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PRETEXT CASES UNDER THE ADA: SOUND BUSINESS DECISION OR DISCRIMINATORY ACTION?*

I. Overview of ADA Title III

Imagine standing in a courtroom, convinced that your employer has discriminated against you due to your disability, only to be forced to listen to that employer put forward a perfectly reasonable-sounding justification for its actions. Perhaps you know that your boss always looked down on someone in a wheelchair and waited for an economic downturn so he could eliminate your position. Maybe after disclosing your disability to your supervisor, you find that he or she scrutinizes your every move, as opposed to your fellow employees, and at the slightest infraction immediately terminates you. On its face, even a law such as the Americans with Disabilities Act ("ADA"), which is designed to prevent such discriminatory behaviors, may offer little protection if your employer can "prove" that it fired you for legitimate reasons. Or perhaps you are an employer who reluctantly terminated an employee with a disability because they were doing inferior work. You are now being accused of discrimination when you feel that you gave this employee every chance to improve their performance and treated them no differently than any other employee. It is in these situations that the law of pretext applies. Pretext is defined as, "Asserting a false reason or motive as a cover for the real reason or motive."

The ADA and the Rehabilitation Act of 1973 (as well as many similar state laws) prohibit employment discrimination based on a disability. Sometimes the employer admits that the action it is taking is because of a person's disability. But other times, although the employee is sure that disability was the reason, the employer gives another reason altogether for taking the action it did. In general, the ADA and Rehabilitation Act only prohibit those acts that are taken because of a disability. So how do you prove what the real reason was for an employer's actions, if the employer does not admit it? In many cases the answer is found in the law of pretext.

Under Title I of the ADA, no covered entity may "discriminate against a qualified individual on the basis of disability." Entities covered by Title I include employers, employment agencies, labor organizations and joint labor-management committees. The ADA recognizes three distinct types of claims—disparate treatment, disparate impact, and the failure to accommodate. Disparate treatment claims are the focus of this paper. Covered entities are prohibited from discriminating against a person with a disability in a way that "adversely affects the opportunities or status of such [a person] because of the disability." "Disparate treatment…is the most easily understood type of discrimination. The employer simply treats some people less favorably than others." In disparate treatment cases under the ADA, causation is often a key question—did the employer take action against the employee with a disability because of that disability, which may be a violation of the law, or did it take action because of some "legitimate, nondiscriminatory reason," which would normally not violate the law.

II. Direct Evidence and Indirect (Circumstantial) Evidence

There are two distinct methods for proving what motivated the employer's actions, one involving direct evidence and one centering on a burden-shifting scheme using indirect or circumstantial evidence. "The direct evidence and circumstantial evidence paths are mutually exclusive; a plaintiff need only prove one or the other, not both." However, distinguishing between the two types of cases is vital because the framework for analyzing each differs.

A. Direct Evidence

In direct evidence cases, a plaintiff will have some evidence that indicates, without the need to draw any inferences, that his or her disability was inappropriately considered in an adverse employment decision. The most common type of direct evidence is an explicit statement by a supervisor or interviewer revealing intent to discriminate on the basis of a disability. In such a case causation is normally not an issue.

A more difficult question arises in situations known as "mixed-motive" cases, in which there is evidence showing that an employer based an adverse employment decision on both legitimate and discriminatory factors. The nature and procedural aspects of the mixed-motive analysis, and its applicability to ADA cases, is beyond the scope of this article.

B. Circumstantial Evidence

Assuming an employee does not have the "smoking gun" proof typical of a direct evidence case, he or she may still be able to prove an ADA claim using indirect or circumstantial evidence. The framework for developing such a claim was first enunciated in the §1981 racial discrimination case of *McDonnell Douglas Corp. v. Green*. In that case, the Supreme Court set out a three-step process by which a plaintiff can prove unlawful causation sufficiently to get past a motion for summary judgment and to trial, even without a "smoking gun."

Under the first step, a plaintiff must present a "prima facie case" of discrimination, by showing that he or she (1) is a member of a protected class (in an ADA case, that means an individual with a disability as defined by the ADA); (2) is qualified for the job in question; and (3) was subjected to an adverse employment action as a result of his or her disability. Assuming a plaintiff can make such a case, the burden then shifts to the employer or potential employer to show that the adverse employment decision was made for a legitimate and non-discriminatory reason. If the defendant can make such a showing, the burden then shifts back to the plaintiff to offer evidence that those purportedly legitimate reasons are merely a "pretext" and that the real reason for employer's actions was indeed the plaintiff's disability.

