

AMERICANS WITH DISABILITIES AND REASONABLE ACCOMMODATION IN EMPLOYMENT

By Bob Gregg
Boardman & Clark Law Firm
One South Pinckney Street, Suite 410
P. O. Box 927
Madison, WI 53701-0927
Telephone (608) 283-1751
rgregg@boardmanclark.com

Disability discrimination is prohibited by the state laws, the Americans With Disabilities Act of 1990 (ADA), and the Federal Rehabilitation Act of 1973 (which covers public sector employers and organizations receiving federal funds). The ADA applies to employers of 15 or more employees. Many state EEO laws apply to those with one or more employees.

State and federal laws also require affirmative action to recruit and hire disabled individuals and disabled veterans.

The coverage and requirements of state laws, ADA and Rehabilitation Act are similar, so the following pages describe the general definitions, terms and reasonable accommodations under all three.

This article is devoted to disability and reasonable accommodation after a person is employed. Disability and accommodation in hiring is covered in a separate article, *The Hiring Process*, by Bob Gregg, Boardman Law Firm.

Disability is: *An ongoing mental or medical condition which seriously limits one or more major life activities and/or makes work achievement unusually difficult or limits the capacity for work.* (The federal law requires both a limitation on life activities and a work effect. Several state laws do not require major life limitation, only a substantial job effect.)

“Short term” medical conditions (illness, broken bones, recovery from accidents or operations) are not “disabilities” **if** they will resolve within a reasonably short term and not result in any ongoing condition which limits life activity or make work achievement unusually difficult. The ADA describes a short-term, “transient” non-disability as a condition expected to last only “six months and have minor” effects. This leaves an open question as to conditions which are less than six

months but “major,” or longer term and “minor.” (Pregnancy is not a disability, even though it does continue for more than six months. However, it must be treated the same as an employer treats other short-term medical conditions.)

The ADA is “liberally construed” in favor of interpreting a condition as a disability, rather than excluding it. [Do not confuse the “*liberally* construed” as a political issue. The ADA has had uniform bi-partisan support. The ADA Amendments Act of 2008 which mandated the “liberal construction” was first introduced by Rep. James Sensenbrenner (R-Wis), one of the more conservative members of Congress.] So, courts have been exploring whether a short-term condition is covered by the ADA.

Court Rules Four Month Lifting Restriction Was A Disability Under ADA. In *Austin v. Children’s Hospital Colorado* (D. Col., 2018), the court rejected the employer’s argument that a short-term duration for limitations and full recovery could not be a “disability” under the ADA. A nurse had shoulder surgery and was limited for four months to 20 lb. lifting. The Position Description required lifting up to 100 lbs. (She actually regained full ability in just over three months.) After the operation she requested return to work with restrictions. The employer felt she could not perform the requirements of the job and terminated the employment. It claimed it had no obligation to engage in an interactive process nor to Reasonably Accommodate since this was a short-term – non-disability situation. The court found otherwise, ruling there was sufficient foundation for an ADA case. The EEOC guidance “makes clear that an impairment lasting fewer than six months can still be substantially limiting.” At the time she was fired the nurse could not lift over 20 lbs., and in her personal life “could not reach her hand above her head nor around her back to fasten her bra or remove her shirt as she had done before,” both major life activities of personal care and dressing as described in the ADA. Thus the employer’s failure to engage in the Interactive Process regarding accommodation could be a violation of the law.

Regarded as: *An individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.* The disability laws also prohibit discrimination against those **Regarded as Disabled**. This includes stereotyped assumptions about people’s conditions and wrongly labeling a person as having a condition. Careless management inquires or “fishing” into a person’s supposed or suspected condition often generates a **Regarded as** case.

Associated with a Disabled Person. Employers may not discriminate in employment or benefits because a person has a disabled family member, volunteers to care for disabled people or is otherwise associated. An employer does not have to accommodate an “associated with” situation.

What can be Included in the Definition of Disability?

- * Currently limited by a disability in a major life activity;
- * Could be limited - but condition is in remission (record of a condition);

Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentration, thinking, communicating and working.

Major bodily functions include but are not limited to the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.”

Record of an Impairment

Successful treatment, remission and corrective technology do not remove a person from the definition of disability. Some people have had conditions such as epilepsy, but have not had a seizure since childhood. Medication keeps the condition controlled, and there is no limitation on any major life activities. “Assistive technology” enables other individuals with long term conditions to succeed in all major life activities. Medical implants are a good example. Others are in “remission” and the condition has no current effect in any life activities, and may not in the future. However, the ADA provides that “an impairment that is episodic or in remission is a disability **if** it would substantially limit a major life activity when active. . . . The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as:

- medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
- use of assistive technology;
- reasonable accommodations or auxiliary aids or services; or
- learned behavioral or adaptive neurological modifications.

The List of Auxiliary Aids and Services includes, but is not limited to:

- qualified interpreters or other effective methods of making auxiliary delivered materials available to individuals with hearing impairments;
- qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;
- acquisition or modification of equipment or devices; and
- other similar services and actions.

