

Legal Briefings

Invisible Disabilities and the ADA

By Equip for Equality¹

When someone has an “invisible disability,” such as diabetes, epilepsy, mental health disabilities, traumatic brain injury, or HIV/AIDS, the “invisible” nature of the disability raises unique issues for both the employer and the employee. This legal brief will review the legal issues and court decisions when “invisible” disabilities are at issue. The focus of this legal brief will be on:²

1. Whether the condition constitutes a disability under the ADA as amended;
2. Medical inquiries, examinations, and disability disclosure;
3. Confidentiality;
4. Disabilities must be known by the employer to establish an ADA violation; and
5. Disability harassment.

I. Does the Condition Constitute a Disability Under the ADA?

The first question in any ADA case is whether the employee is a person with a disability under the ADA. This question is more liberally construed under the ADA Amendments Act of 2008 (ADAAA), which went into effect in 2009.³ The ADAAA provides greater protections for individuals with invisible disabilities due to several changes made in the law. These changes include: liberalizing the definition of disability, removing the requirement that mitigating measures be taken into account when assessing whether an individual has a substantial limitation, and adding additional major life activities including a separate category that includes “major bodily functions.” Congress’ primary focus in enacting the ADAAA was to make clear that the Supreme Court and lower courts had unduly narrowed the definition of disability and, as a result, many people with impairments that it had intended to be covered, had been deemed not to have an ADA disability.⁴

A. The ADAAA’s Definition of Disability

The ADAAA made several changes to the definition of disability under the ADA. The ADAAA contains numerous “Rules of Construction” to assist courts in their analysis of the definition of disability.

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These Rules of Construction include:

- The definition of disability is to be construed in favor of broad coverage to the maximum extent permitted;
- “Substantially limits” shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008 as the regulations defining the term “substantially limits” as “significantly restricted” proved too limiting;
- An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active, such as mental illness, HIV, cancer, epilepsy and diabetes; and
- Whether an impairment substantially limits a major life activity shall be made without taking into account mitigating measures (excluding ordinary eyeglasses and contact lenses).⁵

The ADA Amendments Act provisions regarding episodic conditions and mitigating measures are very important to people with invisible disabilities. Further, as most ADA cases had focused on an individual’s medical condition rather than on the alleged discrimination, Congress specifically stated that the issue of whether a person’s impairment constitutes an ADA disability should “not demand extensive analysis.”⁶

B. Major Life Activities

When the ADA was passed, Congress did not include specific examples of “major life activities” in the actual text of the ADA. In the ADA Amendments Act, Congress listed numerous specific examples while also making clear that this list is not exhaustive. Congress included the list of major life activities previously contained in EEOC Regulations and Guidance and added some additional major life activities. Major life activities relevant to people with invisible disabilities include:

- Concentrating and thinking;
- Caring for oneself;
- Lifting;
- Bending;
- Eating;
- Speaking;
- Sleeping;
- Breathing;
- Learning;
- Concentrating and thinking;
- Reading (not previously recognized by the EEOC);

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- Bending (not previously recognized by the EEOC);
- Communicating (not previously recognized by the EEOC).⁷

In addition, Congress listed a number of “major bodily functions” under the definition of “major life activities.” This is consistent with recent court decisions that have found that limitations of certain bodily functions have qualified as a disability under the ADA.⁸ Again, Congress has made clear that this is not an exhaustive list. The list of major bodily functions in the ADAAA follows with impairments that may involve the function listed parenthetically:

- **immune system:** (HIV/AIDS, auto-immune disorders, lupus);
- **neurological:** (multiple sclerosis, epilepsy);
- **normal cell growth:** (cancer);
- **brain:** (schizophrenia, developmental disabilities);
- **digestive:** (Crohn’s disease, celiac disease);
- **respiratory:** (asthma);
- **bowel:** (ulcerative colitis);
- **bladder:** (kidney disease);
- **circulatory:** (heart disease, high blood pressure);
- **endocrine:** (diabetes); and
- **reproductive functions:** (infertility).⁹

Indeed, this new category of major bodily functions in the ADAAA has made it significantly easier for individuals with invisible disabilities to show a substantial limitation of a major life activity. Among others, courts have found:

- Arterial conditions substantially limit the cardiovascular system¹⁰
- Kidney failure substantially limit the cleansing of the individual's blood and processing of waste¹¹
- Type II Diabetes substantially limits the endocrine function¹²
- Cancer substantially limits normal cell growth¹³
- HIV substantially limits the immune system¹⁴
- Heart disease substantially limits circulatory function¹⁵
- Irritable bowel syndrome substantially limits bowel functions¹⁶
- Graves’ Disease substantially limits immune, circulatory and endocrine functions¹⁷
- Multiple Sclerosis substantially limits normal neurological functions¹⁸
- Brain tumor substantially limits brain functions and normal cell growth¹⁹

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- Spinal stenosis, cervical disc disease, neural foraminal stenosis, and cervical radiculopathy substantially limit operation of the musculoskeletal system²⁰
- Removal of stomach and other parties of gastrointestinal system substantially limit bowel and digestive bodily functions²¹
- Post Traumatic Stress Disorder substantially limits brain function²²
- Hepatitis C substantially limits the immune system, digestive, bowel and bladder function²³
- Coronary disease substantially limits the cardiovascular system²⁴
- Sleep apnea substantially limits sleeping or breathing²⁵

II. Medical Inquiries, Examinations, and Disability Disclosure

When Congress enacted the ADA, it found that historically people with disabilities have been “subjected to a history of purposeful unequal treatment” in many areas including employment.²⁶ The ADA is unique among civil rights laws because it strictly prohibits certain inquiries and examinations. Specifically, Title I of the ADA bars employers from questioning about the existence, nature or severity of a disability and prohibits medical examinations until after a conditional offer of employment has been made.²⁷ Even once a conditional offer is made, the ADA provides certain restrictions and safeguards.²⁸

A. ADA Statutory Requirements Regarding Medical Inquiries and Examinations

The ADA differentiates between three stages of employment in determining what medical information may be sought by employers. At the pre-offer stage, the employer is only entitled to ask about an applicant’s ability to perform the essential functions of the job.²⁹ The ADA’s restriction against pre-employment inquiries reflects the intent of Congress, to prevent discrimination against individuals with “invisible” disabilities, like HIV, heart disease, cancer, mental illness, diabetes and epilepsy, as well as to keep employers from inquiring and conducting examinations related to more visible disabilities like people who are deaf, blind or use wheelchairs. The ADA’s prohibition against pre-employment questioning and examinations seeks to ensure that the applicant’s disability is not considered prior to the assessment of the applicant’s qualifications.

After a conditional offer is made, employers may require medical examinations and may make disability-related inquiries if they do so for all entering employees in that job category.³⁰ If an examination or inquiry screens out an individual because of a disability, the exclusionary criterion must be job-related and consistent with business necessity.³¹

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In addition, the employer must show that the criterion cannot be satisfied and the essential functions cannot be performed with a reasonable accommodation.³²

Once a person is employed, an employer may make disability-related inquiries and require medical examinations *only* if they are job-related and consistent with business necessity.³³ An employer can ask about the ability of the employee to perform job-related functions and may also conduct voluntary medical examinations, which are part of an employee health program.³⁴ The EEOC has stated that an employer may request medical information in response to a request for a reasonable accommodation, “when the disability and/or the need for accommodation is not obvious” as is usually the case with invisible disabilities.³⁵ The information sought by the employer can relate to “functional limitations” as an “employer is entitled to know that the individual has a covered disability for which s/he needs a reasonable accommodation.”³⁶

B. EEOC Guidance on Medical Inquiries and Examinations

Congress charged the EEOC with enforcing the statutory requirements of Title I of the ADA referenced above. Over the years, the EEOC has issued several documents that provide more in-depth analysis on disability related inquiries and medical examinations, including: ***Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations Under the Americans with Disabilities Act (1995)***; ***EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (2000)***; ***Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act***; and ***Fact Sheet: Job Applicants and the Americans with Disabilities Act (2003)***. All of these documents can be found on the EEOC’s website at www.eeoc.gov. Unlike other provisions of the ADA, the courts have generally been very deferential to the EEOC’s guidance on disability-related inquiries and medical examinations.³⁷ Additional information about disability-related medical inquiries can be found in the Great Lakes ADA Center legal brief on the this topic that is found at www.ada-legal.org.

In a document titled, “Questions And Answers: Enforcement Guidance On Disability-Related Inquiries And Medical Examinations Of Employees Under The Americans With Disabilities Act (ADA),”³⁸ the EEOC summed up its guidance regarding when an employer may make medical inquiries. In addition to the statutory information provided above, this Guidance provides more detail on some of the terms used in the statute. The Guidance provides the following information:

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What is a “disability-related inquiry”?

- A “disability-related inquiry” is a question that is likely to elicit information about a disability, such as asking employees about: whether they have or ever had a disability; the kinds of prescription medications they are taking; and, the results of any genetic tests they have had.
- Disability-related inquiries also include asking an employee’s co-worker, family member, or doctor about the employee’s disability.
- Questions that are *not* likely to elicit information about a disability are always permitted, and they include asking employees about their general well-being; whether they can perform job functions; and about their current illegal use of drugs.

What is a “medical examination”?

- A “medical examination” is a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual’s physical or mental impairments or health.

Are there any procedures or tests employers may require that would not be considered medical examinations?

- Yes. There are a number of procedures and tests that employers may require that are not considered medical examinations, including: blood and urine tests to determine the current illegal use of drugs; physical agility and physical fitness tests; and polygraph examinations.

When may an employer ask an employee a disability-related question or require an employee to submit to a medical examination?

- Generally, an employer only may seek information about an employee's medical condition when it is **job-related and consistent with business necessity**. This means that the employer must have a reasonable belief based on objective evidence that:
 - an employee will be unable to perform the essential functions his or her job because of a medical condition; or,
 - the employee will pose a direct threat because of a medical condition.

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- Employers also may obtain medical information about an employee when the employee has requested a **reasonable accommodation** and his or her disability or need for accommodation is not obvious.
- In addition, employers can obtain medical information about employees when they:
 - are required to do so by another **federal law or regulation** (e.g., DOT medical certification requirements for interstate truck drivers);
 - offer **voluntary** programs aimed at identifying and treating common health problems, such as high blood pressure and cholesterol;
 - are undertaking **affirmative action** because of a federal, state, or local law that requires affirmative action for individuals with disabilities or voluntarily using the information they obtain to benefit individuals with disabilities.

May an employer ask all employees what prescription medications they are taking?

- Generally, no. In limited circumstances, however, employers may be able to ask **employees in positions affecting public safety** about their use of medications that may affect their ability to perform essential functions and **thereby result in a direct threat**.

What may an employer do if it believes that an employee is having performance problems because of a medical condition, but the employee won't answer any questions or go to the doctor?

- The employer may discipline the employee for his or her performance problems just as it would any other employee having similar performance problems.

May employers require employees to have periodic medical examinations?

- No, with **very limited exceptions** for employees who work in positions affecting public safety, such as police officers, firefighters, or airline pilots. Even in these limited situations, the examinations must address specific job-related concerns. For example, a police department could periodically conduct vision tests or electrocardiograms because of concerns about conditions that could affect the ability to perform essential job functions and thereby result in a direct threat. A police department could not, however, periodically test its officers to determine whether they are HIV-positive, because a diagnosis of this condition alone would not result in a direct threat.

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While the ADA's provisions covering disability-related inquiries and medical examinations have not resulted in as much litigation as other provisions of the ADA, several interesting issues have been examined by the courts. Some of these cases are discussed below.

C. Pre-Employment Inquiries

Section 12112(d)(2) of the ADA prohibits employers from requiring applicants or employees to undergo medical examinations or answer disability-related inquiries prior to a conditional offer of employment. Several cases have examined this specific provision of the ADA:

1. Driver's License Requirement

In *McKereghan v. City of Spokane*, 2007 WL 3406990 (E.D. Wash. Nov. 13, 2007), the plaintiff's disability was almost "invisible" to the court as it was not disclosed in the complaint or specified except in one court filing where the plaintiff's impairment was identified as epilepsy. In *McKereghan*, the City of Spokane's employment application required the provision of either a driver's license or proof of equivalent mobility. Plaintiff did not have a license due to her disability and did not know how to satisfy the alternative requirement, as the City failed to provide her with an alternative form. She ultimately signed a letter stating that she had a driver for mobility and the City accepted this letter. After she did not receive the position, plaintiff sued the City, claiming it was using a qualification standard that elicits information about a disability that is not job-related in violation of the ADA. Accordingly, at issue was whether this requirement constituted a medical inquiry under the ADA. Another issue was whether the City's requirement screened out individuals with disabilities. The court ruled that the requirement for a driver's license or proof of equivalent mobility was not a medical inquiry under the ADA as it did not seek medical or disability-related information. The court found that the requirement actually broadened the class that could apply for positions with the city and that, while it would be a good business practice to have a standard "proof of equivalent mobility" form, failure to have such a form did not tend to screen out individuals with disabilities. For these reasons, the requirement was not a violation of the ADA.

