's direction regarding the inhaler was not job related or supported by legitimate safety concerns; rather, the opposite appears true.

Beyond the medication controversy, Huber has provided the opinion of Dr. James L. Gamble, a specialist in occupational medicine, who states that Huber could perform the duties of a firefighter with several accommodations, above and beyond permitting use of the inhaler. According to Dr. Gamble, the County could have other firefighters, who are trained to use a stethoscope, evaluate Huber on a daily basis to determine whether he is having a wheezing problem, and if he is having a problem he could be referred to the fire department's medical department for further determination of his work status. At the scene of a fire when the firefighters report for rehabilitation, the paramedics on sight could listen to Huber's lungs to see if there is a wheezing problem. Again, if he is found to have a problem he could report to the firefighter's medical department. Dr. Gamble states that with those accommodations, the risk of any sort of problem would be less than ten percent.

However, an employer need not make accommodations which "would result in an undue hardship," to the employer. The accommodation urged by Huber would appear to add up to just that. To begin with, contrary to Dr. Gamble's assumption, the County fire department has no on-site medical department or rehabilitation center, and common sense suggests that establishing and maintaining such departments to accommodate plaintiff would entail substantial cost. Moreover, the fact that plaintiff's lungs are clear at the start of the day would not guarantee that Huber's lungs would remain clear at the scene of a fire or at any other time during a work shift. Even if Huber were further examined at the site of a fire, his potential incapacitation could require that he be removed from service. That contingency would mean that the County would have to increase its staffing requirements at stations to which Huber is assigned in order to have enough active firefighters at the scene. An accommodation which permits an employee to work only when his or her impairment permits is not reasonable in a job, such as firefighting, where active attendance and immediate, undelayed participation is crucial.

Huber's requested accommodation would also pose an undue burden upon the County in the light of the fact that the County provides only one day of disability leave a month, which experience has shown will not be enough to accommodate Huber. During training as a recruit, Huber was often incapacitated for several days within a single month. Providing Huber with extra disability days would affect staffing and hours of the other firefighters.

It bears repeating that the applicable regulation defines an otherwise qualified person as one who, with or without reasonable accommodation, does not pose a safety or health risk to others. Numerous cases have held that an individual who is at risk of danger to himself or others is not otherwise qualified.

Huber's enthusiasm, sincerity, and commendable desire to serve his community, as well as the

competent work he has done as a volunteer firefighter, all deserve to be noted and taken into account. But the Rehabilitation Act and its ensuing caselaw provide that the County need not accommodate Huber's disability where so to do would result in an undue burden for the County and a risk of harm to Huber himself, to his fellow firefighters, and to the general public. Accordingly, the County is entitled to the summary judgment which it seeks.

Courts have frequently addressed disability cases involving respiratory conditions, and have generally found the conditions not to be covered under the ADA. *See* LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §4.9 *Respiratory Conditions* (2012 and cumulative supplement).

Notes

1. *Accommodating Smoke Sensitivities.* One of the earliest decisions addressing this issue arose under Section 504 of the Rehabilitation Act. In *Vickers v. Veterans Admin.*, 549 F. Supp. 85 (W.D. Wash. 1982), a government employee requested a work environment free of tobacco smoke. The court noted that it is not clear whether someone who is unusually sensitive to tobacco smoke is even covered under Section 504, but the court discussed the problem of balancing the rights of smokers and nonsmokers. The court observed that a number of accommodations were provided to the plaintiff and concluded that the defendant had made a "reasonable effort to accommodate to plaintiff's handicap while at the same time attempting to accommodate to those who felt the need to smoke during working hours." Therefore, the court held for the defendant. See also *Gupton v. Virginia*, 14 F.3d 203 (4th Cir. 1994) (no right to smoke-free environment); *Harmer v. Virginia Electric & Power Co.*, 831 F. Supp. 1300 (E.D. Va. 1993) (no right to a smoke-free floor).

In light of the increasing social and political pressures to limit smoking, would it be permissible for employers to refuse to hire smokers? Could they ask this at the preemployment stage? Could they do drug tests to determine whether someone had violated this? Is it a good social policy to regulate what people do off the job? See Mark A. Rothstein, *Refusing to Employ Smokers: Good Public Health or Bad Public Policy?*, 62 NOTRE DAME L. REV. 940 (1987). See also Mark W. Pugsley, *Nonsmoking Hiring Policies: Examining the Status of Smokers under Title I of the Americans with Disabilities Act of 1990*, 43 DUKE L.J. 1089 (1994). 29 C.F.R. §1630.16(d) states that it is not a violation of the Act for employers to prohibit or impose restrictions on smoking in places of employment.

2. *Chemical and Environmental Sensitivities:* There has been an increase in the number of complaints in the workplace and in other settings about environmental factors affecting the health of individuals. This type of complaint raises not only the issue of whether hypersensitivities of this type are disabilities under the applicable statutes, but also what types of accommodations would be viewed as reasonable in a given case. Chapter 8 (Housing) illustrates an example of such a case.

[3] Physical Impairments and Reasonable Accommodations

The following case illustrates an unusual fact setting where the employee is requesting that the employer "provide" parking, not simply designate a specific parking space in a parking area already provided to employees.

Lyons v. Legal Aid Society

68 F.3d 1512 (2d Cir. 1995)

KEARSE, CIRCUIT JUDGE:

[Betty Lyons was an attorney with the Legal Aid office in lower Manhattan. Two years into her employment, she was injured in a car accident, which left her with a number of serious physical impairments that substantially affected her working. Upon returning to work, she requested that Legal

Aid pay for a parking space near the office and courts because she could not take public transportation which would require walking substantial distances. This request was denied, and Ms. Lyons has been paying $300–$520 a month (which was 15–26 percent of her monthly net salary) for a parking space since that time.]

Lyons commenced the present action in April 1994. Citing an Equal Employment Opportunity Commission ("EEOC") guideline which stated that "reasonable accommodation of a disability 'could include ... providing reserved parking spaces'" the complaint alleged that Legal Aid had refused to provide reasonable accommodations for Lyons's disability, thereby violating her rights under the ADA, the Rehabilitation Act, state law, and municipal law.

II. *Discussion*

The only question is whether Lyons's request that Legal Aid provide her with a parking space near work is, as a matter of law, not a request for a "reasonable" accommodation.

Neither the ADA nor the Rehabilitation Act provides a closed-end definition of "reasonable accommodation." The ADA sets out a nonexclusive list of different methods of accommodation encompassed by that term, stating that

> [t]he term "reasonable accommodation" may include—
>
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) 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 Rehabilitation Act does not include a definition of reasonable accommodation, but the regulations promulgated under that Act use virtually the same language as §12111(9) of the ADA. See 45 C.F.R. §84.12. The term is to be interpreted in the same way with respect to both the ADA and the Rehabilitation Act.

Additional regulations promulgated by the EEOC under the ADA give further guidance as to what may or may not be within the employer's obligation to provide "reasonable accommodation." The employer is required to provide [m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or ... that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities. This description too is nonexclusive. The EEOC notes that "[t]here are any number of other specific accommodations that may be appropriate for particular situations but are not specifically mentioned" in §1630.2(o). On the other hand, the accommodation obligation does not require the employer to make accommodations that are "primarily for the [individual's] personal benefit," such as an "adjustment or modification [that] assists the individual throughout his or her daily activities, on and off the job," or to provide "any amenity or convenience that is not job-related."

In support of the order of dismissal in the present case, Legal Aid argues that Lyons's claim for financial assistance in parking her car amounts to a demand for unwarranted preferential treatment because the requested accommodation is merely "a matter of personal convenience that she uses regularly in daily life." Legal Aid asserts that it does not provide parking facilities or any other commuting assistance to its nondisabled employees and that Lyons's special needs in getting to work must therefore lie outside the scope of its obligations under the federal disability statutes. We find Legal Aid's contentions to be an inappropriate foundation for the Rule 12(b)(6) dismissal.

First, Legal Aid's assertion that it does not provide parking assistance to any other employee goes

beyond the face of the complaint. This assertion cannot be the basis for a dismissal for failure to state a claim.

Further, even if that assertion were established as a matter of fact, it would not dispose of the issue of whether provision of a parking space would be a reasonable accommodation. It is clear that an essential aspect of many jobs is the ability to appear at work regularly and on time, and that Congress envisioned that employer assistance with transportation to get the employee to and from the job might be covered. Thus, the report of the House of Representatives Committee on Education and Labor noted that a qualified person with a disability seeking employment at a store that is "located in an inaccessible mall" would be entitled to reasonable accommodation in helping him "get to the job site." Similarly, the EEOC has stated that possible required accommodations other than those specifically listed in the statute include "making employer provided transportation accessible, and providing reserved parking spaces." So far as we are aware, there has been no judicial interpretation of this EEOC guideline, which may have been intended to mean that the provision of parking spaces can be required, or that the reservation of employer-provided parking spaces can be required, or both.

Whatever the guideline intended, we think that the question of whether it is reasonable to require an employer to provide parking spaces may well be susceptible to differing answers depending on, e.g., the employer's geographic location and financial resources, and that the determination of the reasonableness of such a requirement will normally require some development of a factual record. Further, we have noted that while reasonableness depends upon "a common-sense balancing of the costs and benefits" to both the employer and the employee, an accommodation may not be considered unreasonable merely because it requires the employer "to assume more than a de minimis cost," or because it will cost the employer more overall to obtain the same level of performance from the disabled employee.

Finally, we reject Legal Aid's contention that Lyons's request for a parking space amounts to no more than a demand for an additional fringe benefit in the nature of a "personal amenity" unrelated to the "essential functions" of her job. According to the complaint, whose factual allegations must be taken as true, Lyons cannot fulfill her responsibilities as a staff attorney at Legal Aid without being able to park her car adjacent to her office. Lyons's ability to reach her office and the courts is an essential prerequisite to her work in that position. There is no suggestion in the complaint that the requested parking space near the Legal Aid office and the courts was sought for any purpose other than to allow Lyons to reach and perform her job.

Plainly there is nothing inherently unreasonable, given the stated views of Congress and the agencies responsible for overseeing the federal disability statutes, in requiring an employer to furnish an otherwise qualified disabled employee with assistance related to her ability to get to work. We conclude that Lyons's complaint stated a claim on which relief can be granted under the ADA and the Rehabilitation Act. We express no view as to whether Legal Aid may be able to develop an evidentiary record prior to trial that is sufficient to demonstrate the unreasonableness of the requested accommodation as a matter of law. At this juncture, we note only that, in light of the need to develop a factual record, it was inappropriate to dismiss the complaint summarily by granting defendant's motion pursuant to Rule 12(b)(6).

Notes and Questions

1. What should the outcome be on remand? What facts would need to be established to demonstrate undue burden?

2. Does it make a difference whether Lyons is an existing employee or an applicant for employment?

3. What if she needed a driver or a special vehicle? Where should the line be drawn?

4. The court remanded the issue for further review. The EEOC Interpretive Guidance, 29 C.F.R. pt. 1630

App., §1630.2(o), states, "Other accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment, making employer provided transportation accessible, and providing reserved parking spaces." Does the EEOC guidance that a reasonable accommodation might include "providing reserved parking spaces" mean that an employer would have to pay for a parking space when parking is not provided for any other employees?

5. *Other Parking Issues:* In *Dumas v. Keebler Co.*, 98 F.3d 1354 (11th Cir. 1996), the court found no discrimination when an employer required an employee with a state-issued accessibility parking sticker to prove that she needed to park in a space for people with disabilities. This case raises the difficulty in addressing the abuse in using such stickers, which is a continuing problem. See Myron M. LaBan & Matthew Grimm, *Handicapped Parking: A Privilege or a Right?*, 89 AM. J. PHYSICAL MED. & REHABILITATION 345, 345 (2010) ("Despite the efforts of local, state, and Federal governments to curtail these violations, including increased enforcement, improved signage, and greater social awareness, frequent abuse continues").

In *Feist v. Louisiana*, 730 F.3d 450 (5th Cir. 2013), the plaintiff suffered from a knee condition that made it difficult for her to walk the two cobblestoned blocks from the parking lot assigned to her to work, and requested a parking spot in the parking garage adjacent to her workplace. The employer refused the closer spot. Plaintiff sued, alleging a violation of the ADA, and the defendant filed a motion for summary judgment on the basis that the parking spot did not enable her to perform the essential functions of the job. The court of appeals overturned the lower court, holding that according to the EEOC reasonable regulation, a plaintiff need not demonstrate that a requested accommodation enabled her to perform the essential functions of her job. The plaintiff needs only to demonstrate that the requested accommodation was reasonable. But see *Regan v. Faurecia Automotive Seating*, *Inc*., 679 F.3d 475 (6th Cir. 2012) (holding that an employer did not have to accommodate an employee with narcolepsy who found her changed work schedule very tiring because it increased her commute time).

6. *Barrier Removal Issues:* Reasonable accommodation related to physical access to facilities in employment under the Rehabilitation Act is addressed in 45 C.F.R. §§84.21–.23. Some of the Rehabilitation Act cases addressing these issues include *Stolmeier v. Yellow Freight Sys.*, 64 Empl. Prac. Dec. (CCH) ¶42,597 (D. Or. 1994) (seating modifications and steering on tractor need not be provided until issue of whether they are required is resolved); *Perez v. Philadelphia Hous. Auth.*, 677 F. Supp. 357 (E.D. Pa. 1987) (employer required to provide straight back chair, use of elevator, and regular breaks for a receptionist with back problems); *AFGE, Local 51 v. Baker*, 677 F. Supp. 636 (N.D. Cal. 1987) (United States Mint required to at least attempt to accommodate disabled coin checkers even though it would entail more than minimal cost).

7. More recent ADA cases have also addressed these issues. Many cases involve clerical employees who have developed problems because of the repetitive nature of this work. A few courts have addressed the issue of accommodating such conditions. They include *Beck v. University of Wisconsin Bd. of Regents*, 75 F.3d 1130 (7th Cir. 1996) (wrist rest rather than adjustable keyboard was reasonable accommodation for employee with osteoarthritis); *Garza v. Abbott Labs.*, 940 F. Supp. 1227 (N.D. Ill. 1996) (employee who experienced pain when typing failed to show that split keyboard and voice activated computer were reasonable accommodations in light of their expense). At one point, the Occupational and Safety Health Administration ("OSHA") promulgated an ergonomic rule that was opposed and defeated by business. See Adam M. Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the "Substantially Similar" Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?*, 63 ADMIN. L. REV. 707, 724–28 (2011) (discussing the path of the OSHA ergonomic rule from its beginnings to its eventual veto by Congress under the Congressional Review Act). The Obama Administration has not issued comprehensive ergonomic regulations, but rather, "OSHA has developed industry specific guidelines to provide specific and helpful guidance for abatement to assist employees and employers in minimizing injuries."