Glasses: *Poor vision which is corrected by ordinary eyeglasses or contact lenses shall not be considered as a disability.*

The vision section regarding eyeglasses and contact lenses however is modified:

- Qualification Standards and Tests Related to Uncorrected Vision – Notwithstanding section 3(4)(E)(ii), a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual’s uncorrected vision 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 consistent with business necessity.”

REASONABLE ACCOMMODATION

Title I of the Americans with Disabilities Act (the “ADA”) requires employers to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship. “In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal opportunities.” 42 U.S.C. §12101, *et seq.*, and *EEOC Enforcement Guidance on Reasonable Accommodations and Undue Hardship Under the Americans with Disabilities Act*. Reasonable Accommodation also applies to Sections 501, 503 and 504 of the Rehabilitation Act in federally funded programs. 29 U.S.C. §§791(g), 793(d), 794(d) and to employment under most states' EEO laws. [Also be aware that Reasonable Accommodation of other sorts is required under the religious discrimination provisions of Title VII, and a form of National Origin accommodation is required regarding provision of policies, information, and employment practices for those who do not understand the language of the standard handbook or employment forms.]

KEY TERMS

Essential Functions. “Fundamental” or “core” duties of the position. Reasonable accommodation focuses on the essential functions and enabling the employee to perform the essential functions of the job.

An employer does not have to eliminate an essential function of the position. This is because a person with a disability who is unable to perform the essential functions, with or without reasonable accommodation, is not a “qualified” individual with a disability within the meaning of the ADA. Nor is an employer required to lower production standards - whether qualitative or quantitative - that are applied uniformly to employees with and without disabilities. *EEOC Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, (“*EEOC Guidance*”).

State Laws. Some states' disability laws (such as Wisconsin's) have a greater standard. The inability to perform just one "essential function" is not enough to render a person "unqualified." Rather, these state laws focus on a "bottom line" concept. What is the general purpose, the "essential mission," of the job? A person who may not be able to do one or two essential functions may still be able to accomplish the purpose and essential mission of the position. At some point the person may not be able to do enough crucial duties to meet the purpose of having the position, then they are not a "qualified" person with a disability.

The employee's position description may be the key to establishing the essential functions, or the "bottom line."

Undue Hardship. "Undue hardship" means significant difficulty or expense and focuses on resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive or those that would fundamentally alter the nature or operation of the business. An employer must assess, on a case by case basis, whether a particular reasonable accommodation would cause undue hardship (EEOC Guidance). Accommodations that will generally not be required include: Longer-term lowering of job standards; bumping another employee out of a job; repeatedly excusing prohibited behavior on the job; indefinite leaves of absence; lowering production or performance standards; excusing violations of conduct rules that are job-related and consistent with business necessity; removing an essential function; monitoring an employee's use of medication; and/or actions that would result in undue hardship (i.e., significant difficulty or expense).

TYPES OF REASONABLE ACCOMMODATION

There are three basic types of reasonable accommodations.

- (1) **Modifications to the job application process that enable a qualified applicant with a disability to be validly considered.** These include changing the type or time frame of tests, changing interview formats, use of interpreters and validating selection criteria as "performance predictive."
- (2) **Modifications to the work environment or the manner or circumstances in which the employee's job is customarily performed.** These can be physical changes in facility or equipment, change of job duties, changes in location or time of performance, assistance in performance, or reassignment. It also includes personal changes such as medication or treatment therapy which then enable the employee to function in the workplace. These may require leaves of absence in order to receive treatment or recuperation and/or "forbearance" from enforcing discipline or performance standards for a limited time in order to see if treatment will resolve the issues.
- (3) **Modifications which enable an employee with a disability to enjoy equal benefits and privileges of employment as similarly situated non-disabled employees.** These

accommodations can cover breaks and break areas, travel arrangements, access to training and information, or interpretation at meetings.

THE INTERACTIVE PROCESS

When a disability creates a work issue, the employer and employee should engage in an “informal interactive process” to arrive at a reasonable accommodation. 29 C.F.R. §1630.2(o)(3).

Courts are holding that this process is mandatory. “Once the employer knows of the disability and the employee’s desire for an accommodation [the employer] must meet the employee halfway.” *Bultemeyer v. Fort Wayne Cmty. Schs.*, 100 F.3d 1281, 1285 (7th Cir., 1999); *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 952 (8th Cir., 1999); *McDonald v. Montana Dept. of Environmental Quality* (Mont. S. Ct., 2009).

Initiation of the Process

Generally the disabled individual initiates the process by informing the employer of the disability and that it is having work effects which may need accommodation.

No “magic words” are required. The EEOC Guidance emphasizes a “plain English” request, and the employee “need not mention the ADA or use the phrase ‘reasonable accommodation.’”

Virtually any statement that lets a supervisor know that a medical condition is causing some sort of work issue can be sufficient to put the employer on notice.

The notice can come from others such as a call from the employee’s spouse, a union representative, or a health care provider.