2. Pre-employment Medical Examinations

Medical examinations and inquiries are allowed only after an employer extends a conditional job offer to an individual. As the cases below illustrate, an employer must acquire all non-medical information first, before extending a conditional job offer and seeking medical information. If this is not done and non-medical information is sought

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along with medical information, then courts have held that the alleged conditional job offer was not an actual job offer under the ADA.

Cases finding for the Employee

In ***EEOC v. Celadon Trucking Services, Inc***, 2015 WL 3961180 (S.D. Ind., June 30, 2015), the EEOC brought suit on behalf of individuals applying for truck driver positions. The EEOC alleged that the employer had a pattern or practice of regularly and purposefully subjecting the applicants to medical inquiries and examinations prior to being given a conditional job offer. The employer's written application contained health-related questions and required all applicants to undergo a medical exam. The employer did not deny these facts but rather asserted in its defense that the relevant provision of the ADA only applied to applicants who were "otherwise" qualified and suffered an "injury in fact." The court rejected both of these arguments. The court held that the ADA's provision restricting pre-employment inquiries and medical exams applied to *all* job applicants, regardless of qualification. The court also held that the EEOC had independent standing to bring the suit and did not need to rely on the class members' personal claims of injury. The employer finally attempted to argue that the application questions and the medical examination complied with the ADA because they were related to the applicant's ability to pass Department of Transportation certification and were therefore "job related and consistent with business necessity." However, the court found that one of the application questions was overly broad as it did not relate to an applicant's ability to do the job. It also held that a medical examination was *only* permissible after a conditional offer had been made.

In ***EEOC v. BNSF Railroad Co.***, 2016 WL 98510 (W.D. Wash. Jan. 8, 2016), the plaintiff underwent a post-offer, multi-step medical evaluation. During this process, the plaintiff disclosed a previous back injury. The employer then required that he undergo an MRI at his own cost. The plaintiff refused to do so and the employer withdrew his job offer. The court found that the employer regarded the plaintiff as having a disability and that the withdrawal was a direct result of the plaintiff's disclosure. The court held that this withdrawal constituted facial discrimination because "employers may withdraw conditional offers based only on the applicant's failure to meet standards that are job-related and consistent with business necessity."

In ***Henderson v. Borough of Baldwin***, 2016 WL 5106945 (W.D. Pa. Sept. 20, 2016), the plaintiff alleged that he was subject to a medical examination prior to being given a conditional job offer. The employer did not dispute this fact but instead argued that even if this was a violation of the ADA, the employee lacked standing to sue because he did not allege a cognizable injury. The Court found this argument unpersuasive, holding that

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“an injury need not be economic or tangible in order to confer standing” and a violation of the ADA occurs as soon as an employer conducts an unlawful medical examination or initiates a prohibited medical inquiry.

Cases finding for the Employer

Courts are split on if an employee must allege a tangible injury to bring an improper medical examination or inquiry claim. In ***Taylor v. Health*, 2017 WL 83493 (9th Cir. Jan. 10, 2017)**, the plaintiff was given a “conditional job offer” before the employer had obtained all non-medical information. The Ninth Circuit ultimately held that the plaintiff was not qualified for the position and granted summary judgment in favor of the employer. The court went on to hold that although the ADA “prohibit[s] medical examinations and inquiries until *after* the employer has made a ‘real’ job offer to an applicant,” this was not relevant because standing to bring suit “requires a concrete injury even in the context of a statutory violation.” Because the plaintiff was not qualified for the position, she could not demonstrate a concrete injury from the time of the medical exam.

Another issue is whether the employer conveyed a bona fide conditional offer of employment, as discussed in ***O’Neal v. City of New Albany*, 293 F.3d 998 (7th Cir. 2002)**. There, the court stated that if a job offer is conditioned not only on the applicant successfully passing a medical examination, but also a myriad of non-medical screening tests, then the offer is not real. However, in this case, the plaintiff, an individual with high blood pressure, had already completed all non-medical screening tests, and signed a statement of understanding entitled “conditional offer of employment.” Consequently, the court granted the summary judgment for the employer and dismissed the plaintiff’s ADA claims. The court noted that post-offer medical examinations are proper if given for “all entering employees... regardless of disability,” the information is “maintained on separate forms and in separate medical files and is treated as a confidential medical record,” and the information is used in a way that is job-related and consistent with business necessity.

In ***McDonald v. Webasto Roof Systems, Inc.*, 570 Fed. Appx. 474 (6th Cir. 2014)**, after granting a conditional job offer, the employer required the plaintiff to undergo a second medical examination after the first revealed pertinent medical concerns. The employer then rescinded the job offer when the second exam revealed a history of back injuries and a doctor declared the plaintiff unfit for duty. The plaintiff alleged that the employer violated the ADA by conducting more than one pre-employment medical examination. The court rejected this argument, finding that an employer can request “more medical information ... if the *follow-up examinations* or questions are medically

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related to the previously obtained medical information.” (internal citations omitted).

3. Personality Testing

Courts have held that medical examinations include psychological tests. Therefore, such tests will violate the ADA if given to an applicant prior to extending a job offer. For example, in an older case, ***Barnes v. Cochran*, 944 F. Supp. 897 (S.D. Fla. 1996), affirmed, 130 F.3d 443 (11th Cir. 1997)**, the court confirmed that the prohibition of medical examinations prior to a conditional offer of employment includes psychological examinations.

Although the ADA expressly prohibits medical examinations at the pre-employment stage, many employers administer “personality” tests ostensibly to obtain information about job applicants, such as honesty and temperament, as a way to determine whether the person would be a good hire. These tests have become widespread and a large number of employers administer some type of personality test as part of the application or promotion process. Mental health advocates oppose these tests because they can be used to identify psychiatric disabilities resulting in the screening out of people with certain diagnoses. Accordingly, some employers are using personality tests to obtain illegal disability-related information in a more indirect way. This then leads to the ultimate question: Is a personality test is considered a medical examination under the ADA?

To determine whether a particular test is a “medical” test for ADA purposes, the EEOC has identified the following seven factors:³⁹

- (1) whether the test is administered by a health care professional;
- (2) whether the test is interpreted by a health care professional;
- (3) whether the test is designed to reveal an impairment of physical or mental health;
- (4) whether the test is invasive;
- (5) whether the test measures an employee's performance of a task or measures his/her physiological responses to performing the task;
- (6) whether the test normally is given in a medical setting; and
- (7) whether medical equipment is used.

The most prominent case addressing the issue of whether a personality test is a medical test under the ADA is ***Karraker v. Rent-A-Center*, 411 F.3d 831 (7th Cir. 2005)**. In ***Karraker***, a group of current and former employees filed a class action alleging that the employer’s policy requiring employees seeking management positions

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to take the Minnesota Multiphasic Personality Inventory (MMPI) violated the ADA. Management applicants that had a certain score on the MMPI were automatically excluded from consideration. The plaintiffs alleged that the MMPI could identify conditions such as depression, paranoia, schizoid tendencies and mania. The trial court found that the test did not violate the ADA because it was used for “vocational” purposes to predict future job performance and compatibility rather than for “clinical” purposes. The plaintiffs appealed and the Seventh Circuit reversed holding that the MMPI is a test designed to diagnose mental impairments, and has the effect of hurting the employment prospects of people with mental illness, and thus, it is an improper medical examination that violates the ADA. The court held it was not dispositive that the employer did not use a psychologist or other health care professional to interpret the test. Rather, who interprets the test results is only one of seven factors identified by the EEOC that a court should consider when determining if a test is a medical examination under the ADA. The court further stated that “the practical effect of the use of the MMPI is similar no matter how the test is used or scored--that is, whether or not RAC used the test to weed out applicants with certain disorders, its use of the MMPI likely had the effect of excluding employees with disorders from promotions.”

In light of the court’s decision in *Karraker*, employers should be very cautious when using personality tests, especially the MMPI. Employers should determine whether there are less risky or more effective methods available for evaluating potential employees.

4. Wellness programs

Another developing and interesting issue presenting questions of medical privacy for employees with hidden disabilities is that of employee wellness plans. These plans often require employees to submit to medical examinations and inquiries in order to participate. Some of these plans are tied to employer-sponsored health insurance, while others are not. Employers often provide strong “incentives” for employees to participate in their wellness plans, including greatly reduced healthcare costs. And while the ADA imposes restrictions on certain medical examinations and inquiries, employers find limited exceptions to these restrictions by way of the ADA’s safe harbor provision and the “voluntary” nature of employee participation.⁴⁰

The EEOC recently litigated cases regarding wellness programs. In one such case, *EEOC v. Orion Energy Systems, Inc.*, 2016 WL 5107019 (E.D. Wis. Sept. 19, 2016), the EEOC settled with an employer after an employee whom it had terminated accused the employer of retaliating against her for complaining that the employer’s wellness program violated the ADA. Employees who opted out of this wellness plan were required to pay their entire monthly health insurance premium. After investigating the

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claim, the EEOC filed suit in a Wisconsin district court. The court dismissed cross-motions for summary judgment, and set the case for trial. In its ruling, the court found that the ADA safe harbor provision was inapplicable in these circumstances, but that the employer could still avail itself of the “voluntariness” exception in spite of the very strong financial incentives for its employees to join in the wellness program.⁴¹ The parties settled prior to trial, with the consent decree providing for a financial settlement for the employee in question, and with the employer agreeing to ensure that its wellness plans going forward would comply with the ADA’s voluntariness provisions, and that it would not retaliate against any employees raising concerns of this nature in the future.⁴²

The EEOC filed suit in a different Wisconsin federal district court in order to challenge another employer’s wellness program on ADA grounds. In ***Equal Employment Opportunity Commission v. Flambeau, Inc.*, 846 F.3d 941, 946 (7th Cir. 2017)**, the central issue was whether a wellness plan falls within the ADA’s safe harbor provision if it is part of the employer’s health insurance plan. The Seventh Circuit ultimately upheld the lower court’s ruling that this is so, dismissing the EEOC’s appeal on the narrow grounds that the claim was moot due to the complaining employee having since resigned his position.⁴³

More recently and significantly, the District Court for the District of Columbia vacated EEOC rules pertaining to wellness plans, in ***AARP v. United States Equal Employment Opportunity Commission*, 2017 WL 6542014 (D.D.C. Dec. 20, 2017)**, finding that the agency was moving too slowly in revising these rules per the earlier instruction of the court. In 2016, AARP filed suit seeking an injunction against a recently-adopted EEOC rule that permitted employers to impose penalties of up to 30% of the cost of coverage to encourage employees to disclose information that was protected under the ADA and the Genetic Information Nondiscrimination Act (“GINA”), without rendering such disclosures involuntary. In August 2017, the court agreed that the EEOC’s rulemaking process had been arbitrary, and sent the rule back to the agency for further revision. Finding the EEOC’s projected timeline for completing its revisions to be unacceptably slow, the court responded to AARP’s motion to alter or amend its earlier judgment by vacating the rule altogether, effective January 1, 2019.⁴⁴ As of the time this brief was written, it remained unknown whether the EEOC would complete its new rule prior to that date.

D. Fitness-for-Duty Tests

A similar issue involves fitness-for-duty tests. These tests may be given to job applicants after a conditional job offer is extended or to current employees if they are job-related and consistent with business necessity, such as when employees are returning from medical leave. One determinative factor may be the information that the

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test is measuring. Is the test measuring an employee's ability to perform a particular task, e.g., lifting 50 pounds, or is it measuring a physiological response that occurs during a task, e.g., measuring an employee's blood pressure or heart rate when lifting 50 pounds.