Occupational Safety & Health Administration, *Ergonomics: Standards and Enforcement FAQs*, https://www.osha.gov/SLTC/ergonomics/faqs.html.

For additional cases on equipment and other physical environment accommodations, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §4.20 (2012 and cumulative supplement).

[4] Mental Impairments and Reasonable Accommodation

There is a high incidence of mental illness in American society. It includes depression, bipolar disorder, substance addiction, and a number of other conditions. The highly publicized media stories about violent episodes in the workplace unfortunately serve to perpetuate myths that mentally ill individuals are violent and dangerous. There is great fear and stigma surrounding mental illness. For this and other reasons, individuals with mental illness have a number of challenges in gaining and retaining employment.

Discrimination claims by individuals with mental illness are met with several obstacles. In many cases, the mental problems relate to conduct and behavior that is then found to be the legitimate basis for the adverse employment action. In many instances, if accommodations had been provided before the deficient performance, the misconduct would not have occurred. Employers are required to accommodate known disabilities only.

There are a number of reasons why the individual with a mental illness might not make known the disability. The individual may not be aware that he or she has a mental illness. Or the employee may be in denial about the condition or the need to have accommodations. The individual may be justifiably concerned about stigma and negative treatment in the workplace if the disability is made known. Although adverse employment action might violate the ADA, individuals are aware that it can be difficult to prove that the employer's actions are based on the knowledge of the employee's mental illness. For these reasons, perhaps there should be an exception to accommodate the "after-discovered" mental illness disability. Perhaps in these cases, it should be required that employers give a second chance where the misconduct has not been a danger or threat or where the consequences of the adverse employment treatment are unduly severe. The vast majority of courts, however, do not require "second chances" where the adverse treatment is based on behavior and conduct, even if related to the condition.

Notes

1. An unusual example of a case in which an employee requested accommodations for his manic depression is *Gardner v. Morris*, 752 F.2d 1271 (8th Cir. 1985). The employee was a civilian employee with the Army Corps of Engineers in St. Louis, Missouri. His condition was fairly controlled with careful monitoring of medication and related toxic effects. When chosen for assignment in Saudi Arabia, the medical examining physician advised Gardner that medical facilities were so limited that there was no capability of addressing complicated medical situations.

The court addressed Gardner's Rehabilitation Act claim and noted that the extreme climate, poor communication and transportation facilities and inadequate medical facilities meant that there was a threat that could not be reasonably addressed. Getting him to a place where he could be treated in the event of an episode was infeasible. The court notes that "We emphasize the narrowness of this decision. We do not condone paternalism toward handicapped individuals." Thus it was the potential danger to coworkers, not danger to self, that was the basis for the decision that he could not be accommodated.

2. *Other Accommodations for Individuals with Mental Illness:* Accommodations for individuals with mental illness that should at least be considered in appropriate situations would include education of coworkers and others in the workplace, changing the physical environment, flexible scheduling, job restructuring, job training, improved communication and support, feedback (both

critical and positive), and on-the-job support (such as allowing the employee to call friends or counselors). See American Bar Association & National Mental Health Association, The ADA and People with Mental Illness: A Resource Manual for Employers (1993). See also Mickey & Pardo, *Dealing with Mental Disabilities under the ADA*, 9 THE LABOR LAWYER 531 (1993). A 1994 report indicates that job opportunities and income levels have increased substantially for many people with mental disabilities since the passage of the ADA. Peter Blanck, *Employment Integration, Economic Opportunity, and the Americans with Disabilities Act: An Empirical Study from 1990–1993*, 79 IOWA L. REV. 853 (1994). For a discussion proposing giving second chances as an accommodation in the case of some individuals with mental illness, see Laura F. Rothstein, *The Employer's Duty to Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments Under Disability Discrimination Laws*, 47 SYRACUSE L. REV. 931 (1997).

3. *Technical Assistance:* Another resource dealing with accommodations for employees with mental and physical disabilities in the workplace is the Job Accommodation Network. See *Mental Illness Cases Handled by the Job Accommodation Network*, Report of the Job Accommodation Network, A Service of the President's Committee on Employment of People with Disabilities (December 1, 1993).

[5] Job Restructuring and Job Reassignment

Hypothetical Problem 3.6

Read the following hypothetical problem before reading the materials on job restructuring and reassignment. After reading the materials, analyze this problem.

Ken Ko is a police officer who has worked for the municipality of Springfield for 10 years. He has recently been diagnosed with macular degeneration, a condition that leads to blindness, in both eyes. At the time of diagnosis, Ken's eyesight with his glasses was 20/100 in one eye and 20/60 in the other eye. The city's rules require that an officer who works in the field have vision correctable to 20/40 in both eyes. Ken wants the city to transfer him to an open desk job in the police station, answering the phones, filling in as a 911 operator, giving officers orders in the field, and doing some clerical work. While he is qualified for the position, another officer, Sam Clark has asked the police department to transfer him to the desk job because he is getting older and the job on the street is difficult for him. Ordinarily, the municipality grants jobs based on seniority. Sam is a few months ahead of Ken in seniority.

1. Is Ken a qualified individual with a disability?

2. Is the city's vision requirement legal under the new amendments to the ADA and the Rehabilitation Act?

3. If so, is the city obligated to give Ken the job in order to avoid liability under the Rehabilitation Act?

4. Assume that there is no union and no use of seniority in the workplace. If Ken asks for the desk job as an accommodation to his eye condition, but Sam is better qualified for the clerical part of the job because he can see better, can the city deny the job to Ken? What if Sam is better qualified because he can type better? What if Sam can type better, but the city has never had the policy of hiring the best-qualified person for the job?

The ADA contemplates job restructuring and job reassignment as accommodations that should be considered in appropriate cases. The regulations state that "reasonable accommodation" may include "Job restructuring; part-time or modified work schedules; reassignment to a vacant position...." 29 C.F.R. §1630.2(o)(2)(ii).

In the EEOC Title I Technical Assistance Manual, guidance on reassignment is provided. This guidance indicates that reassignment should be considered only when it is not possible to accommodate the present job or when such an accommodation would be an undue hardship. Only employees, not applicants, need be accommodated through consideration of reassignment. Reassignment to equivalent positions with equivalent pay should be considered first if such positions are vacant or will be vacant within a reasonable time. The question of reasonable amount of time is to be decided on a case-by-case basis. If there is no equivalent position available, reassignment to a lower graded position may be offered, and the lower salary may be paid. Employers are not required to create new jobs or give jobs that are currently held by other employees. What is unclear from this guidance is whether the employer is required to give preference to an employee with a disability seeking reassignment as a reasonable accommodation over another employee seeking to apply to transfer to the vacant position.

U.S. Airways, Inc. v. Barnett

535 U.S. 391 (2002)

JUSTICE BREYER delivered the opinion of the Court.

The Americans with Disabilities Act of 1990 (ADA or Act) prohibits an employer from discriminating against an "individual with a disability" who, with "reasonable accommodation," can perform the essential functions of the job. This case, arising in the context of summary judgment, asks us how the Act resolves a potential conflict between: (1) the interests of a disabled worker who seeks assignment to a particular position as a "reasonable accommodation," and (2) the interests of other workers with superior rights to bid for the job under an employer's seniority system. In such a case, does the accommodation demand trump the seniority system?

In our view, the seniority system will prevail in the run of cases. As we interpret the statute, to show that a requested accommodation conflicts with the rules of a seniority system is ordinarily to show that the accommodation is not "reasonable." Hence such a showing will entitle an employer/defendant to summary judgment on the question—unless there is more. The plaintiff remains free to present evidence of special circumstances that make "reasonable" a seniority rule exception in the particular case. And such a showing will defeat the employer's demand for summary judgment.

I

In 1990, Robert Barnett, the plaintiff and respondent here, injured his back while working in a cargo-handling position at petitioner U.S. Airways, Inc. He invoked seniority rights and transferred to a less physically demanding mailroom position. Under U.S. Airways' seniority system, that position, like others, periodically became open to seniority-based employee bidding. In 1992, Barnett learned that at least two employees senior to him intended to bid for the mailroom job. He asked U.S. Airways to accommodate his disability-imposed limitations by making an exception that would allow him to remain in the mailroom. After permitting Barnett to continue his mailroom work for five months while it considered the matter, U.S. Airways eventually decided not to make an exception. And Barnett lost his job.

II

A

US Airways' claim that a seniority system virtually always trumps a conflicting accommodation demand rests primarily upon its view of how the Act treats workplace "preferences." Insofar as a requested accommodation violates a disability-neutral workplace rule, such as a seniority rule, it grants the employee with a disability treatment that other workers could not receive. Yet the Act, U.S. Airways says, seeks only "equal" treatment for those with disabilities. It does not, it contends, require

an employer to grant preferential treatment. Hence it does not require the employer to grant a request that, in violating a disability-neutral rule, would provide a preference.

While linguistically logical, this argument fails to recognize what the Act specifies, namely, that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal. The Act requires preferences in the form of "reasonable accommodations" that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy. By definition any special "accommodation" requires the employer to treat an employee with a disability differently, *i.e.*, preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach.

Were that not so, the "reasonable accommodation" provision could not accomplish its intended objective. Neutral office assignment rules would automatically prevent the accommodation of an employee whose disability-imposed limitations require him to work on the ground floor. Neutral "break-from-work" rules would automatically prevent the accommodation of an individual who needs additional breaks from work, perhaps to permit medical visits. Neutral furniture budget rules would automatically prevent the accommodation of an individual who needs a different kind of chair or desk. Many employers will have neutral rules governing the kinds of actions most needed to reasonably accommodate a worker with a disability. Congress, while providing such examples, said nothing suggesting that the presence of such neutral rules would create an automatic exemption. Nor have the lower courts made any such suggestion.

In sum, the nature of the "reasonable accommodation" requirement, the statutory examples, and the Act's silence about the exempting effect of neutral rules together convince us that the Act does not create any such automatic exemption. The simple fact that an accommodation would provide a "preference"—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot, *in and of itself*, automatically show that the accommodation is not "reasonable." ...

US Airways also points to the ADA provisions stating that a "'reasonable accommodation' may include ... reassignment to a *vacant* position." And it claims that the fact that an established seniority system would assign that position to another worker automatically and always means that the position is not a "vacant" one. Nothing in the Act, however, suggests that Congress intended the word "vacant" to have a specialized meaning. And in ordinary English, a seniority system can give employees seniority rights allowing them to bid for a "vacant" position. The position in this case was held, at the time of suit, by Barnett, not by some other worker; and that position, under the U.S. Airways seniority system, became an "open" one. Moreover, U.S. Airways has said that it "reserves the right to change any and all" portions of the seniority system at will. Consequently, we cannot agree with U.S. Airways about the position's vacancy; nor do we agree that the Act would automatically deny Barnett's accommodation request for that reason.

B

[The discussion of the interpretation whether reasonable accommodation means only effective accommodation is omitted.]

III

The question in the present case focuses on the relationship between seniority systems and the plaintiff's need to show that an "accommodation" seems reasonable on its face, *i.e.*, ordinarily or in the run of cases. We must assume that the plaintiff, an employee, is an "individual with a disability." He has requested assignment to a mailroom position as a "reasonable accommodation." We also assume that normally such a request would be reasonable within the meaning of the statute, were it not for one circumstance, namely, that the assignment would violate the rules of a seniority system.

Does that circumstance mean that the proposed accommodation is not a "reasonable" one?

In our view, the answer to this question ordinarily is "yes." The statute does not require proof on a case-by-case basis that a seniority system should prevail. That is because it would not be reasonable in the run of cases that the assignment in question trump the rules of a seniority system. To the contrary, it will ordinarily be unreasonable for the assignment to prevail.

A

Several factors support our conclusion that a proposed accommodation will not be reasonable in the run of cases. Analogous case law supports this conclusion, for it has recognized the importance of seniority to employee-management relations. This Court has held that, in the context of a Title VII religious discrimination case, an employer need not adapt to an employee's special worship schedule as a "reasonable accommodation" where doing so would conflict with the seniority rights of other employees. The lower courts have unanimously found that collectively bargained seniority trumps the need for reasonable accommodation in the context of the linguistically similar Rehabilitation Act. And several Circuits, though differing in their reasoning, have reached a similar conclusion in the context of seniority and the ADA. All these cases discuss *collectively bargained* seniority systems, not systems (like the present system) which are unilaterally imposed by management. But the relevant seniority system advantages, and related difficulties that result from violations of seniority rules, are not limited to collectively bargained systems.

For one thing, the typical seniority system provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment. These benefits include "job security and an opportunity for steady and predictable advancement based on objective standards." They include "an element of due process," limiting "unfairness in personnel decisions." And they consequently encourage employees to invest in the employing company, accepting "less than their value to the firm early in their careers" in return for greater benefits in later years.

Most important for present purposes, to require the typical employer to show more than the existence of a seniority system might well undermine the employees' expectations of consistent, uniform treatment—expectations upon which the seniority system's benefits depend. That is because such a rule would substitute a complex case-specific "accommodation" decision made by management for the more uniform, impersonal operation of seniority rules. Such management decisionmaking, with its inevitable discretionary elements, would involve a matter of the greatest importance to employees, namely, layoffs; it would take place outside, as well as inside, the confines of a court case; and it might well take place fairly often. We can find nothing in the statute that suggests Congress intended to undermine seniority systems in this way. And we consequently conclude that the employer's showing of violation of the rules of a seniority system is by itself ordinarily sufficient.

B

The plaintiff (here the employee) nonetheless remains free to show that special circumstances warrant a finding that, despite the presence of a seniority system (which the ADA may not trump in the run of cases), the requested "accommodation" is "reasonable" on the particular facts. That is because special circumstances might alter the important expectations described above. The plaintiff might show, for example, that the employer, having retained the right to change the seniority system unilaterally, exercises that right fairly frequently, reducing employee expectations that the system will be followed—to the point where one more departure, needed to accommodate an individual with a disability, will not likely make a difference. The plaintiff might show that the system already contains exceptions such that, in the circumstances, one further exception is unlikely to matter. We do not mean these examples to exhaust the kinds of showings that a plaintiff might make. But we do mean to say that the plaintiff must bear the burden of showing special circumstances that make an exception

from the seniority system reasonable in the particular case. And to do so, the plaintiff must explain why, in the particular case, an exception to the employer's seniority policy can constitute a "reasonable accommodation" even though in the ordinary case it cannot.