C. Types of Conduct that May Show Pretext

Therefore, pretext becomes critical in cases in which the plaintiff makes a prima facie case, and the employer advances nondiscriminatory reasons. It is designed to establish whether the nondiscriminatory reasons advanced by the employer are the real reasons for the employer's actions.

The Equal Employment Opportunity Commission (EEOC) is the government agency charged with issuing regulations and guidance under Title I of the ADA. The EEOC Technical Assistance Manual provides the following guidance regarding showing pretext in a retaliation case:

> "Even if the respondent produces evidence of a legitimate, nondiscriminatory reason for the challenged action, a violation will still be found if this explanation is a pretext designed to hide the true retaliatory motive.
>
> Example A: CP alleges that R gave him a negative job reference because he had filed an EEOC charge. R produces evidence that its negative statements to CP's prospective employer were honest assessments of CP's job performance. There is no proof of pretext, and therefore the investigator finds no retaliation.

Example B: Same as the prior example, except there is evidence that R routinely declines to offer information about former employees' job performance. R fails to offer a credible explanation for why it violated this policy with regard to CP. Therefore, pretext is found.

III. Showing Pretext

As the Supreme Court noted in a §1981 racial harassment suit, "there are innumerable different ways in which a plaintiff seeking to prove intentional discrimination by means of indirect evidence may show that an employer's stated reason is pretextual and not its real reason. The plaintiff may not be forced to pursue any one of these in particular."

A. Actions That May Show Pretext

There are many different ways to demonstrate pretext. They include, for example:

- Disproving the employer's assertion of performance problems;
- Shifting explanations;
- Harassing or discriminatory language;
- Employer's departure from its normal policies;
- Failure to document alleged work problems;
- Use of a double standard in productivity or discipline;
- Targeting the employee for extra work, scrutiny, or other harassment;
- Evidence of bias, concern about health-related matters, or fear of customer reactions;
- Suspect timing (e.g., the employer took adverse job action soon after it learned of the plaintiffs protected classification or conduct, or treated the employee differently thereafter);
- Employer's assertion that something was an essential job function when it was not;
- Resistance to accommodating or to engaging in the accommodation process;
- Reliance on the need for accommodation;
- Evidence of an improper selection process;
- Evidence that an alleged layoff or reduction in force (RIF) did not really occur; or
- Evidence that RIF was carried out in a discriminatory fashion.

Some of these examples are discussed in more detail below.

1. Suspect Timing

One of the more common types of proof of pretext involves a showing of suspect timing behind an employer's adverse employment action. The temporal proximity between an explicitly discriminatory statement and an adverse employment action may be evidence of discrimination. For instance, while upholding a lower court's finding of summary judgment for an employer, the Third Circuit noted that that a call-center supervisor's screaming "if you're not taking calls there's no work for you to do here so you must be telling me that you're resigning," in reaction to an employee with a speaking disability telling him that he was unable to speak on the phone, was insufficient to show pretext only because of the distance between the statement and the adverse employment decision. In that case, plaintiff had been required to take multiple leaves of absence due to his sarcoidosis and pulmonary fibrosis, conditions affecting his lungs and his ability to breathe and talk. Upon his return from his third leave of absence, his supervisor made the above comment. However, after that incident, the employee was granted off-line status – meaning he didn't have to talk on the phone – and continued at the company for another seven months. The court noted that, "stray remarks…are rarely given great weight, particularly if they were made temporally remote from the date of decision." That being said, the court noted that off-hand discriminatory remarks can show pretext depending on: (1) the relationship between the speaker and the employee; (2) the temporal proximity of the statements to the adverse employment action; and (3) the reason for the

statement.

Relatedly, plaintiffs have also attempted to show pretext based on the temporal proximity between the disclosure of a disability and an adverse employment action. For instance, in *Guglielmo v. Kopald*, a schools' superintendent conceded that the board responsible for her contract had filed fifty-five disciplinary charges against her, but claimed discrimination based on the fact that the charges were only leveled after she had been denied an annual evaluation for the two years immediately after she began receiving chemotherapy treatment for her breast cancer. While the judge in the case acknowledged that the board's dissatisfaction may have been genuine, the fact that it did not express that dissatisfaction until after the employee's disability had been revealed and her treatment begun was enough to send the case to trial.