The employer should generally not question an employee about whether there are “any conditions” or “medical reasons” or “disabilities” which are contributing to work problems. A person’s medical conditions are a privacy matter, and the individual should have the choice of whether or not to reveal any personal medical issues, without being subject to questioning by management. Also, an “interrogation” (including what the supervisor thought was mild questioning) can create a later “regarded as disabled” claim under the ADA. Once an employee has voluntarily revealed a disability, then management has valid reasons to explore the issue under the incentive process.

The major exceptions to the “don’t ask” advice are (1) when there is a serious safety issue and tangible reasons to believe a medical condition may impact safety; and (2) the condition and work effects are so overt that they are blatantly obvious. The employer may have an obligation to self-initiate the process “if the company knows of the existence of the employee disability.” *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1114 (9th Cir., 2000).

Accommodation Policy. All employers should include a reasonable accommodation statement as part of the standard Equal Employment Policy. A statement lets employees know that accommodations are available and encourages them to raise any issues, rather than having management have to ask. A simple statement is:

[Employer] complies with federal and state disability laws and makes reasonable accommodations to assist employees with disabilities which impact work. If you have an ongoing condition which is affecting work and believe an accommodation is needed, please contact _____.

This contact person should not be “your supervisor.” It should be a designated person/position with specific and detailed knowledge of the ADA and how to carefully and confidentially handle the process. Supervisors should have training on how to properly, appropriately, confidentially forward any employee provided information to that designated person.

Employer Response

1. Listen, discuss and clarify the issues. What is the disability? How does it affect the work? What sort of accommodation does the employee believe will be effective?

2. The employer may request “reasonable” documentation, if the disability and/or need for accommodation are not obvious, from the employee’s health care or rehabilitation professionals. This involves a limited release -- only for medical information relevant to the specific disability (specify the job-related information needed).

The rules concerning disability-related inquiries and medical examinations are different at each stage.

- **Prior to an offer of employment**, an employer may not ask any disability-related questions or require any medical examinations, even if they are related to the job.
- **After an applicant is given a conditional job offer, but before he or she starts work**, an employer may ask disability-related questions and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category.
- **After employment begins**, an employer may make disability-related inquiries and require medical examinations only if they are **job-related and consistent with business necessity**.

The ADA strictly limits the circumstances under which you may ask questions about disability or require medical examinations of employees. Such questions and exams are only permitted where you have a reasonable belief, based on objective evidence, that a particular employee will be unable to perform essential job functions or will pose a direct threat because of a medical condition. (See later section on Fitness for Duty and Direct Threat.)

Reasonable Time Frame

The parties are supposed to communicate and cooperate to reach a solution. Quitting before the solution is complete or the accommodation is provided can result in dismissal of the plaintiff's case. The process is not perfect, and there will be frustration and delays. Unless they are unreasonable, the parties must continue in the process to achieve accommodation. *Rennie v. United Parcel Service*, 139 F. Supp. 2d 159, 159 (D. Mass. 2001).

Employee Must Engage in Interactive Process. An employee's ADA claims were dismissed because the evidence showed that he failed to provide additional medical information and take a keyboard test needed to assess the ability to do essential functions of the job. When the employee failed to cooperate in the "interactive process," the employer had "no further obligation" and could terminate the employment. *Allen v. Pacific Bell* (9th Cir., 2003).

In another case, Northwest Airlines met its duty to engage in the ADA's "interactive process." It repeatedly rescheduled meetings with a disabled employee, offered several alternative jobs, and provided a special class to help the employee qualify for vacant positions. The employee often failed or refused to cooperate in the process. The court granted Northwest's Motion for Summary Judgment. *Carter v. N.W. Airlines* (7th Cir., 2004).

Employee must be reasonable. Disability does not excuse bad behavior. The ADA's "interactive process" requires all parties to communicate, and to do so in good faith and appropriately. An employee may be upset with not getting requested accommodation, but this does not warrant overtly angry reactions. Two cases illustrate that employees cannot use physical disabilities to excuse their emotional bad behavior. There was no evidence that physical conditions (*i.e.*, diabetes, carpal tunnel, asthma or impaired vision) created any inability to control emotions or behavior. In *Wilson v. Children's Museum of Pittsburgh* (3rd Cir., 2008), the employee was fired after publicly angrily yelling at her supervisor when he did not respond to her accommodation request as she wished. In *Kolinek v. Ill. Dept. of Human Services* (N.D. Ill., 2008), a rehabilitation counselor was disciplined for a loud, angry, profane confrontation with another employee after not receiving the accommodation of having a meeting rescheduled. The courts dismissed both cases. Employees who believe their rights are violated should appropriately use the available internal or legal complaint processes instead of venting anger at those around them.

The employee is not entitled to the accommodation of choice. If there is more than one way to reasonably accommodate, the employer may select the method which best fits its operational need. *Fowler v. USPS* (M.D., Cal., 2008).