IV

In its question presented, U.S. Airways asked us whether the ADA requires an employer to assign a disabled employee to a particular position even though another employee is entitled to that position under the employer's "established seniority system." We answer that *ordinarily* the ADA does not require that assignment. Hence, a showing that the assignment would violate the rules of a seniority system warrants summary judgment for the employer—unless there is more. The plaintiff must present evidence of that "more," namely, special circumstances surrounding the particular case that demonstrate the assignment is nonetheless reasonable.

Because the lower courts took a different view of the matter, and because neither party has had an opportunity to seek summary judgment in accordance with the principles we set forth here, we vacate the Court of Appeals' judgment and remand the case for further proceedings consistent with this opinion.

[Concurring opinions by Justices Stevens and O'Connor omitted.]

[Dissenting opinions by Justices Thomas, Scalia, Ginsburg, and Souter omitted.]

Notes and Questions

1. *Unanswered Questions.* While this decision answers some questions, it raises new questions. The types of accommodations that might be requested that will be affected by seniority include location of workspace (to allow for natural light or better ventilation), parking spaces, and other perks of seniority. Employers will need to prove in challenges to denials of exceptions to seniority based award of such benefits that these are truly part of a package of legitimate employee expectations. In addition, employers will need to take care in granting exceptions. Does this decision mean that exceptions can never be granted?

2. The Court places the burden of proving the accommodation is reasonable on the plaintiff in cases where seniority systems exist. Does this indicate that the Court would place the burden of proving reasonableness always on the plaintiff?

3. *Vacant Positions:* A number of cases have addressed this issue. In *Fedro v. Reno*, 21 F.3d 1391 (7th Cir. 1994), the court held that there is no duty to reassign an individual when there is no vacant position. But, both the Ninth and the Tenth Circuits conclude that reassignment includes those positions that an employer reasonably anticipates will become vacant in the near future or within a reasonable time period. See *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999); *Dark v. Curry County*, 451 F.3d 1078 (9th Cir. 2006). The court in *Howell v. Michelin Tire Corp.*, 860 F. Supp. 1488 (M.D. Ala. 1994), addressed the issue of whether there is an obligation to offer reassignment to a permanent light-duty position to an employee who becomes injured. The court held that this was an issue for jury determination. See also *Bates v. Long Island R.R. Co.*, 997 F.2d 1028 (2d Cir. 1993) (employer not required to reassign pipefitter with ankle injury); *DiPompo v. West Point Military Academy*, 770 F. Supp. 887 (S.D.N.Y. 1991), *aff'd*, 960 F.2d 326 (2d Cir. 1992) (major restructuring of job requirements which would lead to obvious safety risks is not a reasonable accommodation for a firefighter with dyslexia); *Taylor v. Secretary of Navy*, 852 F. Supp. 343 (E.D. Pa. 1994) (Navy failed to show undue hardship in reassignment of shipyard employee); *Carrozza v. Howard County*, 847 F. Supp. 365 (D. Md. 1994) (job restructuring for clerical employee with bipolar disorder not required because the stresses sought to be removed were inherent); *Lillback v. Metropolitan Life Ins. Co.*, 640 N.E.2d 250 (Ohio Ct. App. 1994) (salesman with back problems not entitled to promotion to managerial position as reasonable accommodation).

4. *Otherwise Qualified to Perform Original Job:* One of the most questionable opinions regarding job reassignments is the Tenth Circuit's opinion in *Smith v. Midland Brake Inc.*, 138 F.3d 1304 (10th Cir. 1998), in which the court held that there is no obligation to reassign to another job where the individual is not qualified for the job from which reassignment is being sought. The ruling was a 2–1 decision and is viewed as a very conservative position on the duty to reassign. The decision essentially negates any duty to reassign because if the employee were qualified to perform the current job, a reassignment would not be needed as an accommodation.

5. *Permanent Light Duty:* The courts have been quite consistent in holding that employees are not entitled to permanent light duty positions as an accommodation, although courts seem to recognize temporary light duty as an accommodation where such positions exist. Courts do not seem to require employers to create light duty positions as an accommodation where they did not exist before.

For cases on the issue of reassignment and change in duty as an accommodation, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §4.20 (2012 and cumulative supplement). E.g., *Malabarba v. Chicago Tribune Co.*, 149 F.3d 690 (7th Cir. 1998) (although ADA provides that reassignment to vacant position may constitute reasonable accommodation, it does not require employers to convert temporary light-duty jobs into permanent ones); *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667 (7th Cir. 1998) (no ADA violation by limiting access to light-duty program to employees with only temporary disabilities to fulfill employer's obligation under worker's compensation statute); *Mengine v. Runyon*, 114 F.3d 415 (3d Cir. 1997) (employer not required to make light duty position permanent); *Soone v. Kyo-Ya Co., Lts*., 353 F. Supp. 2d 1107 (D. Hawaii 2005) (not reasonable to fire nondisabled employee to create vacancy for disabled employee).

6. *Requirement to Assign Less Qualified Employee.* Neither the statutes nor the regulations clarify whether an employer must assign a less qualified employee to a vacant position when there is another applicant with better qualifications. There is now a split on this issue.

The next case deals with the issue of whether an employer is required to transfer a qualified employee with a disability to a position for which the employer has a better qualified applicant.

Huber v. Wal-Mart Stores, Inc.

486 F.3d 480 (8th Cir. 2007)

RILEY, CIRCUIT JUDGE.

We are faced with an unanswered question: whether an employer who has an established policy to fill vacant job positions with the most qualified applicant is required to reassign a qualified disabled employee to a vacant position, although the disabled employee is not the most qualified applicant for the position. Pam Huber (Huber) brought an action against Wal-Mart Stores, Inc. (Wal-Mart), claiming discrimination under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§12101 to 12213. The parties filed cross-motions for summary judgment. The district court granted summary judgment in favor of Huber. Wal-Mart appeals. For the reasons stated below, we reverse.

I. BACKGROUND

Huber worked for Wal-Mart as a dry grocery order filler earning $13.00 per hour, including a $0.50 shift differential. While working for Wal-Mart, Huber sustained a permanent injury to her right arm and hand. As a result, she could no longer perform the essential functions of the order filler job. The parties stipulated Huber's injury is a disability under the ADA.

Because of her disability, Huber sought, as a reasonable accommodation, reassignment to a router position, which the parties stipulated was a vacant and equivalent position under the ADA. Wal-Mart, however, did not agree to reassign Huber automatically to the router position. Instead, pursuant to its

policy of hiring the most qualified applicant for the position, Wal-Mart required Huber to apply and compete for the router position with other applicants. Ultimately, Wal-Mart filled the job with a non-disabled applicant and denied Huber the router position. Wal-Mart indicated, although Huber was qualified with or without an accommodation to perform the duties of the router position, she was not the most qualified candidate. The parties stipulated the individual hired for the router position was the most qualified candidate.

Wal-Mart later placed Huber at another facility in a maintenance associate position (janitorial position), which paid $6.20 per hour. Huber continues to work in that position and now earns $7.97 per hour.

Huber filed suit under the ADA, arguing she should have been reassigned to the router position as a reasonable accommodation for her disability. Wal-Mart filed a motion for summary judgment, contending it had a legitimate non-discriminatory policy of hiring the most qualified applicant for all job vacancies and was not required to reassign Huber to the router position. Huber filed a cross-motion for summary judgment, and the district court granted Huber's motion. Wal-Mart appeals.

II. DISCUSSION

We review de novo the district court's grant of summary judgment.

[T]he parties do not dispute Huber (1) has a disability under the ADA, (2) suffered an adverse employment action, or (3) possessed the requisite skills for the router position. The parties' only dispute is whether the ADA requires an employer, as a reasonable accommodation, to give a current disabled employee preference in filling a vacant position when the employee is able to perform the job duties, but is not the most qualified candidate.

The ADA states the scope of reasonable accommodation may include:

> [J]ob 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)(B) (emphasis added).

Huber contends Wal-Mart, as a reasonable accommodation, should have automatically reassigned her to the vacant router position without requiring her to compete with other applicants for that position. Wal-Mart disagrees, citing its non-discriminatory policy to hire the most qualified applicant. Wal-Mart argues that, under the ADA, Huber was not entitled to be reassigned automatically to the router position without first competing with other applicants. This is a question of first impression in our circuit. As the district court noted, other circuits differ with respect to the meaning of the reassignment language under the ADA.

In the Tenth Circuit, reassignment under the ADA results in automatically awarding a position to a qualified disabled employee regardless whether other better qualified applicants are available, and despite an employer's policy to hire the best applicant.

On the other hand, [i]n the Seventh Circuit, ADA reassignment does not require an employer to reassign a qualified disabled employee to a job for which there is a more qualified applicant, if the employer has a policy to hire the most qualified applicant.

Wal-Mart urges this court to adopt the Seventh Circuit's approach and to conclude (1) Huber was not entitled, as a reasonable accommodation, to be reassigned automatically to the router position, and (2) the ADA only requires Wal-Mart to allow Huber to compete for the job, but does not require Wal-Mart to turn away a superior applicant. We find this approach persuasive and in accordance with the purposes of the ADA. As the Seventh Circuit noted in *Humiston-Keeling*:

> The contrary rule would convert a nondiscrimination statute into a mandatory preference statute, a

> result which would be both inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and coworkers of disabled employees. A policy of giving the job to the best applicant is legitimate and nondiscriminatory. Decisions on the merits are not discriminatory.

We agree and conclude the ADA is not an affirmative action statute and does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate. This conclusion is bolstered by the Supreme Court's decision in *U.S. Airways, Inc. v. Barnett*, holding that an employer ordinarily is not required to give a disabled employee a higher seniority status to enable the disabled employee to retain his or her job when another qualified employee invokes an entitlement to that position conferred by the employer's seniority system. We previously have stated in dicta that "an employer is not required to make accommodations that would subvert other, more qualified applicants for the job."

Thus, the ADA does not require Wal-Mart to turn away a superior applicant for the router position in order to give the position to Huber. To conclude otherwise is "affirmative action with a vengeance. That is giving a job to someone solely on the basis of his status as a member of a statutorily protected group."

Here, Wal-Mart did not violate its duty, under the ADA, to provide a reasonable accommodation to Huber. Wal-Mart reasonably accommodated Huber's disability by placing Huber in a maintenance associate position. The maintenance position may not have been a perfect substitute job, or the employee's most preferred alternative job, but an employer is not required to provide a disabled employee with an accommodation that is ideal from the employee's perspective, only an accommodation that is reasonable. In assigning the vacant router position to the most qualified applicant, Wal-Mart did not discriminate against Huber. On the contrary, Huber was treated exactly as all other candidates were treated for the Wal-Mart job opening, no worse and no better.

III. CONCLUSION

We reverse the judgment of the district court, and we remand for entry of judgment in favor of Wal-Mart consistent with this opinion.

Notes and Questions

1. The Supreme Court granted certiorari in this case, but the case was dismissed before the case was decided due to the parties' settlement. See Jonathan R. Mook, *Mook on Reassignment as an ADA Reasonable Accommodation*, 2008 EMERGING ISSUES 1851 (Jan. 31, 2008). As noted in the Eighth Circuit opinion, there is a split in the circuits on the issue of whether the employer must reassign a qualified individual with a disability to an open position if there is another applicant who is better qualified. The EEOC Guidance takes the position that employees with disabilities are entitled to the vacant positions if they are qualified for them. Otherwise, the EEOC says, "reassignment would be of little value." The circuit courts are split as to whether the ADA requires as a reasonable accommodation the reassignment of a disabled worker over a more qualified nondisabled candidate, although the case law is trending towards agreement with the EEOC." BLOOMBERG BNA AMERICANS WITH DISABILITIES ACT MANUAL §20:467.

2. The Eighth Circuit notes that Wal-Mart had a policy of hiring the most qualified individual for the position and states that it is this policy that permits Wal-Mart to hire the more qualified candidate for the position in question. What would an employer have to prove in order to establish that it has such a policy and that it acts pursuant to the policy regularly? What type of discovery should a plaintiff's lawyer do on the issue of whether an employer has such a policy and follows the policy?

3. What is the danger of the Eighth Circuit opinion? Does this mean that there will never be

reassignment as a reasonable accommodation? On the other hand, what would be the burden on the employer of automatically granting the open position to the person with a disability?

4. Is the Eighth Circuit's point that the ADA is not an affirmative action statute convincing?

5. Consider the following fact pattern: Employee A works as a photocopier in a large university copy center. The employee develops a sensitivity to photocopy chemicals that cannot be accommodated. She asks to be reassigned to another job within the university. A large university typically has a number of low skill jobs available, but there are also often a number of current employees seeking to transfer to those positions through the regular transfer process. Should Employee A be given priority over other transfer applicants for the same position? What if Employee A is qualified for the position, but the University finds other transfer applicants to be preferable? How would the *Barth* court, *supra*, analyze the issue from the perspective of employee morale?

6. It is not unusual for law firms to assign corner offices to senior partners based on seniority. What if a new associate has seasonal affective disorder which is exacerbated by his interior office with no natural light? Is the firm required to give him a corner office? How might this assignment affect morale at the law firm?

[6] Duty to Engage in Interactive Process

Hypothetical Problem 3.7

Read the following hypothetical problem before reading the materials on the duty to engage in the interactive process. After reading the materials, analyze this problem.

Edward Elkins, a university professor who teaches Philosophy, becomes deaf in one ear and finds it difficult to hear his students while engaging in classroom discussion. He believes he would be able to do a better job if he were assigned to teach courses online only. The university has a very small online program that is used primarily for students who live outside of the area and cannot travel to the university town. Never before has the Philosophy Department taught a course online, and a large percentage of the freshmen take Philosophy in their first year. The Chair of the Philosophy Department and the Dean of Arts and Sciences fear that if they permit Elkins to teach exclusively online, other professors will want to do the same in order to avoid the commute to campus. Moreover, they fear that they might not be able to accommodate all of the freshmen Philosophy courses if Elkins teaches online. How should the General Counsel for the university explain to the Chair of the Philosophy Department and the Dean of Arts and Sciences what obligations they have in deciding whether to grant Elkins this or any other accommodation?