Similarly, in *Daoud v. Avamere Staffing, LLC*, a personal care aid at a nursing home showed that while at least one complaint had been filed against her, the fact that the nursing home's decision to terminate her was within days of her disclosure of a flaring up of her arthritis and her need for an alternative work schedule was suspicious. As in *Guglielmo*, while the judge acknowledged that the customer complaints could be a legitimate reason for the nursing home's actions, the suspect timing of the termination decision was enough to send the case to trial.

2. Witness Testimony with Regard to Poor Performance Reviews

Another way employees attempt to show pretext is by accepting employers' proffered accusations of poor performance or qualifications while offering evidence showing those deficiencies not to be the true basis for the employment action. For instance, in *Lentos v. Hawkins Const. Co.*, plaintiff countered his potential employer's claim that he was not hired because he had lied on one of his medical forms with testimony from one of his interviewers that he had in fact not been hired because of his disability. In *Lawson v. CSX Transp., Inc*., a transportation company claimed that it did not hire a plaintiff with diabetes because of his lack of prior work history. The Seventh Circuit found such a claim suspect, and thus sent the case to trial, when a hiring manager at the company testified that she was free to waive the work history requirement whenever she wanted to.

Similarly, in *Dark v. Curry County*, while acknowledging that he had engaged in what the employer identified as misconduct, an employee argued that that misconduct was not the basis for his termination in that in its aftermath he was subjected to a medical examination. As the Ninth Circuit said in that case, quoting the plaintiff, an employer shouldn't "need a doctor's opinion to assess whether plaintiff had engaged in misconduct."

3. Discrimination during a purported workforce reduction

Reductions in force on their face appear to be legitimate and nondiscriminatory, but that is not always the case. For instance, in *Nodelman v. Gruner & Jahr USA Publishin*, although a publishing company claimed that plaintiff was terminated due to economic reasons, his supervisor admitted to him that his disability played a role in the decision. Similarly, in *Serwatka v. Rockwell Automation, Inc.*, plaintiff was able to counter her employer's claims of economic downsizing with proof that the economic downturn did not start until after plaintiff's termination.

4. *Poor Performance*

The easiest way to challenge an employer's supposed legitimate reasons for taking adverse actions against an employee is to show those reasons to be false. For instance, in *Zierke v. Donnelley & Sons Co.*, an employee who had only one hand survived his employer's motion for summary judgment by countering its claim that he had been laid off for poor performance with evidence of excellent performance reviews in the years leading up to his termination. The judge in that case noted that the employee's providing of the favorable reviews did "more than merely raise a skeptical brow" as to whether or not the employee was discriminated against and easily presented triable issues of fact for trial.

In *Lawrence v. National Westminster Bank New Jersey*, the Third Circuit reversed the lower court's summary judgment ruling and found testimony from co-workers, as well as evidence that poor performance reviews had been authored only after a termination decision had been made, as sufficient to warrant a full trial. Similarly, in *Lien v. Kwik Trip, Inc*., the court noted that evidence indicating that an employee's performance reviews

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drastically worsened when her supervisor changed presented enough of a question of pretext to submit to a jury.

Even in cases in which the employee admits inappropriate conduct or performance, there may be evidence showing those deficiencies not to be the true basis for the employment action. For instance, in *Lentos v. Hawkins Const. Co.*, plaintiff countered his potential employer's claim that he was not hired because he had lied on one of his medical forms with testimony from one of his interviewers that he had in fact not been hired because of his disability. In *Lawson v. CSX Transp., Inc*., a transportation company claimed that it did not hire a plaintiff with diabetes because of his lack of prior work history. The Seventh Circuit found such a claim suspect, and thus sent the case to trial, when a hiring manager at the company testified that she was free to waive the work history requirement whenever she wanted to.

5. *Discriminatory Statements*

An even more direct way of showing that an employer's purportedly legitimate reasons for its adverse actions are merely pretext, is for an employee to introduce evidence of explicit discriminatory statements made during the course of a plaintiff's employment. For instance, in *Wilson v. Executive Jet Management, Inc*. supervisors' statements that they did not like an employee, who suffered from a knee infection after surgery, "gimping around" and that he should "lose the crutches" undercut the employer's claims that plaintiff was terminated for performance reasons. In *Kreger v. Baldwin Borough*, a plaintiff who was missing two fingers on his left hand since birth, was denied a position in a local police department, countered the department's claims that he was not hired due to other applicants better qualifications, by offering statements by those involved in his hiring process referring to him as a "cripple."