Cases finding for the Employer

In ***Barnum v. Ohio State University Medical Center*, 642 Fed. Appx. 525 (6th Cir. 2016)**, the university placed an anesthetist on sick leave pending the results of a fitness-for-duty examination. This examination was required after reports from numerous sources that the anesthetist was showing an inability to concentrate on caring for patients, an inability to perform at least one routine task, and had been making comments that suggested suicidal thoughts. The anesthetist submitted to the examination and was reinstated. She then brought suit claiming the university had regarded her as a person with a disability and discriminated against her in violation of the ADA by requiring her to take the fitness for duty examination. The court found that the examination was "job-related and consistent with business necessity" because a reasonable person would have questioned if, based on her behavior, the anesthetist was still capable of performing her job duties.

The court also found for the employer in another case involving employee threats. In ***Coursey v. University of Maryland Eastern Shore*, 577 Fed. Appx. 167 (4th Cir. 2014)**, the university removed a professor from campus and suspended him with pay pending an investigation into complaints from his students about violent outbursts, erratic and inappropriate behavior, and violations of school policies. During the investigation, the professor was often unresponsive, vague, and made comments about people being "out to get him." At this time, the dean recommended a mental health evaluation prior to reinstatement to determine the professor's fitness for duty. A faculty grievance board contradicted this recommendation, but the university continued to require the mental health evaluation. The professor refused to submit to the evaluation and was eventually terminated. The court found that the university did not violate the ADA when requiring this mental health examination, stating such an evaluation was job-related and consistent with business necessity. The court determined that while this must be assessed under an objective standard and the employer must "identify legitimate, non-discriminatory reasons to doubt the employee's capacity to perform his or her duties," the university met these obligations. As the professor was required to interact with students and faculty in a non-threatening manner, the complaints about violent and inappropriate behavior provided sufficient reasoning for the university to require the evaluation.

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Case finding for the Employee

In ***Doby v. Sisters of St. Mary of Oregon Ministries Corp.*, 2014 WL 3943713 (D. Or. 2014)**, the plaintiff was a teacher and an individual with Obsessive Compulsive Disorder (OCD). The plaintiff had previously been granted intermittent FMLA leave for days when the symptoms of her disability made her late for work or required her to stay home. After a coworker allegedly harassed the plaintiff, symptoms of her disability were triggered and she wrote three emails to human resources explaining the harassment and her concerns. Based on these emails, the plaintiff was placed on administrative leave and required to take a fitness-for-duty exam. The plaintiff refused to do so and was terminated. The court denied the employer's motion for summary judgment, finding that a genuine issue of fact existed as to whether a reasonable person would believe that the plaintiff's ability to perform the essential functions of her job were impaired. The court based this determination on a number of factors. It found that the employer had been exposed to similar emails in the past and had categorized them merely as reports of harassment. The court also pointed out that the plaintiff was not engaged in work that would be considered dangerous such that a psychological examination was justified. Finally, the court found the fact that the plaintiff was able to finish the school day without incident was evidence that her disability had not interfered with her ability to perform her job.

E. Drug Testing

Generally, company-wide drug tests are not considered medical examinations under the ADA. See *EEOC Guidance on Disability-Related Inquiries*. However, if the employer uses the test results in a way that screens out or tends to screen out individuals with disabilities, than the employer may be in violation of Section 12112(b)(6) of the ADA prohibiting "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity." In addition, the employer must show that the criterion cannot be satisfied and the essential functions cannot be performed with a reasonable accommodation. 42 U.S.C. §12111(8).

In ***Connolly v. First Personal Bank*, 2008 WL 4951221 (N.D. Ill. Nov. 18, 2008)**, a job applicant had a neck condition and was legally prescribed a controlled substance. She was conditionally offered employment pending passing a pre-employment drug test. When the test results showed the presence of the controlled substance, the bank

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rescinded its offer without allowing her to provide documentation that the positive test was for a substance she had obtained legally via a prescription. She then sued under the ADA. The employer sought to dismiss the case, but the court denied the employer's motion. Although pre-employment drug tests for illegal drugs do not violate the ADA, when the tests cover legally prescribed drugs and are used to make employment decisions beyond the prohibition of illicit drug use, then those tests can violate the ADA.

A similar result was reached in a case involving company-wide drug testing of sitting employees. In ***Bates v. Dura Automotive Systems, Inc.*, 767 F.3d 566 (6th Cir. 2014)**, employees were required to submit to drug testing because of concerns about illegal drug use in the workplace. As a result, several employees were removed from work because they failed initial drug screening tests due to their legal use of prescription drugs. Although these employees were not individuals with disabilities under the ADA, the Sixth Circuit held that was not necessary for an individual to claim that a medical inquiry violated the ADA.⁴⁵ The court based this determination on Congress' efforts to "curtail all questioning that would serve to identify and exclude persons with disabilities from consideration for employment." (internal quotation marks omitted). The court determined that the employer's policy went further than what the ADA's drug-testing exception permitted but did not clearly fit into the definition and examples established by the EEOC. As such, the court remanded the case for trial.

F. Limitations on Medical Information that May be Requested by the Employer

As noted above, the ADA limits the amount of information that an employer may require of employees to only information that is "job-related and consistent with business necessity."⁴⁶ EEOC Guidance notes that, this means that there must be a reasonable basis to believe that an employee is not qualified, poses a direct threat, or needs a reasonable accommodation. In response to a reasonable accommodation request, employers may request "reasonable documentation" about an individual's "disability and its functional limitations that require reasonable accommodation" in situations "when the disability or the need for the accommodation is not known or obvious..."⁴⁷ In addition, the Guidance notes that employers may not generally ask what prescription medications employees are taking.⁴⁸

Cases Finding for the Employer

The court found that the employer met ADA requirements in ***Leonard v. Electro-Mech. Corp.*, 36 F. Supp. 3d 679 (W.D. Va. 2014)**. In *Leonard*, the plaintiff had degenerate disc disease that caused him painful flare-ups. During some flare-ups the pain was mild and the employee only required short periods of rest but during others he would have to

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take FMLA leave for several days to receive steroid injections. The plaintiff was employed as a janitor and his job duties primarily involved manual labor. After one occasion of FMLA leave, the employer requested a note from the plaintiff's doctor confirming he was fit for duty. The doctor provided a note stating the plaintiff was fit for duty with no restrictions. However, when completing FMLA paperwork at a later date, the same doctor stated that the plaintiff could not perform his job duties when the symptoms of his disability flared up and that he would need to take leave when this happened. Shortly thereafter, the plaintiff told one of his supervisors that some of his job duties caused him pain and that he would need to take short breaks when this happened. After this statement, and the conflicting medical documentation from the plaintiff's doctor, the employer required that the plaintiff complete an independent medical examination (IME) before he could return to work. The plaintiff did not submit to the IME and did not maintain contact with his employer; he was eventually terminated. The plaintiff then sued under the ADA for an improper medical examination and inquiry and wrongful termination. The court granted summary judgment to the employer. It found that the employer's request for a medical examination was job-related and consistent with business necessity because the plaintiff's own admissions about his difficulties performing job duties and the conflicting medical documentation regarding his fitness for duty caused his employer to have a reasonable basis to believe that his disability would impair his ability to perform the essential functions of his job.

In *Flanary v. Baltimore Cty., Maryland*, 2017 WL 1953870 (D. Md. May 11, 2017) the court examined whether an employee could be required to undergo therapy as a condition of employment when they had been found fit for duty. The plaintiff was a police officer who had experienced work-related trauma. The plaintiff was taken off duty per policy and required to undergo a fitness for duty examination. The plaintiff was initially cleared to return to work but a few months later had an emotional reaction to an incident on the job that reminded her of the initial trauma. She was then required to undergo a second fitness for duty test. At this time, the doctor determined that the plaintiff was not fit to return to full duty and recommended that she be assigned to an administrative role and undergo therapy. The plaintiff did so and was later cleared to return to work. The plaintiff continued therapy and was eventually diagnosed with PTSD. Months later during her workers compensation hearing, the plaintiff was evaluated by doctors who determined her fit for duty. However, the plaintiff alleged during the trial that she was still having nightmares, flashbacks, trouble sleeping and concentrating, and was more irritable. Due to her testimony during the hearing, her employer required an additional fitness for duty exam. After this exam, the doctor concluded that the plaintiff did have PTSD and was at risk of her symptoms increasing if she was involved in another traumatic event. The doctor recommended additional therapy. As a condition to her continued employment, the employer then required the plaintiff to continue therapy. The court determined that due to the conflicting information

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from the doctors, and from the plaintiff's own testimony, that the employer reasonably believed that the symptoms of her PTSD might present safety or legal issues. The court held that an employer may require an employee to undergo therapy when it is "job-related and consistent with business necessity" and that the employer could require the treating physician to correspond with the employer about attendance and progress of symptoms. The court did note however, that police departments have greater leeway under the ADA's medical examination provision due to the unique job and safety responsibilities of a police officer.

Cases Finding for the Employee

In *Lewis v. Gov't of D.C.*, 282 F. Supp. 3d 169 (D.D.C. 2017), the court denied the employer's motion for summary judgment in a case where the plaintiff was required to disclose her alcohol and prescription-drug use. In this case, the city announced that the plaintiff's office was moving to another facility. As a condition to retaining employment during the move, the city required all staff to submit to a number of background tests, including a drug test. The staff was also required to disclose all medications they were on, or risk being terminated. The plaintiff refused to comply with this requirement and alleged she was retaliated against repeatedly for doing so and eventually terminated. The plaintiff then brought suit against the city alleging, in part, that she was subject to an improper medical inquiry under the ADA. In denying the employer's motion, the court noted that "[t]he business necessity standard is quite high, and is not to be confused with mere expediency" and that employer failed to establish beyond dispute that the medical inquires met this standard.

G. Disclosure and Qualified and/or Direct Threat Issues⁴⁹

Cases Finding for the Employer

The U.S. Supreme Court addressed the direct threat issue involving an individual with an invisible disability in *Chevron v. Echazabal*, 536 U.S. 73 (2002). In *Echazabal*, plaintiff was offered a job contingent on passing a medical examination. The examination revealed elevated liver enzymes and he was eventually diagnosed as having asymptomatic chronic active hepatitis C. Accordingly, his employer rescinded the employment offer on the basis that plaintiff would pose a direct threat to his own health and safety. The Supreme Court held that direct threat included "threat to self" and upheld the employer's decision not to hire Echazabal.

The employer was found to be in compliance with the ADA in *Parker v. Crete Carrier Corp.*, 839 F.3d 717 (8th Cir. 2016) when it stopped giving work to the plaintiff, a truck driver, for refusing to undergo a sleep study. The employer had a policy that required

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employees with a Body Mass Index (BMI) above 35 to get a medical examination to determine if they had sleep apnea. The employer instituted this policy based on recommendations of two advisory committees from the Department of Transportation's Federal Motor Carrier Safety Administration. These committees found a correlation between a high BMI and sleep apnea as well as the increased risk of accidents associated with tiredness deriving from sleep apnea. The plaintiff brought suit, alleging this policy violated the ADA because he had never been involved in an accident, had no history of sleep apnea, and the employer failed to do an individualized assessment of his need to undergo the medical examination.

The Eighth Circuit found that an individualized assessment is not always necessary and there may be circumstances where “[t]he ADA permits employers to require a class of employees to get medical exams.” When this is the case, the employer must show that its reasons for defining the class are consistent with business necessity. It can do so “by showing a ‘reasonable basis for concluding’ that the class poses a genuine safety risk and the exam requirement allows the employer to decrease that risk effectively.” The court found that the employer’s policy was based on the established correlation between a high BMI and sleep apnea as well as the increased risk of motor vehicle accidents in individuals with untreated sleep apnea. As such, the employer’s policy was job related and consistent with business necessity as it had a reasonable basis for concluding the plaintiff posed a genuine safety risk.

In ***McLane v. Sch. City of Mishawaka*, 2017 WL 430843 (N.D. Ind. Feb. 1, 2017)**, a groundskeeper was observed by his employer as unable to do the essential functions of his position, i.e. lifting, walking, bending. The employer required a job site analysis which concluded that the employee was at risk of injuring his back on the job. The employee was then transferred to a hall monitor position and he later filed an ADA lawsuit. The court ruled in favor of the employer, finding that the employee posed a direct threat to himself in light of the potential risk of injury. The court rejected the employee’s argument that he did not pose a direct threat because he had not yet been injured on the job. It found that there was still a risk of future injury and that it would have been irresponsible for the employer to allow him to continue working in the groundskeeper position after receiving the results of the job site analysis.

