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Accommodation in the Public Workplace

Significant Issues in Accommodating Disabled Employees

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SIGNIFICANT ISSUES IN ACCOMMODATING DISABLED EMPLOYEES

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The ADA Amendments Act of 2008 ("ADAAA") and the accompanying regulations of the U.S. Equal Opportunity Commission ("EEOC") represent the most significant changes to the ADA since Congress passed the original statute in 1990. The ADAAA and the EEOC's implementing regulations dramatically expand the definition of "disability" under the statute. It is safe to say that millions of additional individuals now are able to claim the protections of the statute and pursue disability discrimination lawsuits in the courts. As a result of these changes, the focus of ADA law and litigation no longer will be on who is covered by the statute, but rather on the issue of whether the employer has complied with its statutory obligations, including the obligation to reasonably accommodate disabled job applicants and employees.

[1] The "Reasonable Accommodation" Obligation

The duty to make reasonable accommodation to a qualified individual with a disability lies at the heart of the ADA. Under the Act, an employer must do more than merely refrain from discriminating against job applicants or employees with disabilities. An employer, in appropriate circumstances, may need to take affirmative steps to accommodate a person with a disability in order to provide equal opportunity in all aspects of the employment relationship.

[a] Regulatory Definition

Exactly what constitutes "reasonable accommodation" is not explicitly defined in the statute.[1] Under the EEOC's regulations, an accommodation consists of any change in the work environment or the manner in which a job is usually performed that "enables an individual with a disability to enjoy equal employment opportunities."[2]

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[1] Instead of defining the term, the Act offers examples of what reasonable accommodation may encompass. *See* 42 U.S.C. § 12111(9).
[2] 29 C.F.R. App. § 1630.2(o) (2011).

Both the Act and the implementing regulations list various examples of the most common types of accommodations that an employer may be required to provide:

• Job restructuring;

• Part-time or modified work schedules;

• Reassignment to a vacant position;

• Acquisition or modification of equipment or devices;

• Adjustment or modification of examinations, training, or policies;

• Providing qualified readers or interpreters; and

• Altering existing facilities.

[b] Who is Entitled to a Reasonable Accommodation?

Under the ADA and the EEOC's regulations, the obligation to make a reasonable accommodation is owed only to an "otherwise qualified individual with a disability." [3] According to the EEOC, an individual with a disability is "otherwise qualified" if the person is qualified for the job "except that … he or she needs a reasonable accommodation to be able to perform the job's essential functions."[4] Thus, the duty to provide a reasonable accommodation is triggered only if the person with a disability meets all of the employer's criteria, except for those criteria that the individual is unable to perform because of his or her disability.[5]

[c] Nexus Between Disability and Accommodation

The ADA, itself, does not contain a specific requirement that there be a causal link between a person's disability and the accommodation requested. Most circuit courts that have considered the issue, however, have reasoned that imposing such a requirement would be consistent with the purposes of the statute.

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[3] 42 U.S.C. § 12112(b)(5), 29 C.F.R. § 1630.9(a) (2011).

[4] 29 C.F.R. App. § 1630.9 (2011).

[5] S. Rep. No. 116, 101st Cong., 1st Sess. at 33–34 (1989) (Senate Committee on Labor and Human Resources).

What this requirement of a nexus between the disabling condition and the requested accommodation means in practice may be seen in the Second Circuit's opinion in *Felix v. New York City Transit Authority*, involving a New York City Transit Authority employee, Denise Felix, who was traumatized by her near-involvement in a subway fire bombing.[6] This condition caused Felix to have recurrent problems with insomnia and an inability to work in the subways. Felix requested a reassignment to a position that would not require her to work in the subways, which was denied. Felix subsequently was terminated and she filed suit against the Transit Authority asserting that she had been denied a reasonable accommodation under the ADA. The Second Circuit disagreed. Although in Felix's situation the fire bomb incident caused her disabling condition, i.e., insomnia, the circuit court found significant the fact that her insomnia was not the reason for the requested accommodation of not working in the subways. The court acknowledged that Felix's inability to work in the subways was related to her insomnia because "they both stemmed from the same traumatic incident." Nevertheless, the court concluded that "this common traumatic origin alone does not mean that the non-disability impairment [inability to work in the subways] is entitled to an accommodation."[7] Accordingly, the court of appeals held that because the Transit Authority's denial of an accommodation to Felix "was not because of the disability of insomnia," she had no viable ADA claim.[8]

The courts are not in total argument that there must be a causal nexus between the disability impairment and the accommodation requested. In its 1999 opinion in *McAlindin v. County of San Diego*, a majority of the Ninth Circuit panel took a different view.[9] The case involved the claim of an employee, Richard McAlindin, who had been diagnosed as suffering from various mental disorders and had requested reassignment to different supervisors. Due to the medication he was taking for his mental disorders, McAlindin claimed that he could not engage in sexual relations. The Ninth Circuit found that McAlindin had raised a triable issue as to whether he was substantially limited in the major life activity of engaging in sexual relations. Even though this limitation did not impact his work,

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[6] *Felix v. New York City Transit Authority*, 324 F.3d 102 (2d Cir. 2003).

[7] *Id.*

[8] *Id.* at 106–07. The majority opinion in *Felix* prompted a dissent by Circuit Judge Peter Leval. Although Judge Leval agreed with the majority's view that there must be a causal link between the specific condition that limits a major life activity and the accommodation, he was of the opinion that Felix had satisfied this requirement. Because there was evidence that the accommodation Felix requested of not working in the subways would alleviate, or avoid aggravating, her sleep disorder, Judge Leval reasoned there was a nexus between the requested workplace accommodation and her disabling condition. According to Judge Leval, Felix "submitted evidence that working underground in the subway would aggravate her inability to sleep, and, conversely, that working above ground (the requested accommodation) would alleviate the disability (or avoid aggravating it)." 324 F.3d at 109.

[9] *McAlindin v. County of San Diego*, 192 F.3d 1226 (9th Cir. 1999), *cert. denied*, 530 U.S. 1243, 120 S. Ct. 2689, 147 L. Ed. 2d 961 (2000).

the court held that he still could be entitled to a workplace accommodation for his mental disorder. The court pointed out that "[t]he existence of a genuine issue of material fact regarding disability and of one regarding reasonable accommodation require separate inquiries. In the reasonable accommodation analysis, we focus on the impairment as relevant to the workplace and thus on whether the employer is making reasonable accommodations."[10] According to the appeals court, "[t]he two inquiries—namely, whether McAlindin is disabled and what constitutes reasonable accommodation for that disability—only intersect to the extent that McAlindin's disability manifests itself in the workplace."[11] The implications of the *McAlindin* decision, allowing for a disconnect between the basis for determining that an individual is disabled under the ADA and the reasonable accommodation analysis, was noted by Judge Stephen Trott in his partial dissent in the case. As pointed out by Judge Trott:

> I fail to see any causal connection whatsoever with McAlindin's alleged sexual dysfunction and the job he wants, the job he has, or the adverse employment actions he alleges he suffered. Is the employer supposed to accommodate his impotence?[12]

[d] How Extensive Is the Reasonable Accommodation Requirement?

The duty to make reasonable accommodations applies to all employment decisions, not simply to those pertaining to hiring or promotion. The requirement also extends to all job applicants and to all employees, whether full or part time.[13]

Further, reasonable accommodation applies to all services and programs provided in connection with employment. This would include, for example, employer-sponsored placement or counseling services, as well as off-site training programs.

An employer may go beyond its obligations under the ADA and voluntarily provide an accommodation to an individual with a disability that exceeds the ADA's "reasonable" accommodation requirement. Where the accommodation that is provided exceeds that required under the ADA, an employer may decide to end or discontinue the accommodation without being subject to liability. The decision to discontinue an accommodation that was not

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[10] *Id.* at 1237.
[11] *Id.*
[12] 192 F.3d at 1240.
[13] Under the statute, an employee is defined broadly as "an individual employed by an employer." 42 U.S.C. § 12111(4).

required in the first place does not give rise to a cause of action under the ADA.[14]

[2] Process of Supplying a Reasonable Accommodation

[a] The ADA's Problem Solving Approach

Probably the most difficult decision that an employer will need to make in complying with the Americans with Disabilities Act will be in determining what accommodations may be required for particular job applicants or employees with disabilities. This is so because there is no definitive answer as to what constitutes a "reasonable accommodation." Rather, the reasonable accommodation requirement is best understood as establishing a process of decision making, rather than enunciating the decision itself. As emphasized in the legislative history, reasonable accommodation at base is a "problem solving approach."[15]

[b] Duty to Accommodate Known Disabilities

The ADA requires that reasonable accommodation be made only to the "known" physical or mental limitations of an otherwise qualified individual.[16] Vague or conclusory statements by an employee or job applicant revealing an unspecified incapacity have been held not to be sufficient to put an employer on notice of its obligations under the ADA.[17]

Importantly, an employer's knowledge that an employee may have a disability does not, in and of itself, trigger the obligation of the employer to accommodate that employee. The EEOC has recognized that "in general … it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed."[18]

[c] Requests for Accommodation

[i] General Requirements

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[14] *See Graves v. Finch Pruyn & Co*., 457 F.3d 181, 187 (2nd Cir. 2006) (employer, who created a sedentary job for an employee who was diagnosed with a bone spur on the heal of his left foot, was not required to maintain employee in that job, stating "[g]iven that the ADA does not require creating a new position for [the plaintiff] at all, we fail to see how it can dictate the duration of a new position that his employer created for him as a matter of grace.").

[15] S. Rep. No. 116, 101st Cong., 1st Sess. at 34 (1989) (Senate Committee on Labor and Human Resources).

[16] 42 U.S.C. § 12112(b)(5)(A).

[17] *Morisky v. Broward County*, 80 F.3d 445 (11th Cir. 1996).

