# ADA and GINA Update

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# What We Will Cover

- Recent ADA and GINA regulations on employer wellness programs
- Definition of “disability”
- Qualification standards and essential functions
- Reasonable accommodation
- Undue hardship
- Disability-related inquiries and medical examinations

# The ADA, GINA, and Wellness Programs

- On May 17, 2016, EEOC issued regulations on how the ADA and GINA apply to employer wellness programs.
- Also issued a press release and question-and-answer documents on both final rules. A link to the press release, which includes links to the rules and to the Q&A documents is here: https://www.eeoc.gov/eeoc/newsroom/release/5-16-16.cfm.

# ADA, GINA, and Wellness Programs (cont.)

- ADA rule –
  - Allows incentives up to 30 percent of the total cost of self-only coverage for employees to answer questions about their health and/or to take medical exams;
  - Requires that wellness programs be reasonably designed to promote health or prevent disease;
  - Requires that employees be given a notice of what medical information will be collected as part of a wellness program, who will receive it, how it will be used, and how it will be kept confidential;

# ADA, GINA and Wellness programs (cont.)

- ADA Rule also –
  - Prohibits employers from conditioning participation or receipt of an incentive on an employee's agreeing to the sale, exchange, transfer, or other disclosure of their medical information;
  - Prohibits retaliation against employees who do not participate in wellness programs, as well as intimidation, coercion, threats, harassment, and adverse employment actions (e.g., discipline or termination);
  - Requires confidentiality of medical information gathered as part of wellness programs.

# ADA, GINA, and Wellness Programs (cont.)

- Why was a GINA rule needed?
  - Some wellness programs allow spouses and other dependents to participate.
  - Information about a spouse's or other dependent's current health status is genetic information (family medical history) of an employee.
  - GINA rule generally prohibited any incentives in exchange for an employee's genetic information.

# ADA, GINA, and Wellness Programs (cont.)

- GINA rule –
  - Allows same incentive for spouse to provide current health information as for employee;
  - Prohibits any incentives in exchange for a spouse's genetic information (including family medical history), or in exchange for a child's current health information or genetic information;
  - Prohibits retaliation and other adverse employment actions where spouse does not participate
  - Prohibits conditioning participation in a wellness program or receipt of an incentive on a spouse or other family member agreeing to the sale, exchange, disclosure, or other transfer of health information

# Definition of “Disability”

- A physical or mental impairment that substantially limits one or more major life activities; or
- A record of such an impairment; or
- Being regarded as having a disability

# Impairment May Be Substantially Limiting

- Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562 (4th Cir. 2015)
  - Office assistant with social anxiety disorder promoted to deputy clerk.
  - Asks to have work at front counter limited to once a week.
  - Claims she is substantially limited in interacting with others.
  - Employer argues she interacts with the public when she works at the counter, interacts socially with coworkers, and uses Facebook.
  - Court credits plaintiff's testimony that working at the front counter caused her extreme stress and panic attacks.
  - "[a] person need not live as a hermit to be 'substantially limited' in interacting with others."

# Impairment May Be Substantially Limiting

- Cannon v. Jacobs Field Servs. N. Am., --- F.3d ---, 2016 WL 157983 (5th Cir. 2016) -- Plaintiff's rotator cuff injury prevented him from lifting right arm above his shoulder.
  - District court failed to consider broader definition of disability under ADAAA.
  - Evidence that plaintiff was substantially limited in lifting.
  - Also evidence plaintiff was regarded as having a disability.

# Obesity Not Always an Impairment

- Morriss v. BNSF Railway Co., 817 F.3d 1104 (8th Cir. 2016).
  - BNSF's had a policy of not hiring anyone with a BMI of over 40 for a safety-sensitive position because of the "significant health and safety risks associated with Class 3 obesity."
  - Revoked Plaintiff's offer because he had a body mass index of between 40 and 41.
  - Plaintiff not "regarded as" disabled: ADA doesn't cover obesity unless the condition is linked to an underlying physiological disorder.

# Alcoholism is an Impairment

- Alexander v. Washington Metropolitan Area Transit Authority, 826 F.3d 544 (D.C. Cir. 2016).
  - Plaintiff fired for testing positive for alcohol at work.
  - Employer told him that he could apply to be rehired in one year if he completed an intensive alcohol treatment program, but after a year, employer refused.
  - Employer regarded him as having the disability of alcoholism.

# Fragrance Sensitivity

- Rotkowski v. Arkansas Rehabilitation Services, No. 3:15-CV-03085, 2016 WL 1452426 (W.D. Ark Apr. 13, 2016). – fragrance sensitivity may be a disability protected by the ADA where –
  - It substantially limited her ability to walk, see, communicate, think, and work; she sought medical treatment for her symptoms; and her doctor provided a letter to her employer confirming her diagnosis.
  - Plaintiff was a qualified individual because there were reasonable accommodations available: an air purifier in the common room, and a copier in her office so that she would not need to spend as much time in the common area.
  - Mandatory scent-free workplace is not a reasonable accommodation.