In ***Michael v. City of Troy Police Dep’t*, 808 F.3d 304 (6th Cir. 2015)**, a police officer with a brain tumor began engaging in aberrant behavior. After undergoing brain surgery, the police department would not let him return to work until he passed a psychiatric examination. The employer’s and employee’s doctors had conflicting opinions about the employee’s fitness for duty and he was not allowed to return to work. The court found that employer’s reliance on its own doctor’s opinion was sufficient as the ADA only

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requires an employer to rely on an “objectively reasonable opinion” rather than a “correct opinion.” The court also found that an employer can rely on non-medical information, such as the employee’s aberrant behavior, when assessing direct threat.

If an employer does an “individualized assessment” of an individual’s disability, and finds that the individual’s condition causes a “direct threat,” it may be justified in terminating or refusing to hire the individual. For example, in ***Darnell v. Thermafiber, Inc.*, 417 F.3d 657 (7th Cir. 2005)**, a Seventh Circuit case involving an individual with insulin dependent Type 1 diabetes, the plaintiff admitted that his diabetes was not under control. As a result, the court affirmed summary judgment for the employer after it refused to rehire the job applicant. Before applying for employment, the plaintiff had worked for Thermafiber as an Operator through a temporary placement agency from October 2000 through May 2001. The position requires working around heavy machinery in extremely hot conditions. Before starting work, the plaintiff passed a pre-employment physical given by a “nurse practitioner.” In April 2001, the plaintiff applied for employment directly with Thermafiber. While working there, he had not had “any debilitating episodes... related to his diabetes.”

When the plaintiff applied in April 2001 for direct hire, he was required to undergo a pre-employment physical with a physician consisting of “a urine glucose test and interview.” Based on these two procedures, Thermafiber’s physician, “whose practice includes 180 diabetes patients,” determined that [the plaintiff’s] “diabetes was not under control; as a result he felt there was no need to conduct further tests or review [his] medical chart.” The physician was “shocked” by the plaintiff’s “disinterest” in his condition and concluded that his uncontrolled diabetes rendered him unqualified for the position as he posed a “direct threat.” The doctor based the conclusion on his belief that the risk of harm was “significant,” and that there was “a very definite likelihood” that “harm could occur.” The doctor stated that it was “a reasonable medical certainty that [the plaintiff] would pass out on the job ... sooner or later”

The plaintiff argued that this limited examination did not constitute an “individualized assessment,” that he did not pose a “direct threat” as he has not experienced any hypoglycemic events, and that Thermafiber failed to investigate or provide reasonable accommodations such as “additional food and water breaks.” The court did not agree with any of the plaintiff’s arguments stating, “where the plaintiff’s medical condition is uncontrolled, of an unlimited duration, and capable of causing serious harm, injury may be considered likely to occur.” The court noted that Thermafiber’s physician assumed that the requested accommodations would be in place. The court found that harm was likely even though the plaintiff worked safely on the job for ten months.

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Cases Finding for the Employee

The U.S. Court of Appeals for the Fifth Circuit came to a different conclusion in a case involving an individual with allegedly uncontrolled Type II diabetes. In ***Rodriguez v. ConAgra Grocery Product Co.*, 436 F.3d 468, 479 (5th Cir. 2006)**, the court held that the fact that the diabetes was not controlled was irrelevant as the employer did not conduct an independent, individualized assessment and based its decision on generalizations and false beliefs. The court distinguished this case from other cases involving uncontrolled diabetes by noting that this case involved an impairment that was “regarded as” being substantially limiting even though it was actually was not so limiting. Therefore, the court concluded that, “applying the supposed ‘failure to control’ rule in a ‘regarded as’ case just makes no sense.”⁵⁰

Rodriguez demonstrates that employees with invisible disabilities may be found to be unqualified once the disability is disclosed, not based on an individualized assessment, but rather due to stereotypes and misperceptions regarding their disability. Another case that demonstrates this is ***EEOC v. Kyklos Bearings Int'l, LLC*, 2015 WL 1119949 (N.D. Ohio Mar. 11, 2015)**. Upon starting her job with the employer, the plaintiff was in remission from breast cancer. The plaintiff’s position had a 50 pound lifting requirement and she was determined fit for duty after undergoing a post-offer medical examination. However, after an incident where the plaintiff asked for assistance moving products, a practice the plaintiff alleged was common among her coworkers, the plaintiff was required to undergo a fitness for duty exam. During this exam, the employer’s doctor failed to perform a meaningful evaluation of the plaintiff’s ability to do her job and instead, imposed a 7-pound lifting restriction upon learning of her history of breast cancer. The plaintiff then provided documentation from two doctors, including her treating doctor, clearing her to return to work without restrictions. The employer rejected this documentation, claiming it only needed to rely on the assessment of its own doctor. The plaintiff was then terminated. The employer alleged that she had misrepresented her medical condition and would not have been hired if the condition had been known. The court held the ADA mandated an individualized inquiry in this case as the employer regarded the plaintiff as having a disability. In order to comply with the individualized inquiry requirement, the employer must evaluate “*the individual’s actual medical condition*” and any impact that may have on the employee’s ability to perform their job. (internal citations omitted). The court determined that the employer failed to conduct an individualized inquiry and that a rational jury could find that the plaintiff was terminated based on a condition she did not have “and as to which there was no basis, much less a rational basis, for concluding she did have.”

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Similarly, in ***EEOC v. M.G.H. Family Health Ctr.*, 230 F. Supp. 3d 796 (W.D. Mich. 2017)**, the plaintiff was granted a conditional offer subject to a medical examination completed by a third party medical examiner. The plaintiff began her employment prior to undergoing the medical examination and performed her job successfully for five weeks. After the completion of the medical exam, the third party medical examiner placed a medical hold on her employment due to previous injuries, recommending she undergo a functional capacity evaluation. In lieu of the evaluation, the employer allowed the plaintiff to provide a note from her doctor indicating that she was medically fit for duty without restrictions. Despite this, the employer terminated her employment, citing the medical hold. The court found that the employer could not insulate itself from liability by its reliance on the medical examiner's assessment. It held, "[e]mployers do not escape their legal obligations under the ADA by contracting out certain hiring and personnel functions to third parties" and that an individualized inquiry is required to determine if a disability or condition would disqualify an employee. (internal citations omitted).

In ***EEOC v. American Tool & Mold, Inc.*, 21 F. Supp. 3d 1268 (M.D. Fla. 2014)**, the plaintiff disclosed his prior back injury and surgery in a pre-screening medical questionnaire. Despite not knowing the essential function of the position, the employee's doctor deemed him unfit for duty and refused to conduct any further examination. The plaintiff obtained an examination from an independent doctor who deemed him fit for duty, but the employer still withdrew the offer of employment. The court found that the employer did not perform an individualized assessment into the plaintiff's ability to do the job and consequently, there was no basis to declare him unqualified or a direct threat.

In the case of ***Menchaca v. Maricopa Comm. Coll. Dist.*, 595 F.Supp.2d 1063, (D.Ariz. January 26, 2009)**, the court did disagree with the employer's conclusion that the employee was not qualified. The court stated that the employer did not sufficiently explore the possibility of reasonable accommodations such as a job coach, as suggested by the employee. The court also found for the employee on the issue of whether the employee's outburst constituted a "legitimate, non-discriminatory" for the termination. The Ninth Circuit found for the employee on this issue as it has a rule "that conduct resulting from a disability is considered to be part of the disability and is not a separate basis for termination." The court then found that this isolated outburst did not constitute an "egregious and criminal" action necessary to justify an exception to the Circuit's rule.

III. Confidentiality Issues

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Section 12112(d)(3)(B) of the ADA requires information obtained about the medical condition or history of an applicant to be collected and maintained on separate forms, kept in separate medical files, and treated as a confidential medical record. EEOC Guidance further explains that this applies to:

Medical information obtained from a disability-related inquiry or medical examination (including medical information from voluntary health or wellness programs), as well as any medical information voluntarily disclosed by an employee (Internal citation omitted).

Medical information may only be shared by employers “in limited circumstances with supervisors, managers, first aid and safety personnel, and government officials investigating compliance with the ADA.”⁵¹ While there have been relatively few reported decisions on this provision of the ADA, the following cases provide some additional analysis and show the importance of keeping medical information confidential.

A. Confidentiality Regarding the Disability

Cases Finding for the Employer

The ADA provides that confidential information may be shared with individuals who need to know the information. In ***Dillon v. Norfolk S. Ry. Co.*, 35 F. Supp. 3d 896 (E.D. Mich. 2014)**, the plaintiff was subject to a medical examination and a medical history questionnaire after being offered a conditional job offer. He was cleared for employment based on the information provided in the medical exam and questionnaire. Years later, the plaintiff took a medical leave of absence and provided medical documentation to support his fitness for duty upon return to work. At this time, the employer discovered that the plaintiff had failed to disclose a previous injury during his initial medical history questionnaire. In order to determine if disciplinary action should be taken, the employer disclosed this information to its Labor Relations Board, the plaintiff’s supervisors, and during the disciplinary hearing. The plaintiff was eventually terminated. The plaintiff brought suit, alleging that his employer violated the confidentiality provision of the ADA. In its defense, the employer asserted that the disclosure was necessary to evaluate if disciplinary action should be taken. The court found that the employer’s disclosure was allowed under an exception to the ADA’s confidentiality provision as “decision makers may have access to an employee’s medical information for the purpose of making an employment decision *consistent* with the ADA.”

The EEOC interprets the confidentiality provision to apply to medical information even if it is voluntarily disclosed. (See *EEOC Guidance on Disability-Related Inquiries* cited

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above.) However, some courts have taken a more restrictive view. In ***Sheets v. Interra Credit Union*, 671 F. App'x 393 (7th Cir. 2016)**, after his employer expressed concerns about his ability to do his job, the plaintiff voluntarily signed a release that allowed his employer access to his medical records. This information was later disclosed to some members of management in order to address issues with the plaintiff's work. The district court held that the employer did not violate the confidentiality provisions of the ADA because the employee voluntarily disclosed his medical information. The Seventh Circuit affirmed the district court's ruling, asserting that the ADA "allows disclosure to supervisors and managers for the purpose of ascertaining necessary work restrictions and accommodations." The court further held that this disclosure issue did not matter as there was no indication that the plaintiff suffered any harm from the disclosure.

The voluntary disclosure issue was also discussed in ***Perez v. Denver Fire Dep't*, 2018 WL 739380 (10th Cir. Feb. 7, 2018)**. In *Perez*, an individual with PTSD deriving from military service was employed as a firefighter. After having an emotional reaction to events on the job, the plaintiff disclosed to his supervisors and coworkers that his reaction was related to events he had experienced during his military service and that he was currently receiving treatment at the VA; the plaintiff has no memory of stating that he has PTSD. The plaintiff's employer later had him undergo a fitness for duty evaluation and told his coworkers that the plaintiff had PTSD and was being evaluated. The Tenth Circuit upheld the district court's decision finding that the plaintiff failed to provide evidence that his employer disclosed information that was derived from a medical exam or inquiry. The court further held that "an employer can't be liable for disclosing medical information that the employee voluntarily disclosed outside of a medical examination."

Cases Finding for the Employee

In ***McCarthy v. Brennan*, 230 F.Supp.3d 1049 (N.D. Cal. 2017)**, an employee on the autism spectrum, who worked for postal service, was required to take a fitness for duty examination, the results of which contained personal, confidential information about his medical history and diagnosis. The employee was eventually cleared for duty without the need for accommodations. However, the examination report was made available to all of the plaintiff's supervisors. One of the supervisors, who had a history of animus towards people with disabilities, referenced the contents of this examination in letters complaining about the plaintiff to the Letter Carriers' Union, the Postmaster, and the human resources manager. The supervisor also made discriminatory comments about the plaintiff's disability in front of co-workers and took a number of adverse actions against him, including termination. Despite being aware of the unauthorized access to the plaintiff's confidential medical records, the post office took no corrective action. The

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court held that the content of a fitness-for-duty examination is confidential information protected from unnecessary disclosure under the ADA. The court also found that the plaintiff sufficiently alleged that the disclosure led to a tangible injury when the plaintiff was terminated.