[18] 29 C.F.R. § 1630.9 (2011).

To invoke the protections of the Act, the ADA does not require an employee or job applicant to speak any magic words. A job applicant or employee need only let an employer know that some adjustment or change is necessary to do a job because of a disability.[19] As the Seventh Circuit said in *Bultemeyer v. Fort Wayne Community Schools*, "properly participating in the interactive process means that an employer cannot expect an employee to read its mind and know that he or she must specifically say 'I want reasonable accommodation.'"[20]

Importantly, where an employee requests an accommodation for the first time only after it becomes clear that an adverse employment action is imminent, such a request can be "too little, too late."[21]

[ii] Special Issues Involving Mental Disabilities

Problems may arise in the workings of the reasonable accommodation process, especially when an employee has a mental disability. Where an employee's disability involves a mental illness, the employee may not be in a position to ask specifically for a workplace accommodation, even though the employee may need one. In this situation, the Seventh Circuit, in *Bultemeyer v. Fort Wayne Community Schools*, has taken the position that "the employer has to meet the employee half way." Thus, according to the circuit court, "if it appears that the employee may need an accommodation, but does not know how to ask for it, the employer should do what it can to help."[22]

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[19] *EEOC Technical Assistance Manual* (1992), at III-8.

[20] *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1286 (7th Cir. 1996).

[21] *Hill v. Kansas City Area Transp. Auth.*, 181 F.3d 891, 894 (8th Cir. 1999) (finding accommodation request untimely when employee made request only after committing two rule violations that "she knew would mandate her discharge").

[22] *Bultemeyer*, 110 F.3d at 1285. *See also Tobin v. Liberty Mutual Ins. Co.*, 433 F.3d 100, 109 (1st Cir. 2005) (that an employee's request for reasonable accommodation requires a "great deal of communication between the employee and the employer" is "especially true in cases … involving an employee suffering from mental illness") (citations omitted).

In *Walsted v. Woodbury County*, 113 F.Supp. 2d 1318 (N.D. Iowa 2000), the plaintiff who suffered from a significant learning disability and, as a result, had difficulties performing her job, failed to request that her employer accommodate her mental condition. Notwithstanding this fact, the court allowed the plaintiff to proceed with a failure to accommodate claim, reasoning "if an employee's disability and the need to accommodate it are obvious, an employee is not required to expressly request reasonable accommodation." *Id.*, at 1336, *quoting Norris v. Allied-Sysco Food Services, Inc.*, 948 F.Supp. 1418, 1436 (N.D. Cal. 1996), *aff'd*, 191 F.3d 1043 (9th Cir. 1999) (citations omitted). Because it was "admittedly common knowledge" that the plaintiff had a significant learning disability, the court found that the defendant Woodbury County was required to initiate an interactive process with the plaintiff to determine the appropriate reasonable accommodation to her learning disability. *Id.*

Similarly, in *Taylor v. Phoenixville School District,* the Third Circuit Court of Appeals found that the employer had more than enough information to put it on notice that an employee might be disabled when the employee became psychotic at work and was hospitalized immediately thereafter.[23] The court reasoned that given the school's knowledge of the plaintiff Taylor's hospitalization and continued medical treatment, a request from Taylor's son that she would "require accommodations" was more than adequate to trigger the employer's responsibility to engage in an interactive dialogue. The court emphasized that under the circumstances, "it would be especially inappropriate to insist that Taylor's son must have specifically invoked the ADA or used the words 'reasonable accommodation'" when he requested accommodations. The Third Circuit emphasized that in order to "trigger" the interactive process, it was not necessary for the employer to know the specific name of the individual's impairment. It was sufficient for the employer to have been aware that the plaintiff had exhibited serious psychiatric problems and that those problems were severe enough to require her to be hospitalized. The court of appeals also found that in the case before it, the school district knew that the plaintiff was taking lithium and that she continued to see a psychiatrist. In this situation, "if there was any further information that the school district felt it needed to justify an accommodation," the court said "it was incumbent on the school district to ask for it."

The Eighth Circuit, however, has established a fairly stringent standard for finding a request for accommodation by individuals with mental disabilities. Under the Eighth Circuit's view, as articulated in *Wallin v. Minnesota Dep't of Corrections,* where "the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, as is often the case when mental disabilities are involved, the initial burden rests primarily upon the employee to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations."[24]

[d] The Interactive Process

In carrying out any obligation to engage in the interactive process, the Third Circuit in *Taylor v. Phoenixville School District* has pointed out that all an employer needs to do is to "make a good faith effort to seek accommodations."[25] According to the *Taylor* court, an employer can show its good faith in a number

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[23] *Taylor v. Phoenixville School District,* 184 F.3d 296 (3d Cir. 1999).

[24] 153 F.3d 681, 689 (8th Cir. 1998).

[25] *Taylor v. Phoenixville School District,* 184 F.3d 296 (3rd Cir. 1999).

of ways, such as taking steps similar to the following:

• meet with the employee who requested the accommodation;

• request information about the condition and what limitations the employee has;

• ask the employee what he or she specifically wants;

• show some sign of having considered the employee's request; and

• offer and discuss available alternatives when the request is too burdensome.[26]

While preference is to be given to the choice of the person with a disability, the employer has the ultimate discretion to choose between effective accommodations.[27]

[e] Breakdowns in the Reasonable Accommodation Process

[i] Who Bears Responsibility for Breakdowns?

Who bears the responsibility—the employer or the individual with a disability—when there is a breakdown of the interactive process? Neither the ADA nor the EEOC's regulations assign liability for when the interactive process fails. Moreover, as pointed out by the Seventh Circuit Court of Appeals in *Beck v. University of Wisconsin Board of Regents*, "[n]o hard and fast rule will suffice, because neither party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability."[28] Rather, the Seventh Circuit has stated that "courts should look for signs of failure to participate in good faith [or of] failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary."[29] Examples of not acting in good faith, according to the court of appeals, include obstructing or delaying the interactive process or failing to communicate with the other party,

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[26] *Id.*

[27] *See Allen v. Rapides Parish School Board*, 204 F.3d 619 (5th Cir. 2000) ("the ADA does not require an employer to give an employee with a disability his job of choice, especially where there are qualified individuals who desire the same position."); *Williams v. City of Charlotte*, 899 F. Supp. 1484 (W.D.N.C. 1995) ("The ADA … does not mandate that an employer accept whatever reasonable accommodation a disabled employee may desire, so long as the employee is offered a reasonable accommodation."); *Vande Zande v. Wisconsin Dep't of Admin.*, 851 F. Supp. 353, 359 (W.D. Wis. 1994), *aff'd*, 44 F.3d 538 (7th Cir. 1995) (in complying with the ADA, "an employer need not accommodate an employee in a manner that the employee requests or provide the employee with the 'best' possible accommodation").

[28] 75 F.3d 1130, 1135 (7th Cir. 1996).

[29] *Id.*

either by way of initiation or response. Thus, in determining liability for failure to reasonably accommodate, the Seventh Circuit instructs that "courts should attempt to isolate the cause of the breakdown and then assign the responsibility."[30]

[ii] Liability Imposed Only When Reasonable Accommodation was Available

While the EEOC regulations recommend that an employer and employee engage in an interactive process of arriving at a feasible reasonable accommodation, most courts have held that liability will not be imposed upon an employer that fails to engage in this process unless a reasonable accommodation was available.[31] As the Seventh Circuit in *Rehling v. City of Chicago* emphasized,

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[30] *Id.* In *Jackson v. City of Chicago*, 414 F.3d 806 (7th Cir. 2005), the Seventh Circuit, following its decision in *Beck*, upheld a district court's dismissal of a police officer's claim that the city of Chicago had failed to accommodate her disability due to back pain and fibromyalgia because the court found that the plaintiff was responsible for the breakdown in the reasonable accommodation interactive process. Because of her fibromyalgia, the plaintiff was unable to handle a firearm and, hence, could not perform the functions of her existing police officer position. In considering whether the plaintiff might have been entitled to the reasonable accommodation of being reassigned to another position where handling a firearm was not an essential function, the court determined that the city had fulfilled any obligation in this regard by notifying the plaintiff that she could apply for reassignment. The city had sent the plaintiff's counsel several letters requesting clarification of the plaintiff's ability to return to work and requesting that she describe the nature and extent of any of her limitations in order for the city to evaluate her return to duty under the city's limited duty policy. In response, the plaintiff replied to the city's request only with conclusory statements and failed to provide medical information to the city in order for it to make an evaluation of other positions that the plaintiff might be able to perform. Given the plaintiff's failure to give a substantive response, the Seventh Circuit concluded that the plaintiff "was responsible for the breakdown in the interactive process" and, hence, she could not claim the city had failed to accommodate her. *Jackson*, 414 F.3d at 814.

In *Kinneary v. City of New York*, 601 F.3d 151 (2d Cir. 2010), the Second Circuit reversed a jury verdict in favor of a New York City boat captain who requested an exemption from random drug testing because of "shy bladder syndrome." In doing so, the court found that the captain had failed to provide the City sufficient information from his physician that his condition precluded him from providing a sufficient amount of urine for the test. In so ruling, the court noted that the City had afforded the captain the reasonable accommodation of canceling his drug test if his physician provided sufficient medical information. Because the physician's note was inadequate, the court concluded that there was no violation of federal or state disability discrimination laws.

[31] *Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944 (8th Cir. 1999) ("there is no per se liability under the ADA if the employer fails to engage in an interactive process.").

See also Peebles v. Potter, 354 F.3d 761, 769 (8th Cir. 2004) ("[o]ur cases do not … impose liability [upon an employer] merely for failing to fulfill this procedural aspect [engaging in the interactive process] of the duty to reasonably accommodate"); *Dropinski v. Douglas County, Nebraska*, 298 F.3d 704 (8th Cir. 2002) (where accommodations suggested by plaintiff would have placed an undue burden on employer, plaintiff's allegations that the employer failed to

"the interactive process is a means and not an end in itself … ."[32] Thus, in order to make out a violation of the ADA, "a plaintiff must allege that the employer's failure to engage in the interactive process resulted in a failure to identify an appropriate accommodation for the qualified individual."

