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The ADA and Return to work Issues[1]

The Americans with Disabilities Act ("ADA") is a comprehensive federal anti-discrimination law that protects the rights of individuals with disabilities. Unlike many other federal employment discrimination laws, the ADA requires employers to provide reasonable accommodations for qualified applicants and employees with disabilities. The law defines discrimination to include "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."[2] It is well-settled that unpaid leave can be a reasonable accommodation, and it is one that benefits a wide range of employees with disabilities. One employee may need unpaid leave to seek medical or psychiatric treatment; another may need it to recover from an injury; another employee may need time to adjust to a new medication or to treat an exacerbation of manifestations of their disability. In addition to leave under the ADA, employees may also be eligible to take leave under the Family and Medical Leave Act ("FMLA") or pursuant to a workers' compensation law.

Regardless of the reason for an employee's leave, the transition period back into the workplace raises various ADA legal issues. These legal issues include medical examinations and inquiries, employee qualifications, reasonable accommodations, direct threat, and retaliation. This Legal Brief examines the issues faced by employees returning from leave, and outlines how the courts have been analyzing these issues. Further, this Legal Brief also discusses the interplay between an employee's right to leave and reinstatement under the ADA and the FMLA.

I. Interplay Between the ADA and FMLA

Employees with disabilities who need to take leave may be eligible to do so under the ADA as a reasonable accommodation, as discussed in greater detail below in Section

IV. However, such employees may also have rights under a different federal law, the FMLA. The FMLA, passed in 1993, entitles eligible employees to up to 12 weeks of unpaid, job-protected leave in a 12-month period for a "serious health condition."[3] While employees are eligible for unpaid leave under both the ADA and the FMLA in some circumstances, there are various differences between these two federal laws. Employees and employers must understand the ADA, the FMLA, and the way the two laws interplay to ensure compliance with both federal laws. Employers are encouraged to "determine an employee's rights under each statute separately, and then consider whether the two statutes overlap regarding the appropriate actions to take."[4]

The following are some of the key differences between the ADA and the FMLA:

- *Who is Covered?* The FMLA applies to private employers with at least 50 employees working within 75 miles; public agencies regardless of the number of employees they employ; and public or private elementary or secondary schools, regardless of the number of employees they employ.[5] The ADA applies to state and local government employers, and private employees with at least 15 or more employees.

- *Who is Eligible?* The FMLA protects employees with a "serious health condition,"[7] while the ADA protects qualified individuals with a disability. While certain conditions may fall within both categories, employees and employers cannot presume that eligibility for one law ensures eligibility under another. Further, to receive protection under the FMLA, employees must have been employed for at least 12 months by a covered employer and have performed 1,250 hours of work during those 12 months.[8] The ADA, including its reasonable accommodation provisions, applies to all qualified employees with disabilities, regardless of the employee's tenure.

- *Can an Employee Take Leave to Care for Family Members?* The FMLA entitles eligible employees leave from work to care for family members with a serious health condition. The ADA's reasonable accommodation requirement only permits reasonable accommodation for employees with disabilities; the ADA's reasonable accommodation requirements do not enable employees to take leave to care for family members with disabilities.

- *Must a Leave Request be Granted?* As discussed in greater detail below in Section IV, under the ADA, employees seeking leave under the ADA do so as a request for reasonable accommodation. Thus, the general principles guiding the reasonable accommodation process govern an employee's request for leave. This means that whether leave is a reasonable accommodation in any given situation—and the amount of leave that is reasonable—is a fact-specific inquiry requiring an

individualized assessment. Because employers need only provide an effective accommodation under the ADA, as opposed to the employee's preferred accommodation, they also have the right to offer an alternate accommodation instead of leave, so long as the alternate accommodation is reasonable. Finally, an employer need not grant a request for reasonable accommodation if it can demonstrate that the requested ADA leave would pose an undue hardship. The analysis is simpler when requesting leave under the FMLA. Under the FMLA, employees are entitled to up to 12 weeks of unpaid leave without any reasonableness analysis, so long as they are eligible.

- *Can an Employee Extend His FMLA Leave Under the ADA?* Whereas the FMLA caps an employee's leave at 12 weeks, the ADA requires employers and employees to consider whether an extension of leave is a reasonable accommodation. For example, in *Bernhard v. Brown & Brown of Lehigh Valley, Inc.*, an insurance agency employee took a three-week leave of absence to undergo surgery for neck and throat cancer.[9] The employee returned to work while receiving radiation treatments, but after approximately two weeks of treatment, the effects of the treatment required the employee to take additional leave, and the employee requested FMLA leave. Once the employee's FMLA leave expired, he requested an additional three months of leave and provided medical documentation stating that he would likely require an additional three months to recover. At this point, he was terminated. In allowing the employee's ADA claim to advance past summary judgment, the court concluded that it could have been reasonable to extend the employee's leave as an accommodation under the ADA.

- *What Reinstatement Rights Exist?* The FMLA *guarantees* the right to return to the same position or to an a position "virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority."[10] There are certain exceptions, including one for key employees, but the right to reinstatement is not subject to an undue hardship defense.[11] Under the ADA, an employee *should* be reinstated to the same position absent an undue hardship.[12]

- *What if an Employee Cannot Return Absent Accommodations?* Under the ADA, if the manifestation of an employee's disability renders him unable to return to his current position without accommodations, the employee can seek a reasonable accommodation to his current position or seek reassignment as a reasonable accommodation. Under the FMLA, however, an employee need not be reinstated if he is no longer able to perform an essential function of his position."[13] The FMLA's regulations provide if "the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition or an injury or illness also covered by workers'

compensation, *the employee has no right to restoration to another position under the FMLA*."[14] Interestingly, the regulations themselves discuss the interplay with the ADA by acknowledging that despite this limitation, an employer may have obligations under the ADA, as well as other state leave laws or workers' compensation laws. In *Lafata v. Church of Christ Home for Aged*, an employee returning from FMLA leave was told that she was being reinstated in a different position and she could "take it or leave it."[15] The employee asserted that this violated the ADA, because her employer failed to engage in the interactive process, and the Sixth Circuit agreed for purposes of summary judgment. The court held that the employer was required to offer a reasonable accommodation and engage in the interactive process. By offering the employee only one option despite knowing her physical limitations, the employer arguably failed to do so.

- *Which Agency Enforces the Law?* The federal agency that enforces the FMLA is the U.S. Department of Labor ("DOL"). Employees may also bring a private right of action under the FMLA, and do not need to exhaust administrative remedies by filing with the DOL prior to initiating private litigation. However, filing with the DOL does not toll the statute of limitations for filing an FMLA lawsuit. The ADA, on the other hand, is enforced by the Equal Employment Opportunity Commission ("EEOC"). Before filing a private lawsuit, private employees, and employees of state and local governments, must exhaust administrative remedies by filing a charge of discrimination within 180 days of the date of the adverse employment action (or 300 days if there is a work share agreement with the agency that enforces the state disability discrimination law).

II. Medical Exams and Inquiries

One ADA legal issue that arises regularly in return to work cases is whether the employer can require a returning employee to undergo a medical examination, or to answer disability-related questions, and if so, to what extent. As background, the ADA restricts an employer's ability to require medical examinations and pose disability-related inquiries under certain circumstances. The purpose of the ADA's restrictions regarding medical examinations and inquiries is to "limit the gathering and use of medical information as one of the ways to reduce the possibility of discrimination."[16]

The ADA has different requirements for medical examinations and disability-related inquiries specific to applicants[17] and employees who have received a conditional job offer but have not yet begun their position.[18] For current employees, however, including employees returning from a leave of absence, the ADA restricts medical examinations and inquiries to those that are "job-related and consistent with business necessity."[19] Guidance from the Equal Employment Opportunity Commission ("EEOC"), the federal agency charged with enforcing Title I of the ADA, explains that

this provision prevents "medical tests and inquiries that do not serve a legitimate business purpose."[20] Whether an examination or inquiry meets this standard is an "objective inquiry."[21]

Whether a medical examination for a returning employee is administered by a "medical doctor" or another entity is irrelevant to whether the examination is categorized as a medical examination subject to the ADA's protections. In *Medlin v. Rome Strip Steel Co.*, the functional capacity examination ordered upon an employee's return to work was performed by a company specializing in physical therapy, not a medical doctor.[22] The court found that distinction to be legally irrelevant when determining whether the examination was a medical examination within the scope of the ADA. *See also* 29 C.F.R. Pt. 1630, App. § 1630.13(b) ("fitness for duty exams" are equivalent to "medical examinations").

By and large, courts have upheld employers' decisions to require medical examinations or pose disability-related inquiries prior to permitting an employee to return from a medical leave. In order words, so long as the test is "job-related and consistent with business necessity," courts permit employers to ensure that employees returning from leave are able to perform the essential functions of their position. *See*, *e.g.*, *Clink v. Oregon Health & Sci. Univ.*, 2014 WL 3850013, *8 (D. Or. Aug. 5, 2014) ("[A]n employer can require a fit-for-duty certification upon an employee's return to employment after taking FMLA leave without violating FMLA so long as the requested examination is consistent with the ADA's requirements of job-relatedness and business necessity.").