6. *Departure from typical procedure*

Another example of how an employee might show evidence of pretext is by demonstrating that an employer, or potential employer, deviated from their typical procedure specifically with regards to the person with a disability. For example, in *Doebele v. Sprint/ United Management Co.*, in a case marked by supervisors' seemingly personal vendetta against an employee with bipolar disorder, evidence that a company departed from its typical leave policy, by ignoring the recommendations of its human resources department, with regard to one particular disabled employee demonstrated enough of a question with regard to pretext that the Tenth Circuit reversed the lower court's finding of summary judgment on the issue.

Similarly, even though the plaintiff in *Cehrs v. Northeast Ohio Alzheimer's Research Center* neglected to follow a medical-employer's written policy, the court found evidence that that employer routinely waived full compliance with the policy convincing with regards to showing pretext when the employer rigidly enforced that policy with regards to an employee with a disability.

7. *Examining Comparable Employees Without Disabilities*

An additional way to show the falsity of employer's proffered reasons for its actions focuses on comparing an employer's treatment of an employee or potential employee with a disability versus one without a disability. Under this prong, plaintiffs present evidence of a type of double standard, for people with or without disabilities, relating to productivity and discipline or superior qualifications in a failure-to-hire-or-promote setting.

a. Double Standard

The key way of showing pretext using comparable employees is by showing that, in like circumstances and with regard to similarly situated employees, an employer treated an employee with a disability differently. For instance, in *Kleeman v. Disaster Services, Inc.*, although the court acknowledged the legitimacy of the employer's proffered reasons for the termination of an employee who had recently been diagnosed with cancer, the court found the fact that the company in question did not terminate other employees for similarly running unprofitable offices or sending unprofessional emails sufficient to enable plaintiff to survive a motion for summary judgment.

In *Trnka v. Biotel Inc.*, the court found plaintiff's evidence that her employer's accusations of misuse of email were merely pretext, based on other employees' similar misuse, unconvincing in that, while others may have misused their email, none of them sent sexually explicit emails as that particular employee had.

In *Horsewood v. Kids R Us*, a plaintiff offered evidence of pretext by showing that while

she was terminated following three written counselings regarding job performance, another employee with at least the same number of counselings was not.

Similarly, in *Devine v. Minnesota Mining and Mfg. Co*., a court found that by presenting evidence showing that her employer imposed significantly more work on her than other similarly situated employees, an employee diagnosed with depression, presented enough evidence of pretext to get to a full trial.

b. Superior Qualifications

An employee or potential employee may also show pretext is by demonstrating how he or she was passed over for a job or promotion despite being better qualified for the position than comparable applicants. In one case, a pharmacy contended that it rejected an applicant with cerebral palsy not because of her disability but because of her self-professed inability to count pills quickly and difficulties in communicating with others. The court denied the pharmacy's motion for summary judgment when the applicant was able to show that several other pharmacists counted pills slowly and several had extremely thick foreign accents that made it difficult to communicate with consumers at times. Similarly, in *Heiko v. Colombo Savings Bank, F.S.B.*, a plaintiff with kidney condition requiring dialysis showed potential pretext by demonstrating that he was better qualified for the financial position in question and had more relevant experience.

B. Honest Belief Rule

Aside from the types of evidence that a discriminated-against employee might use to show pretext, some debate exists over the degree to which an employer's subjective beliefs about its own motivations should play a role in an ADA case. Ultimately, the issue in a pretext case is whether or not the reasons an employer puts forward for its decision are legitimate or if they are merely masking the true reasons. However, an issue arises if an employer honestly believes that his reasons are legitimate when, in fact, those reasons turn out to be false. On one hand, the reasons for the adverse employment decision were false and thus it would seem the decision was inappropriate. On the other hand, if an employer honestly believed the reasons, then by definition those reasons could not have been masking a more sinister motive. "If you honestly explain the reasons behind your decision, but the decision was ill-informed or ill-considered, your explanation is not a 'pretext.'"

This split approach has led to differing approaches by various Circuit Courts of Appeal. The first view, enunciated by the Seventh Circuit has called for a "strict application" of what has been identified as the "honest belief" rule. Under this perspective, if an employer can demonstrate that it honestly believed the reasons behind it decision, even if those beliefs are foolish, trivial or baseless, the employee will lose. For instance, even though the accusation of fraud for which the employer in *Kariotis v. Navistar Intern. Transp. Corp.* terminated an employee, who had trouble walking following knee surgery, turned out to be baseless, the Court upheld summary judgment in favor of the employer when it demonstrated that it truly believed that the employee had behaved fraudulently.