The Ninth Circuit, however, has stated that the interactive process is a mandatory, rather than a permissive obligation, on the part of the employer under the ADA.[33]

[iii] "Good Faith" Efforts

Even if an employer believes that reasonable accommodation is impossible, an employer should not ignore the interactive process. As the Third Circuit court said in *Mengine v. Runyon*, which was decided under the Rehabilitation Act, "if reasonable accommodation is impossible, nothing more than communication of this fact is required. Nonetheless, if an employer fails to engage in the interactive process, it may not discover a way in which the employee's disability could have been reasonably accommodated … ."[34]

Additionally, the Eighth Circuit has taken the position that "although an employer will not be held liable under the ADA for failing to engage in an interactive process if no reasonable accommodation was possible, … for purposes of summary judgment, the failure of an employer to engage in an interactive process to determine whether reasonable accommodations are possible is prima facie evidence that the employer may be acting in bad faith."[35]

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engage in the reasonable accommodation interactive process is "superfluous").

[32] *Rehling v. City of Chicago*, 207 F.3d 1009 (7th Cir. 2000).

[33] *See Zivkovic v. S. Cal. Edison Co*., 302 F.3d 1080, 1089 (9th Cir. 2002) ("once an employee requests an accommodation or an employer recognizes the employee needs an accommodation but the employee cannot request it because of a disability, the employer must engage in an interactive process with the employee to determine the appropriate reasonable accommodation").

[34] *Mengine v. Runyon*, 114 F.3d 415, 420–21 (3d Cir. 1997).

In *Kennelly v. Pa. Tpk. Comm'n*, 208 F. Supp. 2d 504 (E.D. Pa. 2002), the court denied summary judgment to the employer because a factual issue existed as to whether the employer engaged in the reasonable accommodation interactive process with the plaintiff, a former emergency response worker who was diagnosed with a panic disorder after hospital treatment for an emotional breakdown. The court found that the plaintiff's request for additional training to provide first aid to car accident victims as part of his emergency response duties may have constituted a request for reasonable accommodation of his panic disorder and created a factual issue as to whether the plaintiff's employer adequately responded to a request for reasonable accommodation. In addition, the court found that a factual issue existed as to whether the employer reasonably responded to the plaintiff's alternative request that he be transferred to an equipment operator position.

[35] *Fjellestad v. Pizza Hut of America*, 188 F.3d 944, 952 (8th Cir. 1999).

[iv] Limits to Interactive Process

The reasonable accommodation, interactive process is not without its limits, however. The Third Circuit Court of Appeals in *Taylor v. Phoenixville School District* emphasized that the ADA, for example, does not require "an employer who makes a good faith effort to accommodate … [to] be saddled with a secretary who consistently makes typos and fails to deliver messages. Nor do we hold that an employer cannot introduce a new computer system or switch an employee to a less forgiving supervisor."[36] Rather, all that is required under the ADA "is that an employer, having received adequate notice of an employee's disability and desire for accommodations, cannot fail to engage the employee in the interactive process of finding accommodations," and, then, terminate the employee when the employee fails to perform his or her job functions.[37]

[v] Delays in Providing Reasonable Accommodations

The EEOC has taken the position that unnecessary delays by an employer in the reasonable accommodation process can cause a breakdown in the process and result in a violation of the ADA. Accordingly, the EEOC opines that an employer should respond "expeditiously" to an individual's request for reasonable accommodation. Thus, if an employer and an individual with a disability need to engage in the interactive process to determine an appropriate reasonable accommodation, this process should proceed as quickly as possible. Similarly, the employer should act promptly to provide the reasonable accommodation.[38]

[vi] Jury Considerations

Where the cause of the breakdown in the reasonable accommodation process is not clear, the Seventh Circuit has said that this is an issue for the jury to assess. For example, in *Bultemeyer v. Fort Wayne Community Schools*, the Seventh Circuit reversed the district court's grant of summary judgment for the employer, concluding that there was a genuine dispute as to whether the employer

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[36] *Taylor v. Phoenixville School District,* 184 F.3d 296, 319 (3d Cir. 1999).

[37] *Id.*

[38] See EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002 (Oct. 17, 2002), available at www.eeoc.gov/policy/docs/accommodation.html.

See also Valle-Arce v. P.R. Ports Auth., 651 F.3d 190 (1st Cir. 2011) (concluding that plaintiff raised a jury issue as to whether employer's failure to follow normal reasonable accommodation procedures and its delay in providing accommodations constituted a failure to reasonably accommodate).

sufficiently engaged in an interactive process of seeking accommodations from an employee with a mental disability.[39] In refusing to uphold the lower court's dismissal of the case, the Seventh Circuit stated that "an employee's request for reasonable accommodation requires a great deal of communication between the employee and employer … . Neither party should be able to cause a breakdown in the process or the purpose of either avoiding or inflicting liability … . A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. In essence, the court should attempt to isolate the cause of the breakdown and then assign responsibility."[40]

[f] Rejection of a Reasonable Accommodation

Where an individual rejects a reasonable accommodation and as a result cannot perform the essential functions of the job, the EEOC's regulations provide that the individual will not "be considered a qualified individual with a disability."[41]

[3] Implementing Specific Accommodations

[a] Job Restructuring

[i] ADA Requirements

Job restructuring means modifying a job so that a person with a disability can perform the essential functions of the position; it also entails removing barriers to performance by eliminating nonessential functions. Job restructuring may require such things as:

• Re-delegating job assignments;

• Exchanging assignments with another employee; and

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[39] *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281 (7th Cir. 1996).

[40] *Bultemeyer*, 100 F.3d at 1285, *quoting Beck v. University of Wisconsin Board of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996).

[41] 29 C.F.R. § 1630.9(d), 56 Fed. Reg. 35,726, 35,737 (1991).

See also Fink v. New York City Dep't of Personnel, 855 F. Supp. 68, 72 (S.D.N.Y. 1994), *aff'd*, 53 F.3d 565 (2d Cir. 1995).

• Redesigning procedures for accomplishing certain job tasks.[42]

An example of job restructuring given by the EEOC is that of an employer who has openings for two job positions, each of which entails the performance of a number of marginal functions. If a qualified individual with a disability is able to perform some, but not all, of the marginal elements of each job, the employer, as an accommodation, may redistribute the marginal functions. Under this new arrangement, those marginal functions for both jobs that could be performed by the individual with a disability would be made part of that person's job position. The remaining marginal duties would be shifted to the other position.[43]

Where an individual with a disability cannot meet peripheral job requirements, courts have imposed a limited duty on the employer to redefine the job so as to exclude those requirements. In *Fitzgerald v. Green Valley Area Education Agency*,[44] the plaintiff, a hemiplegic, was rejected for a position as a school teacher because the duties included driving a bus and this duty was beyond the plaintiff's capabilities. The court determined that in rejecting Fitzgerald outright, the school violated the Rehabilitation Act. According to the court, the school failed to consider a variety of possible accommodations, including placing Fitzgerald in a school where driving a bus was not required, hiring an independent carrier to transport the students, or seeking to require the school district to transport the students.

[ii] No Obligation to Eliminate or Reallocate Essential Functions

Significantly, the ADA does not require an employer to eliminate or reallocate *essential* job functions.[45] As stated by the Fifth Circuit Court of

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[42] H.R. Rep. No. 485, Part 2, 101st Cong., 2d Sess. at 62 (1990) (House Committee on Education and Labor).

[43] 29 C.F.R. App. § 1630.2(o), 56 Fed. Reg. 35,726, 35,744 (1991).

In reassigning marginal job duties to other employees, an employer is not required "to adjust co-workers' duties to make them longer or harder." *See Burch v. City of Nacogdoches*, 174 F.3d 615 (5th Cir. 1999).

[44] 589 F. Supp. 1130 (S.D. Iowa 1984).

[45] 29 C.F.R. App. § 1630.2(o); *Carrozza v. Howard County*, 847 F. Supp. 365, 368 (D. Md. 1994), *aff'd*, 45 F.3d 425 (4th Cir. 1995) (the ADA does not require "an employer to 'restructure' a job as to change its fundamental requirements, such as the ability to cope with its inherent stressors."); *McDonald v. Kansas Dep't of Corrections*, 880 F. Supp. 1416 (D. Kan. 1995) (reasonable accommodation does not include requiring employer to create a new rotational position to accommodate physical limitations of employee); *Santos v. Port Authority*, 1995 U.S. Dist. LEXIS 10168 (S.D.N.Y. 1995) (the ADA does not require employers to substantially restructure their workforces by eliminating essential job functions in order to accommodate employees with disabilities).

Appeals in *Burch v. City of Nacogdoches*, "the ADA does not require an employer to relieve an employee of any essential functions of his or her job, modify those [essential] duties, reassign existing employees to perform those jobs, or hire new employees to do so."[46]

In construing the Rehabilitation Act, courts have taken a similar approach. In *Hall v. United States Postal Service*, the Sixth Circuit recognized the general rule followed by courts in interpreting the Rehabilitation Act that "an employer … is not required to accommodate a handicapped individual by *eliminating* one of the essential functions of the job … . In other words, an accommodation that eliminated an essential function of the job is not reasonable."[47] Other courts have recognized the same rule.[48]

[iii] Temporary Elimination of Essential Job Functions

The fact that an employer may have reallocated job functions in the past does not necessarily mean that the employer must continue with this practice, where the job functions are deemed "essential."[49] For example, in *Holbrook v. City of Alpharetta*,[50] the Eleventh Circuit Court of Appeals held that the city of Alpharetta police department was not obligated to continue accommodating a police detective with a visual impairment by not requiring him to undertaken crime scene investigations. Although the city had assigned the detective to office duty and did not require him to be "on call" for investigations, the court held that being able to investigate a crime scene was an essential part of the detective's job. As stated by the court of appeals, "we do not seek to discourage other employers from undertaking the kinds of accommodations of a disabled employee as those

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[46] *Burch v. City of Nacogdoches*, 174 F.3d 615 (5th Cir. 1999).