An employer and a qualified individual with a disability should engage in an interactive process to determine whether there is a reasonable accommodation to the individual's disability. Courts have found an employer liable for failing to engage in the interactive process. The requirement to engage in the interactive process is ongoing.

Humphrey v. Memorial Hospitals Association

239 F.3d 1128 (9th Cir. 2001)

[An earlier portion of this opinion is reproduced, *supra*. Reread that section and then read the following, which deals with the employer's duty to engage in an interactive process to determine whether there is a reasonable accommodation to the plaintiff's disability.]

B. BREAKDOWN OF THE INTERACTIVE PROCESS

The remaining question with respect to the duty to accommodate is purely a legal one: was MHA

obligated to suggest a leave of absence or to explore other alternatives in response to Humphrey's request for a work-at-home position, or was it Humphrey's burden to make an express request for a leave of absence before she was terminated? We conclude, as a matter of law, that (assuming Humphrey was a qualified individual with a disability) MHA had an affirmative duty under the ADA to explore further methods of accommodation before terminating Humphrey.

Once an employer becomes aware of the need for accommodation, that employer has a mandatory obligation under the ADA to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations. "An appropriate reasonable accommodation must be effective, in enabling the employee to perform the duties of the position." The interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees, and neither side can delay or obstruct the process. Employers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible.

Moreover, we have held that the duty to accommodate "is a 'continuing' duty that is 'not exhausted by one effort.'" The EEOC Enforcement Guidance notes that "an employer must consider each request for reasonable accommodation," and that "if a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the employer must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship." EEOC Enforcement Guidance on Reasonable Accommodation, at 7625. Thus, the employer's obligation to engage in the interactive process extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed. This rule fosters the framework of cooperative problem-solving contemplated by the ADA, by encouraging employers to seek to find accommodations that really work, and by avoiding the creation of a perverse incentive for employees to request the most drastic and burdensome accommodation possible out of fear that a lesser accommodation might be ineffective.

When MHA received Dr. Jacisin's letter diagnosing Humphrey with OCD, MHA properly initiated the interactive process by arranging a meeting to discuss possible accommodations. Dr. Jacisin's statement "I would like to see her continue to work, but if it is proving to be a major personnel problem, she may have to take some time off until we can get the symptoms better under control" alerted MHA to the possibility that any initial arrangement that kept Humphrey on the job might not be effective and that a leave of absence might ultimately be necessary to accommodate her disability.

In fact, it is MHA's position, disputed by Humphrey, that MHA explicitly offered her a leave at the June 7 meeting, and that it was Humphrey who decided that flexible scheduling was the better choice. Even if we assume that Humphrey turned down the leave of absence in June in favor of a flexible start-time arrangement, her attempt to perform her job functions by means of a less drastic accommodation does not forfeit her right to a more substantial one upon the failure of the initial effort.

By the time of her annual performance review in September, it was abundantly clear to MHA that the flexible start time accommodation was not succeeding; Humphrey had accumulated six unreported absences in each of the months of August and September, and her evaluation stated that her attendance record was "unacceptable." At this point, MHA had a duty to explore further arrangements to reasonably accommodate Humphrey's disability.

Humphrey also realized that the accommodation was not working, and requested a work at home position. When it received that request, MHA could have either granted it or initiated discussions with Humphrey regarding other alternatives.[16] Instead, MHA denied her request without suggesting any alternative solutions, or exploring with her the possibility of other accommodations. Rather than fulfill its obligation to engage in a cooperative dialogue with Humphrey, Pierson's e-mail suggested

that the matter was closed: "During our 6/7/95 meeting, you requested to be accommodated for your disability by having a flexible start time, stating that you would have no problems staying for a full shift once you arrived. You were given this flexible start time accommodation which continues to remain in effect." We held in *Barnett* that an employer fails to engage in the interactive process as a matter of law where it rejects the employee's proposed accommodations by letter and offers no practical alternatives. Similarly, MHA's rejection of Humphrey's work-at-home request and its failure to explore with Humphrey the possibility of other accommodations, once it was aware that the initial arrangement was not effective, constitutes a violation of its duty regarding the mandatory interactive process.

Given MHA's failure to engage in the interactive process, liability is appropriate if a reasonable accommodation without undue hardship to the employer would otherwise have been possible. As we have already discussed, a leave of absence was a reasonable accommodation for Humphrey's disability. Ordinarily, whether an accommodation would pose an undue hardship on the employer is a factual question. Here, however, MHA has conceded that granting a leave of absence would not have posed an undue hardship. MHA had a policy of granting leaves to disabled employees, and admits that it would have given Humphrey a leave had she asked for one at any time before her termination. MHA's ultimate position, therefore, is simply that Humphrey is not entitled to a leave of absence because she failed to ask for one before she was fired. As we have explained, however, MHA was under a continuing duty to offer a reasonable accommodation. Accordingly, we hold as a matter of law (again, assuming that Humphrey is a qualified individual with a disability) that MHA violated the ADA's reasonable accommodation requirement.

Note

The importance of good faith efforts to reasonably accommodate under 42 U.S.C. §1981a (a)(3). In cases where the employer has engaged in good faith efforts in consultation with the individual with a disability to identify and make a reasonable accommodation and the alleged discrimination is based on an alleged failure to make a reasonable accommodation, the employer is not liable for damages to the individual. The section reads:

> In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C.A. §12112(b)(5)] or regulations implementing section 791 of Title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

42 U.S.C. §1981a(a)(3).

[7] Adverse Employment Actions, Constructive Discharge and Reasonable Accommodation

Notes and Questions

1. *Adverse Employment Actions and Constructive Discharge.* In order to prove a violation of Title I of the ADA or of the Rehabilitation Act, the plaintiff must demonstrate that he or she suffered an adverse employment action. Ordinarily, adverse employment actions include failures to hire or to promote, discharges, demotions, decreases in salary, or transfers to jobs that do not afford the individual the opportunities for advancement that the employee had in the former job. The ADA, however, makes it illegal to fail to make a reasonable accommodation "to the known physical or mental limitations of an otherwise qualified individual with a disability" unless doing so would

impose an undue hardship on the employer. 42 U.S.C. §12112(5). It is clear from the statutory language, then, that failing to make a reasonable accommodation where there is no proof of undue hardship constitutes a violation of the statute, and it appears that no additional adverse employment action is necessary. A question arises, however, as to whether an employee has the right to resign once the employer refuses to grant an accommodation. Does the employee who resigns forfeit his right to bring suit under the ADA? The courts have considered this issue in light of the law of constructive discharge. In *Talley v. Family Dollar Stores of Ohio, Inc.*, 2008 U.S. App. LEXIS 19342 (6th Cir. Sept. 11, 2008), the plaintiff was a cashier at the defendant store who had used a stool because of back pain. She took medical leave several times because of her degenerative osteoarthritis in her back. She alleged that she could not stand or sit for long periods. After her last medical leave, the plaintiff provided a note saying she had no restrictions. Before she returned to work, her boss asked her to sign a statement saying she understood she would not be allowed to use a stool at work and would be limited to three five-minute breaks during a six hour shift. She wrote a letter in response stating that she could not sign the letter because it would prohibit her use of a stool, and returned to work. She eventually provided a doctor's note saying she needed a stool. Her boss allegedly refused to open the note, but told her that he would schedule a meeting with the plaintiff, himself, and the district manager. The plaintiff attempted to call about the meeting a number of times, but her boss did not return her calls. She never returned to work. The lower court granted the defendant's motion for summary judgment because it concluded that there was no adverse employment action.

The Sixth Circuit concluded that the key issue was whether the defendant's alleged refusal to accommodate her converted her resignation into a constructive discharge. The court concluded that there was a genuine issue of material fact as to whether the plaintiff proposed a reasonable accommodation that would have allowed her to be "otherwise qualified." Before her medical leave, the plaintiff had used a stool and her supervisors were evidently pleased with her work. Now, she proposed using the stool again and taking all the evidence in the light most favorable to the plaintiff, her boss would not look at the doctor's note and would not return her phone calls concerning the meeting with him and the district manager. The court held that a reasonable jury could conclude based on these facts that she proposed a reasonable accommodation and that the defendant failed to engage in an interactive process with her, leaving her with no choice but to resign.

2. In *Ekstrand v. School Dist. of Somerset*, 603 F. Supp. 2d 1196 (W.D. Wisc. 2009), the plaintiff was an elementary school teacher who suffered from fibromyalgia, anxiety disorder and panic attacks, depression and seasonal affective disorder (SAD). She was assigned an interior classroom that had many distractions because it was near a common room, had poor ventilation, and was dark. She asked the employer repeatedly to move her to a different room. The plaintiff believed that her depression and SAD worsened as a result of the classroom and the parents' complaints about it. The employer made a number of accommodations to the plaintiff such as installing improved ventilation and better lights, but refused to grant her a room change, even though another teacher offered to change rooms with the plaintiff. The plaintiff became very anxious and depressed which required her to go out on medical leave. She hoped to return to teach in a different room. During her leave, the employer asked the plaintiff to return her keys to her room and she asked to keep the keys to work in her room at times. The employer ordered the plaintiff to stay away unless she submitted written permission from a physician. The plaintiff also asked the employer to permit her to draw from a voluntary leave bank, to which other employees donate their unused sick days. After delaying for a number of months, the employer finally permitted the plaintiff access to the leave bank. Finally, during her leave, the plaintiff requested a room change from the Superintendent of schools. He refused to grant her the room change, stating that he did not micromanage his principals. The plaintiff made no more requests for a new classroom. The plaintiff finally resigned and sued under the ADA and the Rehabilitation Act. The court held that because the employer had made numerous reasonable accommodations to the plaintiff's disability and continued to make them after she was so disabled that she had to go on leave,

the plaintiff never tested whether those accommodations would be sufficient by returning to work. The plaintiff's constructive discharge claim, therefore, failed. The court stated:

> A claim for constructive discharge requires that the working environment become "so intolerable that [the plaintiff's] resignation qualified as a fitting response." *Rooney v. Koch Air, LLC*, 410 F.3d 376, 382–83 (7th Cir. 2005) (internal quotations omitted). The treatment must be "so severe or pervasive as to alter the conditions of employment and create an abusive working environment." *Mannie v. Potter*, 394 F.3d 977, 982 (7th Cir. 2005) (internal quotations omitted). Even assuming, as plaintiff asserts, that defendant's treatment showed that it did not want her to return to work, the incidents she identifies were not severe enough to create the type of abusive environment that has been found to amount to constructive discharge. *Taylor v. Western & Southern Life Insurance Co.*, 966 F.2d 1188, 1191 (7th Cir. 1992) (boss consistently made racial comments and once held a gun to employee's head, took photo, and showed it at staff meeting while making racial jokes); *Brooms v. Regal Tube Co.*, 881 F.2d 412, 417 (7th Cir. 1989) (human resource manager repeatedly showed employee racist pornographic photos and made threatening comments to her including threat to kill her). Therefore, defendant's motion for summary judgment will be granted as to plaintiff's constructive discharge claim as well.

3. How should *Talley* and *Ekstrand* be reconciled? Do the different results in these cases depend on the plaintiffs' behavior? Or, are the courts using different standards in determining whether there is a constructive discharge? Explain. Under *Talley*, does an employee have the right to resign and preserve her lawsuit if the employer refuses to engage in the interactive process? Or, does this right depend on the severity of the pain/disability to which the plaintiff is seeking an accommodation combined with the employer's failure to engage in the interactive process? In *Ekstrand*, could it be argued that the employer failed to engage in the interactive process when the Superintendent refused to meddle with the principal's decision? Compare this case to *Humphrey*, *supra*.

G. Disability-Based Harassment and Retaliation

Hypothetical Problem 3.8

Read the following hypothetical problem before reading the materials on disability-based harassment and retaliation. After reading the materials, analyze this problem.

Agnes Coppola has severe facial disfigurement as a result of an accident. At the time of her accident, Agnes worked as a receptionist in a health club. Because the bosses fear that Agnes will "turn people off" with her looks, after the accident, they move Agnes to the laundry facility of the health club, where her job is to wash and dry all of the towels used at the club. This job is a demotion. Agnes makes only $8 per hour, as opposed to her previous $13 per hour. Agnes' supervisor checks up on her daily in the laundry and on at least seven or eight occasions, he looked at her face and asked her when she was going to get reconstructive surgery. Unfortunately, Agnes has already had reconstructive surgery and no more can be done. One day Agnes left the laundry to take the towels to the locker room and two women customers told her that she was "disgusting" and that she should "quit her job" because they "hated to look at her." Agnes complained to her supervisor, who said nothing to the customers. The same customers returned a number of times that month and made similar comments, some within the earshot of the supervisor, who did nothing. Agnes complained again to her supervisor, who forbade Agnes from leaving the laundry, even over her lunch hour. He also told her to enter the building through the back door. Finally, Agnes filed a charge of disability discrimination and harassment against the health club. Four days after the charge was filed, her supervisor told her that he thought her face looked worse. Agnes was so upset that she left the building and never went back. She subsequently filed a charge of retaliation. The health club had a policy that encouraged employees to report any harassment, based on any reason, to the management.

1. Is Agnes a qualified individual with a disability for the job of receptionist? Explain. If so, does she have a viable claim against the health club based on her demotion? Explain. Analyze the defendant's possible defenses.

2. Analyze whether the comments by the customers and those by Agnes' supervisor constituted disability-based harassment. Consider whether the health club would be liable for the comments of the customers and the supervisor. Do not forget the differing standards applicable to supervisors and customers in this analysis.

3. Does Agnes have a viable retaliation claim against the health club? Explain.

[1] Disability-Based Harassment

Although the Supreme Court has not ruled on whether there is a cause of action for disability-based harassment, most courts assume that the ADA and the Rehabilitation Act would support a cause of action for hostile work environment based on an individual's disability. A hostile work environment cause of action based on disability would require the plaintiff to prove that the harassing behavior alleged to constitute a hostile work environment is: 1) unwelcome; 2) sufficiently severe or pervasive to alter the terms or conditions of employment; and 3) based on the individual's disability. As in Title VII, employers would likely be liable for harassment caused by supervisors, coworkers and third parties such as customers and clients depending on the behavior. Under Title VII, employers are strictly liable for hostile work environments created by supervisors if the supervisors create a tangible employment action. That is, the plaintiff is harassed and is subject to an adverse employment action as part of the harassment such as a firing, demotion, transfer, etc. If there is no tangible employment action, but the environment is hostile because of the individual's disability, the employer will be strictly liable unless it can prove an affirmative defense that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and that the "plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid the harm otherwise." *Faragher v. Boca Raton*, 524 U.S. 775, 807 (1998). Finally, if customers or clients harass the individual with a disability, the employer will be liable based on negligence principles, if it knew or had reason to know of the harassment and did not correct the behavior.