By way of contrast, the second view, put forward by the Sixth Circuit, holds that the honesty of an employers' purported reasons are relevant up to a point, but only if the employer can demonstrate that his or her reliance on those beliefs was reasonable. For instance, in *Smith v. Chrysler Corp.*, Chrysler terminated one of its engineers after seemingly discovering that he had narcolepsy and had failed to reveal that condition on his initial employment forms. Although there was some question as to whether the engineer in question had actually been diagnosed at the time of his hiring or if he had disclosed his condition to the company, the court upheld the lower court's summary judgment in favor of the company finding that it had reasonably relied on various medical documentation purporting to show that the engineer was indeed diagnosed with narcolepsy before starting with the company. While employment "actions taken regarding an individual with a disability [must] be grounded on fact and not 'on unfounded fear, prejudice, ignorance, or mythologies,'" so long as an employer is able "to establish its reasonable reliance on the particularized facts that were before it at the time the decision was made," even if those facts later turn out to be false, he or she will be protected by the honest belief rule. While the Supreme Court has not definitively sided with either opinion, at the very least employers are given some protection, even under the Sixth Circuit view, if they honestly

rely on what later turn out to be improper bases. Such reasons are by definition not pretextual.

IV. Effect of Showing Pretext

Assuming that a plaintiff can make out a prima facie case of discrimination, as well as offer some evidence that a defendant's legitimate non-discriminatory reasons for its actions are merely pretext, the question becomes what else, if anything, a plaintiff must show in order to be entitled to remedial measures under the ADA. In particular, the question arises in a case where a plaintiff can show a defendant's purported reasons for its actions to be pretextual, but cannot definitively identify the true reasons behind the adverse employment decision. For a time it was unclear whether a court could find for a plaintiff merely because a defendant was shown to be lying, or whether the plaintiff had to offer additional evidence showing defendant's true motivations to be discriminatory—so-called "pretext-plus" requirement.

The Supreme Court at first attempted to answer this question in *St. Mary's Honor Center v. Hicks*. In that §1981 racial discrimination suit, a prison guard alleged that he was terminated because of his race. The Appeals Court accepted evidence showing that the employer was lying about its true motivations for the termination, but found there was insufficient evidence to show that the true motivation was discrimination. The Supreme Court upheld the decision finding that a trier of fact was permitted to find that an employer had not discriminated, even where its proffered reasons for its actions were found to be pretextual, based on the record as a whole.

What the Court was not as explicit on, however, was whether or not a trier of fact *could* find discrimination based on evidence of pretext alone. In other words, while the Court had decided that even with evidence of pretext, a defendant could still win, it had left open the question of whether plaintiff could win with mere evidence of pretext but *not* discrimination. This led to some lower courts adopting a "pretext-plus" analysis under which plaintiff had to offer evidence showing both that defendant's proffered reasons were pretextual *and* that its real reasons were discriminatory, while other courts permitted a trier of fact to find for plaintiff based on evidence of pretext alone.

The Supreme Court clarified the law in its 2000 decision *Reeves v. Sanderson Plumbing Products, Inc*., rejecting the pretext-plus framework and finding that a trier of fact could find for plaintiff, even if he or she introduced no new evidence of an employer's true motivations, outside of its prima facie case, and merely presented evidence of the pretextual nature of the employer's proffered reasons for its actions. As the Court noted, "in appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." Thus, a trier of fact is free to find for plaintiff when the totality of the evidence from both the prima facie case and pretext combine to show that a defendant discriminated against an employee with a disability. No further evidence is required from plaintiff.

IV. Conclusion

Pretext is often extremely important as a means to show causation in a disparate treatment case, that is, that the employer's actions were in fact motivated by disability. Exploring the totality of the facts in a case and drawing reasonable inferences from those facts can demonstrate that an employer's stated reason for an adverse action is actually not the real reason. Pretext recognizes the fact that the totality of an employer's actions can indeed speak louder than its words.