In *Hoffman v. Family Dollar Stores, Inc.*, 99 F. Supp. 3d 631 (W.D.N.C. 2015), the plaintiff was an individual with HIV. The plaintiff alleged that after disclosing his HIV status to his manager to excuse an absence related to his disability, his manager disclosed his disability to coworkers and customers. The court held that the ADA confidentiality provision prohibits the disclosure of medical information obtained through a medical inquiry, such as a doctor's note excusing an employee for missing work. Consequently, the court denied the employer's motion to dismiss, finding that the plaintiff's allegations drew a reasonable inference that the employer could have violated the ADA's confidentiality provisions.

Inadvertent or careless disclosure is also prohibited by the ADA. In *Cripe v. Mineta*, 2006 WL 1805728 (D.D.C. June 29, 2006), the attorney of an employee with HIV sent a letter to the employer regarding work accommodations. The employer failed to keep the letter confidential (the letter was sitting on a desk without an envelope) and, as a result other employees learned of the plaintiff's HIV status. The court rejected the employer's argument that the information did not have to be protected since it was not marked as confidential.⁵²

B. Confidentiality Regarding Accommodations

If an employer unnecessarily divulges that an individual with a disability is receiving a reasonable accommodation, this may be tantamount to the disclosure of the medical condition itself. EEOC Enforcement Guidance explains that employers may only disclose reasonable accommodations to co-workers on a "need-to-know basis." Otherwise, an employer may only respond to co-worker questions about accommodation issues by saying that it is acting for legitimate business reasons or in compliance with federal law.⁵³ The EEOC suggests that providing all employees with background information about the ADA and confidentiality rights may be helpful. Further, EEOC Guidance on Reasonable Accommodation states that an employer:

May not disclose that an employee is receiving a reasonable accommodation because this usually amounts to a disclosure that the individual has a disability. The ADA specifically prohibits the disclosure of

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medical information except in certain limited situations, which do not include disclosure to coworkers.⁵⁴

Employers may respond to co-worker inquiries “by emphasizing its policy of assisting any employee who encounters difficulties in the workplace” and emphasizing that all workers’ privacy is respected in such situations.⁵⁵

Case Finding for the Employer

There are few federal court cases discussing this important issue. One case that did discuss this issue was brought by the EEOC. In ***EEOC v. ESAB Group, Inc.*, 208 F.Supp.2d 827 (N.D. Ohio February 19, 2002)**,⁵⁶ the employer posted a schedule available to the “human resources department and those with a ‘need to know.’” Designations such as “ADA” (for employees “working with accommodation schedule according to physician),” and “DIS” (indicating a “non-occupational disability”) were contained in the schedule. One employee with diabetes, Stowers, was receiving an accommodation of a fixed shift and began being harassed as co-workers felt he was “receiving preferential treatment.” The co-workers made threats of violence and referred to Stowers’ “ADA” designation as “American Dick head Association.” In addition, a company nurse disclosed Stowers’ condition to one of his co-workers. The employer argued that it did not violate the ADA as:

The confidentiality requirements of the ADA are limited to information obtained in three situations that are not applicable here: (1) medical information regarding a job applicant obtained through a permissibly required preemployment medical exam; (2) medical information obtained through a voluntary exam that is part of an employee health program, or; (3) information obtained through inquiries by the employer into an employee's ability to perform job-related functions.

The court agreed with the employer, seemingly contrary to EEOC Guidance referenced above requiring that medical information voluntarily disclosed be kept confidential.

EEOC Guidance on confidentiality was also not followed in ***Ross v. Advance America Cash Advance Centers, Inc.*, 605 F.Supp.2d 1025 (E.D.Ark. March 24, 2009)**. In *Ross*, an employee disclosed his bipolar disorder to his supervisor in connection with a request for an adjusted schedule. The supervisor then disclosed the condition to another employee. In the case, Ross did not raise the confidentiality issue but rather claimed that she was retaliated against for complaining about the disclosure, which she considered unlawful. While the employer admitted the disclosure violated company

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policy, the court held that Ross did not offer any evidence to show that the disclosure violated the ADA. The court stated that the disclosure was “ill-mannered,” but “there is nothing in the ADA that requires, or could reasonable be read to require, that the employer keep that information secret from other employees.”

In ***Tidwell v. IMPAQ Int'l, LLC*, 2017 WL 121771 (D. Md. Jan. 12, 2017)**, an employee with a mental health disability and glaucoma, requested a number of reasonable accommodations. His employer agreed to provide many of the requested accommodations, including an ergonomic chair. However, the employee alleged that his confidentiality was breached when a supervisor placed a sign on his chair reserving it for “Ergonomic Reasons When Working”, arguing that his coworkers would know that the word “ergonomic” indicated a disability. The court rejected this argument, finding that the definition of the word “ergonomic” does not inherently have an association with a disability and that the employee failed to plausibly allege that the employer disclosed his disabilities in violation of the ADA.

In ***Sheriff v. State Farm Insurance Co.*, 2013 WL 4084081 (W.D. Pa. Aug. 13, 2013)**, the plaintiff was an individual with bipolar disorder who utilized the defendant, an employment agency, to find employment. An agent of the defendant found out about the plaintiff’s disability from her previous employer and disclosed this information to the plaintiff’s potential employers. The agency defended this disclosure, asserting that it did not violate the ADA because 1) the plaintiff was not an employee of the agency, and 2) the agency did not obtain the disability-related information through a medical examination or inquiry. The court ruled in favor of the agency. It found that the plaintiff was not the agency’s employee and that the ADA’s confidentiality requirement only protects an employee from disclosure of disability-related information. The court also found that even though the information was not voluntarily disclosed by the plaintiff, the agency did not obtain the information through a medical exam or inquiry and therefore it was not protected disability-related information.

Cases Finding for the Employee

In ***McLean v. Delhaize Am.*, 2013 WL 1632646 (D. Me. Mar. 27, 2013)**, the plaintiff requested leave for his substance abuse and mental health issues. The plaintiff claimed that management later disclosed this information to his coworkers. This caused significant distress for the plaintiff and he was unable to return to work. The court denied the employer’s motion to dismiss, finding that the plaintiff sufficiently alleged an ADA claim based on the impermissible disclosure of his medical information. The court also found that the plaintiff sufficiently pled that the disclosure adversely affected the terms of his employment as it made him emotionally unable to return to work.

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In ***EEOC v. Teamsters Local 804***, 2006 WL 988138 (S.D.N.Y. April 12, 2006), a case brought by the EEOC against a union, it was alleged that the union disclosed to a “disgruntled employee” that a co-worker had AIDS. The union allegedly became aware of the employee’s condition as part of a job transfer process and the information was submitted at the employer’s (UPS) request. The employee did disclose in the workplace that he had lymphoma and was undergoing chemotherapy, but never disclosed the fact that he was living with AIDS. The union claimed that UPS did not inform it of the employee’s AIDS and the court indicated that this was a question of fact for a jury. It was also a question of fact for the jury as to whether the disclosure took place at all or whether the co-worker learned of the condition through other sources. The court held that the disclosure may violate the ADA if it occurred as alleged and denied the defendant’s motion for summary judgment although the judge surprisingly indicated “it pains [him] to do so.” The court mentioned that the case posed an interesting legal question: whether the ADA imposes an identical duty of confidentiality not only on the employer... but also on all third-party entities with whom the employer shares the information?” However, the court declined to rule on this issue as it believed “there are good reasons for not reading the statute as expansively as the EEOC requests.” Interestingly, in a rare move for a written decision, the court strongly encouraged that the parties try to settle the case “In light of the limited monetary exposure and the complex questions that must be resolved on this imperfect record...”

Two cases decided by the EEOC in situations involving federal employees discussed the issue of disclosure of a reasonable accommodation to co-workers. In ***Williams v. Astrue (SSA)***, 2007 EEO PUB LEXIS 4206 (EEOC 2007), the EEOC stated that, when responding “to a question from an employee about why a coworker is receiving what is perceived as ‘different’ or ‘special’ treatment,” the employer might explain “that it has a policy of assisting any employee who encounters difficulties in the workplace,” and that “many of the workplace issues encountered by employees are personal, and that, in these circumstances, it is the employer’s policy to respect employee privacy.”

Another EEOC decision provides additional guidance. In ***Dozbush v. Mineta (DOT)***, 2002 EEO PUB LEXIS 484 (EEOC 2002), the EEOC ruled that it was not unlawful for an employer to disclose to co-workers that an employee was “medically disqualified” from performing certain duties. The EEOC distinguished this as a disclosure of “work status” that can relate to reasons unrelated to disability. The EEOC noted that information of a diagnosis or symptoms must still be kept confidential.

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C. Confidentiality of Medical Information from Doctors

In addition to the EEOC Guidance noted above, the guidance also provides:

Since a doctor cannot disclose information about a patient without his/her permission, an employer must obtain a release from the individual that will permit his/her doctor to answer questions. The release should be clear as to what information will be requested. Employers must maintain the confidentiality of all medical information collected during this process, regardless of where the information comes from.⁵⁷

Case Finding for the Employer

The relationship between a company doctor and the employer was at issue in ***Barger v. Bechtel BWXT Idaho LLC*, 2008 WL 4411441 (D. Idaho Sept. 25, 2008)**. In *Barger*, plaintiff was an individual with stress-related issues including anxiety and insomnia. Barger's employment was terminated after his employer required him to see a company physician who later recommended discharge to the Personnel Action Advisory Group. The court held that the employer did not violate the ADA when the company physician disclosed the plaintiff's exam results because the physician only shared general job-related observations and the ADA allows an exception when supervisors must be informed of necessary restrictions on duties of the employee.

Case Finding for the Employee

In ***EEOC v. W. Trading Co.*, 2012 WL 1460025 (D. Colo. Apr. 27, 2012)**, the plaintiff experienced a seizure while at work and was hospitalized. Prior to returning to work, his employer requested medical documentation of his disability and fitness for duty. The plaintiff was eventually terminated and brought a number of complaints against his employer, including a failure to keep his medical documentation confidential. The plaintiff alleged his employer stated that all employee records, including medical records, were kept in the same file. He also pointed to evidence that the medical records his employer provided to the EEOC were mixed with personnel records. The court held that the ADA requires medical records to be kept in a separate file and that the plaintiff provided sufficient evidence to deny the employer's motion for summary judgment as to the confidentiality violation.

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IV. Disabilities Must be Known to the Employer to Establish an ADA Violation

Generally, employers will not be found liable under the ADA if they had no knowledge of an employee's disability. This is true whether the issue involves a failure to accommodate or another type of adverse employment action.

A. Disclosure and Reasonable Accommodations

Employees are under no legal obligation to disclose an invisible disability, unless they are requesting a reasonable accommodation. Because employers are only responsible for accommodating known disabilities, employees must disclose their disability when making a reasonable accommodation request. In requesting accommodations, employees with invisible disabilities should let the employer know of the existence of a disability, identify the limitations that result from the disability, and try to identify possible accommodations, if possible. See *EEOC Guidance on Reasonable Accommodation and Undue Hardship*. The request does not need to be written or expressed formally as long as the individual (or his/her representative) informs the employer know "an adjustment or change at work for a reason related to a medical condition" is needed.⁵⁸ It is considered a best practice, however, to make a reasonable accommodation request in writing.

Cases Finding for the Employer

The court discussed the importance of disclosure in cases involving people with invisible disabilities in ***Cordoba v. Dillard's, Inc.*, 2003 WL 21295143 (M.D.Fla. February 24, 2003)**. The court in *Cordoba* stated:

Unlike gender or racial discrimination statutes, the ADA does not presuppose that the employer is always aware that the employee belongs to the protected category known as "the disabled." In many instances, ... the putative disability is generally invisible to the naked eye.

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Therefore, the court stated that plaintiffs must “show by a preponderance of the evidence that their employers... knew of their disabilities” to establish a claim of discrimination. The plaintiff must produce “probative evidence of Defendant's actual knowledge of [a] disability” in order to establish an ADA violation. The *Cordoba* court found for the employer as there was “serious reason to doubt even that Plaintiff considered herself to be disabled at any time during her tenure at Dillard’s.” While plaintiff realized “she was ill,... it does not follow from this that she regarded herself as statutorily disabled.” The court noted that plaintiff’s request for reduced hours was based “on her own judgment, not the advice of a physician.”

As to the issue of what evidence establishes employer knowledge of a disability, the court stated that Plaintiff’s disclosure to “low-level employees” did not create a finding that the employer had “constructive knowledge” of a disability. As the employee was terminated for “gross insubordination” and as the employer was unaware that the employee had an ADA disability, the court held that the employer was not liable for ADA discrimination.