See also Dropinski v. Douglas County, 298 F.3d 704, 710 (8th Cir. 2002) (ADA does not require an employer to reassign existing workers to assist disabled employee in his essential job duties).

[47] 857 F.2d 1073 (6th Cir. 1988) (emphasis in original) (citations omitted).

[48] *See Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139, 1149 (3d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989) ("accommodating a drug user within the ranks of the police department would constitute a 'substantial modification' of the essential functions of the police department" and, thus, not required); *Gaither v. Anne Arundel County*, 94 Md. App. 569, 618 A.2d 244 (1993) (employer not required to accommodate a handicapped individual by eliminating one of the essential functions of the job) (decided under Maryland Fair Employment Practices Act).

[49] *See Gratzl v. Office of the Chief Judges of the 12th, 18th, 19th & 22nd Judicial Circuits*, 601 F.3d 674, 681 (7th Cir. 2010) (the fact that an employer "divvied up job responsibilities differently in the past" does not mean that currently a job function is not essential); *Robert v. Board of County Comm'rs*, 691 F.3d 1211, 1217 (10th Cir. 2012) (an employer's "tolerance" of temporary non-performance of essential job duties does not constitute evidence that those duties are non-essential; ADA does not "perversely punish employers who are going beyond the minimum standards of the ADA by providing additional accommodation to their employees.").

[50] 112 F.3d 1522 (11th Cir. 1997).

performed by the city. … Indeed, it seems likely that the city retained a productive and highly competent employee based partly on its willingness to make such accommodations. … [W]e cannot say that the city's decision to cease making those accommodations that pertained to the essential functions of Holbrook's job was violative of the ADA."[51]

[iv] No Need to Create Job Positions

The ADA also does not require an employer to create new job positions as a reasonable accommodation.[52] Thus, an employer need not create a light duty position or a new permanent position for a disabled employee.[53]

This rule is consistent with decisions under the Rehabilitation Act. For instance in *Davis v. Meese*,[54] the court held that the FBI was not required to create limited duty assignments for applicants with diabetes who desired to become special agents. In so holding, the court reasoned that to require the creation of new job categories would have impeded the Bureau's functions.

In addition, the courts have recognized that where an employer has created a temporary light duty assignment to accommodate employees with physical impairments, such as those who suffer job-related injuries, the employer has no duty to transform those assignments into permanent positions should the

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[51] The fact that an employer may have made modifications to job duties for other employees, however, may be evidence that those duties are not essential job functions. For example, in *Taylor v. Rice*, 451 F. 3d 898 (D.C. Cir. 2006), the District of Columbia Circuit held that the U.S. Department of State had failed to establish that accommodations proposed by an HIV positive applicant to the State Department's requirement that new Foreign Service officers be able to serve everywhere in the world were not reasonable. In so ruling, the D.C. Circuit noted that there was evidence that the State Department accommodated the compromised health status of existing Foreign Service officers who became HIV positive and, therefore, could not work at all posts and that it was the Department's practice to allow officers to travel for routine medical monitoring. The court of appeals reasoned that even if the plaintiff's proposed accommodations would contravene stated State Department policy, if they were consistent with the Department's day to day practice, then they would constitute reasonable accommodations under the ADA which the Department would need to provide.

[52] *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995), *cert. denied*, 516 U.S. 1172 (1996).

[53] *Rucker v. City of Philadelphia*, 1995 U.S. Dist. LEXIS 11104 (E.D. Pa. 1995), *aff'd*, 85 F.3d 612 (3d Cir. 1996) (employer did not violate ADA by failing to reasonably accommodate employee's disability by not placing him in a "limited duty" position).

[54] 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3d Cir. 1989).

See also *Gaither v. Anne Arundel County*, 94 Md. App. 569, 618 A.2d 244 (1993) (county need not create permanent light duty assignment to accommodate disabled employee).

employee's impairments become permanent.[55] For example, in *Hoskins v. Oakland Co. Sheriffs Dep't.*, the Sixth Circuit held that the ADA did not require an employer to convert a temporary rotating position into a new, full-time position as an accommodation for an employee whose disability had become permanent.[56] The case involved a deputy sheriff who suffered an on the job injury which limited her ability to restrain inmates in the county jail. The plaintiff claimed that the sheriff's department had a duty to accommodate her condition by reassigning her permanently to a position in one of the control booths, which did not require interaction with inmates. The department resisted on the basis that the control booth position was reserved as a rotating position for all deputies and assigning the plaintiff to the control booth position on a permanent basis would undermine the rotating nature of the position. The Sixth Circuit agreed, reasoning that the plaintiff's "request would essentially require the creation of a new position rather than reassignment to an otherwise existing vacant one. As we have made clear, an employer's duty to reassign an otherwise qualified disabled employee does not require the employer create a new job in order to do so."[57]

[b] Part Time or Modified Work Schedules, Work at Home and Unpaid Leave

[i] Part Time or Modified Work Schedules

Part-time work is explicitly included as a "reasonable accommodation" in the ADA's statutory language itself.[58] Although a part-time schedule may be a reasonable accommodation in the appropriate circumstances, for many types of jobs, part-time work may not be mandated as a reasonable accommodation. This is the case because, as noted previously, an employer is not required to reallocate essential functions of the job, nor hire additional employees to perform those essential job tasks that an employee could not accomplish working part-time.

A modified work schedule may be required to accommodate persons who have certain types of medical disabilities or who need medical treatment during

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[55] See *Laurin v. Providence Hospital*, 150 F.3d 52, 60 (1st Cir. 1998) (ADA did not require hospital to assign nurse with epilepsy to permanent day shift even though it had done so on temporary basis to assist her recuperation); *Malabarba v. Chicago Tribune Co.*, 149 F.3d 690, 696 (7th Cir. 1998) ("acknowledging the long-standing recognition that the ADA does not require that employers transform temporary work assignments into permanent positions").

[56] *Hoskins. v. Oakland County Sheriff's Dep't.*, 227 F.3d 719, 730–31 (6th Cir. 2000).

[57] *Hoskins*, 227 F.3d at 730.

[58] 42 U.S.C. § 12111(9)(B) ("the term 'reasonable accommodation' may include … part-time or modified work schedules … .").

the week or at various times during the day.[59] While modified work schedules or unpaid leave may cause some difficulties, the employer is still obligated to bear the inconvenience unless it amounts to an "undue hardship."[60]

Importantly, an employer is not required to accommodate frequent and unpredictable employee absences. Open-ended and work-when-able schedules generally also are not reasonable accommodations under the ADA.[61] The courts have reasoned that the employee could not be considered a qualified individual with a disability because "unfettered ability to leave work at any time is certainly not a reasonable accommodation."[62] Cases construing the Rehabilitation Act also have recognized that reasonable accommodation does not require an employer to do away with job attendance requirements. As stated by the District of Columbia Circuit in *Carr v. Reno*:

> to require an employer to accept an open ended "work when able" schedule for a time sensitive job would stretch "reasonable accommodation" to absurd proportions … .[63]

Additionally, an employer, as a reasonable accommodation, is not obligated to grant a leave of absence for an indefinite period following the expiration of an

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[59]*See Dees v. Austin Travis County Mental Health and Mental Retardation*, 860 F. Supp. 1186 (W.D. Tex. 1994), the court interpreted Title II of the ADA to require a Texas agency that provides community services to the mentally ill to change the time of its board meetings in order to accommodate individuals whose medication makes it difficult to attend early morning functions. The agency that had been holding board meetings at 7:00 and 8:00 a.m. was ordered to meet between 9:30 a.m. and 6:00 p.m. as a reasonable accommodation.

[60]*See, e.g.*, *Perez v. Philadelphia Hous. Auth.*, 677 F. Supp. 357 (E.D. Pa. 1987), *aff'd*, 841 F.2d 1120 (3d Cir. 1988) (employer failed to reasonably accommodate employee who had sustained a serious back injury, where physician recommended part-time schedule, but employer refused); *Cook v. Department of Mental Health, Retardation, & Hosps*., 10 F.3d 17 (1st Cir. 1993) (employer may need to "bear absenteeism and other miscellaneous burdens involved in making reasonable accommodations in order to permit the employ of disabled persons.").

[61]*Rask v. Fresenius Med. Care N. Am.*, 509 F. 3d 466, 471 (8th Cir. 2007) (allowing a patient care technician at a kidney dialysis center "to take sudden, unscheduled absences" due to problems with her medication for depression, as a matter of law, was not a reasonable accommodation).

[62]*Buckles v. First Data Resources*, 176 F.3d 1098, 1101 (8th Cir. 1999).

See also Pickens v. Soo Line Railroad Co., 264 F.3d 773 (8th Cir. 2001) (railroad conductor with back injury whose suggested method of accommodation—that he should be able to work only when he feels like working—is "unreasonable as a matter of law").

[63] 23 F.3d 525, 531 (D.C. Cir. 1994); *Huber v. Howard County*, 849 F. Supp. 407, 414 (D. Md. 1994), *aff'd*, 56 F.3d 61 (4th Cir. 1994), *cert. denied*, 516 U.S. 916 (1995) ("An accommodation which permits an employee to work only when his or her impairment permits is not reasonable in a job … where active attendance and immediate, undelayed participation is crucial.").

employee's twelve weeks of FMLA leave.[64]

[ii] Work at Home

If an employer offers a telework program for its employees, an employer must allow employees with disabilities an "equal opportunity" to participate in the program as a reasonable accommodation. In Woodruff v. Peters, 482 F.3d 521 (D.C. Cir. 2007), the District of Columbia Circuit also ruled that a triable issue of fact existed as to whether or not an employee who had undergone back surgery and a long recuperation period could perform the essential functions of his job with a flexible schedule, including work at home. In so ruling, the court noted that the agency's telecommuting handbook had anticipated that employees may telecommute as frequently as five days a week and that the federal agency previously had allowed the employee to telecommute two days a week and have a flexible work schedule.