There may be a continuing duty to explore further accommodation if the first one does not work. *Memorial Hospitals Assoc. v. Humphrey*, 239 F.3d 1128 (9th Cir., 2001), cert. denied (May 15, 2002).

However:

The Employer is Not Required to “Try and Try and Try Again.” An employer is not required to continue to provide and re-provide accommodation “that has repeatedly proven untenable.” In this case, a jockey with alcohol dependency had been accommodated several times, with time off for treatment, only to resume active alcoholism once back at work. The employer had a valid safety reason to discharge the employee and had met its obligation to attempt reasonable accommodation. *Hebert v. Churchill Downs* (S.D. Ind., 2004).

However, the employer is required to maintain the accommodation once it does work.

Discharge For Abusive Behavior After Removal Of Accommodation May Be Discrimination. A college counselor suffered a traumatic brain injury. On return to work, she had episodes of angry outbursts toward students and co-workers. Following assessment and accommodation, she again properly performed the job. The accommodation included less stressful scheduling and a one-hour per week job coach. A new supervisor removed the job coach, and the counselor’s behavior reverted. She was fired after an angry outburst against the supervisor. The college fired her for “egregious and criminal conduct.” She filed an ADA suit. The court denied summary judgment to the college, allowing the case to proceed to trial. The court first found that the college’s description of the conduct was an overreaction. There had been no violence or criminal conduct. Second, when removal of an effective accommodation results in deterioration of performance, the employer may well have an obligation to restore the accommodation instead of firing the employee. *Menchaca v. Maricopa Community College Dist.* (D. AZ., 2009).

ISSUES IN REASONABLE ACCOMMODATION

Reassignments

Supervision. An employer does not have to reassign an employee to a different (less stressful) supervisor as an accommodation. *Schneiker v. Fortis Ins. Co.*, 200 F.3d 1055, 1062 (7th Cir., 2000); *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254 (1st Cir., 2001).

Shifts. An employer was not required to change the employee’s shift to accommodate the employee’s inability to drive. Commuting to and from work is not part of the work environment and the employer is not required to accommodate the employee’s need to be scheduled so as to take public transportation. *Chenoweth v. Hillsborough County*, 250 F.3d 1328, 1328 (11th Cir., 2001). The decision rejected the EEOC Guidance advice, that schedule modifications to facilitate commuting to work can be a required accommodation. For a different result see *Lyon v. Legal Aid Soc’y* 68 F.3d 1512 (2nd Cir., 1995).

Vacancies. The ADA specifically lists reassignment to a vacant position as a form of reasonable accommodation if one cannot perform the essential functions of the current job. 42 U.S.C. §12111(9)(B).

This provision has generated a flurry of litigation. The Seventh Circuit has enforced the employer's duty to use the vacancies as a reasonable accommodation if the employee is otherwise qualified for the vacant job and can perform the essential functions with or without reasonable accommodation. *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 694 (7th Cir., 1998); *Cochrum v. Old Ben Coal Co.*, 102 F.3d 908, 913 (7th Cir., 1996). The employer has a duty to look for vacancies.

The disabled employee has more than just the right to compete for the vacancy. There is a priority status for the disabled employee. *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1184 (10th Cir., 1999); *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1312 (D.C. Cir., 1999). However, the disabled employee does not have an absolute right to a vacancy. Courts have set some limits:

(a) An employer or a union is not required to violate a bona fide seniority system, and the seniority rights of other workers, to place a less senior disabled employee into a vacancy. *U.S. Airways v. Barnett*, 122 S. Ct. 1516 (2002); *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 354 (4th Cir., 2000); *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1043 (7th Cir., 1996).

(b) The employer does not have to advance the disabled employee over a clearly more qualified candidate for the vacancy, or a person who was being specifically trained to take over the vacancy (*i.e.*, apprenticeship or documented succession planning). *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1028 (7th Cir., 2000).

No Recall Right. The transfer accommodation exists while the person is employed. Once the employee is terminated due to inability to perform a job, and no present vacancy exists which the employee is qualified for, the employer is not required to offer subsequent vacancies. The employee must apply and compete like everyone else. *Boykin v. ATC/Vancom of Colorado*, 247 F.3d 1061, 1064 (10th Cir., 2001).

Attendance

Being present at work is generally an essential function of the job. An employer does not have to tolerate spotty attendance or frequent absences as a reasonable accommodation. Regular attendance can be required. *Amadio v. Ford Motor Co.*, 238 F.3d 919, 927 (7th Cir., 2001); *EEOC v. Yellow Freight Systems*, 253 F.3d 943 (7th Cir., 2001).

But, there are jobs where the end-results are the measures of performance, rather than specific hours or location of performance. Telecommuting and other factors may make altering attendance requirements a valid reasonable accommodation.

Telecommuting is a growing trend, and may allow the reasonable accommodation of not being present to do the work. Whether or not this is “reasonable” is part of the interactive analysis. For contrasting views see *Langon v. Dept. of Health & Human Services*, 959 F.2d 1053 (D.C. Cir., 1992), supporting at home work and, *Vande Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538 (7th Cir., 1995), and *Humphrey v. Mem’l. Hosps. Ass’n.*, 239 F.3d 1128 (9th Cir., 2001), finding undue hardship.