This is especially true when the employee initially sought leave due to a work-related exacerbation of symptoms arising from a disability, and the employee seeks to return to the same position. For instance, in *Thomas v. Corwin*, the Eighth Circuit affirmed a decision holding that an employer did not violate the ADA when it required a police officer to submit to a fitness-for-duty examination when she was returning from a three-week leave of absence necessitated by the "stress and anxiety" of her position, which was "severe enough to mandate a trip to the emergency room" and require a leave of absence.[23]

Similarly, employers are generally permitted to require medical clearance prior to reinstating an employee when the employee was placed on a medical leave in light of the results of a prior fitness-for-duty evaluation, and may demand that the same physician conduct the review. In *Rodriguez v. School Board of Hillsborough County, Florida*, a custodian at an elementary school was placed on an administrative leave following a fitness-for-duty evaluation, which was ordered after an emotional meeting where the employee disclosed that she had previously considered suicide. Before returning to work, the doctor who conducted the initial fitness for duty examination declared the employee unfit to return. A few months later, the employee's treating

physician cleared her to return, and the employer permitted the employee to do so, even though she still lacked clearance from the physician who conducted the original fitness-for-duty evaluation. Nonetheless, the employee brought an ADA lawsuit asserting that her employer should have returned her to work three months earlier. The court disagreed, and found the employer acted reasonably and lawfully when it established the requirement that the physician who conducted the first fitness-for-duty re-evaluate the employee's ability to return. It also held that "[e]mployers may require a medical evaluation to assess an employee's fitness to return to work after a health-related absence."[24]

Likewise, in *Owusu-Ansah v. Coca-Cola Co.*, after becoming agitated in a meeting, banging his hand on the table and declaring that someone was "going to pay for this," a quality assurance specialist was placed on paid leave and was required to undergo a psychiatric/psychological fitness-for-duty evaluation prior to returning to the workplace.[25] The Eleventh Circuit concluded that the employer did not violate the ADA because the evaluation was "job-related and consistent with business necessity" as it assessed the whether the employee could perform two essential functions of his position—the "ability to handle reasonably necessary stress and work reasonably well with others." [26]

Moreover, an employer can require a medical examination if the employee provides conflicting information about his ability to perform the essential functions of his job, even if the information is received after the employee has returned from leave. In *Leonard v. Electro-Mechanical Corporation*, a janitor with degenerative disc disease was out of work for approximately one week to receive epidural steroid injections to treat his pain.[27] Upon his return, the employee initially provided two return to work certificates, and in response to his employer's request, the employee's doctor reviewed a copy of the employee's written job description and attested that the employee was able to return to work without restrictions. Approximately two months later, however, the employee submitted a FMLA request form, in which the same doctor noted that the employee was unable to perform any job function of his position when his condition flared up, which occurred approximately one or two times per month, and lasted approximately three to five days. The employee also voluntarily disclosed to his general manager that he occasionally needed to sit and rest. At that point, the employer required the employee to submit to an independent medical examination, and when the employee failed to do so, he was terminated. The court found in favor of the employer, and explained that based on the doctor's "seemingly conflicting opinions" and the employee's own statements, the employer could require the employee to submit to a medical examination under the ADA.[28]

Despite the outcome of the *Leonard* case, employers should consider all facts before refusing to return an employee from a medical leave for failing to submit to a medical examination. For instance, in *Bloomfield v. Whirlpool Corporation*, an employee took a

six month medical leave, during which time she was treated by a psychiatrist.[29] Although the employee's own doctor cleared her to return to work, she was required to undergo a psychiatric independent medical examination. The employee attended the examination, but at the end of the session, disclosed that she had taped the discussion, refused to delete it after the psychiatrist demanded that she do so, and left the psychiatrist's office without signing a release authorizing the disclosure of the examination results to her employer. Whirlpool terminated the employee, asserting that it did so because the employee failed to produce documentation from the examination supporting her ability to return to work, as well as other continued inappropriate behavior. The court permitted the employee's case to proceed, holding that the employer's rationale could be pretextual, and emphasized that the employer failed to ask the psychiatrist if the employee could return to his office to sign the consent form, which it easily could have done.

Whether a request for specific information is permissible depends on whether it is job-related and consistent with business necessity. The Second Circuit and the Northern District of New York provided helpful guidance in determining whether an employer's policy requiring the disclosure of specific medical information is permissible. In *Conroy v. New York State Department of Correctional Services ("DOCS")*, plaintiffs challenged DOCS' policy requiring all correctional officers returning from a medical/sick leave of four or more days to submit medication certification, including a "general diagnosis."[30] Over DOCS' objection, the Second Circuit concluded that requiring a "general diagnosis" was a disability-related inquiry invoking the ADA's protections, as it tended to reveal a disability. The Second Circuit then remanded the case to the district court to determine whether the question was job-related and consistent with business necessity. On remand, in *Fountain v. New York State Department of Correctional Services*, the court granted the plaintiffs' motion for summary judgment, and concluded that the diagnosis requirement was not job-related and consistent with business necessity.[31] Emphasizing that the relevant question is whether the asserted "business necessity is vital" and not simply "convenient or beneficial,"[32] the court rejected DOCS' two arguments proffered in support of the disclosure requirement. First, DOCS argued that the diagnosis requirement ensured that correctional officers could safely and securely perform the functions of their position. However, plaintiffs established that only two employees out of 40,000 were deemed unfit to return based on the disclosure requirement, and so the requirement did not actually further this goal. Second, DOCS asserted that the disclosure requirement prevented the spread of communicable disease, but failed to demonstrate any link between the general diagnosis requirement and the spread of disease in correctional facilities. Finally, the court emphasized that the actual duties of correctional officers varied significantly, and it was unreasonable to "lump" them all together. [33]

It is important to remember that the ADA requires information obtained from a returning employee pursuant to a medical examination or a disability-related inquiry to be held in

confidence.[34] Under the ADA, this information must be maintained confidentially in a file separate from the employee's personnel file, and can be disclosed only to a limited group of people, such as the employee's supervisor or managers in certain circumstances, safety personnel, or the government when it is investigating the employer's compliance with the ADA.

In *Medlin v. Rome Strip Steel Co.*, upon returning from a medical leave to recover from an off-the-job injury, the employee was required to undergo a functional capacity evaluation.[35] In his ADA lawsuit, the employee alleged that his employer unlawfully shared the results and specific findings of this evaluation with his co-workers at a meeting, including the fact that he grew short of breath shortly after the evaluation began. The employer defended itself by arguing that the employee had signed a release authorizing the disclosure of information and thus, should have expected the information to be disseminated. The court rejected this argument, explaining that the ADA authorizes the release of confidential information to supervisors and managers involved in the decision-making process with respect to a particular employee. The employer's second argument, which the court found equally unpersuasive, was that the information about the employee's shortness of breath were not disability-related. The court explained that the ADA protects employees from the "perception of disability" as much as an actual disability. [36]

III. Qualified Upon Return to Work

To prevail in an ADA case, employees must demonstrate that they are "qualified." Although some employees return with the same functional abilities to the same position, and thus, their ADA cases do not hinge on whether they are qualified for their position, other employees, return to work with a newly acquired disability, or with exacerbations of the manifestations of their disability. These cases raise interesting legal questions about whether employees remain qualified to return to their position.

A "qualified" individual is one "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[37] The EEOC's regulatory interpretation of the term "qualified" divides this inquiry into two steps. First, to be qualified, an employee must "satisf[y] the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires."[38] Second, an employee must be able to "perform the essential functions of such position . . . with or without reasonable accommodation."[39]

The ADA and its implementing regulations also provide instruction on how to determine whether a job function is essential, which is critical to understanding the definition of "qualified." The statute provides that "consideration shall be given to the employer's judgment as to which functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the

job, this description shall be considered evidence of the essential functions of the job."[40]

Additional EEOC guidance defines "essential functions" as "the fundamental job duties of the employment position the individual with a disability holds or desires" which do "not include the marginal functions of the position."[41] EEOC regulations also explain that a job function may be essential because the position exists to perform the function, there are a limited number of employees available who can perform the function, and/or because the function is highly specialized so the individual is hired for his or her expertise or ability to perform the function.[42]

Finally, while emphasizing that this list is not exhaustive, the EEOC regulations list relevant factors to consider when determining whether a particular function is essential.[43] The factors are as follows:

- The employer's judgment as to which functions are essential;
- Written job descriptions prepared before advertising or interviewing applicants for the job;
- The amount of time spent on the job performing the function;
- The consequences of not requiring the incumbent to perform the function;
- The terms of a collective bargaining agreement;
- The work experience of past incumbents in the job; and/or
- The current work experience of incumbents in similar jobs.[44]

One recent case out of the Sixth Circuit, *Henschel v. Clare County Road Commission*, reminds employers not to overemphasize any one of these factors when determining whether an employee is qualified to return to work following a medical leave, and addresses the importance of accurate job descriptions.[45] In *Henschel*, an excavator operator sought to return to work after a multi-month medical leave where he recovered from a motorcycle accident. As a result of the accident, the employee had an above-the-knee amputation and a prosthetic leg. The operator previously hauled equipment as part of his job, but due to his prosthesis, was no longer permitted to drive the manual transmission vehicle required to do so pursuant to state law. Thus, the issue before the court was whether the excavator was qualified to do his job if he could no longer haul equipment; in other words, whether hauling equipment was an essential function of the employee's position. The Sixth Circuit explained that although the employer considered hauling to be an essential function, employer judgment "carries weight" but is "only one factor to be considered."[46] The employee was able to move forward with his case by pointing to the other factors outlined by the EEOC, including the fact that the excavator stayed at the job site 90% of the time, there were minimal adverse consequences to the employer's operations if the excavator did not haul equipment, and the experiences of past incumbents. Further, the employee asserted that his job description did not include the duty of hauling equipment, which was particularly relevant because hauling equipment was included in the job description for

a different position, the truck/tractor driver position. Although the employer argued that the employee's job description's inclusion of "other duties assigned" included hauling, the court held that not every other duty under the "other duties assigned" category is an essential function, and to find otherwise would render the job description meaningless.[47]

Likewise, in *Rorrer v. City of Stow*, the plaintiff worked as a firefighter for nine years until he became blind in his right eye.[48] After receiving medical clearance to return to work, the firefighter's supervisor denied him the opportunity to resume his job, and ultimately terminated his employment. The firefighter had requested to be relieved of driving duties, due to his accident, but his employer rejected this request, and cited a National Fire Protection Association ("NFPA") guideline requiring firefighters to be able to operate "fire apparatus or other vehicles in an emergency mode with emergency lights and sirens."[49] In reversing and remanding the district court's decision granting summary judgment to the employer, the Sixth Circuit found that the firefighter produced evidence demonstrating that it would have been "very easy" for the firefighter to return to work while being excused from his driving duties.[50] A number of additional factors also supported the employee's assertion that driving was not an essential function: there are minimal consequences of failing to drive a fire apparatus during an emergency; it is not a highly specialized task; and it is not a task that only a limited number of employees could perform. Finally, while the job description stated that firefighters *may* operate emergency vehicles, it was the only task, out of seventeen tasks listed, to incorporate conditional language.