[2] Retaliation

42 U.S.C. §12203 states:

> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

The following case demonstrates how allegations of harassment and retaliation interact.

Quiles-Quiles v. Henderson

439 F.3d 1 (1st Cir. 2006)

HOWARD, CIRCUIT JUDGE.

This appeal arises from a civil action under the Rehabilitation Act brought against the Postmaster General of the United States by Genaro Quiles-Quiles, a former postal employee. See 29 U.S.C. §791 et seq. Quiles alleges that his Postal Service supervisors harassed him because of his disability and retaliated against him when he complained about the harassment. A jury found for Quiles on both claims and awarded him $950,000 in compensatory damages, which the district court reduced to the statutory cap of $300,000. See 42 U.S.C. §1981a (a)(2). The Postmaster General filed a post-trial motion for judgment as a matter of law, which the district court allowed. We reverse and reinstate the

verdict in the statutorily-capped amount.

I.

The jury could have found the following facts. Quiles began his employment for the Postal Service in 1986 as a mail carrier. In 1995, he was assigned to the Bayamon Gardens station where he worked as a window cashier. Among his duties, he sold stamps and other postal products. His immediate supervisor was Doris Vazquez, who served under Virgilio Lopez. Luther Alston was the station manager.

Soon after Quiles moved to Bayamon Gardens station, Vazquez began to bother him. Vazquez frequently interfered with Quiles' running his window, dealing with customers, and handling the cash drawer money. This conduct made Quiles "anxious and nervous" because he was afraid that he would be held responsible for any accounting errors. Quiles complained to Lopez, who did nothing to stop the interference.

On October 4, 1997, Vazquez screamed at Quiles because he had gone to lunch "without authorization." The incident took place in front of several employees and customers. Immediately thereafter, Quiles suffered a panic attack and sought psychiatric help for anxiety and depression. Quiles missed three days of work because of his distress. When Quiles returned, he presented to Lopez a certificate from his psychiatrist stating that the absence was medically necessary.

After Quiles returned to work, Vazquez interrupted his work more frequently. Quiles complained on several occasions, but neither Lopez nor Alston intervened. On March 5, 1998, Quiles was crossing the street outside the post office when (so the jury could have found) Vazquez drove at him in her truck. Quiles reported the incident to his supervisors and the police. Afterwards, Quiles entered a state of "acute anxiety."

As a result of Quiles' worsening mental condition, his psychiatrist prescribed a week-long leave of absence and recommended that he be reassigned from his cashier duties after returning to work. Quiles brought Lopez a sealed envelope containing the medical certificate referencing this information. Lopez opened the envelope, read the medical certificate, and brought it to Vazquez. Vazquez read the certificate and laughingly exclaimed, "He is crazy!" Lopez laughed as well. When Quiles informed Alston of the incident, Alston told Quiles to "stop acting."

From this point forward, Vazquez and Lopez called Quiles "crazy" on a daily basis. They also constantly "joked" in front of coworkers and customers about the fact that Quiles saw a psychiatrist and took medication for his condition. This commentary included remarks about the effect that the medication had on Quiles' ability to have sexual relations with his wife. In addition, Lopez often remarked that Quiles posed a "great risk" to the other employees because he was under on-going psychiatric treatment. Alston frequently stated that Quiles was a "risk to the floor" because he was undergoing psychiatric treatment. And Vazquez remarked several times a day that Quiles should "not be working" in the post office because he was "crazy."

On April 14, 1998, Quiles filed a complaint with the Equal Employment Office of the Postal Service, claiming that Vazquez, Lopez, and Alston had harassed him because of his mental disability. Through the remainder of 1998 and 1999, the harassment and derogatory comments continued. Two weeks after Quiles filed his EEO complaint, Alston threw Quiles out of his office, screamed at him, and slammed the door as Quiles was leaving. Several weeks later, Lopez stopped a union grievance meeting between Quiles and a shop steward and shouted at Quiles in front of coworkers. Alston approached Quiles in the bathroom and told him that he would "soon be without a job," called Quiles a "punk," challenged Quiles to a fight, and grabbed his (own) crotch while calling Quiles a "coward."

Quiles' mental condition deteriorated. On March 31, 2000, Quiles' psychiatrist found him totally disabled because of severe depression, and Quiles began a leave of absence. Quiles was hospitalized for several days during this period to treat his depression. A year later, Quiles returned to his position

because of financial need. He worked until August 14, 2003, when Vazquez again called him “crazy.” This triggered a relapse of Quiles' depression and required another hospitalization. He has since been totally disabled.

Following the close of evidence, the Postmaster General moved for judgment as a matter of law. The district court denied the motion and submitted the case to the jury. After the jury returned a verdict for Quiles, the district court allowed the Postmaster General's renewed motion for judgment as a matter of law, and entered judgment against Quiles. The court rejected the jury's disability-harassment finding because Quiles had not demonstrated that he was disabled. The court also rejected the jury's retaliation finding because Quiles had failed to prove either that he was subjected to a hostile work environment, or that any harassment he suffered was causally related to his filing of an EEO complaint.

II.

We review the ruling on a motion for judgment as a matter of law de novo. Our review is “weighted toward preservation of the jury verdict” because a verdict should be set aside only if the jury failed to reach the only result permitted by the evidence.

As a Postal Service employee, Quiles' claim arises under the Rehabilitation Act, not the Americans with Disabilities Act (ADA). Nevertheless, the liability standards are the same under each statute. See 29 U.S.C. §791(g). Therefore, “the caselaw construing the ADA generally pertains equally to claims under the Rehabilitation Act.”

A. Disability Harassment

[The discussion of whether the plaintiff is an individual with a disability is omitted.]

We turn next to the Postmaster General's first alternative argument for affirmance: Quiles failed to adduce sufficient evidence that he was forced to endure a hostile work environment. The Postmaster General acknowledges that Quiles was subject to daily ridicule about his mental impairment. He contends, however, that this sort of conduct is common in blue-collar workplaces such as a post office, and that conduct of this sort, while inappropriate, does not constitute a hostile work environment.

To establish a hostile work environment, Quiles had to show that his “workplace [was] permeated with discriminatory intimidation, ridicule, and insult that [was] sufficiently severe or pervasive to alter the conditions of ... [his] employment and create an abusive working environment.” Among the factors relevant to this inquiry are the severity of the conduct, its frequency, and whether it unreasonably interfered with the victim's work performance.

There was testimony that Quiles was subject to such constant ridicule about his mental impairment that it required him to be hospitalized and eventually to withdraw from the workforce. This evidence was, in our view, sufficient for a reasonable jury to find a hostile work environment.

Finally, we consider the Postmaster General's other alternate ground for affirmance: the hostile conduct at issue was not directed at Quiles because of his disability. In presenting this argument, the Postmaster General highlights the fact that Vazquez harassed Quiles before she knew of his impairment.

The Supreme Court has emphasized that the federal employment discrimination laws do not establish “a general civility code” for the workplace. Rather, an employee claiming harassment must demonstrate that the hostile conduct was directed at him because of a characteristic protected by a federal anti-discrimination statute.

The Postmaster General correctly posits that some of Vazquez's conduct does not constitute actionable harassment because it occurred before Vazquez knew that Quiles was suffering from depression. But, even discounting this conduct, there was ample proof that Quiles was harassed

because of his disability. On March 5, 1998, Quiles brought a medical certificate to Lopez identifying his mental impairment. And, for the next two years, Quiles' superiors harassed and ridiculed him relentlessly, frequently mentioning the disability in the course of their actions. This evidence was sufficient to ground the jury's finding that Quiles was discriminated against because of his perceived disability.

B. Retaliation

As explained above, the jury also found that Quiles' supervisors retaliated against him after he complained about the harassment. The Rehabilitation Act prohibits retaliation against employees for complaining about violations of the Act. To prove retaliation, Quiles had to establish that (1) he engaged in protected conduct; (2) he experienced an adverse employment action; and (3) there was a causal connection between the protected conduct and the adverse employment action. The adverse employment action requirement may be satisfied by showing the creation of a hostile work environment or the intensification of a pre-existing hostile environment. And, in proper circumstances, the causation element may be established by evidence that there was a temporal proximity between the behavior in question and the employee's complaint.

The district court rejected the retaliation claim on two grounds. It concluded that Quiles did not satisfy the adverse-action requirement because the evidence of a hostile environment was insufficient. The court also ruled that, even if Quiles had introduced sufficient proof of a hostile environment, he had failed to show that the hostility was caused by his complaint.

We have already addressed the hostile-environment issue in the disability-harassment discussion, but now consider it as it relates to the retaliation claim. The relevant conduct is that which occurred after Quiles complained about his superiors' disability-related harassment.

There was proof that, within a few weeks of Quiles filing a harassment complaint with the Postal Service's Equal Employment Office, the harassment intensified. Prior to the EEO complaint, the harassment related primarily to comments concerning Quiles' mental impairment. But, after Quiles filed his complaint, the harassment expanded to include, inter alia, threats by Alston, screaming tirades directed at Quiles by both Alston and Lopez, and efforts by Lopez to interrupt Quiles' pursuit of a union grievance.

“Subject to some policing at the outer bounds, [the hostile environment question] is ... to be resolved by the trier of fact on the basis of inferences drawn from a broad array of circumstantial and often conflicting evidence.” We cannot say on this record that the jury's conclusion that Quiles endured a hostile work environment after he made his EEO complaint was irrational.

We also think that there was sufficient evidence for the jury to have found that the hostile environment was motivated by a desire to retaliate against Quiles. The district court found no evidence of such causation because Quiles did not “even present one stray hearsay remark as to the motivation for these particular supervisors' actions.” But there is no requirement for the plaintiff to present such “smoking gun” evidence; circumstantial evidence can suffice. The proof that the intensified harassment commenced shortly after Quiles filed his EEO complaint is sufficient evidence from which the jury could infer causation.

III.

Quiles presented sufficient evidence that he was the victim of harassment by his supervisors because of his perceived disability. He also presented sufficient evidence that his supervisors retaliated against him after he complained about their harassment. Accordingly, the district court erred in granting the Postmaster General's motion for judgment as a matter of law.

Reversed and remanded.

Notes

1. Although some courts make the mistake of stating that a plaintiff alleging a hostile work environment must show that the harassing behavior was severe *and* pervasive, the actual standard established by the Supreme Court is that the conduct be severe *or* pervasive. This means that the behavior need not be severe, but that repeated pervasive behavior may be sufficient to create a hostile work environment that alters the terms or conditions of employment. In *Casas v. El Paso*, 502 F. Supp. 2d 542 (W.D. Tex. 2007), a case brought under Title II of the ADA, the plaintiff alleged that the defendant subjected the plaintiff to a hostile environment based on the behavior of city bus drivers who argued with the plaintiff and treated him rudely when the plaintiff attempted to board city buses with a personal care assistant without the assistant's paying a fare. The court held that the behavior was not severe or pervasive enough to constitute a hostile environment even though the plaintiff alleged 17 different instances of rude behavior based on his disability over a two-year period.

In May 2013, the EEOC was awarded a $240 million jury verdict, the largest in its history, in a case alleging severe discrimination under the ADA and abuse of employees with mental disabilities. The employees were men who worked at a turkey processing plant who, according to the testimony, were called names such as “retard” and physically abused. See http://www.eeoc.gov/eeoc/newsroom/release/5-1-13b.cfm.

In recent decisions where plaintiffs have claimed that the employer retaliated, the plaintiff generally is not able to meet the burden of proving that motivation. Nonetheless, the possibility of retaliation claims is significant and warrants training of employee supervisors and those implementing human resources policies.

2. The retaliation in this case is retaliatory harassment. In many traditional retaliation cases, the employer or its agents subject the plaintiff to an adverse employment action, such as firing, demotion or unfavorable reassignment, in retaliation for the employee's opposition to illegal discriminatory behavior or because the employee testifies or participates in a lawsuit or proceeding brought against the employer. Here, the retaliation alleged is not a particular adverse action such as a firing but the worsening of a hostile work environment. Many courts today recognize a cause of action for retaliatory harassment.

3. In *Crawford v. Metropolitan Gov't of Nashville & Davidson County*, 555 U.S. 271 (2009), the Supreme Court held that an employee who responds to questions asked during an employer's internal investigation of a sexual harassment complaint is protected by the anti-retaliation provision of Title VII. Similar protection likely exists under the ADA.

H. Defenses

[1] Employee Misconduct

Defenses to an ADA claim discussed previously include the following: the employer is not covered by the statute under which a claim is brought; the individual bringing the claim is not disabled within the statutory definition; the employer does not know of the disability; the individual is not otherwise qualified; or the requested accommodation is not reasonable or is an undue hardship.

Other defenses include downsizing and selection or promotion of a more qualified individual. One frequent defense is misconduct, which can include an array of employee behavior ranging from insubordination, attendance (discussed previously), providing false information, dishonesty, and sexual harassment. Courts disagree as to whether an employer must accommodate a person whose misconduct is caused by the disability.

There are cases in which the employee is able to carry out the technical, physical, or professional requirements of the job competently, and the employee has no problems with attendance or dealing with stress, but engages in some type of misconduct. Depending on the seriousness of the misconduct,

courts have been inclined to find that certain levels of conduct are qualifications for the job.

For example, truthfulness and honesty often are deemed to be legitimate job requirements. In *Hartman v. City of Petaluma*, 841 F. Supp. 946 (N.D. Cal. 1994), the court held that the deliberate failure to disclose past drug use supported a discharge. Insubordination or failure to comply with employer instructions also have been found to be misconduct meriting termination of employment. See *Schartle v. Motorola, Inc.*, 1994 LEXIS 6241 (N.D. Ill. 1994); *Fehr v. McLean Packaging Corp.*, 860 F. Supp. 198 (E.D. Pa. 1994).