Employer could not justify no-work-from-home policy. An employee requested to work from home two days a week due to her disability restrictions. Management refused on the grounds that removing the documents she worked with created a security risk. However, at trial, the employee’s supervisor testified that her daily presence in the office was not necessary as long as she had documents to work on. Further, the papers at issue were low level, had no security designation, and were not covered by any department security or safekeeping practices. The employer’s reasons for denial of work from home were without foundation. *Freeman vs. Department of Homeland Security* (D. NJ, 2009).

Work from home accommodation validly stopped due to performance record. An employer validly denied a disabled employee’s accommodation request to continue telecommuting. The evidence showed she repeatedly missed deadlines and produced significantly less work than others, and less than her prior at-work level. This justified discontinuation of the accommodation. *Robinson v. Dept. of Energy* (9th Cir., 2009).

Overtime. The court rejected the EEOC position that mandatory overtime cannot be an essential function of a job. **Important** customer service needs are essential functions for a business. *Davis v. Fla. Power & Light*, 205 F.3d 1301 (11th Cir.), cert. denied, 531 U.S. 927 (2000).

Leaves of Absence. Time off to receive treatment, or recuperate are forms of reasonable accommodation.

The Family Medical Leave Act (“FMLA”) provides 12 weeks of time off which can be used for this purpose. However, the EEOC Guidance on reasonable accommodation warns that this may not be sufficient. The Guidance warns against simply waiting the 12 weeks and then terminating the employee. To be valid under the ADA, the employer must show that it is an **undue hardship** to allow even further leave.

This is not an indefinite leave provision. In *Amadio v. Ford Motor Co.*, the court decided that an 18-month leave of absence had stretched a reasonable accommodation to its limit and validated the termination of the employee.

Indefinite Leave is Not a Reasonable Accommodation. An executive employee with AIDS was unable to return to work after 12 weeks of FMLA leave. He requested an “indefinite leave” but was refused and replaced. The court ruled that though a leave of absence beyond FMLA may be a valid reasonable accommodation, it must have a reasonable return-to-work date. An indefinite, undetermined-length leave creates an undue hardship for the employer. *Cline v. Home Quality Mgt., Inc.* (S.D. Fla., 2004). *Verrocchio v. Fed. Express Corp.* (N.D. NY, 2001).

Sporadic/Unscheduled Leave

ADA accommodation is different than FMLA. In certain circumstances an employee can use FMLA for unpredictable, unscheduled absence due to a serious chronic condition (such as migraine headaches or fibromyalgia). However, a court has decided that this is not a reasonable ongoing accommodation under the ADA. The FMLA provides a limited time frame. After that time frame is used, it is not a reasonable long-term ADA accommodation for jobs that require regular attendance and result in disruption in production or service when an employee has ongoing, unscheduled, unpredictable absences. Regular, predictable, non-disruptive attendance is an essential function for most jobs. *Will, et al. v. American Airlines, Inc.* (5th Cir., 2008).

Light Duty

Light duty is supposed to be a temporary reassignment, for recuperation, with subsequent return to the regular job.

There is no duty to create a light duty job. *Hansen v. Henderson*, 233 F.3d 521 (7th Cir., 2000).

If light duty goes too long it can become the permanent job. To avoid this consequence, be clear about the temporary nature of the light duty assignment. Have an end date. *Basith v. Cook County*, 241 F.3d 919 (7th Cir., 2001).

If you give it to one, must you provide it for all? In *Dalton v. Subaru-Isuzu Auto., Inc.*, 141 F.3d 667, 680 (7th Cir., 1998), the court held that a company can establish a limited number of 90-day light duty jobs, for Workers' Compensation purposes. If there had not been a clear written policy the decision may have been different, requiring the employer to extend light duty accommodations to all disabled employees for an indefinite period of time.

Employee's Perceptions do not Create Disability

In a mental disability issue, there is no duty to reasonably accommodate alleged work conditions which are the product of the employee's imagination (delusional employee requested transfer to escape "conspiracy" by co-workers; had already been transferred previously for similar allegations). *Tyler v. Ispat Inland, Inc.*, 245 F. 2d 969 (7th Cir., 2001).

Weird is not disabled. No one was aware of an employee's diagnosed OCD condition. He made no mention to anyone and "covered" his condition. After he was discharged, he sued, claiming that he was "regarded as disabled" because his co-workers perceived him as "weird" or "crazy" due to some of his behaviors at work. The court dismissed the case. There was no evidence any such behaviors were connected with or considered in the discharge. A person's idiosyncrasies or unusual behavior, unless extreme, are not sufficient to put an employer on notice that a person might have a disability. *Ablestein v. U.S. Dept. of Agriculture* (D. New Jersey, 2009). Stray remarks by union steward that employee was "mental" were not sufficient to create a regarded as disabled case. *Mayweather v. Teamsters* (N.D. Ind., 2011).