This reasoning is followed in many other cases. In *Jarman v. Jostens, Inc.*, 2016 WL 5868509, (M.D. Tenn. Oct. 7, 2016), the plaintiff had a skin condition that required intermittent FMLA and ADA leave during flare ups. Eventually the plaintiff’s doctor identified that her skin condition could be exacerbated by certain chemicals used in printer ink. The plaintiff then asked her employer if the printers in the office used the identified chemicals; she did not express that this inquiry was related to her disability. The employer discovered that one of the problematic chemicals was used in the office printers but did not relay this information to the plaintiff. The plaintiff brought suit alleging that her employer had record of her disability and should have offered her an accommodation. The court held that the plaintiff never requested a reasonable accommodation and that “an employee's giving her employer her medical records is not sufficient to establish the initial burden of requesting a reasonable accommodation.”

In *Keeler v. Florida Department of Health*, 2009 WL 1111551 (11th Cir. Apr. 27, 2009), plaintiff claimed that her former employer failed to accommodate her mental health disability and then terminated her employment in violation of the ADA. Plaintiff had asked her employer to transfer her to another position, claiming that her current position was too stressful and overwhelming. Her employer denied her request and said that she was “doing fine” in her current position. During a subsequent meeting, she “broke down” and started to cry. During the week after this meeting, she was reprimanded twice; once for working late without approval and once for failing to complete her assigned tasks in a timely manner. After these incidents, Keeler disclosed to her employer that she was diagnosed with Attention Deficit Hyperactivity Disorder and Obsessive Compulsive Disorder. Prior to these events, she had not told her

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employer about her hidden impairments. The plaintiff was terminated from her position shortly after the disclosure. She sued under the ADA and argued that her employer failed to accommodate her disability when it refused to transfer her to a new position. The court held that the employer did not violate the ADA because it did not know about her alleged impairments when it denied her request. She did not reveal her disability until after the employer made its decision. She argued that her behavior – complaining about how stressful her job was and crying during a meeting – should have put her employer on notice on her disability. The court found that these behaviors were not sufficient to put the employer on notice because they did not suggest that she was substantially limited in a major life activity.⁵⁹

In ***Walz v. Ameriprise Financial, Inc.*, 779 F.3d 842 (8th Cir. 2015)**, the plaintiff had bipolar disorder but never disclosed her disability to her employer. As a result of symptoms of her disability, the plaintiff exhibited erratic and disturbing behavior. The plaintiff's supervisor discussed the behavior with her on a number of occasions and eventually issued a discipline. Shortly thereafter, the plaintiff took FMLA leave which was granted through a third-party provider. Upon returning to work, the disruptive behavior continued and the plaintiff was eventually fired for repeated misconduct. The plaintiff brought suit, alleging that her erratic behavior and use of FMLA leave should have notified her employer of her medical issue and that her employer should have forced her to take leave. The court held that "an employer is not liable for its failure to accommodate an employee who made no request for an accommodation." It determined that the plaintiff never requested an accommodation and declined to hold that a duty exists for an employer to guess an employee's disability and force them to take leave.

In ***Freadman v. Metropolitan Property and Casualty Insurance Co.*, 484 F.3d 91 (1st Cir. 2007)**, the First Circuit ruled in favor of an employer because an employee was not sufficiently specific in her request for an accommodation. The plaintiff had ulcerative colitis, for which she had received accommodations in the past. She alleged that when her symptoms returned, she told her supervisor that she was working too much and needed time off because she was "starting not to feel well." She claimed that her employer told her to wait until she finished an important upcoming presentation. Finding the presentation unsatisfactory, her employer terminated her. The court held that an employee has the burden to be specific regarding an accommodation request. The employer's awareness of the plaintiff's condition allowed an inference that her request for time off was linked to her colitis. The vagueness of her statement, however, did not constitute a request for an accommodation. It was not "sufficiently direct and specific" because it did not indicate exactly when she would need time off.

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In ***Estades-Negroni v. Associates Corp. of North America***, 377 F.3d 58, 64 (1st Cir. 2004), the court held that the employer did not violate the law when it denied an employee's request for a reduced workload prior to the employee being diagnosed with depression. The court noted that there was no evidence that the depression was evident at the time of the request.

In ***Amon v. Union Pacific Distribution Services Co.***, 2015 WL 1396663 (D. Neb. Mar. 26, 2015), an employee with depression, anxiety, and a mood disorder missed work when experiencing symptoms of his disability. He was terminated after refusing to return to work. The employee alleged that his employer should have been on notice of his disability because he had once taken short term disability (STD) leave and because he told his employer he would explain the "condition" necessitating his current leave upon his eventual return to work. However, the employee categorized this leave to his employer as "vacation leave" and denied being sick when asked. Further, the employee's STD leave had been processed through a third-party company and his employer was only notified that the STD had been approved, not the reason behind the need for leave. The court found that the employee presented no evidence that his employer was aware of his disability such that his termination could have been related to his disability.

Similarly, in ***Arroyo-Flores v. IPR Pharm., Inc.***, 2017 WL 944194 (D.P.R. Mar. 9, 2017), an employee with depression alleged that his employer failed to provide reasonable accommodations. The employee had received a number of disciplines and negative performance evaluations and was eventually suspended. Prior to his suspension, the employee had requested certain changes to his work environment. However, the employee only alleged that he had previously complained of being "stressed" and "overworked" but failed to allege that he had ever expressed the need for an accommodation based on his disability. The employee even provided his employer with medical certifications that did not list any restrictions. However, during his suspension, the employee provided medical documentation of his need for extended disability leave and eventually resigned.

The court found that the employer had no duty to accommodate, as the employee never sufficiently requested a reasonable accommodation. The court held that an employer's obligation to provide accommodations is only present when "triggered by a request" from the employee and that the request "must be sufficiently direct and specific, giving notice that she needs a special accommodation." (internal citations omitted). At a minimum, the request needs to explain how the requested accommodation is connected

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to a disability. The court ruled in favor of the employer, finding that the employee's claim lacked merit because he did not put his employer on notice of his disability or the accommodations that could have been provided.

In the cases discussed above, the courts did not require the employer to seek more information from the employee regarding the limitations caused by a known disability. EEOC guidance, however, recommends a different approach—namely, it recommends that employers seek additional information from the employee if an accommodation request or documentation is deemed “insufficient.” Other cases have followed this approach, requiring that the employer seek clarification or additional information if it feels the information the employee provided is insufficient.

Cases Finding for the Employee

While the court in *Arroyo-Flores*, put the burden on the employee with a mental disability to properly articulate a reasonable accommodation request, the court in *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281 (7th Cir. 1996), felt that employers needed to be understanding of employees with mental disabilities. In *Bultemeyer*, the employee's psychiatrist requested a “less stressful” environment. No other specific accommodation was requested other than a “less stressful” environment, yet the court required the employer to engage in the interactive process with the employee. The court stated that the psychiatrist's letter can be seen as requesting that accommodations that were previously in place be reinstated and that Bultemeyer be reassigned to a smaller school. The court stated that, if the employer thought that the doctor's letter was vague ambiguous, it should have sought clarification.

The *Bultemeyer* court discussed the issue in some depth stating:

An employee's request for reasonable accommodation requires a great deal of communication between the employee and employer... In a case involving an employee with mental illness, the communication process becomes more difficult. It is crucial that the employer be aware of the difficulties, and 'help the other party determine what specific accommodations are necessary...'

In *Kowitz v. Trinity Health*, 839 F.3d 742 (8th Cir. 2016), the plaintiff had recently undergone neck surgery for which she took FMLA leave. Upon returning to work, she provided medical documentation outlining necessary restrictions related to her neck injury. One of the essential functions of the plaintiff's job was to be certified in basic life

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support and her certification had recently expired. The plaintiff notified her supervisor that she was still experiencing neck pain and would be unable to complete the certification until she has been cleared to do so by her doctor, in approximately four months. The plaintiff was fired the next day. The plaintiff filed suit and the employer moved for summary judgment, claiming an accommodation had not been requested.

The district court ruled in favor of the employer but the Eighth Circuit overturned this decision, finding that there was sufficient evidence for a reasonable jury to determine that the plaintiff made her employer aware of her need for accommodation. The employer had prior knowledge of her medical condition and its corresponding limitations and the plaintiff referenced her surgery, previous leave, and continued pain when notifying her employer that she would not be able to obtain the certification without clearance from her doctor. The court held that while an employee is “responsible for providing relevant information about her condition and needs” when initialing the accommodation process, “she need not use technical language to make the request or suggest what accommodation might be appropriate.” The employee must provide sufficient information so that the employer is aware of the disability and need for accommodation but “[t]his determination necessarily accounts for the employer’s knowledge of the disability and the employee’s prior communications about the disability, and is not limited to the precise words spoken by the employee at the time of the request.”

In ***Ryan v. Shulkin*, 2017 WL 6270209 (N.D. Ohio Dec. 8, 2017)**, the plaintiff was diagnosed with PTSD after being sexually harassed and assaulted by a coworker. The plaintiff then requested a transfer to a new position and provided medical documentation in support of this request. The employer responded with a request that the plaintiff complete additional documentation. The plaintiff failed to do so and the transfer was never granted. The employer contended that it did not have notice of the plaintiff’s need for accommodation because she did not respond to its request for additional documentation. The court rejected this argument, finding that “[n]either the ADA or the [employer’s] Reasonable Accommodation policies required that [the plaintiff] formally complete the Reasonable Accommodation process in order to obtain accommodation for her disability.” The court held that the plaintiff presented evidence that she requested a transfer because of her PTSD which was sufficient to put the employer on notice of her need for accommodation.

In ***Butler v. Washington Metropolitan Area Transit Authority*, 275 F. Supp. 3d 70 (D.D.C. 2017)**, a plaintiff with sleep apnea sought reassignment after he was unable to perform the essential functions of his original position. His employer denied this request.

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The plaintiff brought suit and the employer alleged that the plaintiff did not request an accommodation because he never requested reassignment to a non-union represented position. The court found that while the employer's assertion was true, "case law does not require accommodation requests to align identically with the accommodation received." It was sufficient that the plaintiff requested reassignment to some vacant position for which he was qualified.

In *Hale v. Johnson*, 245 F. Supp. 3d 979 (E.D. Tenn. 2017), the court determined that the plaintiff sufficiently requested an accommodation even though he did not use the term accommodation when making his request. The plaintiff was an individual with chronic obstructive pulmonary disease (COPD) and worked as a security guard for the employer. After the employer changed the physical requirements for the position, the plaintiff asked if he could waive taking the newly required test and instead take the test that was previously used. The court held that there are no "magic words" that need to be said when requesting accommodations and that a reasonable jury could find the plaintiff's inquiry was a request for reasonable accommodation.

Based on these cases, employers will be on firmer ground if they inquire further if they have knowledge of a disability but are unsure whether a reasonable accommodation was specifically requested. If the employee answers that no accommodation is needed, then the employer has likely fulfilled its duty under the law. If an employee feels that an accommodation may be needed, then the interactive process should be initiated to identify possible effective reasonable accommodations. This appears to be a safer practice for employers than taking the position that "as you only told us about your disability but not your limitations, we have no further obligations under the ADA." For employees, identifying specific accommodations is desirable whenever possible.

B. Adverse Employment Actions

The cases above demonstrate that employers must be aware of an ADA disability before they can be found liable for failure to provide a reasonable accommodation. The same reasoning applies to claims involving other adverse employment actions.

Case Finding for the Employer

In *Stout v. Social Security Administration*, 2007 WL 707337 (E.D. Ark. Mar. 5, 2007), an employee was demoted but the court found no evidence that the employer knew of the employee's depression at the time of the demotion. The employer alleged the employee was demoted due to performance issues. Therefore, the employer could

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not be found guilty of discrimination on the basis of disability.