Generally, an employee is not qualified for a job if his disability prevents him from meeting standards required by *federal* law or regulation.[51] For example, in *Jarvela v. Crete Carrier Corporation*, the Eleventh Circuit affirmed a decision finding that federal regulations promulgated by the U.S. Department of Transportation ("DOT") rendered a commercial truck driver unqualified.[52] In *Jarvela*, the driver was diagnosed with alcoholism, took a one and a half month medical leave to participate in an intensive outpatient treatment, and then sought to return to his former position. The employer did not permit his return, citing DOT regulations, which disqualify individuals from operating a commercial vehicle if they have a "current clinical diagnosis of alcoholism."[53] Finding for the employer, the Eleventh Circuit cited the ADA's defense, and explained that the truck driver was not qualified, as he no longer met the position's qualifications required by the DOT. *See also Tate v. NC Pepsi-Cola Bottling Co. of Charlotte*, 2011 WL 3813175, at *3 (W.D.N.C. Aug. 29, 2011) aff'd 473 F. App'x 245 (4th Cir. 2012) (concluding that the employee was not a "qualified individual" within the ADA because he could not obtain DOT certification to resume his position as a delivery driver following a two month leave of absence); *O'Campo v. Chico Mall, LP*, 758 F.Supp.2d 976 (E.D.Cal. 2010) (finding a state law statute preempted to the extent it conflicts with the ADA).

It is important for employers and employees to remember, however, that this defense only applies to federal laws and regulations, and employers cannot shield themselves from ADA liability or successfully use it as a defense to an ADA claim if the requirement in question is applied too broadly. *See Samson v. Federal Express Corporation*, 746 F.3d 1196 (11th Cir. 2014) (rejecting the employer's reliance on the Federal Motor Carrier Safety Regulations because the regulations did not apply to the specific position in question).

IV. Reasonable Accommodations

In the ADA's text, the statute defines "discrimination" to include "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."[54]

The ADA continues by defining "reasonable accommodation" to include:[55]

- "making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or 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.
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To provide further clarification, the EEOC's regulations define "reasonable accommodation" to include:[56]

- "modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position" and

- "modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities."

<u>Leave as a Reasonable Accommodation</u>

Leave is an important reasonable accommodation for employees with disabilities, and one that raises a number of additional legal questions. One factual scenario often found in the case law is when an employee is currently on a leave, either pursuant to an ADA accommodation, the FMLA, a workers' compensation leave, or another kind of medical- or disability-leave, and then employee determines that she needs an

extension of that leave.

When determining whether a leave extension is reasonable, courts frequently look at how the employer has characterized the requested extension. For example, in *Barfield v. Donahoe*, a mail processor with anxiety, depression and hypertension, stopped coming to work, and provided a series of medical documentation stating only that she was "totally incapacitated."[57] She continually submitted documentation stating that she could not return until a specified date, and the final documentation submitted prior to her receipt of any disciplinary measures, stated that she could not return to work before December 15, 2011. Approximately one week later, the employee still had not returned to work, and her employer scheduled a pre-disciplinary interview citing the employee's failure to provide documentation supporting her leave since December 15, 2011. On January 17, 2012, the employer terminated the employee, citing the employee's failure to attend work for 16 work days. In defending the lawsuit brought under the Rehabilitation Act, the employer argued that a multi-month leave is not a reasonable accommodation. The court permitted the employee's case to proceed, explaining that the relevant issue was not whether the entire leave was reasonable, but rather, whether an additional 16 days of leave would have been reasonable. Because the employer cited that period of time as reason for termination, and because it could have been a reasonable accommodation to permit a leave extension of 16 days, the court allowed the case to proceed.

Employees tend to be successful in cases where they are cleared to return to work shortly after their leaves expire and they are terminated. For instance, in *Moore v. Maryland Department of Public Safety and Correctional Services*, a correctional officer ultimately received an eight-month leave of absence through using her accrued paid leave and her colleague's donated leave.[58] On August 4, 2010, she was told that she would be placed on unpaid medical leave. She was cleared to work the very next day, and approximately one week after, she was told that her employment had been terminated on August 4, 2010. The employer argued that the correctional officer's eight -month leave of absence amounted to indefinite leave, and that it imposed an undue hardship on the State. The court rejected this argument, finding the reasonableness of the employee's leave to be a factual matter, while emphasizing that she was cleared to work just one day after she was allegedly terminated.

Another question considered by courts is the amount of leave time considered to be reasonable under the ADA. The answer to this question varies greatly, demonstrating the fact-intensive nature of this question. Courts are generally unwilling to draw bright line rules, given that the reasonableness of leave varies based on the employer's policies, and the employee's position.

That being said, it has long been the case that indefinite leave has been found to be unreasonable under the ADA. *See*, *e.g.*, *Corder v. Lucent Technologies Inc.*, 162 F.3d

924, 928 (7th Cir. 1998) ("Nothing in the ADA requires an employer to give an employee indefinite leaves of absence."); *Hudson v. MCI Telecommunications Corp.,* 87 F.3d 1167, 1168 (10th Cir.1996) (concluding that indefinite leave was not a reasonable accommodation under the ADA).

Still employers cannot simply call a leave request indefinite to escape liability under the ADA. *See Bernhard v. Brown & Brown of Lehigh Valley, Inc.*, 720 F. Supp. 2d 694, 701 (E.D. Pa. 2010) (rejecting employer's argument that the employee's request for an additional three month leave of absence as a reasonable accommodation under the ADA, following the expiration of his FMLA leave, as "disingenuous[]" and "absurd"); *Feldman v. Law Enforcement Associates Corp.*, 779 F. Supp. 2d 472 (E.D.N.C. 2011) (rejecting an employer's assertion that an employee with Multiple Sclerosis sought "indefinite" leave, as the employee sought leave for "at least three weeks" on two separate occasions).

Short of indefinite leave, courts vary significantly in the amount of leave time they find to be reasonable. As a few examples, in *Schwab v. Northern Illinois Medical Center*, the court found a one month personal leave enabling an employee to be available for medical appointments to treat breast cancer could have been a reasonable accommodation under the ADA."[59] Similarly, in *Feldman v. Law Enforcement Associates Corporation*, the court denied the employer's motion to dismiss, finding that had the employer approved the employee's leave request, the employee, who had sought leave due to exacerbations of Multiple Sclerosis, could have returned after seven weeks of leave.[60] However, in *Hwang v. Kansas State University*, the court held that it was unreasonable to require over six months of leave as a reasonable accommodation.[61]

Whether leave is considered a reasonable accommodation also depends on whether it would permit the employee to return to work. For instance, in *Sclafani v. PC Richard & Son*, an employee was diagnosed with Post Traumatic Stress Disorder ("PTSD") after surviving an assault in her employer's parking lot.[62] Following the exhaustion of her FMLA leave, the employee sought additional unpaid leave under the ADA. In her accommodation request, however, her doctor stated that she could never work at her previous place of employment. The court concluded that because the employee's requested leave would not have rendered her qualified, the employer did not violate the ADA by denying the additional leave. *See also Basden v. Professional Transport Inc.*, 714 F.3d 1034 (7th Cir. 2013) (upholding the employer's decision to deny an employee's request for a 30-day leave of absence, even though the employer failed to engage in the interactive process, because the employee suggested that she would remain unable to return to work following the requested leave time).

Under the ADA, employers are generally able to choose which accommodation to provide to an employee, so long as the accommodation is effective. However, when an

employer is choosing between an accommodation that enables the employee to perform the essential functions of his job, thereby maintaining a salary, and unpaid leave as an accommodation, there is a line of cases that say that unpaid leave is improper. For instance, in *Mamola v. Group Manufacturing Services, Inc*., the court held that unpaid leave may not be reasonable when an employee specifically requests another accommodation that would allow him to perform the essential functions of the position without missing work.[63] In *Mamola*, a salesman was hospitalized after a severe automobile accident resulting in a brain injury, the loss of his left eye, and occurrence of periodic seizures, which resulted in a series of surgeries. Following one surgery with a recuperation period of approximately five weeks, the employee requested permission to telework. The employer rejected this accommodation, citing the "security and integrity of the Company's computer network and data" and instead permitted the employee to continue unpaid leave.[64] The court permitted the employee's case to proceed past summary judgment, and stated "[a] reasonable fact finder could therefore conclude that unpaid leave actually prevented [the employee] from earning wages for work that he would have performed if [the employer] had granted the requested accommodation."[65] *See also Reilly v. Revlon, Inc.*, 620 F.Supp.2d 524 (S.D.N.Y. 2009) ("Providing paid disability leave above and beyond the FMLA requirements is commendable, but providing benefits to a person who cannot work is not the same thing as making an accommodation in the workplace so the person can work.").