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Notes:

[*] This legal brief was written by Barry C. Taylor, Legal Advocacy Director at Equip for Equality, Alan M. Goldstein, Senior Attorney with Equip for Equality, Aaron Gavant, an Equip for Equality intern and Brian East, Senior Attorney at Advocacy, Inc. Equip for Equality is the Illinois Protection and Advocacy Agency (P&A) for people with disabilities. Advocacy, Inc. is the Texas P&A. Equip for Equality is providing this information under a subcontract with the DBTAC: Great Lakes ADA Center, University of Illinois at Chicago, U.S. Department of Education, National Institute on Disability Rehabilitation and Research Award No. H133A060097.

1. *See Black's Law Dictionary.*
2. 42 USCA §12112(a). Under the 2008 Amendments to the ADA, the phrase "on the basis of disability" replaced the phrase "with a disability because of the disability of such individual." Subsec. (a). Pub.L. 110-325, § 5(a)(1).
3. 42 USCA §12111(2).
4. Disparate impact claims involve facially neutral policies or regulations that disproportionably effect people with disabilities. See, e.g., *International Broth. of Teamsters v. U.S., 431 U.S. 324, 335 n.15 (1977). The ADA specifically prohibits the use of employment criteria, tests or standards "that have the effect of discrimination on the basis of disability" unless such criteria are "job-related" and "consistent with business necessity." 42 U.S.C.A. § 12112(b)(3) and (6).*
5. The ADA's obligation to provide a reasonable accommodation is set out in 42 U.S.C.A. § 12112(b)(5).
6. 42 USCA §12112(b)(1)
7. *International Broth. of Teamsters v. U.S., 431 U.S. 324, 335 FN15 (1977).*
8. 29 C.F.R. § 1630.15(a)
9. *Kline v. Tennessee Valley Authority*, 128 F.3d 337, 348-49 (6th Cir.1997).
10. *Monette v. Electronic Data Systems Corp*., 90 F.3d 1173, 1184 (6th Cir. 1996)
11. Note that there may still be dispute in the case about whether the plaintiff has a covered disability, whether he or she was qualified, and whether the employer can prove one of the ADA's safety defenses.
12. This is to be distinguished from "pretext" cases discussed below in which plaintiffs argue that defendants proffered legitimate reason for its employment decisions was not its true motivation. In mixed motive cases, both bases are true – the defendant took adverse action based on the disability and for some other legitimate reason.
13. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
14. *See, e.g,. Lawson v. CSX Transp., Inc*., 245 F.3d 916, 922-23 (7th Cir. 2001); *Ward v. Massachusetts Health Research Institute, Inc*., 209 F.3d 29 (1st Cir. 2000); *Skerski v. Time Warner Cable Co*., 257 F.3d 273 (3d Cir 2001). Note that the courts are not completely consistent as to the elements of a prima facie case.
15. *McDonnell Douglas*, 411 U.S. at 802.
16. *Id*. at 804.
17. *EEOC Technical Assistance Manual on Title I of the ADA §* 8(II)(E)(2).
18. *Patterson v. McLean Credit Union*, 491 U.S. 164, 218 (1989).
19. *See, e.g., Smith v. Davis*, 248 F.3d 249, 252 (3d Cir. 2001) (although employer contended plaintiff was fired for absenteeism, supervisors' declarations did not mention absenteeism, and there was evidence that plaintiff performed his duties satisfactorily and carried a higher case load than his coworkers); *Lien v. Kwik Trip, Inc*., 2007 WL 4820967, at *5 (W.D. Wis. 2007) (fact that performance evaluations changed with new supervisor).
20. *See, e. g., Wilson v. Phoenix Specialty Mfg. Co., Inc*., 513 F.3d 378, 387 (4th Cir. 2008); *Taylor v. Rice*, 451 F.3d 898 (D.C. Cir. 2006); *Cleveland v. Home Shopping Network, Inc*., 369 F.3d 1189, 1194–1195 (11th Cir. 2004).
21. *See, e.g., Wilson v. Executive Jet Management, Inc*., 2006 WL 495973, at *12 (S.D. Ohio 2006) (one supervisor told plaintiff to stop "gimping around," and another said he was taking heat about plaintiff's crutches, so plaintiff should hide them).
22. *See, e.g., Doebele v. Sprint/United Management Co*., 342 F.3d 1117, 1138 (10th Cir. 2003) (plaintiff supposedly fired for absences although she had sufficient leave under the FMLA and company policy; additionally, there were procedural irregularities in the documentation against her, her supervisors did not follow standard

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practice in the way they treated her, and some of the notes regarding supervisory treatment were missing); *Lawson v. CSX Transp., Inc*., 245 F.3d 916, 931 (7th Cir. 2001) (plaintiff was only member of ___).