In ***Colclough v. Gwinnett County School District*, 2017 WL 4341864 (N.D. Ga. June 19, 2017)**, the plaintiff worked as a crossing guard for the defendant-school district. The plaintiff was diagnosed with prostate cancer shortly before his termination. Immediately prior to his termination, plaintiff contacted his supervisor and requested the day off for a doctor's appointment. This request was granted. However that absence constituted plaintiff's twenty-third absence that year and his employer terminated his employment. The plaintiff did not disclose his cancer diagnosis until after his termination occurred but contended that his employer was sufficiently on notice because he had requested the day off for a doctor's appointment. The court, however, found that the employer had no reason to suspect that the plaintiff's request for time off was anything more than a routine doctor's visit, unassociated with any disability. The court held that "[a]n employer cannot fire an employee because of his disability unless the decisionmaker has actual knowledge of the disability at the time the decisionmaker terminates the employee" and that "[v]ague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of an employee's disability under the ADA."

Case Finding for the Employee

In ***Mayhew v. T-Mobile USA, Inc.*, 2009 WL 5125642 (D. Or. Dec. 22, 2009)**, the plaintiff worked as a customer service representative. She requested time off to care for her son's disabilities and was denied. She then requested a "work-when-able" schedule to accommodate her own heart condition, but defendant terminated her employment before addressing her request. Plaintiff then brought a lawsuit alleging a failure to accommodate, and defendant filed a motion for summary judgment. The court granted defendant's motion for summary judgment as to plaintiff's request to care for her son, because ADA accommodations must be based on plaintiff's own disability—not that of a family member. However, the court denied defendant's motion as to plaintiff's request to have a "work-when-able" schedule due to her newly disclosed heart condition. The court noted that due to the unique nature of a customer service job, attendance is less significant than with other jobs. Plaintiff presented evidence that her unpredictable absences had little to no effect on defendant's call center, customer wait times, or call quality. This case demonstrates that employers should take even a "last-minute" disclosure seriously.

C. Knowledge of a "Record of" an Invisible Disability

To establish liability under the "record of" prong of the definition of disability in the ADA, an employee must show that the employer had knowledge that the "record of" a disability. However, the record of a disability need not be a written record, knowledge of

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a history of having a disability may establish liability. This situation would apply when an individual does not have a current disability. One case involving a “record of” an invisible disability is *Trafton v. Sunbury Primary Care, P.A.*, 689 F. Supp. 2d 180 (D. Me. 2010). In *Trafton*, the employee raised claims that she was terminated due to having a “record of” a disability related to her major depression and post-traumatic stress disorder (PTSD).⁶⁰ Prior to her termination, plaintiff’s supervisor made numerous comments to her that seemed to indicate that he had knowledge of her disability although she never disclosed the disability to him. At various times, the supervisor told plaintiff that that he thought the job was “too much for her,” that she could not handle the job because she was “unstable,” that she tended “to get out of control,” and once stated, “now don’t go out and burn the building down.” In addition, plaintiff presented circumstantial evidence of two other facts indicating her employer’s knowledge of her “record of” a disability. Plaintiff asserted that she had “numerous, highly visible” scars on her arms from a suicide attempt which she claimed were often visible around the workplace as she often had her sleeves rolled up or wore short sleeve. In addition, plaintiff had received treatment from a company physician for her mental illness. The physician expressed having “serious reservations about noting [Trafton’s] work stress and depression in her medical record,” as the physician “suspected the privacy of employees’ medical records... was not scrupulously maintained” and stated that he never informed plaintiff’s supervisor of her disability.

Despite this evidence, the magistrate judge recommended summary judgment in favor of the employer. The district court however rejected this recommendation, finding that the plaintiff’s records of a hospitalizations for attempted suicides combined with her supervisor’s comments and termination provided sufficient evidence to raise a triable question as to whether her supervisor was aware of her record of a disability and if he terminated her for that reason.

V. Disability Harassment⁶¹

Title I of the ADA prohibits discrimination in employment, and provides employees with disabilities with broad protections in the workplace. The statute states: “No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other **terms, conditions, and privileges** of employment.” 42 U.S.C. § 12112 (a).

Courts that have recognized a cause of action for disability harassment have focused on the similarities between this provision of the ADA and Title VII. Although harassment is not expressly prohibited in Title VII, the U.S. Supreme Court has recognized that

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harassment based on a protected status is implicitly prohibited by Title VII. Because both Title I of the ADA and Title VII use the language “terms, conditions, and privileges of employment,” and courts have interpreted this to be the relevant portion of the statutes from which to draw a harassment claim. The courts have established that, should conduct rise to a level that is severe and pervasive, and creates an abusive work environment that interferes with an employee’s ability to perform the job, it is a form of discrimination, because it adversely effects the “terms and conditions” of that individual’s employment.

The U.S. Supreme Court has not yet addressed harassment under the ADA, but lower federal courts have either expressly recognized or presumed that the ADA also includes a cause of action for harassment based on disability since Congress was aware of the Supreme Court’s interpretation of “terms, conditions, and privileges of employment” under Title VII when it enacted the ADA. Multiple federal circuit courts of appeal have ruled that disability harassment/hostile work environment claims are actionable under Title I of the ADA. Many other circuits have presumed that the cause of action exists, but have not yet explicitly issued a ruling that a disability harassment claim is actionable under the ADA. Further, numerous federal trial courts have either recognized the claim or presumed that the claim exists. Significantly, no federal court has ruled that a disability harassment claim is not actionable under Title I of the ADA.

Courts recognizing a claim for disability harassment have adopted the Title VII analysis for harassment or hostile work environment claims, slightly modified to reflect that the claimed harassment is based on disability. Courts have held that, to establish a hostile work environment claim under the ADA, a plaintiff must prove that:

1. Plaintiff is a qualified individual with a disability;
2. Plaintiff was subjected to unwelcome harassment;
3. The harassment was based on plaintiff’s disability;
4. The harassment was sufficiently severe or pervasive to alter a term, condition, or privilege of employment; and
5. Some factual basis exists to impute liability for the harassment to the employer (i.e. the employer knew or should have known of the harassment and failed to take prompt, remedial action).

In disability harassment cases, as in sexual harassment cases under Title VII, plaintiffs frequently have had difficulty establishing the fourth element, that the harassment was severe or pervasive enough to alter a term, condition, or privilege of employment. While people with visible or invisible disabilities may be subject to workplace harassment, it

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may be argued that there are more stereotypes, myths, misunderstandings, and mistreatment related to invisible disabilities than visible ones.

Cases Finding for the Employer

Most dismissals of disability harassment cases have occurred because the plaintiff has been unable to convince the court that the harassment was sufficiently severe and pervasive to alter the terms, conditions and privileges of employment.

One of the cases with the most egregious facts that were not deemed sufficient for a claim of disability harassment was ***Shaver v. Independent Stave Co.*, 350 F.3d 716 (8th Cir. 2003)**. The plaintiff, Christopher Shaver, had epilepsy and had an operation in which part of his brain was removed and a metal plate was inserted. Shaver's supervisor disclosed these facts to Shaver's co-workers without his permission. Both Shaver's co-workers and supervisors called Shaver "platehead" as a nickname for a period of over two years. When Shaver asked his co-workers to stop calling him "platehead," some of the co-workers and supervisors stopped, but others did not. The employer defended the name-calling by claiming it was not related to Shaver's disability, but merely a nickname, and many employees had nicknames at that workplace. Some co-workers made offensive comments about Shaver, calling him "stupid" or saying that he was "not playing with a full deck." Nonetheless, the district court entered judgment in favor of the employer on Shaver's disability harassment claim.

The Eighth Circuit adopted the five-element test discussed above, but the court held that Shaver did not present sufficient evidence that the harassment he experienced was severe or pervasive. The court found that "[c]onduct that is merely rude, abrasive, unkind, or insensitive does not come within the scope of the law." The court considered the environment in which Shaver worked, and found, that like many work environments, rude, name-calling ridicule and horseplay were standard, and the court's proper role was not to act as an arbiter of human resources issues. The court also found that the supervisor's unauthorized disclosure of Shaver's medical condition might be a separate violation of the ADA's confidentiality provisions, but did not support Shaver's claim for hostile work environment under the ADA.

In ***Flieger v. E. Suffolk BOCES*, 693 F. App'x 14 (2d Cir. 2017)**, an employee who was hard of hearing filed an employment discrimination suit alleging various causes of action, including hostile work environment. The employee alleged that after learning of her disability, her supervisor commented that she "didn't ask for a deaf assistant." The court stated that the comment was "inappropriate," but dismissed the employee's claim

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because it “[did] not rise to the level of severity required in order for a single comment to support a claim for hostile work environment.”

In ***Ballard-Carter v. Vanguard Grp.*, 703 F. App'x 149 (3d Cir. 2017)**, the plaintiff alleged that her supervisor regularly made abusive comments related to her hearing and learning disabilities. She eventually took leave because of the impact of her supervisor’s actions and did not return to work. The Third Circuit determined that the alleged comments could not sustain the plaintiff’s harassment claim. It conceded that some of the comments made were impolite and uncivil but held that “the ADA anti-discrimination mandate does not require a happy or even a civil workplace” and that they were not severe or pervasive enough to alter the conditions of her employment.

In ***Ray v. New York Times Management Services*, 2005 WL 2467134 (M.D. Fla. Oct. 6, 2005)**, the court granted summary judgment for the employer, holding that an employee with hepatitis C failed to demonstrate numerous, specific incidents which unreasonably interfered with his working conditions. Disclosing an employee’s medical condition to co-workers does not necessarily create a hostile work environment.

In ***Ryan v. Capital Contractors, Inc.*, 679 F.3d 772 (8th Cir. 2012)**, the court denied the plaintiff’s harassment claim in part because he failed to provide evidence that his employer knew or should have known about the harassment. The plaintiff alleged regular name calling and unwelcome horseplay on the part of his coworker but admitted that the coworker did not engage in this behavior when management was present and that he never complained to management about the harassment. The court held that “[a]n employee has a duty to take reasonable steps to prevent harassment and mitigate harm” and that the plaintiff failed to take these steps.

Cases Finding for the Employee

An early case recognizing a cause of action for disability harassment for an individual with an invisible disability was ***Flowers v. Southern Regional Physician Services, Inc.*, 247 F.3d 229 (5th Cir. 2001)**. In *Flowers*, the plaintiff worked for Southern Regional Physician Services, Inc. for over two years (and its predecessor company for four years prior to that) as a medical assistant to a physician. Although Flowers had previously been good friends with her supervisor, almost immediately after the supervisor discovered that Flowers was HIV-positive, the supervisor stopped socializing with Flowers and refused to even shake her hand. The supervisor also began intercepting Flowers’ telephone calls, eavesdropping on her conversations, and hovering around her desk.

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Although the employer had previously required Flowers to submit to only one random drug test, after the supervisor discovered Flowers' HIV status, Flowers underwent four random drug tests within a one-week period. Additionally, before Flowers' HIV status was known, she received good performance evaluations and a ten percent raise. Within a month after informing her employer of her HIV status, Flowers was written up, and one month later, the supervisor wrote-up Flowers again and placed her on a ninety-day probation. Just days before the ninety-day probation ended, Flowers was again written up and put on another ninety-day probation. This time, the president of Southern Regional was present at the meeting. Flowers testified that the president called her a "bitch" and said that he was "tired of her crap." Ultimately, Southern Regional discharged Flowers.

The jury found that Flowers was subjected to unwelcome harassment based on her HIV-positive status and that the harassment was so severe and pervasive that it unreasonably interfered with her job performance. The court adopted the five-element test discussed above and concluded that the jury could have reasonably found that the supervisor's and the president's conduct was sufficiently severe or pervasive to create a hostile work environment and unreasonably interfered with Flowers' work performance. Furthermore, Southern Regional did not contest that it was aware of the harassment, and the evidence showed that Southern Regional failed to take prompt action to remedy the harassment.

The court found that Flowers' claims of emotional harm were based on emotional and physical symptoms that she experienced *after* her termination from employment. Flowers presented evidence that after her discharge from Southern Regional she started losing weight, had diarrhea and nausea, had trouble sleeping, and became ill. However, because she did not provide sufficient evidence that she was experiencing distress or other injury during the months she was being harassed on the job, the court found she was only entitled to nominal damages. The court explained that to recover more than nominal damages for emotional harm, a plaintiff must prove "actual injury" resulting from the harassment, and the court would not presume emotional harm just because discrimination occurred. Therefore, the court vacated the jury's award of damages.

The cases below are other situations where courts allowed people with invisible disabilities to proceed on a disability harassment claim.