Company had right to insist employee use only one personality at work. A newly-hired engineer insisted that he was three different beings. His legal name was Gary, but he also shifted into being Steward and Trustee. He claimed that all his property and pay were in a trust for The Kingdom of God On Earth. Immediately after starting he began emailing on different days as the different beings. He filled out personal payroll tax withholding forms as Trustee, insisting that no taxes could be taken out of his pay. Co-workers and customers quickly became confused as to who was sending them communications. The company requested that he use one, and only one, identity for professional communications. He refused, and was then discharged. The ensuing suit was for Title VII religious discrimination, refusing to accommodate his religious beliefs. The court found that the requested accommodations, including violating the IRS laws, were unreasonable and dismissed the case. *Lizalek v. Invivo* (7th Cir, 2009).

MEDICAL EVALUATION BY THE EMPLOYER’S HEALTH PROFESSIONAL

Pre-employment. No medical information may be asked of any applicant during a hiring process, whether they are or are not disabled. The ADA prohibits use of medical information or medical inquiry during the hiring process, except a job-related medical evaluation may be required after a “conditional offer of employment.”

After Employment Starts. The employer may require evaluation only when there is insufficient information from the employee’s health care professionals. The EEOC Guidance states that the insufficiencies should first be communicated to the employee.

Medical evaluation is not a required step. If the employee does not provide sufficient information to show disability and need for accommodation, it can be a violation of the interactive process, and the employer can simply decline to accommodate.

Employer evaluations are often done where the employee’s good faith efforts to provide information are insufficient, and more expert opinion is needed, or where there are disagreements between parties.

Medical evaluation may also be done when there is a serious question of a person’s ability to do the essential functions of the job; a “fitness for duty” evaluation. *Tice v. Ctr. Area Transp. Auth.*, 247 F.3d 506, 515 (3rd Cir., 2001). (The employer could validly order a bus driver with an injured back to undergo fitness evaluation). *Appel v. Spiradon, et al.* (2nd Cir., 2008) (A bullying professor could be forced to undergo psychological evaluation.)

The evaluation requirements are:

1. “Job related and consistent with business necessity;”
2. Objective evidence that the employee may not be able to perform essential functions satisfactorily;
3. Done by a medical professional; and
4. The whole evaluation is done with a job-related focus.

“Essential function” for job-relatedness usually comes from the position description. However, things like safety and not disrupting the work of others are implied essential functions of any job and are valid grounds for a fitness evaluation.

A most important element is the evaluator’s personal knowledge of the actual position and workplace. ADA evaluations should not be done in the abstract. If challenged in court, the health care provider who did the evaluation will be cross-examined on how the disability affected the specific workplace and the evaluator’s “real life” knowledge of that workplace. So, use an evaluator who is familiar with the industry and the workplace, and has actually been on-site.

The evaluation can determine whether an employee has a disability, whether the disability impacts essential functions, and can make recommendations for appropriate treatments or modifications to consider as reasonable accommodations.

Invalid Carpal Tunnel Evaluation Costs \$4.4 Million. A manufacturing company settled a case by agreeing to pay \$4.4 million in back pay and compensatory damages to 40 applicants who were rejected by a “nerve conduction test” for carpal tunnel syndrome. The evaluation did not meet the ADA standards for individualized assessments as to whether the person could or could not do the job and “had little or no value in predicting the likelihood of future injury.” *EEOC v. Amstead Railco* (S.D. Ill., 2018).

The employee cannot be forced to take medication or engage in a specific treatment just because the evaluator recommends it. *Robertson v. Neuromedical Ctr.*, 161 F.3d 292, 296 (5th Cir., 1998).

However, the continuing inability to perform the job because the employee refused the doctor’s recommended treatment plan can result in discharge. It is not the refusal to take the medication or treatment, per se, which is the cause of discharge; it is the rejection of the available accommodation which could solve the problem, and the resulting continuation of the performance problems which is the basis for discharge. *Vieira v. Bombardier Motor Corp. of America*, 20 N.D.L.R. 120 (S.D. Ill. 2000).

The Evaluation Must be Reasonable and Not Overbroad.

Cannot Require Applicants To Pay For Their Own Pre-Employment Medical Evaluations. In this case, *EEOC v. BASF Railway* (9th Cir., 2018), the company did require such a post-offer evaluation. The initial evaluation raised concerns about a back issue. So the company requested an additional MRI – at the applicant’s expense. The applicant could not afford the \$2,500 cost.

The job offer was rescinded for failure to provide the MRI information. The court found an ADA violation. The ADA authorizes post-offer testing. “It does not impose a burden on the prospective employee as to the costs of testing.” [Many states have laws which specifically require an employer to pay the costs of any required medical inquiry or testing, and often, if the person is already employed, wages for the time the employee spends in that process.]