23. *See, e.g., Soto v. Casiano Communications, Inc*., 2008 WL 312682, at *5 (D.P.R. 2008) (employer never confronted plaintiff or issued a disciplinary warning about supposed performance problems).
24. *See, e.g., Doebele v. Sprint/United Management Co*., 342 F.3d 1117, 1138 (10th Cir. 2003).
25. *Wishkin v. Potter*, 476 F.3d 180, 187 (3d Cir. 2007) (Rehabilitation Act) (supervisor required fitness-for-duty examinations of all employees with disabilities, and routinely warned them regarding their job status).
26. *See, e.g., E.E.O.C. v. Heartway Corp*., 466 F.3d 1156, 1167 (10th Cir. 2006) (statements revealing discriminatory attitudes and fear of customer reaction); *Lederer v. BP Products North America*, 2006 WL 3486787 (S.D.N.Y. 2006) (shunning, and asking intimate details of how plaintiff acquired HIV).
27. *See, e.g., Stodola v. Finley & Co., Inc*., 2008 WL 835709, at *13 (N.D. Ind. 2008) (although employer previously issued warnings to plaintiff, it was only after charge was filed that employer found it necessary to take action, which was substantial); *Guglielmo v. Kopald*, 2007 WL 1834740, at *3-4 (S.D. N.Y. 2007) (bad evaluation shortly after disability disclosure); *Davenport v. Idaho Dept. of Environmental Quality*, 2007 WL 914191 (D. Idaho 2007) (employer never raised issues of performance or lack of skills until after it discovered plaintiff's disability).
28. *See, e.g., Haynes v. City of Montgomery, Alabama*, 2008 WL 695023, at *5 (M.D. Ala. 2008) (NFPA standards were not a federal requirement).
29. *See, e.g., Kells v. Sinclair Buick-GMC Truck, Inc*., 210 F.3d 827, 833-834 (8th Cir. 2000) (an inference of unlawful discriminatory intent may arise from employer's repeated denials of reasonable accommodations).
30. See, e.g., *Tomao v. Abbott Laboratories, Inc*., 2006 WL 2425332 (N.D. Ill. 2006). See also Reasonable Accommodations for Attorneys with Disabilities, § G, Ex.12 (EEOC May 23, 2006), http://www.eeoc.gov/facts/accommodations-attorneys.html.
31. *See, e.g., Heiko v. Colombo Savings Bank*, F.S.B., 434 F.3d 249, 259 (4th Cir. 2006), cert. dismissed, 127 S. Ct. 34 (2006) ("A plaintiff alleging a failure to promote can prove pretext by showing that he was better qualified, or by amassing circumstantial evidence that otherwise undermines the credibility of the employer's stated reasons.").
32. *See, e.g., Wilson v. Phoenix Specialty Mfg. Co., Inc*., 513 F.3d 378, 387-388 (4th Cir. 2008); *Serwatka v. Rockwell Automation, Inc*., 2007 WL 2441565, at *4–5 (E.D. Wis. 2007) (economic downturn did not occur until after firing); *Walerstein v. RadioShack Corp*., 2007 WL 1041668 (E.D.N.Y. 2007); Sanchez v. American Popcorn Co., 450 F. Supp. 2d 985, 1002 (N.D. Iowa 2006).
33. *See, e.g., Kinsella v. Rumsfeld*, 320 F.3d 309, 314 (2d Cir. 2003) (plaintiff was only one of eight supervisors not rehired after layoffs); *Tidwell v. Exel Global Logistics, Inc*., 2008 WL 360999, at *1 (N.D. Tex. 2008) (RIF may not be defense if plaintiff was not really in the job position that was eliminated); *Wright v. Cor-Rite, Inc*., 2007 WL 2907947, at *4 (M.D. Pa. 2007) (admission that employer felt plaintiff with ataxia could not get around well enough, together with subsequent newspaper ad mentioning quickness requirement); *Nodelman v. Gruner & Jahr USA Pub*., 2000 WL 502858 (S.D.N.Y. 2000) (employer told plaintiff that disability was one reason he was selected for layoff in workforce reduction).
34. *See, e.g. Fiore v. Fairfield Bd. of Educ.*, 2009 WL 2852938 (D.Conn.,2009)("…[t]he temporal proximity of the remark to the adverse employment action may also be indicative of discriminatory intent…") citing *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 162-63 (2d Cir.1998).
35. *Parker v. Verizon Pennsylvania, Inc.*, 309 Fed.Appx. 551, 553 (3rd Cir. 2009).
36. *Id.* at 559.
37. *Parker v. Verizon Pennsylvania, Inc*., 309 Fed.Appx. 551, 558-59 (3rd Cir. 2009).
38. *Guglielmo v. Kopald*, 2007 WL 1834740, *2 -*3 (S.D.N.Y. 2007).
39. *Daoud v. Avamere Staffing, LLC*, 336 F. Supp. 2d 1129, 1137 (D. Or. 2004).
40. *Lentos v. Hawkins Const. Co.*, 2007 WL 3376760, *11 (D.Neb.,2007).
41. *Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 931 (7th Cir. 2001)