Using drugs and alcohol at work or working under the influence of these substances also are often deemed misconduct disqualifying the individual from employment. See *McDaniel v. Mississippi Baptist Med. Ctr.*, 869 F. Supp. 445 (S.D. Miss. 1994); *Flynn v. Raytheon Co.*, 868 F. Supp. 383 (D. Mass. 1994).

The excerpt from *Maddox v. University of Tennessee*, 62 F.3d 843 (6th Cir. 1995), in Section 3[A][3], *supra*, highlights that defense in the context of a case in which the employee claimed that because the disability related to the misconduct, the adverse employment action violated the Rehabilitation Act.

[2] Eleventh Amendment Immunity

One of the areas receiving substantial attention from the Supreme Court is the defense of Eleventh Amendment immunity from damage claims. The Eleventh Amendment, as interpreted by the United States Supreme Court, does not permit citizens of a state to sue their own states in federal court for damages unless Congress has openly and validly waived the states' Eleventh Amendment immunity to damages suits. In *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), a divided Court (5–4) held that the Eleventh Amendment banned the cases of state employees with disabilities who sued their employers for damages for violations of the ADA because Congress lacked the power to abrogate the states' immunity. It reasoned that the scope of the rights of citizens with disabilities is narrow, and that there was insufficient evidence in the Congressional record when the ADA was enacted that the states routinely had violated the rights of persons with disabilities. Four Justices filed a blistering dissent, arguing that there was powerful evidence of discrimination against persons with disabilities in the record, and that the scope of the rights of persons with disabilities is broader than that acknowledged by the majority.

The Court left open the issue of immunity under Title II of the ADA in the 2001 *Board of Trustees v. Garrett* opinion. In 2004, the Court addressed this issue again, although not in the context of employment discrimination. In *Tennessee v. Lane*, 541 U.S. 509 (2004) (excerpted in Chapter 5, *infra*), the Court held that Title II of the ADA does not exceed Congressional power under the Fourteenth Amendment in allowing actions for damages against state agencies in the context of access to the judicial system. In *United States v. Georgia*, 546 U.S. 151 (2006), the Supreme Court held that a Georgia inmate may sue the state for money damages under Title II, at least so long as the claim of a breach of the disabilities law would also make out a violation of his rights protected by the Fourteenth Amendment. What remains unresolved in these opinions is the applicability of Eleventh Amendment immunity in the context of employment discrimination cases brought under Title II. A threshold question, of course, is whether under Title II, state employees may ever bring employment discrimination cases against their employers or whether Title I would be their exclusive remedy. Given the analysis in *Garrett*, it seems probable that the Supreme Court would not allow damages claims against state agencies under Title II even if employees are permitted to bring employment discrimination suits under Title II. The Supreme Court has not addressed whether state agencies are immune from damages in employment settings under Section 504 of the Rehabilitation Act. For more recent cases on immunity, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §4.26

(2012 and cumulative supplement).

I. Relationship of ADA to Other Federal and State Laws

There are a number of other federal and state laws that are not disability discrimination laws, but nonetheless interact with the ADA and/or the Rehabilitation Act.

[1] Benefits Statutes

Statutes providing benefits for disability are particularly problematic because the definition for one statute does not necessarily equate to the definition in the other statute. For example, to be eligible for workers' compensation or Social Security disability benefits, one must meet the definition of being either totally or partially disabled. Does meeting this definition preclude the individual claiming the benefits from seeking reinstatement to the job with accommodations? Is the individual precluded from claiming that he or she is otherwise qualified to perform the job when the individual had indicated an inability to do the work as a basis for receiving the benefits? An employee who is injured on the job is less likely to be eligible for workers' compensation if the employer reasonably accommodates the injured employee and makes reasonable efforts to return the worker to the job.

Section 510 of the Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. §1140, makes it unlawful for an employer to discriminate against an employee for the purpose of interfering with the right to become a participant in an employee welfare plan, such as health insurance.

There has been a great deal of debate about tension between benefits statutes and discrimination statutes and how the definition of whether one is qualified and able to work under one statute affects the individual's ability to bring suit under another statute.

Note

The Supreme Court has clarified whether individuals are judicially estopped from claiming that they are otherwise qualified to carry out employment requirements when they have sought or obtained benefits in situations where one must indicate the inability to work.

In *Cleveland v. Policy Management Systems Corp*., 526 U.S. 795 (1999), the plaintiff was employed by the defendant and suffered a stroke, which damaged her concentration, memory and language skills. She filed for disability benefits with the Social Security Disability Insurance Program (SSDI), stating that she was “disabled” and “unable to work.” Her condition improved, and three months later she returned to work and reported her return to the Social Security Administration. The SSDI noted that she had returned to work and denied her SSDI benefits. Four days later, the plaintiff was fired. She appealed her denial of her benefits from the SSDI, stating that she had attempted to work but that her employer had fired her because she could no longer do the job. She alleged that she was unable to work because of her disability. She then filed a lawsuit against her former employer, alleging that it violated the ADA because it failed to grant her a reasonable accommodation. Her complaint alleged that she could perform the essential functions of the job with an accommodation.

The federal district court granted summary judgment to the defendant of the ADA suit because of the plaintiff's claims that she was unable to work in her appeal to the SSDI, and the court of appeals affirmed. The case went to the United States Supreme Court. The issue was whether there is a presumption that a person who receives SSDI benefits because she is unable to work may not bring an ADA claim because she would not be a qualified individual. The Court held that there is no special presumption against a recipient of SSDI that she is not a qualified individual for purposes of the ADA. The two laws have different definitions of disability, and collecting SSDI benefits is not necessarily inconsistent with proving a violation of the ADA. The definition of a qualified individual with a disability under the ADA provides that she is a person who can perform the essential functions

of the job either with or without reasonable accommodation. In contrast, the SSDI does not take into account the possibility of a reasonable accommodation in defining whether an individual is unable to work. Moreover, SSDI benefits are processed with reference to a list of questions, one of which asks the former employee whether he or she has an impairment that meets or equals those on a list of impairments. Because of the differences in the definitions of disability of the two statutes, a person who collects SSDI benefits will not have a presumption against her in an ADA case. But, the ADA plaintiff cannot ignore the apparent contradiction. Her sworn assertion in an SSDI application that she is unable to work will likely negate an essential element of the ADA unless the plaintiff can offer a sufficient explanation.

For cases since this decision, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §4.25 (2012 and cumulative supplement).

[2] Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. §§2601–2654, provides that employers with 50 or more employees must provide up to 12 weeks of unpaid leave for the birth or adoption of a child; to care for the spouse, child or parent of an employee; or the serious health condition of the employee. The FMLA and ADA are not mutually exclusive. For example, an individual with a disability requiring physical therapy might be entitled to have reasonable leave (unpaid) from the job under the ADA, which might in some cases be more extensive than the maximums provided for in the FMLA.

Where the employee has a disability or a serious medical condition or injury, there is often an intersection of issues concerning the FMLA, the ADA and the state worker compensation laws. Much of the FMLA and ADA litigation arises from work-related illnesses or injuries. An employee who is absent from work because of a work-related condition or illness often has rights under the FMLA or the ADA. The following chart, using Nevada's worker's compensation act as a model, examines in a broad fashion the rights and obligations under the different statutes, but does not contain the specific details of the FMLA and WC statutes:

	ADA	FMLA	WORKER'S COMPENSATION
Purpose	To prevent discrimination against qualified persons with disabilities. To get persons with disabilities working.	To grant leaves to persons who have serious medical conditions, birth or adoption, or family members with serious medical conditions.	To compensate workers injured at work or caused by work related industrial disease.
Covered Employers	Those with 15 employees.	Those with 50 employees within 75 miles.	Every person, firm, voluntary association and private corporation that has any person under contract for hire.
Eligible Individuals	Qualified applicants or employees with disabilities. Mental or physical impairment that substantially limits a major life activity; a record of such an impairment; or regarded as having an impairment.	Employees who have worked at least 1 year, with at least 1,250 hours within the past 12 months. Employee has "serious health condition."	Every person in service of an employer whose injuries arise out of work and in scope of employment or whose occupational disease is incidental to the business.
Medical Information (inquiries and medical examinations)	Pre-offer (no) Post-offer but pre-employment (yes if all in same job category); Employees—only if job related and consistent with business necessity	Evidence from Employee's doctor of "serious health condition." Need not defer to WC's authorized treating physician. Employee may seek second opinion from another doctor. Employer then must pay for a third opinion by a mutually agreed upon doctor.	Employer's doctor certifies ("authorized treating physician"). Before ADA, could ask questions in interviews about prior WC claims to assess risks—no longer permissible. Post-conditional offer of employment, may require medical exams and information if required for all employees in unit, but must keep confidential and separate under ADA. If applicant has a disability under ADA, may not refuse to hire based on the disability unless person would pose a direct threat to his or others' health or safety.
Medical Records	Separate confidential file	May keep FMLA medical info in same ADA file. WC information may be kept in same file, but ADA information can only be revealed in limited circumstances.	May submit under the ADA information obtained through medical exams or inquiries to state WC offices or SIF (Second Injury Fund)—to promote employment of individuals with disabilities.

	ADA	FMLA	WORKER'S COMPENSATION
Requests for Leaves	Only as reasonable accommodation	To care for oneself or loved ones	Because of injury.
Terms of Leave	Won't necessarily need leave unless leave is a reasonable accommodation; unpaid. If leave taken under ADA, may run concurrently with FMLA leave. Must permit Employee able to perform essential functions of the job with or without accommodation to return to work, unless undue hardship based on cost to Employer, # of jobs and persons at facility, other business issues.	12 weeks unpaid over one year period; may be intermittent. Qualifying exigency leave of up to 12 weeks for persons with family members on active duty or where active duty is impending. Employee caregiver has up to 26 weeks leave to care for family service member.	Paid medical and disability benefits until maximum medical improvement; if injury persists, may be eligible for permanent, partial or total disability payments, vocational rehabilitation. May consider any leave taken under WC as FMLA leave. 100% healed policy before returning to work violates ADA.
Return to Work	If Employee can perform essential functions of the same job; or as accommodation, place in another vacant position for which she is qualified. If Employee cannot perform essential functions of same job, and there is no vacant position, Employer not required to create a position for Employee, but must consider what jobs may become vacant in reasonable future. 9th Circuit case required Employer to permit Employee to work from home as reasonable accommodation where some other Employees worked from home; Employer not ordinarily required to create part time positions if there are none.	Employee entitled to same job or equivalent job with equal pay and benefits; may return on intermittent schedule if provides certification that medically necessary. Must attempt to schedule intermittent leaves during mutually convenient times. Employer may move Employee to different equal position during intermittent leave.	Employer should provide light duty assignment or permanent reassignment in accordance with state law. Under ADA, if Employer has light duty jobs for Worker's Comp Employees, must give one to non WC disabled Employee as accommodation. But if light duty jobs are temporary, Employer not required to give it to a disabled Employee permanently. Employer may still have to give reasonable accommodation to disabled Employee.

Notes

1. Definitions of persons covered under the ADA, FMLA, and WC differ. Under the ADA, a qualified individual is one who can perform the essential functions of the job with or without reasonable accommodation. Under the ADA, a person with a disability has a mental or physical impairment that substantially limits a major life activity. Until recently, it has been difficult to establish that an individual has a disability, but after the ADAAA, it has been easier to prove that a person has a disability. Under the FMLA, the person must have a "serious health condition." This is not a difficult standard to meet, and a person can have a serious health condition without having a disability under the ADA. The definition under the FMLA is very broad: it requires 1) inpatient care; 2) any period of incapacity requiring absence of more than three days involving treatment by health care provider; or 3) continuing treatment by a health-care provider.

2. A person with a "serious health condition" may qualify for up to 12 weeks of unpaid leave under the FMLA, and may take the leave intermittently. The employer may require an employee who takes intermittent leave to transfer to another equal job if doing so better accommodates the employer's need during the intermittent leave. If the "serious health condition" or a disability is a work injury or

illness, the employee may also be covered by WC, and the 12 week FMLA leave may run concurrently with the WC absence.

3. Where it is "medically necessary" to care for a serious health condition, an employee may take FMLA leave intermittently, e.g., weekly physical therapy. The employer must track the hours taken. An employee need not call it FMLA leave, but must ask for time off. The employer must notify the employee that it is FMLA leave that s/he is taking.

4. FMLA leave is unpaid, but the employer may require the employee to substitute any paid leave the employee has accrued for any part of the 12 weeks.

5. While on FMLA leave, the employee may continue coverage under the employer's health plan.

6. When the employee returns from FMLA leave, he or she must be returned to the position held before the leave or an equivalent position in benefits, pay, other terms or conditions of employment.

7. When rights under the FMLA and ADA apply simultaneously, the statute with the greater protection controls. For example, FMLA grants 12 weeks unpaid leave. ADA grants a reasonable accommodation. The reasonable accommodation may include an unpaid leave of less than or greater than 12 weeks if there is no showing of undue hardship. But undue hardship is not a defense under the FMLA. So, there is a minimum of 12 weeks unpaid leave (under the FMLA), but an employee may have the right to more unpaid leave under the ADA if it is a reasonable accommodation that does not impose an undue hardship.

A recent Tenth Circuit case, however, concluded under Section 504 of the Rehabilitation Act that a university that refused to consider giving more than six months' leave, where it had a six-month inflexible sick leave policy, as an accommodation to the plaintiff's cancer did not violate the Act. See *Hwang v. Kansas State University*, 2014 WL 2212071 (10th Cir. May 29, 2014). There is a serious question as to whether this would be a correct interpretation of the reasonable accommodation requirement under the ADA given that the ADA requires an individual determination.

In *Young v. United Parcel Service*, *Inc*., 135 S. Ct. 1338 (2015), the Supreme Court held that the Pregnancy Discrimination Act of Title VII requires an employer to grant a reasonable accommodation to a pregnant woman with a 20 pound lifting restriction if she can prove that other employees who were not pregnant with similar inability to work were given accommodations, that the employer's policy created a significant burden on pregnant women and that the employer's "legitimate non-discriminatory reason" was not sufficiently strong to justify the burden on pregnant women.