Other courts have reached similar conclusions, cautioning employers from relying too heavily on leave instead of considering accommodations that would keep an employee in the workplace. *See also Woodson v. Int'l Bus. Machines, Inc.*, 2007 WL 4170560, at *5 (N.D. Cal. Nov. 19, 2007) (noting that leave may not accommodate an employee if other accommodations would be more effective); *Jadwin v. Cnty. of Kern*, 610 F. Supp. 2d 1129 (E.D. Cal. 2009) (finding that full time leave may not have been a reasonable accommodation given the fact that the employee was cleared to return to work on a part-time basis and had been permitted to do so for a period of time); *But see Gleed v. AT & T Servs., Inc.*, 2014 WL 3708546, at *1 (E.D. Mich. July 28, 2014) (finding no ADA violation when the employer denied plaintiff's request for a modified work schedule, and offered leave, some of which was potentially paid instead, and plaintiff rejected that offer and resigned, stating that the employer has the right to choose between effective accommodations). As a best practice, employers are discouraged from automatically assuming that leave is the best accommodation option for an employee with disability, and instead are encouraged to consider ways through the interactive process to maintain an employee's position with accommodation.

B.Inflexible Leave Policies

Almost every decision made under the ADA requires employers to engage in an individualized inquiry, but many times, employers rely too heavily on policies restricting

the amount of time an employee can be out on leave. For this reason, the EEOC has been active in litigating cases where employers have established a *per se* policy whereby employees are automatically terminated after a specified amount of time.

In *EEOC v. Interstate Distributor Company*, the EEOC filed a nationwide lawsuit challenging the trucking firm's company's "maximum leave policy," as unlawfully denying reasonable accommodations to hundreds of employees.[66] The maximum leave policy provided that employees who needed leave in excess of twelve weeks were terminated automatically. According to the EEOC, the employer has an obligation under the ADA to consider whether it would be reasonable to provide additional leave time as a reasonable accommodation. Discussed in greater detail below, the employer's policy also required employees to have no restrictions upon their return to the workplace, a policy also challenged by the EEOC. In 2012, this case settled for $4.85 million.[67] Further, the employer was enjoined from engaging in further discrimination on the basis of disability, required to modify its policies to include reasonable accommodations for employees with disabilities, provide periodic training on the ADA to employees, issue reports to the EEOC, post the settlement in the workplace, and appoint a monitor to ensure compliance.

The EEOC reached a similar settlement in *EEOC v. Sears Roebuck & Co.*, where it asserted that Sears maintained an inflexible workers' compensation leave policy, and terminated employees who exhausted their leave instead of considering accommodations, including an extension of their leave.[68] In 2010, this case settled for $6.2 million.[69] *See also EEOC Settlement with Verizon Communications* (settling case for $20 million regarding Verizon's "no fault" attendance policy that failed to consider reasonable accommodations for employees with disabilities).[70]

However, one recent case out of the Tenth Circuit questioned whether all inflexible leave policies are unlawful. In *Hwang v. Kansas State University*, the Tenth Circuit held that the University's inflexible leave policy, which permitted only six months of paid leave was not impermissible, noting that leave in excess of six months is rarely reasonable.[71] In this case, a teacher required a leave of absence for cancer treatments, and after six months, was automatically terminated under the University's inflexible leave policy. While this opinion raises some questions about inflexible leave policies, employers are still cautioned from relying on it too heavily, and should be reminded to engage in the interactive process to determine if a leave extension is reasonable in any given situation.

One recent case out of the Sixth Circuit addressed a leave policy whereby the employer automatically terminated an employee after six months of leave *unless* prior to the expiration of the leave, the employee submitted a request for an extension, supported by medical documentation demonstrating the employee's ability to return to

work within a reasonable time.[72] This case, *Cash v. Siegel-Robert, Inc.*, involved a mold setter who took a medical leave of absence to undergo surgery for back pain.[73] Prior to the expiration of his leave, the employee sought guidance from his employer about how to apply for long term disability benefits. He did not, however, ask for a leave extension or any other accommodation. Just three days after his leave expired, the employee was cleared to return to work, and he went to the plant to provide this documentation to his HR manager. The HR manager explained that his leave had already expired; she did not offer to revoke the termination or reassign him to a different position. Company policy permitted the employee to reapply for employment, but he did not do so. Without criticizing the leave policy, the Sixth Circuit affirmed the dismissal of the employee's claim for discriminatory termination and failure to accommodate. Regarding his failure to accommodate, the Sixth Circuit explained that the employee failed to propose an accommodation, and even if the doctor's note was a "tacit request," he had already been terminated according to company policy. Regarding his discriminatory termination case, the Sixth Circuit stated that the employee knew that his leave would expire, but did not seek additional leave time; instead, he filed for long term disability, which reasonably signaled to the HR manager that he was unable to return to work at the end of his leave. Interestingly, after the employee initiated litigation, the employer revised its practices and now communicates with an employee nearing the end of his medical leave of absence, and specifies how to request an extension of leave if needed, suggesting that even if a policy is deemed lawful, maintaining an open line of communication and assessing accommodations on an individualized basis is still a best practice for employers.

C. Accommodations for Employees Returning from Leave

Employees returning from leave may need new accommodations to perform the essential functions of their job either because they are returning to work with new functional limitations, or because they are returning to different or modified positions. Because the ADA requires the provision of reasonable accommodations, and because all accommodation requests must be assessed on a case-by-case basis, employer policies and practices disregarding these requirements have been found to be unlawful.[74]

Specifically, employer policies and practices refusing to allow employees to return until they are 100% healed, or until they have no restrictions, have been found to be impermissible under the ADA. *See, e.g., Steffen v. Donahoe*, 680 F.3d 738, 748 (7th Cir. 2012) ("Since a '100% healed' policy prevents individual assessment, it necessarily operates to exclude disabled people that are qualified to work, which

constitutes a per se violation."); *Henderson v. Ardco, Inc.,* 247 F.3d 645, 653 (6th Cir. 2001) ("[A] 100% rule is impermissible as to a disabled person."); *McGregor v. National R.R. Passenger Corp.,* 187 F.3d 1113, 1116 (9th Cir.1999) ("A "100% healed" or "fully healed" policy discriminates against qualified individuals with disabilities because such a policy permits employers to substitute a determination of whether a qualified vindividual is '100% healed' from their injury for the required individual assessment whether the qualified individual is able to perform the essential functions of his or her job either with or without accommodation.").

Moreover, the two EEOC lawsuits referenced above, *EEOC v. Interstate Distributor Company*[75] and *EEOC v. Sears Roebuck & Co.*,[76] also involved policies where employees were only permitted to return from a leave of absence if they could return without restrictions. As referenced above, both cases settled for a significant monetary amount, and the employers agreed to revise their policies and undergo ADA training. *See also EEOC Settlement with Supervalu / Jewel-Osco* (settling case for $3.2 million, requiring Supervalu to revise its policy to assure employees that they need not be 100% healed to be considered for a return to work).[77]

More recently, at least one court has viewed an inflexible leave policy as a 100% healed requirement, and permitted the case to proceed based on that characterization. *In EEOC v. United Parcel Service*, the EEOC challenged United Parcel Service's policy, asserting that a twelve-month leave policy effectively acts as a 100% healed requirement, and thus, is a qualification standard.[78] UPS argued that attendance is an essential function of a job, so it had the right to terminate employees who were unable to return to work, but the court disagreed for purposes of a motion to dismiss. Permitting the EEOC's claim to proceed, the court explained that when the twelve-month leave policy is characterized as "a 100% healed requirement on those seeking to return to work . . . [it] can be considered a qualification standard."[79]

D. Accommodation Requests and the Interactive Process

Generally, employees have the obligation to ask for a reasonable accommodation, and courts are frequently presented with cases where the parties disagree whether the employee asked for a reasonable accommodation. It is well-established that employees seeking reasonable accommodations are not required to use "magic words" or specifically state ADA or reasonable accommodation in their request. *See, e.g., Waterbury v. United Parcel Service*, 2014 WL 325326, at *7 (E.D. Cal. Jan. 28, 2014) (holding that neither the employee nor the employee's physician were required to use "magic words" to request a reasonable accommodation); EEOC Enforcement Guidance ("[A]n individual may use 'plain English' and need not mention the ADA or use the phrase 'reasonable accommodation.'").[80]

Employees, do, however, need to be clear that they have a medical need or disability,

and that they are requesting something related to that need. For example, *in Jenks v. Naples Community Hospital, Inc.*, an employee took FMLA leave to seek treatment for breast cancer.[81] After the employee passed away, her estate brought a lawsuit alleging, among other things, that the hospital failed to provide the employee with a reasonable accommodation. The plaintiff asserted that the employee's FMLA documentation constituted a request for accommodation, as the documentation indicated that fatigue was a side effect of the cancer. The plaintiff asserted that this reference to fatigue should have alerted the hospital to the fact that the employee would need additional break periods as a reasonable accommodation. The court disagreed, however, and held that the employee never requested a reasonable accommodation. *See also Rowry v. Litigation Solutions, Inc*., 82 F. Supp. 2d 928, 935 (N.D. Ill. 2000) (finding plaintiff provided insufficient notice of his disability to support a reasonable accommodation request when he requested a leave because his "head was not into work"). These cases remind employees to be sure to connect the dots between their disability and their request, and to be a specific as possible when seeking an accommodation.