Notes:

42. *Id.*
43. *Dark v. Curry County*, 451 F.3d 1078 (9th Cir. 2006).
44. *Id*. at 1085.
45. *Nodelman v. Gruner & Jahr USA Publishing*, 2000 WL 502858, *10 (S.D.N.Y. 2000).
46. *Serwatka v. Rockwell Automation, Inc.*, 2007 WL 2441565, *4 (E.D.Wis. 2007).
47. *Zierke v. Donnelley & Sons Co.*, 1997 WL 614390, *6 (N.D.Ill. 1997).
48. *Lawrence v. National Westminster Bank New Jersey*, 98 F.3d 61, 69 (3rd Cir. 1996).
49. *Lien v. Kwik Trip, Inc.*, 2007 WL 4820967, *5 (W.D.Wis.,2007).
50. *Lentos v. Hawkins Const. Co.*, 2007 WL 3376760, *11 (D.Neb.,2007).
51. *Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 931 (7th Cir. 2001)
52. *Wilson v. Executive Jet Management, Inc.*, 2006 WL 495973, *1 (S.D.Ohio, 2006).
53. *Kreger v. Baldwin Borough*, 2006 WL 456249, *1 (W.D. Pa. 2006).
54. *Doebele v. Sprint/United Management Co.*, 342 F.3d 1117, 1138 (10th Cir. 2003).
55. *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775, 784 (6th Cir. 1998).
56. *Kleeman v. Disaster Services, Inc.*, 2006 WL 572323, *6-7 (M.D.Tenn.,2006)
57. *Trnka v. Biotel Inc.*, 2008 WL 108995 (D.Minn.,2008).
58. *Horsewood v. Kids R Us*, 27 F.Supp.2d 1279, 1287 (D.Kan.,1998).
59. *Devine v. Minnesota Mining and Mfg. Co.*, 2001 WL 1019991, *3 (D.Minn.,2001).
60. *Thalos v. Dillon Companies, Inc.*, 86 F.Supp.2d 1079, 1086-87 (D.Colo.,2000).
61. *Heiko v. Colombo Savings Bank, F.S.B.*, 434 F.3d 249, 259 (4th Cir. 2006).
62. *Pollard v. Rea Magnet Wire Co., Inc.*, 824 F.2d 557, 559 (7th Cir. 1987).
63. *Kariotis v. Navistar Intern. Transp. Corp.*, 131 F.3d 672, 676 (7th Cir. 1997)
64. *Id.*
65. *Smith v. Chrysler Corp.*, 155 F.3d 799, 806-7 (6th Cir. 1998)
66. *Id.*
67. *Id*. at 806.
68. *Id*. at 807.
69. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).
70. *Id*. at 510–12.
71. *See, e.g. Fisher v. Vassar College*, 114 F.3d 1332, 1344 (7th Cir. 1997)("…once the employer has proffered an explanation, a plaintiff may not prevail without evidence that, on its own, unaided by any artificially prescribed presumption, reasonably supports the inference of discrimination…"); *Rhodes v. Guiberson Oil Tools* 75 F.3d 989, 994-95. (5th Cir. 1996)
72. *See, e.g. Aka v. Washington Hosp. Center*, 156 F.3d 1284, 1290 (D.C.,1998)("…we…reject any reading of Hicks under which employment discrimination plaintiffs would be routinely required to submit evidence over and above rebutting the employer's stated explanation in order to avoid summary judgment…")
73. *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133 (2000).
74. *Id*. at 147.

PRETEXT CASES UNDER THE ADA: SOUND BUSINESS DECISION OR DISCRIMINATORY ACTION?