Genetic Information Nondiscrimination Act

Overbroad Medical Request Creates GINA Liability. A doctor’s overbroad medical request created liability for the company which requested an independent medical evaluation. An employee was asked to go through a medical screening for vision and physical ability to operate machinery. She passed, and there was no evidence of any visual or physical inability. Yet the doctor made a further in-depth inquiry regarding the employee’s prior history and requested her complete medical records. She refused the requests and instead presented further verification from her doctor regarding her ability to work with no restrictions. The company terminated her for not meeting the company doctor’s request. She sued and the court found violation of GINA and the ADA. The company had valid reason to ask for a fitness for return evaluation. However, it had no reason to ask for additional information after she passed that evaluation. Especially there was no reason to ask for past medical records, and for all medical history. Failing to limit the scope of medical exam and inquiry to what was currently necessary violated the law. Further, the company had no GINA “safe harbor notice” which would have warned the doctor against overbroad inquiry, and which stated the employee’s right to not provide such information. This eliminated the employer’s ability to separate itself from liability for the doctor’s violation. *Jackson v. Regal Beloit America, Inc.* (E.D. Ky., 2018). [For more information on the GINA Safe Harbor Notice, see the article GINA II – Cautions for Employers by Boardman & Clark.]

\$189,000 Settlement For Asking Applicant Family Medical History. The City of Minneapolis settled a GINA case alleging it illegally asked a veteran applying for a police job to provide family medical history and then not hiring him once it found he had a prior PTSD diagnosis. He complained to the U.S. Dept. of Justice, which brought suit. It then found the city routinely asked police applicants for family history; a violation of both GINA and the ADA and Rehabilitation Act. *United States (DOJ) v. City of Minneapolis* (D. Minn., 2018).

Return to Work

“100% Standard” Violates ADA. Employers can require Fitness For Duty evaluations before allowing disabled employees to return to work from medical leave. A 100% fitness standard is not allowed. The ADA requires Reasonable Accommodation to enable those who are less than 100% to return, and function, with accommodations. A 100% return-to-work standard thwarts the purpose of the Reasonable Accommodation provisions. In *EEOC v. Kindred Healthcare, Inc.* (E.D. Wis., filed April 2004), the EEOC alleges that a manager was able to return to the job after cancer treatment, but was not allowed to due to a requirement that he be “100% healed” before he could resume work.

DIRECT THREAT

In order to actually remove a person from the job for posing a “direct threat,” the EEOC Guidance requires proof of the following:

1. Significant risk (high probability) of substantial harm;
2. Identify the specific risk;
3. Show it is a current risk (not speculative, remote or “could develop into . . .”);
4. Objective medical and/or other factual evidence regarding the individual; and
5. Cannot be eliminated by reasonable accommodation.

The ADA specifically provides that a person not pose a “direct threat.” 42 U.S.C. §12111(3). Direct threat is defined as “a significant risk to the health and safety of others that cannot be eliminated or reduced by reasonable accommodation.” 42 U.S.C. §12111(3).

The EEOC Guidance says risk “to others or to self,” 29 C.F.R. §1630.2(r) and *Koshinski v. Decatur Foundry, Inc.*, 177 F.3d 599, 603 (7th Cir., 1999). In *Echazabal v. Chevron USA, Inc.* (2000), the U.S. Supreme Court finally verified the EEOC's interpretation.

The Direct Threat Must be “Real.” In *Doe v. An Oregon Resort*, 98-6200-HO (D.C. Oregon, 2001), the Court ruled that though it was “possible” to transmit, HIV did not pose a “significant risk” of transfer from an infected ski patrol/first aid employee. The direct threat concept cannot be used to have a “play it safe by eliminating all risks” approach. There must be a “real and measurable” risk.

Discharge based on stereotype of dyslexia. A truck driver had a record of good performance. He informed his new supervisor that he had dyslexia. The new supervisor fired the driver, stating that he was afraid of taking the chance of the driver's dyslexia making him see things “all swirly” and causing an accident. There was no evaluation; no interactive process; just a stereotypical reaction. The company settled the case, paying the employee \$95,000, providing ADA training to all supervisors and will file compliance reports with the EEOC for two years. *EEO v. IESI* (D. La., 2010).

Mislabeling: Liability for confusing the difference between direct threat and fitness for duty. **Two bus driver cases:** *Rizzo v. Children’s World Learning Ctr., Inc.*, 213 F.3d 209, 214 (5th Cir., 2000), resulted in a \$100,000 award to a hearing-impaired school bus driver who was relieved of driving duties after parents complained that she might place children at risk, since she could not hear them, or hear other possible traffic dangers. The driver had several years of experience with an “unblemished record,” and no medical evaluation or other evidence was gathered before the employer took action. [The employer clearly could require a fitness evaluation. Its error was to remove the driver without first having the evaluation, and with no evidence of any performance or safety problems.]

On the other hand, a bus driver with a back injury, which interfered with leg use and required pain medication, who had several complaints of reckless driving could validly be kept off the job

and forced to undergo a fitness evaluation, and then not returned to the job due to posing a direct threat. The employer did first establish a proper foundation for the action. *Tice v. Ctr. Area Transp. Auth.*, 247 F.3d 506, 515 (3rd Cir., 2001).