Interestingly, in *Barfield*, an employee with depression and anxiety did not explicitly seek an accommodation request, but instead supplied notes from her physician stating that she was "totally incapacitated" and could not work.[82] In denying the defendant's motion for summary judgment, the court stated that depression and anxiety can make it more difficult for an employee to engage in meaningful communications. When that it is the case, "an employer has a duty to meet the employee half way."[83] *See also Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1285 (7th Cir. 1996) ("[P]roperly participating in the interactive process means that an employer cannot expect an employee to read its mind and know that he or she must specifically say 'I want a reasonable accommodation," particularly when the employee has a mental illness. The employer has to meet the employee half-way.")

It is also well-settled that someone other than the employee can make a request for a reasonable accommodation on the employee's behalf. *See, e.g., Feldman v. Law Enforcement Associates Corp.*, 779 F. Supp. 2d 472 (E.D.N.C. 2011) (permitting employee's reasonable accommodation case to proceed even though the request came from the employee's spouse and lawyer); EEOC Enforcement Guidance ("[A] family member, friend, health professional, or other representative may request a reasonable accommodation on behalf of an individual with a disability."). [84]

An employee's request for a reasonable accommodation triggers the "interactive process" whereby the employee and employer engage in good-faith discussions to try to identify an effective reasonable accommodation. If an employee can demonstrate that an employer failed to engage in the interactive process, in many instances, the employee's case is able to survive summary judgment. For instance in *Snapp v. United Transportation Union*, following an extended disability leave, the plaintiff sent the

employer a job application letter, as well as a letter from his doctor referring to his disability and need for an accommodation.[85] The Ninth Circuit found that while this letter was not completely clear, a reasonable jury could conclude that the letter was a notification of a disability and a desire for the accommodation of reassignment, thus triggering the interactive process. Because the employer failed to engage in the interactive process, the case could not be resolved through summary judgment.

Courts recognize that the interactive process is an important step in determining how to accommodate an employee returning from a leave of absence. In *Medlin v. Rome Strip Steel Co.*, an employee returning to work was deemed unable to perform the essential functions of his previous position due to an off-the-job injury if he returned without accommodations.[86] The court criticized the employer's failure to engage in the interactive process, and found a genuine issue of material fact as to whether a particular piece of machinery, a slitter machine, could have been equipped with devices that would have lessened the physical demands of the position. Emphasizing that the employer was at least "constructively aware" of the option of adapting this equipment, the court explained that "[e]mployers are simply more knowledgeable about adapting or modifying an employee's position, especially since the means to secure such adaptation and modification are most often entirely within their control" and employees should not have to "engage in solitary private investigation to uncover information that the employer may well already know, or have the ability to know with little effort."[87]

E. Reassignment as a Reasonable Accommodation

While a returning employee could seek any potential accommodation, a number of accommodations appear more regularly in the case law. One of these frequently-discussed reasonable accommodations is reassignment.

Under the ADA, it is clear that reassignment to a vacant position for which the employee is qualified can be a reasonable accommodation. One recent case example about reassignment comes from *Hillman v. Costco Wholesale Corporation*, where a service assistant who was injured during a snow storm while pushing carts sought to return from a medical leave of absence in a position with limited sitting and walking.[88] The court permitted his case to proceed, finding that a reasonable jury could find that the employee was qualified for the vacant position of major sales assistant.

A hot topic in the world of ADA litigation involves the issue of reassignment; specifically, whether the reassignment requires an employee to be placed in a position, or whether it only requires an employee to be permitted to compete for the position. While the specific cases addressing this issue are outside of the return to work context, the legal doctrine that stems from this line of cases certainly apply to employees who need to return to work in reassigned positions. While a circuit court split previously existed on this issue, in 2012, the Seventh Circuit issued its holding in *EEOC v. United*

Airlines, and changed its position.[89] In *United Airlines*, an *en banc* Seventh Circuit panel held that the ADA does indeed mandate that an employer place employees with disabilities into vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to that employer. With this holding, the majority of appellate courts that have considered this issue have found reassignment to be required without competition, absent an undue hardship.[90] Currently, the Eighth Circuit is the only circuit that has reached the opposite conclusion, and it did so relying on pre-*United Airlines* precedent. *See Huber v. Wal-Mart,* 486 F.3d 480 (8th Cir. 2007) (adopting the reasoning from a Seventh Circuit case "wholesale" and "without analysis").

As suggested by *United Airlines*, when reassignment requires an employer to violate a collective bargaining agreement and violate a seniority system, courts find reassignment to pose an undue hardship. For example, in *Henschel v. Clare County Road Commission*, the employer declined to reassign an excavator returning from a leave to another position.[91] The Sixth Circuit confirmed that the employer had no legal obligation to do so under the ADA because "there is no requirement that an employer violate a collective bargaining agreement."[92] Reassignment in this case would have required the employer to move a more senior employee from his position, which the court found to be unreasonable. Notably, however, the Sixth Circuit explained that it was not addressing the related question of whether the employee could have been assigned to a specific piece of equipment during the winter, as the ADA requires job restructuring as a reasonable accommodation in appropriate circumstances. *See also U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (recognizing that reassignment to a vacant position is a reasonable accommodation specified in the ADA, and may be reasonable absent a bona fide seniority system).

Both the EEOC and the courts have characterized reassignment as an accommodation of last resort both because "reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship,"[93] and because employees are only required to be reassigned if a position is available.[94] In *Fields v. Clifton T. Perkins Hospital*, for example, the employer held an employee's position of security attendant open for seven months while the employee was on various leaves.[95] After this seven-month period, the employee sought to return, but was restricted from performing the duties of a security attendant. In his ADA lawsuit, he asserted that his employer violated the ADA by failing to reassign him to a position, but the court disagreed. The court explained that the employee had failed to proffer any evidence establishing that any position was available at the relevant time. Without this type of evidence, the employee could not pursue his failure to accommodate claim.

If a position comparable to the employee's former position is available, it is impermissible for an employer to reassign an employee to a position with a "significant diminution in salary, benefits, seniority or other advantages."[96] In *Simmons v. New*

York City Transit Authority, an employee was reassigned from the position of train operator to the position of bus cleaner. While the employer asserted that it was accommodating her disability of irritable bowel syndrome, a jury concluded that the bus cleaner job was inferior in terms of working environment, hours, pay, and benefits, and other positions comparable to job of train operator were available at the time the employer ordered the reassignment. Affirming the jury's decision, the Second Circuit also explained that the employee had presented evidence that she was qualified for reassignment to a more comparable position, such as a position in "the Yard" or to the position of Transit Property Protection Agent, and that such positions were available at the time of her unlawful reassignment. *Cf. Pattison v. Meijer, Inc.*, 897 F. Supp. 1002, 1005 (W.D. Mich. 1995) (finding reassignment from a full-time third shift stocker position to a part-time position with flexible hours was a reasonable accommodation for an employee's inability to drive at night, even though part-time schedule did not include full-time benefits and could have resulted in loss of pay, because no comparable first shift position was vacant or soon to be vacant, no other daytime position existed, and employee did not dispute that flexible part-time schedule would have allowed him to use public transportation).

F. Part-time Employment as a Reasonable Accommodation

Another frequently-requested accommodation for returning employees is the ability to work in a part-time capacity. The ADA specifically includes "part-time or modified work schedules" as examples of reasonable accommodations.[97] Whether part-time work is reasonable or would pose an undue hardship in any given situation depends on the facts of the specific case.

Part-time work has been found to be a possible accommodation, at least on a temporary basis, in *Reilly v. Revlon, Inc*.[98] In *Reilly*, an employee with post-partum depression sought to return from her maternity leave on a part-time basis, and gradually increase her hours until she was working full time. However, her employer denied this request, asserting that part-time work was unreasonable as a matter of law. The court permitted the employee's case to proceed, finding that part-time work, especially for a limited duration of time, could certainly be reasonable. *But see White v. Standard Insurance Company*, 529 Fed.Appx. 547 (6th Cir. June 28, 2013) (suggesting that part-time work was not reasonable for a customer service agent because full-time work was an essential function of her job, and the employer was not required to create a new part-time position).

At least one court has found it reasonable to permit an employee to return to work on a part-time basis, but to require the employee to use FMLA leave to account for the remaining time. In *Basta v. American Hotel Register Company*, an employee injured her shoulder while on the job, causing her to require surgery.[99] After two different medical leaves totaling approximately five months, the employee returned, but was

limited to a four-hour work day. Following her second leave, the employer permitted the employee to return on this reduced schedule, but stated that the remaining time would be considered leave time under the FMLA. The employee required a third leave of absence, and when she did not return after the expiration of her FMLA leave, despite the fact that an independent medical examination concluded that she was able to return, she was terminated. In her ADA lawsuit, the employee asserted that she was denied a reasonable accommodation of part-time work because her employer deducted the portion of the day that she did not work from her FMLA leave. The court disagreed. In granting summary judgment for the employer, the court held that it was not "improper for an employer to provide an employee with a reduced schedule as a reasonable accommodation while also attributing the unworked portion of the plaintiff's workday as leave time under the FMLA."[100] In so doing, the court emphasized the fact that the employer had provided the employee with notice that it was making this type of deduction, and that the employee did not explicitly request to be automatically transferred to a part-time position. Typically, employees do not need to make explicit requests for accommodations, but this case is a cautionary tale for employees, reminding them that being explicit about accommodation requests is the most effective way to proceed.