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In ***Zemrock v. Yankee Candle Co.*, 2017 WL 506249 (D. Mass. Feb. 7, 2017)**, after undergoing a hysterectomy, the plaintiff was subject to repeated, graphically sexual comments from her coworker about her surgery. These comments were made in front of supervisors who would laugh and joke about the plaintiff's disability. The plaintiff attempted to complain to her supervisors about these comments, even asking for a schedule change, but her employer took no action to address the harassment. The court found that the plaintiff easily met her burden of proving that a reasonable person in her situation would find the comments and her employer's response to be sufficiently severe to create a hostile work environment. In making this determination, the court looked to the nature and frequency of the comments, the intent to humiliate behind the comments, and the interference created with the plaintiff's work performance. The court also held that her supervisors' reactions provided additional evidence of a hostile work environment and that "a deaf ear from management may contribute to and encourage the hostility of the workplace, creating an impression that employees may engage in ... harassment or discrimination with impunity." (internal citations omitted).

In ***Mashni v. Bd. of Educ. of City of Chicago*, 2017 WL 3838039 (N.D. Ill. Sept. 1, 2017)**, a technology coordinator in the Chicago Public Schools with anxiety disorder was allowed to move forward with his hostile work environment claim against his employer. The employee alleged that over the course of five months, he was subject to harassment on more than two dozen occasions. The alleged harassment included comments mocking his disability as well as comments made in the presence of other that were meant to humiliate him. The court found that in the aggregate, these claims could be deemed objectively hostile.

In ***Rodriguez-Ivarez v. Diaz*, 2017 WL 666052 (D.P.R. Feb. 17, 2017)**, a plaintiff with HIV was allowed to move forward with her hostile work environment claim. The plaintiff claimed that after disclosing her disability, her employer immediately cut off access to the bathroom, forcing her to urinate in the hallway. The plaintiff also alleged that she was stripped of all of her job duties and excluded from social gatherings. The court found these allegations were sufficient severe or pervasive to constitute a hostile work environment and survive summary judgment.

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In *Arrieta-Colon v. Wal-Mart Stores*, 434 F.3d 75 (1st Cir. 2006), the court upheld a \$230,000 jury verdict in a case where the employer did not take action against harassment employee with Peyronie’s Disease experienced because of his penile implant. Employee was subjected to repeated teasing and harassment by co-workers and managers about his condition, including over the store’s paging system. Co-workers testified that supervisors knew about the harassment and failed to prevent it. It held that an employer cannot shield itself from liability by relying on a grievance policy that is not consistently used.

Conclusion

Invisible disabilities pose challenges for both employers and employees. Invisible disabilities may be disclosed via medical examinations, disability-related inquiries, or via voluntary disclosure. If a reasonable accommodation is needed, an employee must be sure to adequately disclose the disability and its limitations. Employers must be sure that any medical examinations or disclosures of an employee’s disability are “job-related and consistent with business necessity.”

¹ This Legal Brief was updated in 2018 by Hannah R. Walsh, Attorney, Employment Rights Helpline, Equip for Equality. This legal brief was originally written in 2010 by Barry C. Taylor, Legal Advocacy Director, Alan M. Goldstein, Senior Attorney, and Rachel M. Weisberg, Staff Attorney with Equip for Equality. Equip for Equality is the protection and advocacy system for the State of Illinois, and is providing this information under a subcontract with Great Lakes ADA Center funded by National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR grant number 90DP0091-02-00).

² Direct threat issues often involve people with invisible disabilities; however, many issues in direct threat cases are more related to employer stereotypes or misperceptions regarding the disability, rather than relating to the invisible nature of the disability itself. For a detailed discussion of direct threat issues, please see the Great Lakes ADA Center’s Legal Brief regarding Direct Threat, updated in 2018, available at: www.ada-legal.org

³ For a detailed discussion of the ADA Amendments Act, please see the Great Lakes ADA Center’s Legal Brief regarding the ADA Amendments Act, updated in 2018, available at: www.ada-legal.org

⁴ ADA Amendments Act Sections 2(a)(1)-(8) and 2(b)(1)-(6). Specifically, the ADAAA overruled the U.S. Supreme Court decisions in the Sutton trilogy, [*Sutton v. United Air Lines*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999); *Albertsons Inc. v. Kirkingburg*, 527 U.S. 555 (1999)] and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

⁵ ADA Amendments Act §§2(b)(1)-(6) and 4(a).

⁶ ADA Amendments Act §2(b)(5).

⁷ ADA Amendments Act §4(a).

⁸ See, e.g., *Walton v. U.S. Marshals Service*, 476 F.3d 723 (9th Cir. Feb. 9, 2007).

⁹ ADA Amendments Act §4(a).

¹⁰ *Daniels v. Texas Dep’t of Transportation*, 2016 WL 7188836 (E.D. Tex. Dec. 10, 2016).

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- ¹¹ *Arroyo-Ruiz v. Triple-S Mgmt. Grp.*, 206 F. Supp. 3d 701 (D.P.R. 2016).
- ¹² *Szarawara v. Cnty. of Montgomery*, 2013 WL 3230691, at *3 (E.D. Pa. June 27, 2013). See also *Tadder v. Board of Regents of University of Wisconsin System*, 15 F.Supp.3d 868, 881-86, n. 5-9 (W.D. Wisc. 2014) (“Post-ADAAA, the endocrine system is expressly listed as a ‘major bodily function’...”).
- ¹³ *Punt v. Kelly Servs.*, 2016 WL 67654 (D. Colo. Jan. 6, 2016); *Haley v. Community Mercy Health Partners*, 2013 WL 322493, at *10 (S.D. Ohio Jan. 28, 2013) (breast cancer); *Angell v. Farmount Fire Protection Dist.*, 907 F.Supp.2d 1242, 1250-51 (D. Colo. 2012) (cancer in remission); *Norton v. Assisted Living Concepts, Inc.*, 786 F. Supp. 2d 1173, 1185 (E.D. Tex. 2011) (renal cancer); *Chalfont v. U.S. Electrodes*, 2010 WL 5341846, at *9 (E.D. Pa. Dec. 28, 2010) (heart disease and leukemia). See also *Katz v. Adecco USA, Inc.*, 845 F.Supp.2d 539, 548 (S.D.N.Y. 2012) (“Cancer will virtually always be a qualifying disability”).
- ¹⁴ *Horgan v. Simmons*, 704 F. Supp. 2d 814, 818-19 (N.D. Ill. 2010).
- ¹⁵ *Chalfont*, 2010 WL 5341846, at *9 (heart disease and leukemia).
- ¹⁶ *Myles v. University of Pennsylvania Health System*, 2011 WL 6150638, at *7-8 (E.D. Pa. Dec. 12, 2011).
- ¹⁷ *Seim*, 2011 WL 2149061, at *3.
- ¹⁸ *Feldman v. Law Enforcement Assoc. Corp.*, 779 F.Supp.2d 472, 483-84 (E.D.N.C. 2011).
- ¹⁹ *Meinelt v. P.F. Chang’s China Bistro*, 787 F.Supp.2d 643, 651-52 (S.D. Tex. 2011).
- ²⁰ *Barlow v. Walgreen Co.*, 2012 WL 868807, at *4 (M.D. Fla. Mar. 14, 2012).
- ²¹ *Kravtsov v. Town of Greenburgh*, 2012 WL 2719663, at *10-11 (S.D.N.Y. July 9, 2012).
- ²² *Franklin v. City of Slidell*, 2013 WL 1288405, at *10-11 (E.D. La. Mar. 27, 2013).
- ²³ *Hardin v. Christus Health Se. Texas St. Elizabeth*, 2012 WL 760642, at *6 (E.D. Tex. Jan. 6, 2012).
- ²⁴ *Hafermann v. Wisconsin Department of Corrections*, 2016 WL 206484, *4 (W.D. Wis. Jan. 15, 2016).
- ²⁵ *Id.*
- ²⁶ 42 U.S.C. §12101.
- ²⁷ 42 U.S.C. §12112(d)(2)(A).
- ²⁸ 42 U.S.C. §12112(d)(3) and (4).
- ²⁹ 42 U.S.C. §12112(d)(2)(B).
- ³⁰ 42 U.S.C. §12112(d)(3).
- ³¹ 42 U.S.C. §12112(b)(6).
- ³² 42 U.S.C. §12111(8).
- ³³ 42 U.S.C. §12112(d)(4)(A).
- ³⁴ 42 U.S.C. §12112(d)(4)(B).
- ³⁵ *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*
- ³⁶ *Id.*
- ³⁷ See e.g., *Grenier v. Cyanamid Plastics*, 70 F.3d 667 (1st Cir. 1995); *Thompson v. Borg-Warner Protective Services Corp.*, 1996 WL 162990 (N.D. Cal. Mar. 11, 1996)).
- ³⁸ EEOC Guidance found at: <http://www.eeoc.gov/policy/docs/ganda-inquiries.html>.
- ³⁹ *ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations* (1995), www.eeoc.gov.
- ⁴⁰ In 2016, the EEOC released final rules regarding wellness programs addressing both the safe harbor and voluntariness exceptions. These regulations, along with an accompanying “Q&A,” are available online at www.eeoc.gov/laws/regulations/ganda-ada-wellness-final-rule.cfm (last visited on March 17, 2018).

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- ⁴¹ *EEOC v. Orion Energy Systems, Inc.*, 2016 WL 5107019 (E.D. Wis. Sept. 19, 2016).
- ⁴² See “Wisconsin Employer Resolves EEOC Case Involving Wellness Program and Retaliation,” available online at www.eeoc.gov/eeoc/newsroom/release/4-5-17a.cfm, last visited on March 17, 2018.
- ⁴³ *Equal Employment Opportunity Commission v. Flambeau, Inc.*, 846 F.3d 941, 946 (7th Cir. 2017).
- ⁴⁴ *AARP v. United States Equal Employment Opportunity Commission*, 2017 WL 6542014 (D.D.C. Dec. 20, 2017).
- ⁴⁵ Courts have differed on whether a plaintiff must have an ADA disability in order to bring suit for discriminatory inquiries and medical exams. The majority is that plaintiffs can bring such cases without establishing an ADA disability. See, e.g., *Harrison v. Benchmark Electronics Huntsville, Inc.*, 2010 WL 60091 (11th Cir. Jan. 11, 2010) (involving an individual with epilepsy in a suit brought before the ADA Amendments Act).
- ⁴⁶ *EEOC Guidance on Medical Inquiries Under the ADA* found at: <http://www.eeoc.gov/policy/docs/qanda-inquiries.html>.
- ⁴⁷ *EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)* found at: <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.
- ⁴⁸ See *Roe v. Cheyenne Mountain Conference Resort*, 124 F.3d 1221 (10th Cir. 1997).
- ⁴⁹ For a detailed discussion of direct threat issues, please see the Great Lakes ADA Center legal brief and webinar on Direct Threat, updated in 2018, found at www.ada-legal.org.
- ⁵⁰ *Id.*
- ⁵¹ *EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)*, <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.
- ⁵² See also, *Doe v. U.S.P.S.*, 317 F.3d 339 (D.C.Cir. 2003), where the supervisor’s disclosure of HIV status in conjunction with request for leave under the FMLA may have violated the Rehabilitation Act, using the same standards as the ADA.
- ⁵³ See *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*, Question 16.
- ⁵⁴ *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* found at: <http://www.eeoc.gov/policy/docs/accommodation.html>.
- ⁵⁵ *Id.*
- ⁵⁶ The section of the opinion dealing with the confidentiality issue was withdrawn on August 20, 2002. The court withdrew the section after a joint motion was filed per the terms of a settlement agreement reached in a Sixth Circuit mediation.
- ⁵⁷ *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* found at: <http://www.eeoc.gov/policy/docs/accommodation.html>.
- ⁵⁸ *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* found at: <http://www.eeoc.gov/policy/docs/accommodation.html>.
- ⁵⁹ See also, *Stewart v. St. Elizabeth’s Hospital*, 589 F.3d 1305 (D.C. Cir. 2010) (hospital not required to accommodate employee with mental illness when there was no actual or constructive knowledge of the employee’s disability) and *Fournier v. Payco Foods Corp.*, 611 F.Supp.2d 120 (D.Puerto Rico, 2009) (Employee “failed to provide any evidence that the decision-makers at Payco knew of his depression and anxiety.”)
- ⁶⁰ The employee also raised a “regarded as” ADA claim, but that issue is outside the scope of this legal brief.
- ⁶¹ For more detailed information on ADA disability harassment issues, please see *Great Lakes ADA Center* legal brief and webinar on direct threat found at www.ada-legal.org.