General Safety Requirements. General safety requirements must only meet the “consistent with business necessity” standard. So if applied across the board and not invented for a specific person, the safety standard can be used to remove a disabled employee from the job. *EEOC v. Exxon Corp.*, 203 F.3d 871, 874 (5th Cir, 2000), upheld permanent termination of anyone who had ever had a positive drug test from “safety sensitive positions” (including all who had a “history of treatment” under the ADA).

High-speed car chase not excused by disability. A soup salesperson with depression experienced an alleged severe episode while driving a company car. He pointed a gun at other drivers, then led police on a high-speed car chase until he crashed into a truck. He was fired for violating car use and other company policies. He sued, claiming his disability caused the incident and that the company should have considered that and not fired him. The court disagreed. A company is entitled to enforce its policies and fire people for serious violations as long as all are treated equally. The ADA does not give employees a dispensation from discharge for serious infractions. *Llewellyn v. Campbell Sales Co.* (7th Cir., 2009). [*Be aware that lesser policy violations may require forbearance from discharge and the opportunity for treatment, etc., if the violation was due to disability.*]

Direct threat pertains to a specific individual and not to the employer’s general qualifications or safety standards.

Reports of Threatening Behavior

A failure to act may reap the consequences of a violent act. Precipitous action may harm an innocent, non-violent person, and result in liability.

In general, try to balance the interests. Act to address the report of potentially violent behavior including removing the employee until “objective factual evidence” can be obtained. Do so quietly and confidentially, if possible. In case the “objective evidence” does not show a direct threat, the employee’s reputation has not been destroyed and the ADA has not been violated.

The Zero Tolerance Policy Defense. If the company has a policy providing that any reported threat of violence may result in suspension, pending investigation, then the employee can be sent home without an ADA violation. It is the reported behavior which is at issue, not a behavioral disability. The policy must be consistently enforced, not just in instances of people with perceived psychiatric problems.

The Truth Defense. If there is a validly perceived threat of present violence, warranting a call to the police or security, the case of *Aviles v. Cornell Forge Co.*, 241 F.3d 589, 592 (7th Cir., 2001) is instructive. A company suspended an employee for five days. He refused to leave, and the police were called to escort him out. Later that day the employee was seen sitting in his car

across from the company's entrance. A worried supervisor called the police and reported that the suspended employee was outside. The police dispatcher asked if the employee was armed. The supervisor replied, "I don't know, but he might be." A police squad car came and removed the employee from the car, at gunpoint, injuring his arm when he resisted. The employee turned out to be unarmed.

The company won. The Court decided that the supervisor acted reasonably based on the situation. There was no defamation. When asked about a weapon, the supervisor gave a factual response, without exaggeration, without embellishment: "I don't know, but he might be." The Court's opinion stated, ". . . if an employer had to face liability for truthfully reporting to the police, . . . we might discourage employers from taking the most prudent actions to protect themselves and others in the workplace."

The Lesson:

- Report facts
- Do not embellish
- Do not exaggerate "for effect"
- Do not speculate
- Be open about what you do not know, and
- Do not "fill in the gaps"

CONFIDENTIALITY OF INFORMATION

The ADA (and FMLA) requires confidentiality of **all** medical information about all employees whether they are disabled or not! Medical information may be discussed only with managers, health or safety personnel who have a direct need to know! The information may not be shared with managers or other staff who are not involved in the interactive process or decision-making, and do not have a direct need to know.

Medical information, communication and notes regarding the same must be kept in separate files, with more security than standard personnel records.

Confidentiality breach gets supervisor fired and company sued. In *EEOC v. Ford Motor Credit Co.* (M.D. Tenn., 2008), an employee had a mixed FMLA-ADA issue. He needed a reduced work schedule due to HIV, and a company nurse validated a serious medical condition which warranted one day a week FMLA leave. This also qualified as an "accommodation" under the ADA. The supervisor insisted on knowing the specific diagnosis before granting the accommodation (not necessary for an FMLA leave which has been validated by a medical professional). Then when the diagnosis was given, the supervisor blabbed it to other employees, creating reputational damages and depression for the employee. The supervisor was fired for the breach of confidentiality, but the court allowed suit against the company for the ADA confidentiality violation.

The ADA recognizes that employers may sometimes have to disclose medical information about applicants or employees. Information that is otherwise confidential under the ADA may be disclosed:

- to supervisors and managers where they need medical information in order to provide a reasonable accommodation or to meet an employee's work restrictions;
- to first aid and safety personnel if an employee would need emergency treatment or require some other assistance (such as help during an emergency evacuation) because of a medical condition;
- to individuals investigating compliance with the ADA and with similar state and local laws; and
- pursuant to worker's compensation laws (*e.g.*, to a state worker's compensation office in order to evaluate a claim) or for insurance purposes.