G. Restructuring Job Duties and Light Duty Assignments

Because employees frequently return from leave with new restrictions, many accommodation requests from returning employees involve job restructuring. In *EEOC v. LHC Group, Inc.*, after taking time off following a grand mal seizure, a team leader of nurses requested two reasonable accommodations—assistance with driving and assistance with computer work—both of which were denied.[101] The Fifth Circuit reversed and remanded the lower court's decision granting summary judgment to the employer. With respect to driving, the Fifth Circuit held that driving was not an essential function of a Team Leader, although it was for the position of Field Nurse, and thus, it may be reasonable to eliminate this marginal task. Team Leaders drove only a couple of hours of a day, and performed many other duties in the branch office, despite the written job description. Thus, the court held that it could not say as a matter of law that driving was an essential function. It also explained that various accommodations could have accommodated the employee's need to transport, including public transportation options, and a van or taxi service. Because the employer failed to discuss these accommodations, the employer was deemed to have failed to engage in the interactive process.

Another interesting issue raised by the *LHC Group* case is whether employers must provide temporary accommodations to assist an employee readjusting to the workplace. In *LHC Group*, in addition to driving, the employee also requested assistance using the computer due to limitations she was experiencing as a result of her unusually high dosage of anti-seizure medication, which she was in the process of

adjusting. Instead of engaging in the interactive process, her employer simply failed to respond to the request, leading the Fifth Circuit to conclude that the employee's case should proceed. These facts also suggest that it may be reasonable for an employee to make a request for an accommodation for a temporary issue.

Similar to job restructuring, many employees returning from leave also request to return in a light duty capacity. Courts typically analyze requests for light duty as either a request for reassignment or a request for modified job duties. Under the latter approach, many courts only find light duty to be reasonable when it does not require the elimination of essential functions of the job. For instance, in *Ammons v. Aramark Uniform Services*, a boiler engineer and lead mechanic injured his right knee on the job.[102] He returned to a light duty position, given his various restrictions in the amount of time he could spend climbing, on his knees, bending, squatting, climbing stairs, lifting and using a ladder. He then alternated between this light duty position and medical leave for a period of time. However, per the employee's collective bargaining agreement, he was terminated after being absent due to illness or injury for more than 18 months. The court found that the essential functions of the employee's job "included duties and exertion greatly exceeding the restrictions" placed on him by his physician, and removing such duties would constitute "a significant change in the essential functions of his job" which is not required.[103] Thus, the court granted the defendant's motion for summary judgment. *See also Acker v. Coca-Cola N. Am.*, 2007 WL 2955595 (E.D. Pa. Oct. 9, 2007) *aff'd* 314 Fed.Appx. 409 (3d Cir. Nov. 8, 2008) (suggesting that indefinite light duty is not reasonable if it eliminates essential job functions, even though the employee had remained in light duty position for six years); *Medlin v. Rome Strip Steel Co.*, 294 F. Supp. 2d 279 (N.D.N.Y. 2003) (finding it reasonable to reject a request for light duty that requires reallocation of essential functions of the job, but noting that altering equipment as light duty could be a reasonable accommodation).

At least one recent decision cautions employers from refusing to place an employee in a light duty position, when it would be possible to limit an employee's work to specific tasks. In *Brunson v. Peake*, a food service worker at a Department of Veterans' Affairs ("VA") Medical Center was injured on the job, requiring several months of medical leave due to his herniated disc and sprained back.[104] He returned with various restrictions, as he was unable to accomplish many of the tasks that he had previously been required to perform, and made various requests, both formal and informal, to work in a light duty position. Although this request was granted on a temporary basis, it was then denied, and the employee was eventually terminated because he could not perform his duties. Permitting the employee's claim to proceed, the court found a genuine issue of material fact as to whether the VA could have accommodated the employee in a light duty position. To support its conclusion that the employer had failed to engage in a good faith interactive process, the court also cited that one of the employee's supervisors had been able to accommodate the employee in a light duty

capacity, and had created a list of tasks that the employee could handle. There was also evidence that the "agency was looking hard at not having a lot of light duty."[105] While the court also noted that other evidence suggested that the employer did, in fact, engage in an interactive process, it concluded ultimately that the case was best left for a jury to decide.

H. Telecommuting as a Reasonable Accommodation

Some employees are able to return to work, but not to the physical workplace, leading them to request telework as a reasonable accommodation. Whether telework is reasonable, and under what circumstances, is a hot topic in ADA litigation. When determining whether telework is reasonable, courts consider whether an employee's essential functions can be performed off site. In *Bisker v. GGS Information Services, Inc.*, a parts lister with multiple sclerosis requested to work from home following a medical leave.[106] She filed an ADA lawsuit after her request was denied. Her employer argued that it is *per se* unreasonable for employees expected to interact with others to meet tight deadlines to work from home, but the court "decline[d] to adopt such a *per se* rule."[107] Permitting the case to proceed, the court explained that while the employee's job description required "frequent contact with employees" and occasional interfacing, it did not specify that such interactions needed to be face-to-face. Thus, the employee established a genuine issue of fact as to whether telework was a reasonable accommodation upon her return from leave. *See also* EEOC Guidance Document, Work At Home/Telework as a Reasonable Accommodation ("Changing the location where work is performed may fall under the ADA's reasonable accommodation requirement of modifying workplace policies, even if the employer does not allow other employees to telework.").[108]

On the other hand, in *McNair v. District of Columbia*, a hearing officer with a degenerative disc disease requested to telework about two- or three-days a week for the foreseeable future while she recovered from a back surgery.[109] While the court stated that "an employer must consider telecommunicating as a potential form of reasonable accommodation,"[110] it held that it was not reasonable in this case because the hearing officer needed to be in the office to perform her essential functions of her position. Specifically, the hearing officer was expected to conduct on-site administrative hearings on rent-adjustment petitions filed by landlords and tenants, be on-site to access registration records for housing accommodations and other records, meet and confer with rent administrators, and handle walk-in and scheduled appointments with landlords and tenants. Thus, telecommuting was not a reasonable accommodation in this case.

Likewise, telecommuting may not be a reasonable accommodation if an employee is

unable to perform the essential functions from home for disability-related reasons. For instance, in *Adams v. District of Columbia*, an information technology specialist sought to return to work following a medical leave to recover from a stroke, and asked to work from home as a reasonable accommodation.[111] The court found the employer did not violate the ADA by denying this request, as the employee could not demonstrate that he was able to perform the essential functions of his position from home. Specifically, the employer produced evidence that the essential functions of the IT specialist's position required travel and required the employee to speak to people on the phone, which the employee was unable to do due to the restrictions caused by his stroke, including slurred speech, difficulty walking, and an inability to stand or sit for long periods of time. As a result, the court granted summary judgment for the employer.

Other courts have held that because teamwork, personal interaction and supervision are essential functions of many positions, telework is not reasonable. In *Anderson v. United Conveyor Supply Co*., the court upheld an employer's decision not to provide an employee's request to work at home as a reasonable accommodation.[112] The court stated that a home office is rarely a reasonable accommodation because most jobs require teamwork, personal interaction, and supervision that cannot occur in a home office situation. While not emphasized by the court, the employee in Anderson was a supervisor, and her duties required her to supervise two other employees. Similarly in *Carlson v. Liberty Mutual Insurance Co.*, following a seizure, an employee was unable to drive, and worked from home temporarily.[113] However, she was not permitted to work from home on a permanent basis, a decision that was found to be permissible by the court. The Eleventh Circuit explained that the employee's duties required her to be available to other employees, participate in weekly meetings, and hold weekly office hours. Likewise, her job description required her to provide "on-site" support, provide consultation, and to be able to work in a team/organization. Notably, the court acknowledged that full-time presence in the workplace may not be essential; however, because the employee in this case was unable to perform the essential function of at least some presence in the office, her claim could not proceed.

While outside of the return to work context, the Ninth Circuit held that it was "inconsistent with the purposes of the ADA to permit an employer" to deny a request to work from home based on past disciplinary action taken due to the disability sought to be accommodated.[114] In *Humphrey v. Memorial Hospitals Association*, a medical transcriptionist with obsessive compulsive disorder requested to telework as a reasonable accommodation for her obsessive compulsive disorder. While the employer permitted many individuals to telework, it denied the employee's request because she was currently involved in the discipline process. Because the past discipline was related to the employee's disability, and because the telework accommodation may have relieved the employee of the stress of having to leave the house in the morning, the Ninth Circuit permitted the employee's case to proceed, suggesting that telework is a reasonable accommodation.

V. Direct Threat and Returning Employees

Because many returning employees have new or changed functional limitations, return to work cases often included a discussion of direct threat. Under Title I of the ADA, an employer may exclude an individual from a job if that individual would pose a direct threat—a significant risk of substantial harm—to the health or safety of the individual him or herself or to others that cannot be eliminated or reduced by a reasonable accommodation. However, in order to ensure that employers do not unjustly exclude people from the workplace based on unwarranted fears, generalizations, stereotypes, or myths about a particular disability, the ADA requires that employers engage in an individualized assessment that is based on reasonable medical judgment relying on the most current medical knowledge and/or on the best available objective evidence.