Even if an employer has no telework policy, t-he EEOC has taken the position in its Enforcement Guidance on reasonable accommodation that "an employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation."[65] Thus, an employer may be required to allow an individual with a disability to work at home, but "only if this accommodation would be effective and would not cause an undue hardship."[66] The EEOC's Guidance acknowledges, however, that the essential functions of some jobs cannot be performed at home. Critical to the analysis is consideration of "the employer's ability to adequately supervise the employee and the employee's need to work with certain equipment that cannot be replicated at home."[67]

Although the EEOC supports working at home as a reasonable accommodation, present case law supports the view that working at home is not necessarily mandated by the ADA. Many jobs involve team work under supervision, which cannot be performed at home without a reduction in the quality of the employee's job performance. Thus, the Seventh Circuit Court of Appeals in its 1995 decision in *Vande Zande v. Wisconsin Department of Administration* found that an employer would not be required to accommodate an individual with a disability by allowing unsupervised work at home. The court, however, acknowledged that advances in communications technology may change the need for interaction among employees and personal supervision.[68]

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[64] *Williams v. City of Omaha*, 2004 U.S. Dist. LEXIS 3213, *14–15 (D. Neb. Mar. 2, 2004).
[65] EEOC Enforcement Guidance on Reasonable Accommodation, *supra*, Question 33.
[66] *Id.*
[67] *Id.*
[68] *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538 (7th Cir. 1995) ("reasonable

In other decisions, the courts also have concluded that a request to work at home is unreasonable because it would require the employer to eliminate an essential function of the job. In *Kvorjak v. Maine*, a disabled employee who worked as a claims adjuster requested the accommodation of working at home on a full-time, permanent basis.[69] The First Circuit, deferring to the employer's evidence that training and team work were essential functions of the claims adjuster position, held that the employer was not obligated to provide the accommodation because the employee could not perform the essential functions of the position from home.[70] Similarly, in *Hypes v. First Commerce Corp.*, the Fifth Circuit had held that a disabled loan analyst's request for a "flex-time accommodation," which ostensibly would have allowed the employee to work from home, was unreasonable because his presence in the office was an essential function of the loan analyst position.[71]

In one case holding that a triable issue existed as to the reasonableness of working at home as an ADA accommodation, *Humphrey v. Memorial Hosps. Association*, the Ninth Circuit emphasized there was evidence in the record that the essential functions of the employment position could be performed at home.[72] The case was brought by a disabled medical transcriptionist who sought to perform her job duties with an at-home work accommodation. In allowing the case to proceed to trial, the court of appeals explained that "[w]orking at home is a reasonable accommodation when the essential functions of the position can be performed at home and a work-at-home arrangement would not cause undue hardship for the employer."[73] In assessing the evidence on summary judgment, the circuit court found that "physical attendance at [the employer's] offices [was] not an essential job duty" because, according to the court, "the record [made] it clear that [the employer] permitt[ed] some of its medical transcriptionists to work at home.[74]

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accommodation almost never requires an employer to allow a disabled employee to work at home").

See also *Keck v. New York State Office of Alcoholism & Substance Abuse Servs.*, 10 F. Supp. 2d 194, 201 (N.D.N.Y. 1998) (concluding that being able to work from home would not be a reasonable accommodation for employee with chemical sensitivities because of the difficulty of supervising an employee who works from home).

[69] *Kvorjak v. Maine*, 259 F.3d 48, 51 (1st Cir. 2001).

[70] *Id.* at 57–58.

[71] *Humphrey v. Memorial Hosps. Ass'n*, 239 F.3d 1128, 1136 (9th Cir. 2001), *cert. denied*, 535 U.S. 1011 (2002).

[72] *Humphrey v. Memorial Hosps. Ass'n*, 239 F.3d 1128, 1136 (9th Cir. 2001), *cert. denied*, 535 U.S. 1011 (2002).

[73] 239 F.3d at 1136.

[74] *Id.* at 1137.

[iii] Leave of Absence

A leave of absence also may be a reasonable accommodation. In granting leave as a reasonable accommodation, an employer would be obligated to hold open the employee's job, unless doing so would impose an undue hardship. How much leave an employer will be obligated to provide will depend upon an individualized assessment of the specific factual situation.[75]

[iv] – Accommodating an Employee's Commute

The Second Circuit has said that under certain circumstances, an employer may be obligated to assist a disabled employee's commute by, for example, modifying an employee's work schedule to allow the employee to use public transportation or avoid driving at certain times. This might include, for example, providing a disabled employee with a car, reserved parking spaces or a parking permit, transferring the employee to a location closer to the employee's home, or allowing the employee to work from home.[76]

Other circuit courts have taken a different view as to whether assisting a disabled employee with commuting to and from work may be a reasonable accommodation. For example, in *Regan v. Faurecia Auto. Seating, Inc*., the Sixth Circuit took the position that the ADA does not require an employer to accommodate a disabled employee's request for an alteration in the employee's work schedule to allow the employee to commute during more convenient hours.[77]

[c] Employer's Obligations to Reassign Disabled Employee

If a disabled employee cannot be reasonably accommodated in his or her current job, then the ADA requires an employer to consider reassignment of that employee to a vacant position that the employee is qualified to perform.

[i] Is There Priority for Disabled?

In its Enforcement Guidance on "Reasonable Accommodations and Undue

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[75] *Ralph v. Lucent Technologies, Inc*., 135 F.3d 166, 171-72 (1st Cir. 1998). *See also Dark v. Curry County*, 451 F. 3d 1078, 1090 (9th Cir. 2006) (while "recovery time of unspecified duration may not be a reasonable accommodation," there existed an issue of fact as to the reasonableness of plaintiff's request to use his over 700 hours of accumulated sick leave until the medical issues pertaining to his epileptic seizures "could be resolved").

[76] *Nixon-Tinkelman v. N.Y. City Dep't of Health & Mental Hygiene*, 2011 U.S. App. LEXIS 16569 (2d Cir. Aug. 10, 2011).

[77] *Regan v. Faurecia Auto. Seating, Inc*., 679 F.3d 475, 480 (6th Cir. 2012).

Hardship under the Americans with Disabilities Act," the EEOC has stated explicitly that reassignment is a reasonable accommodation for which disabled employees should have priority.[78] The EEOC's position was followed by the Tenth Circuit Court of Appeals in *Smith v. Midland Brake, Inc.*[79] Similarly, in *EEOC v. United Airlines, Inc.*, the Seventh Circuit agreed with the EEOC that disabled employees who no longer can perform their current positions, with or without reasonable accommodation, must be offered reassignment to a vacant position for which they are qualified unless the employer can show undue hardship.[80]

Some courts have not adhered to the EEOC's position and, instead, have indicated that the reassignment obligation means merely that an employer must consider an employee with a disability in the same manner as other non-disabled employees. To do otherwise, would give disabled employees a preference in filling a vacancy, which these courts have reasoned is not required under the ADA.[81]

[ii] Limits on Reassignment

An employer is not obligated to create a "new position" for which to reassign a disabled employee.[82] An employer also is not required to accommodate an employee with a disability by promoting the employee to a vacant position.[83]

Further, while reasonable accommodation may include reassignment, there is no duty for an employer to "bump" other employees from positions they

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[78] EEOC Enforcement Guidance on Reasonable Accommodation, *supra*, Question 26.

[79] 180 F.3d 1154, 1167 (10th Cir. 1999) (en banc).

[80] *EEOC v. United Airlines, Inc.,* 693 F.3d 760 (7th Cir. 2012).

[81] *Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1263 (1996)

See also Wernick v. Federal Reserve Bank of New York, 91 F.3d 379, 384–85 (2d Cir.1996) ("nothing in the law leads us to conclude that in enacting the Disability Act, Congress intended to interfere with personnel decisions within an organizational hierarchy. Congress intended simply that non-disabled persons have the same opportunities available to them as are available to non-disabled persons. …").

[82] *Phelps v. Optima Health, Inc*., 251 F.3d 21 (1st Cir. 2001); *Smith v. Midland Brake, Inc*., 180 F.3d 1154, 1174 (10th Cir. 1999).

[83] *Lucas v. W. W. Grainger, Inc*., 257 F.3d 1249 (11th Cir. 2001); *Smith v. Midland Brake, Inc*., 180 F.3d 1154, 1176 (10th Cir. 1999) (en banc); *Milton v. Scrivner, Inc*., 53 F.3d 1118, 1125 (10th Cir. 1995). *See Bettis v. Illinois Department of Human Services*, 70 F. Supp. 2d 865 (C.D. Ill. 1999) (employer did not fail to reasonably accommodate maintenance worker with Crohn's disease when employer refused to promote him to a position that allegedly would have alleviated his symptoms; ADA does not require promoting individual with a disability as a reasonable accommodation).

hold to accommodate an individual with a disability.[84]

Often, employers may have a certain number of temporary light duty jobs, which have been created to provide work assignments for employees injured on or off the job. In fulfilling its reasonable accommodation obligation, an employer may be obligated to transfer a disabled employee to a vacant temporary light duty position. In this circumstance, the reassignment to the temporary light duty position need only be for the temporary period of the job. "If a light duty job is a temporary job, reassignment to that job need only be for the temporary period of the job. An employer need not convert a temporary job into a permanent one."[85] For example, in *Hoskins v. Oakland County Sheriff's Dep't*, the Sixth Circuit ruled that the ADA does not require an employer to turn a rotating "relief" job into a permanent position because doing so essentially would require the creation of a new position.[86] As the court of appeals explained, the ADA does not require employers to create new positions for disabled employees.