The Court noted that the facts in *Young* occurred before the enactment of the Americans with Disabilities Act Amendments Act (ADAAA), which went into effect in 2009. It raised the question without deciding whether the new Title I regulations under the 2009 Amendments, if applicable to *Young*, would grant a right to a pregnant woman to accommodate her lifting restrictions. The regulations to the new ADAAA state that a disability does not have to last six months or longer to be considered a disability, and the guidance gives the example of an employee with a bad back with a 20 pound lifting restriction that lasts for a number of months. The guidance notes that this person would have an impairment that substantially limits the major life activity of lifting and would therefore be covered by the ADA. Thus, the reasonable accommodations provisions of the ADA would apply. See 29 C.F.R. §1630.2(j)(1)(ix), and 29 C.F.R. §1630.2(j)(1)(ix) Appendix (interpretive guidance). It appears that a pregnant woman who has similar lifting restrictions due to her pregnancy may be a person with a disability under the ADA and therefore have a right to reasonable accommodations.

8. Under the ADA, as a reasonable accommodation, the employer may reassign a person to a position that is a demotion, if the employer first considers a lateral move and there is no available position. The employer need not bump an employee with more seniority, if the seniority system has been uniformly applied.

9. The FMLA was amended and the regulations updated for the FMLA. The new U.S. Department

of Labor update of the FMLA regulations went into effect on January 16, 2009. The amended statute includes increased leave for members of military families. The rules are very specific and detailed and must be consulted before employers/employees act. See John H. Geaney, *The Relationship of Workers' Compensation to the Americans with Disabilities Act and Family and Medical Leave Act*, 4 CLIN. OCCUP. ENVIRON. MED. 273 (2004). Other sources of useful information are the following:

A. EEOC website: www.eeoc.gov (for ADA information)
B. Dept. of Labor website: www.dol.gov (for FMLA information)
C. For cases on the Family and Medical Leave Act and its relationship to disability discrimination law, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §1.33 (2012 and cumulative supplement).

[3] National Labor Relations Act

Another law that may intersect with the ADA is the National Labor Relations Act (NLRA), 29 U.S.C. §§151–169, the law that regulates unionization and collective bargaining. For example, under the ADA, one type of reasonable accommodation is to reassign an individual to a vacant position. In companies with collective bargaining agreements, however, job transfer rights are usually set out in the collective bargaining agreement and often are determined on the basis of seniority.

The Supreme Court's decision in *Barnett* is included earlier in this chapter in the section on job reassignment. It should be noted that the Court held that seniority system expectations generally take precedence over requests for reasonable accommodation, regardless of whether such systems are based on a collective bargaining agreement or if they are based on an employer established system.

[4] Genetic Information Nondiscrimination Act (GINA)

Congress passed GINA, 42 U.S.C. §2000ff, et seq., overwhelmingly, but only after thirteen years of attempts to pass a bill on genetic discrimination. While proponents of the Act presented testimony of persons who had suffered genetic discrimination by employers and insurance companies, it was acknowledged that there were few documented instances of genetic discrimination. *See* Jessica L. Roberts, *Preempting Discrimination: Lessons from the Genetic Information Nondiscrimination Act*, 63 VAND. L. REV. 439 (2010). Nonetheless, with the Human Genome Project and medicine's ability to track the genes in humans and an expected movement toward personalized medicine based on an individual's genetic makeup, genetics have moved into the treating physician's office. There is a belief that individuals will resist genetic testing or participation in genetic studies, however, because of their fear that they and their family members will suffer discrimination in employment and insurance coverage if their genetic information is dispersed.

GINA passed Congress and was signed by then President Bush on May 21, 2008. The law became effective on November 21, 2009. GINA protects against discrimination based on genetic information in the insurance and employment contexts. Title II deals with employment and prohibits employers, labor organizations, employment agencies and employment training programs from discriminating against an employee or applicant on the basis of genetic information. The term “employee” includes those employees and applicants covered by various acts protecting government and private employees including Title VII of the Civil Rights Act, the Government Employees Rights Act of 1991, the Congressional Accountability Act of 1995, Chapter 5 of Title 3 of the United States Code, and Section 717 of the Civil Rights Act of 1964. “Genetic information” includes genetic tests of the individual or family members and manifestation of disease or disorder of family members. Discrimination is defined as it is in Title VII of the 1964 Civil Rights Act and the ADA:

> (1) to fail or refuse to hire, or to discharge, any employee, or otherwise to discriminate against any employee with respect to the compensation, terms, conditions, or privileges of employment of

the employee, because of genetic information with respect to the employee; or

(2) to limit, segregate, or classify the employees of the employer in any way that would deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect the status of the employee as an employee, because of genetic information with respect to the employee.

P.L. 110-233.

The Act also prohibits employers, with certain exceptions, from acquiring genetic information of an employee, applicant, or family member of the employee or applicant. The exceptions include:

(1) an employer's inadvertent acquisition of information (known as the "water cooler exception");

(2) where the employer offers health or genetic services including a wellness program and the employee participates knowingly and voluntarily;

(3) where the employer needs information to comply with certification provisions under the Family Medical Leave Act or state family medical leave laws;

(4) where the employer purchases documents that are publicly available (such as newspapers) that contain such information;

(5) where the information is used for genetic monitoring of biological effects of toxic substances in the workplace and the employee knowingly and voluntarily participates;

(6) where the employer conducts DNA analysis for law enforcement purposes and requests employees' DNA to assure no contamination of samples.

The Act also requires that if an employer, labor organization, employment agency or joint labor-management committee possesses genetic information about an employee or member, the information be maintained on separate forms in separate medical files and be treated as the confidential medical record of the employee. Complying with confidentiality of medical records under the ADA, 42 U.S.C. §12112 (d)(3)(B), is deemed compliance with this provision. Disclosure is limited to exceptions listed and required by law. P.L. 110-233 §205 & 206.

Finally, the Act grants remedies in accordance with the remedies provided by the Acts listed above which cover the employee. For example, employees covered by Title VII of the 1964 Civil Rights Act have the same procedural pre-requisites (filing a charge with the EEOC) and remedies available to them as those available to persons proving discrimination under that Act. These include the same remedies as those found under the ADA and the same caps on compensatory and punitive damages as apply to plaintiffs under Title VII and the ADA. See Section [I], *infra*, for a discussion of the caps. One major difference, however, is that GINA does not grant a cause of action for violations that cause a disparate impact. Thus, unintentional discrimination having a disparate impact does not violate GINA. The Act does, however, establish a Commission to study disparate impact six years after the Act goes into effect. It appears that the Commission has not as yet been funded or constituted. See PRACTICAL LAW LABOR & EMPLOYMENT, DISCRIMINATION UNDER GINA: BASICS, PRACTICAL LAW PRACTICE NOTE 4-615-0265.

EEOC Regulations

GINA gives the EEOC the authority to write regulations implementing the statute. The EEOC issued the proposed regulations on November 9, 2010, and the regulations took effect January 10, 2011. See Regulations Under the Genetic Information Nondiscrimination Act of 2008, 75 Fed. Reg. 68,912 (Nov. 9, 2010) (codified at 29 C.F.R. pt. 1635).

GINA, the ADA, and the ADAAA

Before GINA, the EEOC took the position that discrimination based on genetic information was

discrimination under the "regarded as" prong of the ADA and the Rehabilitation Act. While the EEOC filed a lawsuit under this theory, the case settled, and the EEOC did not have the opportunity to make its arguments before the courts. Given the narrow interpretation of "individual with a disability" after the *Sutton* trilogy, particularly the requirement that the employee must prove that the employer believed that the impairment substantially limited a particular major life activity of the employee in order to prove his case under the "regarded as" prong of the statute, and the Supreme Court's willingness to ignore the agencies' regulations interpreting the definition of disability, there is a serious question as to whether the courts would have given much deference to the EEOC's regulation.

Given the passage of GINA, the landscape is significantly improved for persons with genetic predisposition to specific diseases, but there are significant problems with the confidentiality and the coverage provisions. GINA does not amend the ADA, which permits employers to condition employment after an offer on passing medical tests. Thus, when an employer asks for medical information, it is likely that it will be impossible to separate the genetic information protected by GINA from the other information in an employee's medical records. *See* Mark A. Rothstein, *GINA, the ADA, and Genetic Discrimination in Employment*, HEALTH CARE 837, 838 (Winter 2008). Furthermore, as Professor Mark Rothstein demonstrates, there is a problem with coverage. Under GINA, individuals are protected from discrimination based on their genes, but not from discrimination based on the disease once it is manifested. The gap between persons who fit the definition of having a disability and those who are asymptomatic but have a genetic anomaly may prove to be problematic. *Id*. at 839.

[5] Mental Health Parity and Addiction Equity Act

The original Mental Health Parity Act (MHPA), signed into law by President Clinton in 1996, and the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act (MHPAEA), signed into law by President George W. Bush in 2008, 29 U.S.C. §1185a and 42 U.S.C. §300gg-5, apply to large group health plans. MHPA required parity between offered physical and mental health insurance benefits in the context of lifetime and annual spending caps. MHPAEA required parity between offered physical and mental health insurance benefits in the context of financial requirements (e.g., deductibles, co-payments, and coinsurance amounts) and treatment limitations (e.g., inpatient day limitations and outpatient visit limitations).

Neither MHPA nor MHPAEA required large group health plans to offer any particular mental health or substance use disorder benefits, however. Until President Obama signed the Affordable Care Act ("ACA") into law in 2010, it was legal for a large group health plan to simply not offer any mental health or substance use disorder benefits as a way of avoiding the parity requirements set forth in MHPA and MHPAEA.

The ACA is very important, then, because it requires exchange- and non-exchange-offered individual and small group health plans as well as Medicaid benchmark and benchmark equivalent plans to offer ten sets of essential health benefits (EHBs), including mental health and substance use disorder benefits. See 42 U.S.C. §18022(b)(1)(A)–(J). Although the ACA does not list particular diagnostic examinations, medical treatments, or surgical procedures that are considered EHBs, the ACA does require each state to select a benchmark plan that will serve as a reference plan for the minimum EHBs in each state. Nevada, for example, selected the Health Plan of Nevada Solutions HMO Platinum Plan for years 2017 and forward. This plan tells Nevadans who have individual or small group insurance or Medicaid benchmark or benchmark equivalent insurance what their EHBs are. Unfortunately, the EHBs do not apply to the large group plan context, the self-insured group plan context, or the grandfathered health plan context, leaving millions of Americans without EHBs.

J. Enforcement

Enforcement of employment discrimination rights under the Rehabilitation Act and the Americans with Disabilities Act includes both administrative and private procedures and remedies.

[1] Section 501 of the Rehabilitation Act

Section 501 of the Rehabilitation Act prohibits employment discrimination on the basis of disability by federal agencies. 29 U.S.C. §791(a). It also requires federal agencies to have affirmative action plans for the hiring, placement, and advancement of individuals with disabilities. 29 U.S.C. §791(b). The 1978 amendments to the Rehabilitation Act clarified that there is a private right of action under Section 501 of the Rehabilitation Act. 42 U.S.C. §§2003-16, 20003-5(f)–(k). Individuals pursuing actions under Section 501 are required to exhaust administrative remedies through the agency employer. The standards used to determine whether this section has been violated in a case alleging employment discrimination are those applied under title I of the ADA and the provisions of sections 501 through 504, and 510 of the ADA (42 U.S.C. §§12201–12204 and 12210), as such sections relate to employment 29 U.S.C. §791(f).

The remedies available to complainants under Section 501 are the remedies found in the Civil Rights Act of 1964, which is incorporated by reference. These remedies include equitable and legal relief and are discussed later in this section.

Although the majority of courts addressing the issue have held that Sections 501 and 504 claims can be brought against federal agencies, this issue has not been finally resolved by either the Supreme Court or Congress. For citations to cases on this issue, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §4.03 (2012 and cumulative supplement).

[2] Section 503 of the Rehabilitation Act

Section 503 of the Rehabilitation Act prohibits employment discrimination on the basis of disability by federal contractors with over $10,000 in annual federal contracts. 29 U.S.C. §793. Like federal agencies, federal contractors must have affirmative action plans.

Complainants under Section 503 must pursue relief by filing a complaint with the Department of Labor, Office of Federal Contract Compliance Programs (OFCCP). This office has a detailed procedure for resolving these complaints. The majority of jurisdictions have ruled that relief through OFCCP procedures is the exclusive avenue of redress and that individuals may not bring private actions in court. For citations to cases on this issue, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §4.03 (2012 and cumulative supplement).

The remedies available for Section 503 violations include injunctive relief, withholding progress payments, terminating the contract, and prohibiting the violator from receiving future government contracts. 41 C.F.R. §60-741.66. Courts have consistently ruled that there is no private right of action created under Section 503 and the only remedies available are through the administrative agency. See 9-162 LARSON ON EMPLOYMENT DISCRIMINATION §162 (2015).

[3] Section 504 of the Rehabilitation Act

Section 504 of the Rehabilitation Act prohibits employment discrimination on the basis of disability by recipients of federal financial assistance. 29 U.S.C. §794. Like Section 501, the remedies and procedures of the Civil Rights Act of 1964 are incorporated by reference. 34 C.F.R. §§100.6–.10, 101.1–.131. Section 501 requires covered entities to have affirmative action policies, but Section 504 does not. 29 U.S.C. §791(b). The standards used to determine whether this section has been violated in a case alleging employment discrimination are those applied under title I of the ADA and the provisions of sections 501 through 504, and 510, of the ADA (42 U.S.C. §§12201–12204 and 12210), as such sections relate to employment. 29 U.S.C. §794(d).

Section 504 requires employers with 15 or more employees to adopt grievance procedures with procedural safeguards to ensure prompt and equitable complaint resolution. These procedures are to be available to employees, but they need not be provided to applicants for employment. 45 C.F.R. §84.7(b).

Complainants are not required to resort to internal grievance procedures before filing an administrative complaint with the granting agency. Nor are they required to exhaust administrative remedies before bringing action in court.

For a discussion of enforcement under Section 504, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §4.04 (2012 and cumulative supplement).

In 1996, the Supreme Court held that Congress had not waived the federal government's sovereign immunity against awards of monetary damages for violations of section 504 of the Rehabilitation Act. The following is part of the Court's reasoning. Justices Stevens and Breyer dissented. The case involved a Merchant Marine Academy cadet, who was terminated from the Academy because of his diabetes mellitus. The termination was found by the District Court to violate the Rehabilitation Act, and the court ordered reinstatement, but denied compensatory damages on the basis of sovereign immunity.

Lane v. Pena

518 U.S. 187 (1996)

JUSTICE O'CONNOR delivered the opinion of the Court.