The ADA defines direct threat to mean "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[115] The definition of direct threat in the EEOC's regulations adds additional language to the ADA's definition. The regulation states that a direct threat is "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,"[116] and the Supreme Court upheld this EEOC interpretation.[117]

The EEOC regulations also establish the standard for whether an individual poses a direct threat. Under the regulations, a decision whether an individual presents a direct threat must be based on a particularized inquiry. Such a determination must be based on "an individualized assessment of the individual's present ability to safely perform the essential functions of the job" which itself must be based on "a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."[118] The assessment should consider four factors: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.[119]

Recent case law reminds employers that make exclusions based on the direct threat defense require an individualized inquiry based on the most current medical knowledge. One helpful example of this requirement comes from *Gaus v. Norfolk Southern Railroad Co*.[120] In *Gaus*, a journeyman electrician with various medical conditions including ulcerative colitis, hernias, carpal tunnel syndrome, torn ligaments, gall bladder problems, Addison's disease, and chronic pain, sought to return to work. Although he was cleared to return by both his treating doctors and the company's doctor, the employer's medical department was concerned about the medication that he was currently taking based on general information regarding the medication, and ultimately denied his return. The court engaged in a thorough analysis of the ADA's direct threat provision, and concluded that the employer's argument was based largely on speculation and conclusory statements. The employer failed to establish any of the

four factors outlined in the ADA's regulations. It could not identify any objective evidence establishing that the employee's pain or medication regimen created a significant risk, as there was no evidence that the employee experienced any side effects from his medications. The employer relied too heavily on written guidelines, which ran afoul to the ADA because they failed to take into account the employee's particular circumstances, including his reaction to medication, into consideration. According to the court, the actual evidence demonstrated that the employee was not experiencing side effects from his medication, and that a number of doctors had cleared his return to work.

Another example of an employer's failure to consider the facts in the specific case comes from *EEOC v. Rexnord*,[121] where the court concluded the employee's alleged seizure disorder did not rise to the level of a direct threat for purposes of summary judgment. In *Rexnord*, an assembler was required to work with a variety of tools. There was conflicting testimony about whether the employee was having seizures, whether she was becoming unconscious at work, whether her condition was under control, and whether she was able to predict blackouts sufficiently to get to a safe location. Given this conflicting testimony, the court rejected the employer's argument that the assembler posed a direct threat due to her alleged seizure disorder. *See also Garr v. Union Pacific Railroad*, 2013 WL 68699 (N.D. Ill. Jan. 4, 2013) (rejecting employer's direct threat analysis because, among other reasons, it pointed to a statistic regarding the likelihood of sudden incapacitation, and the court noted that the specific statistic would not apply to the plaintiff given his medical interventions).

One recent case explored the interplay between an employer's right to require functional capacity evaluations upon return to work, and the direct threat analysis, and ultimately concluded that if an employee refuses to undergo a permissible evaluation, then the employer can establish a direct threat argument based on the information available to it at the time. In *Cleveland v. Mueller Copper Tube Co*., an employee with a permanent lifting restriction due to a prior on-the-job injury worked in a light work position of five-tier-operator.[122] She then injured her ankle on the factory floor, and was off work on workers compensation and FMLA leave for over two months. During that time, her entire shift was laid off, or reassigned. When the employee learned of the pending lay-offs, she bid on a position of block-crane operator, a position that required lifting in excess of her limitations. Her employer initially refused, but then asked the employee to have a doctor evaluate her restrictions through a functional capacity evaluation. The employee refused, and she was ultimately laid off. Applying the principles of the "interactive process" from the reasonable accommodation context, the court found that the employer acted lawfully in concluding that the employee was unable to safely perform the block-crane operator position. The court explained that the risk of allowing an employee with a permanent lifting restriction to return to a position that requires lifting in excess of that position, without first obtaining objective evidence that it was safe to do so, presents "a high probability of substantial harm to the individual."[123]

VI. Retaliation Upon Return from Leave

Employees returning from a leave of absence often fear retaliation for taking leave, or for requesting additional accommodations upon return. Title V of the ADA protects employees from retaliation when pursuing their federally-protected rights, including taking reasonable accommodations, such as leave.

The ADA provides: "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act."[124] To succeed in a retaliation case, a plaintiff must show that she: (1) engaged in a protected activity; (2) suffered an adverse employment action; (3) the defendant was aware of the protected activity; and (4) there is a causal link between the protected activity and the adverse employment action.[125] Most retaliation cases turn on whether the plaintiff is able to establish a causal connection between the protected activity and the adverse employment action.

Many employees attempt to demonstrate this required causal connection through temporal proximity alone—in other words, many assert that because the protected activity occurred around the same time as the adverse action, one must have caused the other. Depending on the amount of time between engaging in the protected activity and the adverse employment action, some courts find temporal proximity to sufficiently establish a causal connection on its own. In *Wagner v. County of Nassau*, a laborer complained that her work environment was making her sick. She was sent home, and pursuant to company policy, was not permitted to return until she submitted a doctor's note stating that she could return without restrictions.[126] She was then placed on involuntary sick leave. Although the employee did not pursue her claim against the employer for its 100% healed policy, she brought claims for discriminatory termination and retaliation. With respect to her retaliation claim, the court rejected the employer's argument that there was not temporal proximity between the adverse action and the protected activity. In fact, the court called this argument "disingenuous" because there was only nine days between the date that she submitted a doctor's note complaining about the conditions in the warehouse, and the date that she was involuntarily placed on sick leave.[127]

Other courts rely on temporal proximity coupled with other factors to find an employee established a prima facie case of retaliation. In *Hudson v. Guardsmark*, an employee returned from a medical leave for his anxiety and depression.[128] Shortly after his return to the workplace, he was subjected to discipline and disparaging comments by his manager, which were specifically related to his leave of absence, and ultimately terminated. The court held that while suspicious timing alone is insufficient to establish a claim, the timing coupled with this pattern of conduct was sufficient to permit the employee's case to move forward. Similarly in *Akerson v. Pritzker*, an employee with

an inflammatory bladder disease called interstitial cystitis required an unexpected two week leave of absence to undergo treatment.[129] She returned to work, and had a meeting with her supervisor and an HR representative, where she discussed her medical leave and disclosed her bladder condition. During this meeting, her supervisor asked how long she would need to be in the bathroom and also asked her to advise him every time she left her desk for reasons other than using the restroom, a request not made of other employees. Upon her return, the employee's desk was moved to a different location, and many of her duties were reassigned. Two weeks later, she was terminated for poor work performance. The court held that the employee's claim for ADA retaliation could proceed. It explained that the timing between her request for accommodation and her termination was "highly probative of retaliation" but especially when considering other factors, including her supervisor's alleged attitude toward her bathroom breaks and changes in her employment conditions upon her return from leave.[130]

Conclusion

A number of different legal issues under Title I of the ADA arise when an employee returns to the workplace. While certain legal principles related to return to work issues are well-established in the statute, regulations and case law, others are still evolving. Above all, employees and employers are encouraged to communicate with one another, engage in the interactive process, and conduct individualized inquiries when determining how to best approach new questions involving an employee's return to work.

Notes

1. This legal brief was written by Barry C. Taylor, Vice President of Systemic Litigation and Civil Rights and Rachel M. Weisberg, Staff Attorney, with Equip for Equality, the Illinois Protection and Advocacy Agency (P&A). The authors would like to thank Kayla Higgins, Equip for Equality Legal Intern, and Michelle Mbekeani-Wiley, Equip for Equality Volunteer Attorney, for their valuable assistance with this Legal Brief. Equip for Equality is providing this information under a subcontract with Great Lakes ADA Center.
2. 42 U.S.C. § 12112(b)(5)(A).
3. 29 C.F.R. § 825.112(a).
4. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Oct. 17, 2002, Question 21, http://www.eeoc.gov/policy/docs/accommodation.html.

5. See Fact Sheet #28: The Family and Medical Leave Act, U.S. Department of Labor Wage and Hour Division, http://www.dol.gov/whd/regs/compliance/whdfs28.pdf
6. 29 U.S.C. § 12111(5)(A).
7. 29 C.F.R. § 825.112(a).
8. 29 C.F.R. § 825.110.
9. *Bernhard v. Brown & Brown of Lehigh Valley, Inc.*, 720 F. Supp. 2d 694 (E.D. Pa. 2010).
10. 29 C.F.R. § 825.215(a).
11. 29 C.F.R. § 825.112(a).
12. EEOC Enforcement Guidance, *supra*, n. 4.
13. 29 C.F.R. § 825.216(c).
14. *Id.* (emphasis added).
15. *Lafata v. Church of Christ Home for Aged*, 325 Fed.Appx. 416, 418 (6th Cir. 2009).
16. *Heston v. Underwriters Labs., Inc*., 297 F.Supp.2d 840 (M.D.N.C. 2003).
17. 42 U.S.C. § 12112(d)(2).
18. 42 U.S.C. § 12112(d)(3).
19. 42 U.S.C. § 12112(d)(4)(A).
20. 29 C.F.R. pt. 1630, App'x 1630.13(b).
21. *Pence v. Tenneco Auto. Operating Co., Inc*., 169 Fed. Appx. 808, 812 (4th Cir. 2006); *See also Owusu-Ansah v. Coca-Cola Co.*, 715 F.3d 1306 (11th Cir. 2013) (noting that the employer had a "reasonable, objective concern").
22. *Medlin v. Rome Strip Steel Co.*, 294 F. Supp. 2d 279 (N.D.N.Y. 2003).
23. *Thomas v. Corwin*, 483 F.3d 516, 528 (8th Cir. 2007).
24. *Rodriguez v. Sch. Bd. of Hillsborough County, Florida*, 2014 WL 5100635, at *4 (M.D. Fla. Oct. 10, 2014).
25. *Owusu-Ansah*, 715 F.3d at 1311-1312.
26. *Id*. at 1311.
27. *Leonard v. Electro-Mech. Corp.*, 2014 WL 1385356 (W.D. Va. Apr. 9, 2014).
28. *Id*. at *5.
29. *Bloomfield v. Whirlpool Corp.*, 984 F.Supp.2d 771 (N.D. Ohio 2013), opinion denying reconsideration Feb. 7, 2014.
30. *Conroy v. New York State Dep't of Corr. Svcs.*, 333 F.3d 88 (2d Cir. 2003).