[iii] Reassignment Process

If a vacant position is not presently available, but the employer knows that one will become available shortly, the employer may be obligated to retain a disabled employee on leave until the opening occurs. In this circumstance, how long must an employer allow the leave to extend?

The EEOC has suggested that retaining an employee on leave more than six months pending the opening of a vacant position would be beyond a "reasonable amount of time."[87]

Court decisions also have made clear that employers are not obligated to retain a disabled employee on leave indefinitely or for an excessive amount of time. For example, in *Hoskins v. Oakland County Sheriff's Department*, the Sixth Circuit Court of Appeals concluded that it would be unreasonable to require the employer, a county sheriff's department, to assign an employee to a new position

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[84]29 C.F.R. App. § 1630.2(o), 56 Fed. Reg. 35,726, 35,744 (1991). See also *Fowler v. Frank*, 702 F. Supp. 143 (E.D. Mich. 1988) (no failure to accommodate plaintiff's disability by refusal to reassign him to another facility where employer had no full-time opening at other facility for which employee was physically qualified and employer offered employee limited duty position consistent with disability at facility where employee already was working).

[85] 29 C.F.R. App. § 1630.2(o), 56 Fed. Reg. 35,726, 35,744 (1991). See also *Fowler v. Frank*, 702 F. Supp. 143 (E.D. Mich. 1988) (no failure to accommodate plaintiff's disability by refusal to reassign him to another facility where employer had no full-time opening at other facility for which employee was physically qualified and employer offered employee limited duty position consistent with disability at facility where employee already was working).

[86]*Hoskins v. Oakland County Sheriff's Dep't*, 227 F.3d 719, 730 (6th Cir. 2000).

[87]EEOC's Enforcement Guidance on Reasonable Accommodation, *supra.*

that became available "well over a year" after the employer became aware of the employee's disability and the need for reasonable accommodation.[88]

[iv] Seniority and Reassignment

Many employers have put in place systems for filing vacant positions based upon seniority. Must an employer, as a reasonable accommodation, ignore a seniority policy by reassigning a disabled worker to a vacant position even though a more senior employee otherwise would be given the position based upon the employer's seniority plan? In *US Airways, Inc. v. Barnett*, the Supreme Court answered that in the "run of cases," seniority trumps reasonable accommodation and an employer would not be required to reassign a disabled employee in violation of a valid seniority-based policy.[89]

In *Shapiro v. Township of Lakewood*, the Third Circuit Court of Appeals considered the impact of the Supreme Court's *U.S. Airways* opinion upon whether the employer was required to deviate from its unwritten practice that employees desiring transfers to a vacant position must monitor for themselves the job postings and apply for positions that they seek.[90] The court of appeals interpreted *U.S. Airways* as prescribing a two-step approach for cases in which a requested accommodation in the form of a job reassignment is claimed by the employer to violate a disability-neutral rule. The first step requires the employee to show that the accommodation is a type that is reasonable in the run of cases. The second step varies depending on the outcome of the first step. If the accommodation request is shown to be a type that is reasonable in the run of cases, the burden shifts to the employer to show that granting the accommodation would impose an undue hardship under the particular circumstances of the case. On the other hand, if the accommodation is not shown to be one that is reasonable in the run of cases, the employee still can prevail by demonstrating that special circumstances warrant a finding that the accommodation is reasonable under the particular circumstances of the case.[91]

[v] Reassignment Under Rehabilitation Act and State Laws

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[88] 227 F.3d 719, 729 (6th Cir. 2000).

See also Dark v. Curry County, 451 F.3d 1078, 1089–90 (9th Cir. 2006) (in order for the employer to satisfy its reasonable accommodation obligation, "an employer must consider not only those contemporaneously available positions but also those that will become available within a reasonable period").

[89] *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 394, 122 S.Ct. 1516, 152 L.Ed.2d 589 (2002).

[90] 292 F.3d 356 (3d Cir. 2002).

[91] 292 F.3d at 361.

Most courts construing the Rehabilitation Act and state anti-discrimination laws have taken an approach similar to that required under the ADA. In one of the leading cases construing the Rehabilitation Act, *School Board of Nassau County v. Arline*, the Supreme Court stated that while employers "are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies."[92] Lower courts have taken a similar position. In *Coley v. Secretary of Army*, the district court recognized that reasonable accommodation of a disabled employee would include reassignment to another position.[93]

[d] Acquisition or Modification of Equipment or Devices

Acquisition or modification of equipment or devices may encompass a number of accommodations that an employer may make. The types of equipment or devices that may be appropriate to aid employees with disabilities will often vary depending upon an employee's specific disability. Certain devices that may be appropriate to accommodate a specific category of disability may not help an employee with a different type of physical or mental impairment.

For blind and visually impaired individuals, reasonable accommodation by an employer may require the provision of equipment and adaptive devices such as the following:

• Reading material in Braille or large types;

• Audio recordings;

• Voice synthesizer; and

• Electronic visual aids.

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[92] *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 289 n.19, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987).

[93] 689 F. Supp. 519 (D. Md. 1987).

See Wooten v. City of Columbus, Division of Water, 91 Ohio App. 3d 326, 632 N.E.2d 605 (1994) (reasonable accommodation under both Rehabilitation Act and state law includes reassignment to an available related vacant position for which person with a disability is qualified and can perform); *Gaither v. Anne Arundel County*, 94 Md. App. 569, 618 A.2d 244 (1993) (reasonable accommodation may include demotion from a position that a disabled employee cannot perform to one in which the employee can perform the essential functions of the job); *McMullen v. LIRC*, 148 Wis.2d 270, (Wis. Ct. App. 1988) (reasonable accommodation under state law included transfer to vacant position as the employee with a disability was qualified for the new position); *Clarke v. Shoreline School Dist.* No. 412, 106 Wash. 2d 102, (1986); *Dean v. Seattle-Metro*, 104 Wash. 2d 627, 708 P.2d 393 (1985).

The visually impaired also may benefit from computer technologies such as:

• Computers that translate words on the terminal screen into Braille;

• Speech synthesizers that "say" the words on the terminal screen;

• Laser scanners that "read" printed pages into computer storage and make the material immediately available to both blind and sighted readers;

• Devices that scan printed or stored text and magnify it on a screen.

Installing amplifiers for the telephone receiver and high-frequency or visual telephone ringers are some of the simplest and most inexpensive ways in which an employer may accommodate hard-of-hearing employees. For those with more severe hearing impairments, teletypewriters (or TTYs) may be installed.

Although the list of special devices that an employer may need to provide or supply in making a reasonable accommodation is extensive, the employer's obligation extends to only those devices that are job-related. The EEOC in its Interpretive Guidance on the ADA has described "job related" as meaning that which "specifically assists the individual in performing the duties of a particular job."[94] An employer's obligation does not encompass providing equipment or devices that are primarily for the personal benefit of an individual with a disability. According to the EEOC, "if an adjustment or modification assists the individual throughout his or her daily activities, on and off the job, it will be considered a personal item that the employer is not required to provide."[95]

[e] Adjustment or Modification of Examinations, Training Manuals, or Policies

In order to accommodate job applicants with disabilities, job application forms, pre-employment tests and other job application material should be offered in accessible formats such as audio recordings, large type, or Braille material.[96]

The ADA, however, does not require that an employer change or modify a

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[94] 29 C.F.R. App. § 1630.2(o) (2011).

[95] *Id.*

[96] *Fink v. New York City Dep't of Personnel*, 855 F. Supp. 68 (S.D.N.Y. 1994), *aff'd*, 53 F.3d 565 (2d Cir. 1995) (employer reasonably accommodated blind employees by providing a taped version of civil service promotional examination; employer did not need to provide a Braille examination) (decided under Section 504 of the 1973 Rehabilitation Act).

job description or policy if the employer can demonstrate that it would fundamentally alter the essential functions of the job.[97] Similarly, in a case decided under the Rehabilitation Act, the Eighth Circuit refused to require the reinstatement of a police officer who was a paraplegic as a result of a job-related shooting, where the officer could no longer meet the forcible arrest and transfer requirements of the department.[98] These requirements were viewed by the court to be essential and, hence, not subject to change or adjustment.

[f] Qualified Readers or Interpreters

The provision of "qualified readers and interpreters" is recognized both under the statute and the EEOC's implementing regulations as constituting a "reasonable accommodation" to assist an employee with a disability.[99] Whether an employer will be required to provide a sign language interpreter to a hearing impaired employee will depend upon the specific circumstances of the case.

[g] Personal Assistants and Attendants

As pointed out in the ADA's legislative history, attendants also may be required for traveling and other job-related functions of a disabled employee.[100]

Cases construing the 1973 Rehabilitation Act have not required an employer to hire a full-time assistant for an individual with a disability, with the assistant's only function being to aid the individual with the disability in the performance of the essential functions of the job.[101] This rule has been followed

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[97] H.R. Rep. No. 485, Part 2, 101st Cong., 2d Sess. at 64 (1990) (House Committee on Education and Labor).

[98] *Simon v. St. Louis County, Mo.*, 735 F.2d 1082 (8th Cir. 1984).

In *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993), the Eleventh Circuit upheld a challenge under Section 504 of the Rehabilitation Act, to the city's "no beard" policy for firefighters. The plaintiffs, who suffered from pseudofolliculitis barbae and, as a consequence, were unable to shave, claim that the city's policy discriminated against them on the basis of disability. The court of appeals held that assuming the plaintiffs were handicapped under the Rehabilitation Act, the city's policy was not discriminatory inasmuch as it was required by business necessity—a firefighter needed to be clean shaven in order to use respirator masks—and there was no reasonable accommodation available. According to the court, the city "adduced evidence affirmatively showing that the no beard rule is required for safety and there exists no comparably safe, less discriminatory alternative to the ban."