I

The clarity of expression necessary to establish a waiver of the Government's sovereign immunity against monetary damages for violations of §504 is lacking in the text of the relevant provisions. The language of §505(a)(2), the remedies provision, is telling. In that section, Congress decreed that the remedies available for violations of Title VI would be similarly available for violations of §504(a) "by any recipient of Federal assistance or Federal provider of such assistance." This provision makes no mention whatsoever of "program[s] or activit[ies] conducted by any Executive agency," the plainly more far-reaching language Congress employed in §504(a) itself. Whatever might be said about the somewhat curious structure of the liability and remedy provisions, it cannot be disputed that a reference to "federal provider[s]" of financial assistance in §505(a)(2) does not, without more, establish that Congress has waived the Federal Government's immunity against monetary damages awards beyond the narrow category of §504(a) violations committed by federal funding agencies acting as such—that is, by "federal provider[s]."

The lack of clarity in §505(a)(2)'s "federal provider" provision is underscored by the precision with which Congress has waived the Federal Government's sovereign immunity from compensatory damages claims for violations of §501 of the Rehabilitation Act, which prohibits discrimination on the basis of disability in employment decisions by the Federal Government. In §505(a)(1), Congress expressly waived the Federal Government's sovereign immunity against certain remedies for violations of §501.

But our analysis need not end there. In the Civil Rights Act of 1991, Congress made perfectly plain that compensatory damages would be available for certain violations of §501 by the Federal Government (as well as other §501 defendants), subject to express limitations: "In an action brought by a complaining party under the powers, remedies, and procedures set forth in ... section 794a(a)(1) of title 29 [which applies to violations of §501 by the Federal Government] ... against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations

implementing section 791 of title 29 concerning the provision of a reasonable accommodation ... the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section ... from the respondent." The Act's attorney's fee provision makes a similar point. Section 505(b) provides that, "[i]n any action or proceeding to enforce or charge a violation of a provision of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." This provision likewise illustrates Congress' ability to craft a clear waiver of the Federal Government's sovereign immunity against particular remedies for violations of the Act. The clarity of these provisions is in sharp contrast to the waiver Lane seeks to tease out of §§504 and 505(a)(2) of the Act.

Given the care with which Congress responded to our decision in *Atascadero* by crafting an unambiguous waiver of the States' Eleventh Amendment immunity in §1003, it would be ironic indeed to conclude that that same provision "unequivocally" establishes a waiver of the Federal Government's sovereign immunity against monetary damages awards by means of an admittedly ambiguous reference to "public ... entit[ies]" in the remedies provision attached to the unambiguous waiver of the States' sovereign immunity.

For the reasons stated, the judgment of the Court of Appeals for the District of Columbia Circuit is affirmed.

[4] Title I of the Americans with Disabilities Act

Title I of the Americans with Disabilities Act prohibits employers with 15 or more employees from discriminating in employment on the basis of disability. 42 U.S.C. §12112. Like Sections 501 and 504 of the Rehabilitation Act, Title I of the ADA incorporates the powers, remedies, and procedures of the Civil Rights Act of 1964. 42 U.S.C. §12117(a). The ADA also specifies that agencies with enforcement authority under Title I and under the Rehabilitation Act are to coordinate enforcement. 42 U.S.C. §12117(b).

Individuals seeking redress under Title I of the ADA are required to file a charge with the Equal Employment Opportunity Commission. The EEOC may attempt conciliation after a complaint has been investigated. Only after conciliation has failed may the EEOC pursue a civil action through the courts. And, in the vast majority of cases, the EEOC does not bring a case in its own behalf. After the EEOC makes a final determination of cause or no cause, it will provide the complainant with a "Letter of Right to Sue," which the plaintiff can use to bring suit on her own behalf in federal or state court, regardless of whether the EEOC has found cause. If the plaintiff wishes to go to court sooner, it may request a right to sue letter after the EEOC has had the charge for 180 days, but has not reached a determination of cause or no cause. 42 U.S.C. §2000e-5.

For a discussion of Title I enforcement, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §4.26 (2012 and cumulative supplement).

Arbitration Clauses and the ADA

The Supreme Court has twice addressed remedies available to individual complainants in ADA employment claims where they have entered into arbitration agreements to resolve controversies. In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), the Court upheld the validity of arbitration agreements by individuals waiving the right to bring ADA claims in court or to obtain relief in a judicial forum. Individual plaintiffs are bound by agreements to arbitrate their ADA claims so long as their waiver of rights is knowing and voluntary. The Court further clarified the role of such arbitration agreements in *EEOC v. Waffle House, Inc.* 534 U.S. 279 (2002). The Court held that while these arbitration agreements are binding against individuals seeking recourse through the courts, they do not bar the Equal Employment Opportunity Commission from bringing victim-specific cases. The EEOC may seek back pay, reinstatement, and damages in ADA enforcement actions on behalf of

individuals. The Court notes, however, that the individual's recovery through the arbitration process may limit the relief in an EEOC case.

In *14 Penn Plaza LLC v. Pyett*, 555 U.S. 271 (2009), the Supreme Court held that a union may waive the rights of its members to a judicial forum in an age discrimination case if the waiver is clear and unmistakable in the collective bargaining agreement and the agreement provides for arbitration of the statutory claim. This analysis will likely be applied to ADA cases as well as Age Discrimination in Employment Act cases.

[5] Title II of the Americans with Disabilities Act

Title II of the Americans with Disabilities Act prohibits discrimination on the basis of disability by state and local governmental agencies. 42 U.S.C. §12132. Unlike Title III of the ADA (prohibiting discrimination by private providers of public accommodations), which does not apply to employment discrimination, Title II appears to prohibit not only discrimination in the provision of services, but also employment discrimination. See 28 C.F.R. §35.140 for applicable regulations.

A circuit split has developed, however, on the question of whether a public employee may sue the employer for employment discrimination under Title II of the ADA. A number of courts have concluded that Title II does not apply to relations between state and local government employers and employees, but applies only to services, programs or activities furnished by a public entity. See *Reyazuddin v. Montgomery Cnty., Md*., 789 F.3d 407, 420 (4th Cir. 2015) ("Our sister circuits have divided on this issue ... The Second, Seventh, Ninth, and Tenth Circuits have held that litigants asserting public employment discrimination claims against their state and local government employers cannot rely on Title II ... In addition, the Third and Sixth Circuits 'have expressed the view that Title I is the exclusive province of employment discrimination within the ADA.... Only the Eleventh Circuit has reached a contrary conclusion.... We join the majority view"). But see *Bledsoe v. Palm Beach Soil and Water Conservation Dist.*, 133 F.3d 816 (11th Cir. 1998) (applying Title II to an employment discrimination case brought by a public employee). Title I applies to state and local employees, but in the case of state employees, the Eleventh Amendment prohibits money damages brought against the state. See *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), discussed at Section [H][2].

Unlike Title I of the ADA, which requires individuals complaining about employment discrimination to exhaust administrative remedies by pursuing redress through the EEOC, it appears that employees of state or local governmental agencies may go directly to court to seek redress if it is determined that Title II applies to employment. Individuals covered by Title II would also be covered by Title I, unless the governmental agency has fewer than 15 employees.

Title II applies the remedies, procedures, and rights of Section 504 of the Rehabilitation Act, which in turn incorporates the remedies, procedures, and rights of the Civil Rights Act of 1964.

[6] Civil Rights Act of 1964

The Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. §2000e, provides for a number of remedies for discrimination. These remedies include injunctive relief, appropriate affirmative action, equitable relief, back pay, front pay, and declaratory relief.

The 1991 amendments clarify that damages are also available as a remedy, but limit compensatory and punitive damages to certain circumstances. The damages provisions can be found at 42 U.S.C. §1981a and are applicable to the ADA and the Rehabilitation Act. Damages are not available where the employer has made good faith efforts at reasonable accommodation. Punitive damages are recoverable only where there has been malice or reckless indifference to federally protected rights. Compensatory damages include future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. Punitive damages are not

available against state and local governmental agencies. Caps on total damage awards (the sum of compensatory and punitive damages) range from $50,000 per violation (for employers with 15–100 employees) up to $300,000 per violation (for employers with more than 500 employees).

Lilly Ledbetter Fair Pay Act of 2009

The Lilly Ledbetter Fair Pay Act is an amendment to the ADA and the Rehabilitation Act. It overturns the decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). It applies to Title I of the ADA and to Sections 501 and 504 of the Rehabilitation Act as well as Title VII of the Civil Rights Act. It states that an unlawful employment practice occurs, with respect to discrimination in compensation, when a discriminatory compensation decision is adopted, when an individual becomes subject to a discriminatory compensation decision, including each time wages, benefits, or other compensation is paid, resulting in whole or part from a discriminatory decision. This Act is important because it permits persons who are discriminated against in their pay to bring suit when there is a continuous violation because each time compensation is paid, the statute of limitations begins to run anew.

[7] Other Remedies Issues

The availability of attorneys' fees is a significant factor in whether an individual can find representation in disability discrimination cases. This is increasingly the case because of the complexity and difficulty in succeeding in such cases. Settlement of these claims may be less likely because of a 2001 Supreme Court ruling. In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), the Supreme Court held that attorneys' fees under the ADA or the Fair Housing Act are only available where a favorable judgment on the merits or a consent decree approved by the court favors the plaintiff. As a result of this decision, it would seem that settlement agreements should specify recovery of attorneys' fees. Otherwise settlements would be discouraged. It may be problematic, however, for counsel to bargain for attorneys' fees at the same time they are negotiating settlements. Consider the conflicts of interest that might arise.

The issue of damages as a remedy is also one that is receiving greater attention in the courts, including the Supreme Court. In a case that was not an employment case, but which has implications for all disability discrimination claims, the Court held that while compensatory damages would be available in claims against state agencies, punitive damages are not available under Section 202 of the ADA or Section 504 of the Rehabilitation Act. *Barnes v. Gorman*, 536 U.S. 181 (2002). This decision does not necessarily govern employment cases, however, because they specifically are covered by 42 U.S.C. §1981a, which provides for capped compensatory and punitive damages and does not limit punitive damages to private entities.

K. Summary

Chapter 3 deals with how the disability statutes regulate employment discrimination based on an applicant's or employee's disability. It focuses on the ADA and the Rehabilitation Act, with a discussion of who is a person with a disability, which employers are covered, how to determine whether a person who has a disability is a qualified individual and whether the employer is required to grant a reasonable accommodation to the individual with a disability. It also deals with disability discrimination caused by harassment by employers, employees or customers and retaliation claims against employers who take adverse employment actions against individuals who claim that disability discrimination is occurring in the workplace. Finally, it discusses enforcement of rights under the disability statutes and the interplay among disability statutes, the Family and Medical Leave Act, and state workers' compensation statutes.

After the effective date of the Americans with Disabilities Act Amendments Act ("ADAAA") in 2009, it became much easier to prove that an individual with a mental or physical impairment has a disability. While courts still make individual determinations about whether a person has a disability under the ADA, the ADAAA changes permit a finding of nearly a per se disability in a number of situations such as cancer, HIV, etc. The newer cases in the employment context focus on whether a person with a disability is qualified to perform the essential functions of the job and whether an employer should grant an accommodation or whether the employer has proved that the proposed accommodation creates an undue hardship for the employer.

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8. In addition to the "coaching" responsibilities on the field, Coach Majors described other essential job functions of an assistant coach as: 1) the recruitment of high school football players, 2) serving as a positive role model for athletes on the university's football team, 3) counseling players on various issues, including the use and abuse of alcohol and drugs, and 4) promoting a positive image as a representative of not only the football program but the university as well.

3. The Court in *McDonnell Douglas* set forth a burden-shifting scheme for discriminatory-treatment cases. Under *McDonnell Douglas*, a plaintiff must first establish a prima facie case of discrimination. The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its employment action. If the employer meets this burden, the presumption of intentional discrimination disappears, but the plaintiff can still prove disparate treatment by, for instance, offering evidence demonstrating that the employer's explanation is pretextual. The Courts of Appeals have consistently utilized this burden-shifting approach when reviewing motions for summary judgment in disparate-treatment cases.

2. Individuals with obsessive compulsive disorder experience obsessions or compulsions or both. *See American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 417* (4th ed. 1994). Obsessions are recurring or persistent thoughts, images, or impulses that, rather than being voluntarily produced, seem to invade a person's consciousness despite his attempts to ignore, suppress, or control them. Compulsions are urges or impulses to commit repetitive acts that are apparently meaningless, stereotyped, or ritualistic. The disorder was recently made famous by Jack Nicholson's Oscar-winning portrayal of a man with OCD in the 1998 film *As Good As it Gets*.

3. In evaluating the costs and benefits of a proposed accommodation, it must be noted that Section 504 does not require that the *employer* receive a benefit commensurate with the cost of the accommodation. The concept of reasonable accommodation, developed by regulation under Section 504, received the imprimatur of congressional approval with the passage of the Americans With Disabilities Act, 42 U.S.C.A. §§12101 *et seq*. (stating, in a 1992 amendment, that Section 504 is to be interpreted consistently with the employment-related provisions of the Americans With Disabilities Act). As set forth by statute and regulation, the concept of reasonable accommodation permits the employer to expect the same level of performance from individuals with disabilities as it expects from the rest of its workforce. But the requirement of reasonable accommodation anticipates that it may cost more to obtain that level of performance from an employee with a disability than it would to obtain the same level of performance from a non-disabled employee. And Congress fully expected that the duty of reasonable accommodation would require employers to assume more than a *de minimis* cost. It follows that an accommodation is not unreasonable simply because it would be more efficient, in the narrow sense of less costly for a given level of performance, to hire a non-disabled employee than a disabled one.

4. With our approach contrast that which the Seventh Circuit appears to adopt in *Vande Zande*. Under that case, the plaintiff is required to do a rough cost/benefit analysis to demonstrate that a reasonable accommodation exists, but the employer may defend by showing that "upon more careful consideration" the accommodation imposes an undue hardship. *Vande Zande* does not deal expressly with questions of burdens of production and persuasion. It is possible, therefore, that in the Seventh Circuit the burdens of production and of persuasion on the issue of reasonableness—although subject only to a rough cost/benefit analysis—nevertheless rest with the plaintiff.

16. As we have discussed, working at home is a reasonable accommodation when the essential functions of the position can be performed at home and a work-at-home arrangement would not cause an undue hardship for the employer. EEOC Enforcement Guidance on Reasonable Accommodation, at 7626.