31. *Fountain v. New York State Dep't of Corr. Svcs.*, 2005 WL 1502146 (N.D. New York June 23, 2005).
32. *Id*. at *6.
33. *Id*. at *10.
34. 42 U.S.C. § 12112(d)(3)(B).
35. *Medlin v. Rome Strip Steel Co.*, 294 F. Supp. 2d 279 (N.D.N.Y. 2003).
36. *Id*. at 294.
37. 42 U.S.C. § 12111(8).
38. 29 C.F.R. 1630.2(m).
39. 29 C.F.R. 1630.2(m).
40. *Id*.
41. 29 C.F.R. 1630.2(n)(1).
42. 29 C.F.R. 1630.2(n)(2).
43. 29 C.F.R. 1630.2(n)(3).
44. *Id*.
45. *Henschel v. Clare Cnty. Rd. Comm'n*, 737 F.3d 1017, 1024-25 (6th Cir. 2013), *reh'g denied (Feb. 10, 2014)*.
46. *Id*. at 1022.
47. *Id*. at 1023.
48. *Rorrer v. City of Stow*, 743 F.3d 1025, 1031 (6th Cir. 2014).
49. *Id*. at 1041.
50. *Id*. at 1042.
51. 29 C.F.R. 1630.15(e) ("*Conflict with other Federal laws.* It may be a defense to a charge of discrimination under this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part.")
52. *Jarvela v. Crete Carrier Corp.*, 754 F.3d 1283 (11th Cir. 2014).
53. *Id*. at 1287 (citing 49 C.F.R. 391.41(b)(4)).
54. 42 U.S.C. § 12112 (b)(5)(A).
55. *Id*. at 12111(9).
56. 29 C.F.R. 1630.2(o).

57. *Barfield v. Donahoe*, 2014 WL 4638635 (N.D. Ill. Sept. 17, 2014).
58. *Moore v. Maryland Dep't of Public Safety and Corr. Svcs.*, 2011 WL 4101139 (D. Md. Sept. 12, 2011).
59. *Schwab v. N. Illinois Med. Ctr.*, 2014 WL 2111124, at *10 (N.D. Ill. May 20, 2014).
60. *Feldman v. Law Enforcement Assoc. Corp.*, 779 F. Supp. 2d 472 (E.D.N.C. 2011).
61. *Hwang v. Kansas State Univ.*, 753 F.3d 1159 (10th Cir. 2014).
62. *Sclafani v. PC Richard & Son*, 668 F. Supp. 2d 423 (E.D.N.Y. 2009).
63. *Mamola v. Group Mfg. Svcs., Inc.*, 2010 WL 1433491 (D. Ariz. April 9, 2010).
64. *Id*. at *2 (internal citations omitted).
65. *Id*. at *4.
66. *EEOC v. Interstate Distrib. Co.*, Civil Action No. 12-cv-02591-RBJ (D.Colo.)
67. Interstate Distributor Company to Pay Nearly $5 Million to Settle EEOC Disability Suit, EEOC Press Release, Nov. 9, 2012, available at www.eeoc.gov/eeoc/newsroom/release/11-9-12.cfm
68. *EEOC v. Sears Roebuck & Co.*, Civil Action No. 04-cv-7282 (N.D. Ill.)
69. Sears, Roebuck to Pay $6.2 Million for Disability Bias, EEOC Press Release, Sept. 29, 2009, available http://www1.eeoc.gov//eeoc/newsroom/release/9-29-09.cfm; Court Approves $6.2 Million Distribution in EEOC v. Sears Disability Settlement, EEOC Press Release, Feb. 5, 2010, available http://www.eeoc.gov/eeoc/newsroom/release/2-5-10a.cfm
70. Verizon to Pay $20 Million to Settle Nationwide EEOC Disability Suit, EEOC Press Release, July 6, 2011, available http://www1.eeoc.gov//eeoc/newsroom/release/7-6-11a.cfm
71. *Hwang v. Kansas State Univ.*, 753 F.3d 1159 (10th Cir. 2014).
72. *Cash v. Siegel-Robert, Inc.*, 548 Fed.Appx. 330 (6th Cir. 2013).
73. *Id.*
74. *See, e.g., Steffen v. Donahoe*, 680 F.3d 738, 748 (7th Cir. 2012).
75. *EEOC v. Interstate Distrib. Co.*, Civil Action No. 12-cv-02591-RBJ (D.Colo.).
76. *EEOC v. Sears Roebuck & Co.*, Civil Action No. 04-cv-7282 (N.D. Ill.).
77. Supervalu / Jewel-Osco to Pay $3.2 Million under Consent Decree for Disability Bias, EEOC Press Release, January 5, 2011, available http://www1.eeoc.gov//eeoc/newsroom/release/1-5-11a.cfm
78. *EEOC v. United Parcel Serv.*, 2014 WL 538577 (N.D. Ill. Feb. 11, 2014).
79. *Id*. at *2.

80. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Oct. 17, 2002, http://www.eeoc.gov/policy/docs/accommodation.html.
81. *Jenks v. Naples Cmty. Hosp., Inc.*, 829 F. Supp. 2d 1235 (M.D. Fla. 2011).
82. *Barfield v. Donahoe*, 2014 WL 4638635, at *3 (N.D. Ill. Sept. 17, 2014).
83. *Id*. at 4.
84. EEOC Enforcement Guidance, *supra*, n. 4.
85. *Snapp v. United Trans. Union*, 547 Fed. Appx. 824 (9th Cir. Nov. 5, 2013).
86. *Medlin v. Rome Strip Steel Co.*, 294 F. Supp. 2d 279 (N.D.N.Y. 2003).
87. *Id*. at 292.
88. *Hillman v. Costco Wholesale Corp.*, 2014 WL 3500131 (N.D. Ill. July 14, 2014).
89. *EEOC v. United Airlines*, 693 F.3d 760 (7th Cir. 2012), *cert. denied,* 133 S.Ct. 2734 (May 28, 2013)(No. 12–707).
90. *See Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (en banc); D.C. Circuit: *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998) (en banc).
91. *Henschel v. Clare Cnty. Rd. Comm'n*, 737 F.3d 1017, 1024-25 (6th Cir. 2013), *reh'g denied (Feb. 10, 2014)*.
92. *Id*. at 1025.
93. 29 C.F.R § 1630.2(o).
94. *See*, *e.g*., *Fields v. Clifton T. Perkins Hosp*, 2014 WL 2802986, at *1 (D. Md. June 19, 2014).
95. *Id.*
96. *Simmons v. New York City Transit Auth*., 340 F. App'x 24, 26 (2d Cir. 2009) (quoting *Norville v. Staten Island Univ. Hosp.*, 196 F.3d 89, 99 (2d Cir. 1999).
97. 42 U.S.C. § 12111(9)(B).
98. *Reilly v. Revlon, Inc.*, 620 F.Supp.2d 524 (S.D.N.Y. 2009).
99. *Basta v. Am. Hotel Register Co.*, 2012 WL 88187 (N.D. Il. Jan. 11, 2012).
100. *Id*. at 708.
101. *EEOC v. LHC Group, Inc.*, --- F.3d ---, 2014 WL 7003776 (5th Cir. Dec. 11, 2014).
102. *Ammons v. Aramark Uniform Svcs.*, 368 F.3d 809 (7th Cir. 2004).
103. *Id*. at 819.
104. *Brunson v. Peake*, 2011 WL 3715084 (E.D. Pa. Aug. 24, 2011).

105. *Id*. at 9.

106. *Bisker v. GGS Info. Svcs., Inc.*, 2010 WL 2265979 (M.D. Pa. June 2, 2010).

107. *Id*. at *3.

108. EEOC Guidance Document, Work At Home/Telework as a Reasonable Accommodation, available at http://www.eeoc.gov/facts/telework.html.

109. *McNair v. D.C.*, 11 F.Supp.3d 10 (D.D.C. Jan. 23, 2014).

110. *Id*. (*citing* 29 C.F.R. § 1630.2(o)(2)(ii); *Carr v. Reno*, 23 F.3d 525, 529 (D.C. Cir. 1994)).

111. *Adams v. District of Columbia*, --- F.Supp.2d -- , 2014 WL 2918883 (D.D.C. June 27, 2014).

112. *Anderson v. United Conveyor Supply Co*., 461 F.Supp.2d 699 (N.D. Ill. Nov. 15, 2006).

113. *Carlson v. Liberty Mutual Ins. Co.*, 237 Fed.Appx. 446 (11th Cir. June 7, 2007).

114. *Humphrey v. Mem. Hosp. Ass'n*, 239 F.3d 1128 (9th Cir. 2001).

115. 42 U.S.C. § 12111(3).

116. 29 C.F.R. §1630.2(r).

117. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 78 (2002).

118. 29 C.F.R. § 1630.2(r); *see also* EEOC Interpretive Guidance, *supra* note 20 ("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.").

119. 29 C.F.R. § 1630.2(r).

120. *Gaus v. Norfolk S. Ry. Co.*, 2011 WL 4527359, at *26 (W.D. Pa. Sept. 28, 2011).

121. *EEOC v. Rexnord*, 966 F.Supp.2d 829 (E.D. Wis. 2013).

122. *Cleveland v. Mueller Copper Tube Co*., 2012 WL 1192125 (N.D. Miss. April 10, 2012).

123. *Id*. at *8.

124. 42 U.S.C. §12203(a)

125. 42 U.S.C. §12203©

126. *Wagner v. Cnty. of Nassau*, 2014 WL 3489747, at *6 (E.D.N.Y. July 11, 2014).

127. *Id*. at *9.

128. *Hudson v. Guardsmark, LLC*, 2013 WL 6150776 (M.D. Pa. Nov. 22, 2013).

129. *Akerson v. Pritzker*, 980 F.Supp.2d 18 (D. Mass. 2013).