[99] 42 U.S.C. § 12111(9)(8); 29 C.F.R. § 1630.2(o) (2011).

[100] S. Rep. No. 116, 101st Cong., 1st Sess. at 33 (1989) (Senate Committee on Labor and Human Resources); H.R. Rep. No. 485, Part 2, 101st Cong., 2d Sess. at 64 (1990) (House Committee on Education and Labor).

[101] *Gilbert v. Frank*, 949 F.2d 637 (2d Cir. 1991) (Postal Service not required to hire a co-worker to perform heavy lifting tasks of mail handlers job where job applicant, due to a kidney disorder,

under the ADA. For example, in *Cochrum v. Old Ben Coal Co.*, the Seventh Circuit Court of Appeals held it was not a reasonable accommodation for a miner whose job involved drilling bolts into the mine ceiling to require the employer to assign him a helper for overhead work.[102]

[h] Altering Existing Facilities

Many individuals with disabilities may have difficulty performing a particular job because of the physical configuration and structure of the work site. In order for an employer to fulfill its accommodation obligation under the ADA, the EEOC has stated that an employer may be required to make its existing facilities "readily accessible to and usable by individuals with disabilities."[103]

To ensure adequate mobility for wheelchair users, an employer should designate certain parking spaces near the entrance to the work place wide enough to accommodate a driver who needs to get in and out of a wheelchair. Inside the workplace, mobility of a wheelchair will be enhanced by keeping halls cleared of obstacles and by leaving floors bare or covered with low-pile, rather than plush, carpeting. Office fixtures such as lamps, filing cabinets, postage meters, and photocopying machines may need to be placed slightly lower so that wheelchair users can reach them.[104]

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unable to perform heavy lifting; hiring a co-worker was not a reasonable accommodation because it "would slow down and reduce the productivity of the operation").

See also Southeastern Community College v. Davis, 442 U.S. 397, 99 S. Ct. 2361, 60 L. Ed. 2d 980 (1979) (no requirement to hire additional employee as a speech interpreter to accompany applicant with a hearing disability); *Peters v. City of Mauston*, 2001 U.S. Dist. LEXIS 22806, 12 AD Cases (BNA) 1182 (W.D. Wis. Dec. 20, 2001) (employer was not required to accommodate former employee's lifting limitations by providing a helper to lift items for him, as needed, where plaintiff's former job position required that he be able to perform the duties of a manual laborer).

[102] *Cochrum v. Old Ben Coal Co.*, 102 F.3d 908, 912 (7th Cir. 1996) ("we cannot agree that [plaintiff] would be performing the essential functions of his job with a helper.").

In *Jewell v. Blue Valley Unified School District No. 229*, 13 AD Cases (BNA) 746 (D. Kan. July 5, 2002), the court held that the school district would not need to hire a full-time para-professional assistant to accommodate a teacher who had limited use of her left hand due to an arm injury. In so holding, the court took the position that an employer would not be required as a reasonable accommodation to hire new employees to perform the functions or duties of a disabled employee's job.

[103] 29 C.F.R. App. § 1630.2(o) (1991).

Employers also may be required to make their facilities accessible to individuals with disabilities under the Public Accommodations and Commercial Facilities section of the ADA, 42 U.S.C. § 12181, *et seq.*

[104] In *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 802 (7th Cir. 2005), the Seventh Circuit Court

[4] Accommodation of Individuals with Psychiatric Disabilities

In general, accommodating employees with mental or psychiatric disabilities is no different from accommodating persons with physical disabilities. The process of accommodation is the same as are the types of reasonable accommodations that should be considered by an employer, such as job restructuring and reassignment, part-time or modified work schedules and reassignment to a vacant position. Nonetheless, practical differences may arise between accommodating persons with physical disabilities and those with mental disabilities. In order to address some of the specific issues raised by the accommodation of individuals with psychiatric disabilities, the Equal Employment Opportunity Commission (EEOC) has issued an Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities.[105]

[i] Accommodation Requests

In dealing with requests for accommodation by employees with psychiatric disabilities, it may be the case that the employee's status as an individual with a disability is not obvious. In this situation, the EEOC has recognized that an employer may ask an employee for "reasonable documentation" about the disability and the functional limitations resulting from the disability.[106] In addition to requesting existing medical documentation from an employee's own health care provider, an employer also may require an employee to be examined by a health care professional of the employer's choice for purposes of determining whether the employee has an ADA covered disability and needs a reasonable accommodation to perform the job. The EEOC, however, cautions that such a request should be made only if the employee "initially provides insufficient information to substantiate" that the employee has an ADA

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of Appeals held that an employee who had difficulty walking due to a neurological disorder had raised a genuine issue of material fact precluding the grant of summary judgment with respect to whether her employer had made its facility "readily accessible to and usable by" her. The employer had allowed the plaintiff to use a reserved parking space near her work area. Nonetheless, after entering the employer's facility, the plaintiff still had to walk before and after each shift back and forth across the facility. Although the employer had allowed the plaintiff to use a short cut to get to her work area, the employee's supervisor later announced a blanket policy rescinding the accommodations and told the plaintiff that she would be reprimanded if she continued to use the shortcut. Accordingly, the Seventh Circuit ruled that a jury could conclude the employer had failed to reasonably accommodate the plaintiff because the accommodations that had been provided had not been made consistently or effectively.

[105] EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, 915.002 (March 25, 1997), available at www.eeoc.gov/policy/docs/psych.html.

[106] EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, *supra*, at 22.

disability and needs a reasonable accommodation.[107]

[ii] Types of Accommodation

Some persons with psychiatric disabilities may need time off from work for inpatient treatment of their mental condition, for example, hospitalization for treatment of schizophrenia. Under the ADA, permitting an employee to use accrued or paid leave, or providing additional unpaid leave, is a reasonable accommodation, unless the employee's absence would impose an undue hardship on the operation of an employer's business.[108] Also, some medications taken for the treatment of psychiatric disabilities, such as depression, can cause extreme grogginess and lack of concentration in the morning. In this situation, a reasonable accommodation may be to allow the employee suffering from depression to change his or her regularly scheduled working hours to a later start time, for example, starting work at 10:00 a.m., rather than 8:00 a.m. In order to accommodate a later starting time, the employer may request that an individual work later in the day to make up for the hours missed in the morning.[109]

As with the accommodation of individuals with physical disabilities, physical changes to the workplace may be effective accommodations for some individuals with psychiatric disabilities.

Persons with psychiatric disabilities especially may have difficulty interacting with others, including supervisors. Accordingly, the EEOC has taken the position that changes in supervisory methods may be an appropriate form of reasonable accommodation to persons with psychiatric disorders. In accommodating individuals with psychiatric disabilities, does an employer need

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[107] *Id.* at 23. *See also Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 203–204 (6th Cir. 2010) (Clay, J., concurring) (pointing out that when dealing with an employee with a mental disability, the employer, rather than the employee, may be in a better position to know what accommodations could be made and questioning whether in this circumstance, the employee should have the burden of proposing accommodations to address all of his mental deficiencies).

[108] EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, *supra* at 24.

[109] *Id.* at 24–25. In *Ekstrand v. Sch. Dist. of Somerset*, 583 F.3d 972 (7th Cir. 2009), the Seventh Circuit found that providing an elementary school teacher who suffered from seasonal affective disorder (a form of depression) and had difficulty functioning in a room with artificial, rather than natural, light, had shown that being transferred to a classroom with natural light would constitute a reasonable accommodation for her condition. Following a trial, the jury returned a verdict in favor of the elementary school teacher concluding that a reasonable jury could have found that the teacher was a qualified individual with a disability during the fall and winter months and that the school district knew about the teacher's condition, but failed to accommodate her with a new classroom that had exterior windows. The judgment in favor of the school teacher was upheld on appeal in *Ekstrand v. Sch. Dist. of Somerset*, 683 F.3d 826 (7th Cir. 2012).

to consider transferring the disabled employee to a different supervisor? The EEOC's Enforcement Guidance indicates that a request for a change of supervisor would be unreasonable *per se*.[110]

The EEOC has taken the position that an employer may be required to provide a temporary job coach to assist in the training of a qualified individual with a disability.[111] Importantly, the EEOC has not taken the position that an employer must provide a permanent job coach or a job coach on an indefinite basis.

[iii] Limits on Accommodation

The EEOC recognizes that reasonable accommodation of individuals with psychiatric disabilities, in general, does not include altering workplace conduct and performance standards. According to the EEOC, an employer may discipline an individual with a psychiatric disability for violating a workplace conduct standard, even though the misconduct may have resulted from or been caused by the psychiatric impairment.[112] The one limitation on this general rule is that conduct standards must be "job-related for the position in question and consistent with business necessity." If the conduct standards do not meet this requirement, the EEOC cautions that imposing discipline under them could violate the ADA.[113]

[5] Reasonable Accommodation for Alcoholics and Drug Addicts

Alcoholism may constitute a disability covered by the ADA. Persons addicted to drugs also may be covered as long as they are not "currently engaging in the illegal use of drugs."[114]

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[110] *See* EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, *supra*.

A number of courts have taken a similar position that the duty to reasonably accommodate a disability under the ADA does not extend so far as to require an employer to provide an employee with a new supervisor. *See Taylor v. Phoenixville School District*, 184 F.3d 296, 319 n.10 (3d Cir. 1999); *Weiler v. Household Finance Corp*., 101 F.3d 519, 526 (7th Cir. 1996); *Gaul v. Lucent Technologies, Inc*., 134 F.3d 576, 581 (3d Cir. 1998).

[111] *See* EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, *supra* at 27.

[112] *See* EEOC, The Americans With Disabilities Act: Applying Performance and Conduct Standards to Employees With Disabilities (Sept. 2008), available at http://www.eeoc.gov/facts/performance-conduct.html. *See Palmer v. Circuit Court of Cook County, Illinois*, 117 F.3d 351, 352 (7th Cir. 1997), *cert. denied*, 522 U.S. 1096 (1998) ("if an employer fires an employee because of the employee's unacceptable behavior, the fact that that behavior was precipitated by a mental illness does not prevent an issue under [the ADA]").

[113] *Id.*

[114] 42 U.S.C. § 12114(a).

[i] Qualification Standards

While an individual's status as an alcoholic or a recovering drug addict may be protected under the ADA, the person is not protected from the consequences of his or her conduct, and an employer need not tolerate misconduct by an employee who is an alcoholic or a recovering drug addict.[115] The statute specifically provides that an employer may hold the employee "to the same qualification standards for employment or job performance and behavior" that the employer "holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism" of the disabled employee.[116] As recognized by the federal District Court for the Central District of Illinois, "so long as the reason for [an alcoholic's] discharge was for conduct that any person would have been disciplined for doing, the fact that alcoholism may have caused the conduct does not lead to an ADA violation."[117]

In *Raytheon Co. v. Hernandez*, the Supreme Court ruled that an employer could rely upon a neutral, generally applicable policy prohibiting the rehire of former employees who had been terminated for violating workplace conduct rules in justifying the refusal to rehire a rehabilitated drug addict who previously had been terminated by the employer for having tested positive for illegal drug use.[118]

[ii] Accommodating Alcoholics

Employers still have an obligation to accommodate employees with these disabilities as long as the employees can continue to perform their jobs satisfactorily. Because of the complexity of the issue and because plausible arguments can be made in support of various interpretations of the ADA, the degree to which alcoholics must be accommodated, if at all, is a matter that continues to be the subject of various court decisions enforcing the statute.

Where an alcoholic maintenance worker, who was required by his employer to have a valid driver's license, had his license revoked because of

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[115] In *Despears v. Milwaukee County*, 63 F.3d 635 (7th Cir.), *reh'g denied*, 1995 U.S. App. LEXIS 27327 (7th Cir. 1995), the Seventh Circuit Court of Appeals held that the employer did not violate the ADA by demoting and suspending an employee for failing to maintain a valid driver's license because the license had been revoked for drunk driving. The fact that the employee was an alcoholic did not cause him to act illegally and lose his driver's license. Therefore, the court concluded that the employer's job action was due to the employee's misconduct, not his alcoholism.

[116] 42 U.S.C. § 12114(c)(4).

[117] *Carroll v. Illinois Department of Mental Health and Developmental Disabilities*, 979 F. Supp. 767, 770 (C.D. Ill. 1997).

[118] 124 S. Ct. 513, 157 L. Ed. 2d 357 (2003).

drunk driving, the Seventh Circuit Court of Appeals in *Despears v. Milwaukee County* held that the employer was not required, as a reasonable accommodation, to waive its driver's license requirement.[119] Accordingly, the employer legally could demote the maintenance worker to a custodial position that did not require having a driver's license. Although the court recognized that an alcoholic is more likely than a non-alcoholic to lose his driver's license because of drunk driving, the court reasoned that being an alcoholic would not cause a person to drive while drunk nor to lose one's license for conviction of drunk driving. Hence, the court concluded that an employer would not be required as a reasonable accommodation to excuse an employee convicted of drunk driving from the job-related requirement of having a driver's license since this would be a request to be excused from criminal activity, which is not required by the ADA. The court of appeals noted that a different situation might arise if an alcoholic employee told his employer that he could not drive because of his alcoholism and asked the employer to waive its requirement of having a valid driver's license because driving was not an essential part of the job. In this latter situation, the circuit court opined that the request might need to be granted, depending upon the circumstances, because it would be a request for a reasonable accommodation, rather than a request to be excused from the consequences of criminal activity.[120]

Likewise, it has been said that the ADA does not protect an employee "from his own bad judgment and drinking on the job."[121] In *Martin v. Barnesville Exempted Village School District Board of Education*, the Sixth Circuit Court of Appeals considered the case of a school bus driver who, while on duty, was discovered on school grounds drinking a beer. The driver was allowed to keep his position by signing a last-chance agreement. When the driver later applied for other bus driver positions, however, he was rejected on the basis of the earlier beer drinking incident. The driver also filed an ADA lawsuit contending that he had been discriminated against on the basis of his disability, alcoholism, and that he should be awarded back pay and other remuneration.[122] The district court

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[119] *Despears v. Milwaukee County*, 63 F.3d 635 (7th Cir. 1995).

[120] 63 F.3d at 637.

In *Randall v. Port of Portland*, 21 F. Supp. 2d 1225 (D. Ore. 1998), the federal district court for the District of Oregon held that an employer did not violate the ADA when it discharged an alcoholic employee for losing his driver's license following his conviction for driving while intoxicated. In so holding, the court noted that the former employee had failed to produce any evidence that his discharge was precipitated by his alcoholism, as opposed to the legal consequences of his decision to drive while intoxicated.

[121] *Martin v. Barnesville Exempted Village Sch. Dist. Bd. of Educ*., 209 F.3d 931 (6th Cir.), *cert. denied*, 531 U.S. 992 (2000).

[122] The driver also filed a grievance under the collective bargaining agreement with the school district and ultimately prevailed and, as a consequence, was awarded the position sought. 209 F.3d at 933.

dismissed the bus driver's ADA claim and this dismissal was affirmed by the Sixth Circuit Court of Appeals. The court found that the school district had refused to award the bus driver positions at issue based upon the plaintiff's misconduct: drinking on the job. Even though the driver's drinking was due to his alcoholism, the court of appeals stated that the driver could not force the school district to "hire him as a school bus driver when there is a serious risk that he again may drink on the job, have an accident and kill a group of school children. Any suggestions to the contrary is absurd on its face. Were federal courts to interpret the ADA to require a school board to hire the school bus driver, a person guilty of drinking on the job, and thereby run the risk of an accident, would raise serious constitutional problems."[123]

[iii] Rehabilitation Programs

The ADA does not require employers to implement rehabilitation programs for alcoholics or drug addicts.[124] The Act also does not require an employer to accommodate an employee addicted to drugs or alcohol who violates an employer's job performance or behavior requirements by giving that employee the opportunity to enter into a rehabilitation program prior to being discharged.[125] Thus, if an employee who happens to be an alcoholic is caught drinking, the employer can discipline the individual without having to give the alcoholic employee a "last chance."[126]

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[123] 209 F.3d at 935.

[124] *See* EEOC, the Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities" (Sept. 2008) (the ADA does not require employers to establish drug or alcohol assistance programs, although an employer may suggest that an employee seek help through such a program), available at http://www.eeoc.gov/facts/performance-conduct.html. The EEOC has advised, however, that in imposing discipline upon an employee who has engaged in alcohol or drug-related misconduct, an employer may suggest that the employee seek help through an employer's existing Employee Assistance Program. *Id.*

[125] *Peyton v. Otis Elevator*, 72 F. Supp. 2d 915 (N.D. Ill. 1999) (employer "was not obligated under ADA to offer [employee] treatment instead of termination just because it learned after it had already reached a legitimate decision to fire him, that [employee's] alcoholism was the cause of his problems.").

[126] *See* 42 U.S.C. § 12114(c)(4), ADA § 104(c)(4) (an employer "may hold an employee … who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the … alcoholism of such employee").

See also Siefken v. Village of Arlington Heights, 65 F.3d 664 (7th Cir. 1995) (an employer is not required to give an employee with a disability a second chance after the employee has engaged in conduct that would justify termination, notwithstanding the fact that the conduct may have resulted from the person's disabilities); *Brundage v. Hahn*, 57 Cal. App. 4th 228, 66 Cal. Rptr. 2d 830 (2d Dist. 1997) (reasonable accommodation under the ADA "does not include excusing a failure to control a controllable disability or giving an employee 'second chance' to control the disability in the future.").

Where, however, an employer decides to condition an employee's continued employment upon the employee's agreement to refrain from engaging in certain conduct, the agreement and the employer's subsequent decision to terminate an employee for violation of the agreement have been accorded judicial approval.[127]

If an employee voluntarily discloses that he or she has an alcohol problem that has not affected the employee's job performance, and the employee takes leave for treatment of the condition, an employer generally may not require the employee to be subject to random alcohol testing. An exception arises, however, where without such testing, the employee would pose a direct threat to him or herself or others. The reason for this rule is that requiring such testing would single out persons with disabilities, i.e., alcoholics, and would be violative of the ADA unless the company could demonstrate that the policy was justified based upon an individualized assessment of the safety risk that would arise from the employee's consumption of alcohol.[128]

[iv] Medical Marijuana

Because the ADA specifically exempts from the definition of "qualified individual with disability" an employee who is "currently engaging in the illegal use of drugs," employers should have no legal obligation to accommodate an employee's medical marijuana use.

In a case decided under Title II of the ADA, which prohibits public entities from denying the benefit of public services to a "qualified individual with a disability," the Ninth Circuit Court of Appeals has interpreted the use of medical

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[127] *See* 42 U.S.C. § 12114(c)(4), ADA § 104(c)(4) (an employer "may hold an employee … who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the … alcoholism of such employee").

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[128] See *A.D.P. v. Exxonmobil Research & Engineering Co.*, 2012 N.J. Super LEXIS 171 (N.J. App. Div., Oct. 26, 2012) (decided under the New Jersey law against discrimination, whose provisions are similar to those of the ADA).

marijuana as constituting the "illegal use of drugs" even though marijuana use may be legal under state law.[129]

[129] *James v. City of Costa Mesa*, 2012 U.S. App. LEXIS 10168 (9th Cir. May 21, 2012).