# Pregnancy-Related Impairments

- Though pregnancy is not itself a disability, impairments related to pregnancy can be.
- Pregnant workers may be able to get accommodations at work under the Pregnancy Discrimination Act (PDA) if employers provide accommodations to workers with similar limitations unrelated to pregnancy, or under the ADA if their pregnancy-related impairments qualify as disabilities.

# Examples of Pregnancy-Related Impairments that May Be Disabilities

- Cervical insufficiency
- Anemia
- Sciatica
- Carpel tunnel syndrome
- Preeclampsia
- Gestational diabetes\
- Depression

# New Resource Documents on Pregnancy Accommodations

- On June 14, 2016, EEOC issued:
  - "Legal rights for Pregnant Workers Under Federal Law," https://www.eeoc.gov/eeoc/publications/pregnant_workers.cfm; and
  - "Helping Patients Deal with Pregnancy-Related Limitations and Restrictions at Work," https://www.eeoc.gov/eeoc/publications/pregnancy_health_providers.cfm

# Qualified

- Individual can meet the skill, experience, education, and other job-related requirements for a job

and

- Can perform the job's essential functions with or without a reasonable accommodation.

# Qualification Standards

- Nathan v. Holder, 2013 WL 3965241 (E.E.O.C.)
  - Applicant with monocular vision rejected for job as FBI Special Agent.
  - EEOC concludes that vision standard is a qualification standard not an essential function.
  - Agency did not do an individualized assessment to determine whether Nathan could perform Special Agent job without posing a direct threat.

# Qualification Standards (cont.)

- Complainant v. United States Postal Serv., 2013 WL 8338375 (E.E.O.C.)
  - Complainant had a 10-pound lifting restriction due to an impairment.
  - Excluded from a job that employer said required lifting 70 pounds.
  - Lifting requirement was qualification standard, not essential function.
  - Agency could not show the standard was justified, because at most, employees in the position had to lift 30 pounds.

# Qualification Standards (cont.)

- Petitioner v. Dep't of Homeland Sec., EEOC Petition No. 0320110053, 2014 WL 3571431 (July 10, 2014), decision upheld, Alvara v. Dept. of Homeland Sec., 121 M.S.P.R. 613, 2014 MSPB 77 (Spec. Pan. Sept. 29, 2014).
  - Customs and border protection officer with sleep apnea requests accommodations that would allow him to get 8 hours of nocturnal sleep.
  - Agency first grants, but then rescinds accommodation.
  - Working rotating shifts and substantial amounts of overtime are essential functions.
  - attendance and work schedule rules are not essential functions, but methods by which essential functions can be performed and are subject to reasonable accommodation.

# Qualification Standards (cont.)

- *EEOC v. P.H. Glatfelter*, Civil Action No. 15-cv-01881 (M.D. Pa.)
  - Employer required employees who operate forklifts or other motorized industrial equipment to meet DOT regulations applicable to commercial motor vehicles.
  - No assessment of individuals screened out by the standard to determine if they can do the job with or without accommodation.
  - 2 individuals with disabilities denied jobs.

# Qualification Standards (cont.)

- *EEOC v. P.H. Glatfelter*, Civil Action No. 15-cv-01881 (M.D. Pa.)
  - $180,000 for 2 affected individuals.
  - Agreement enjoins future discrimination.
  - Employer must revise qualification standard so it is job-related and consistent with business necessity and includes individualized assessment.
  - Employer must post notice of consent decrees at its production facilities.

# Factors to Consider in Determining Whether Function is Essential

- Whether job exists to perform the function
- Whether there are others who can perform the function
- Whether the job is highly specialized

# Evidence of Whether Function Is Essential

- Employer judgment
- Terms of a written job description
- Terms of a collective bargaining agreement
- Amount of time spent performing the function
- Consequences of not performing the function
- Experience of current and previous employees in the job

# Essential Functions (cont.)

- Brown v. Smith, 827 F.3d 609 (7th Cir. 2016).
  - Plaintiff fired because insulin-dependent diabetes prohibited him from maintaining a commercial driver's license (CDL).
  - A CDL was not an essential function of the job:
    - Plaintiff's supervisor knew Plaintiff did not have a CDL when he was hired;
    - Plaintiff never needed a CDL during the four years he held the street supervisor position;
    - Two other former street supervisors testified that they had only needed a CDL once in twenty years and two or four times in four years, respectively;
    - Other drivers were always available if Plaintiff was asked to drive.

# Essential Functions (cont.)

- Shell v. Smith, 789 F.3d 715 (7th Cir. 2015)
  - Mechanic's helper with hearing and vision impairments told he has to get a commercial driver's license and drive buses
  - Impairments prevent him from obtaining the license and he is terminated.
  - District court grants summary judgment for employer, but 7th Circuit reverse.

# Essential Functions (cont.)

- Shell v. Smith, 789 F.3d 715 (7th Cir. 2015) – Seventh Circuit reversed.
  - Job description says only that mechanic's helper "may occasionally drive and deliver buses to various field locations."
  - Driving buses had never been a part of plaintiff's job during the 12 years he held it.
  - There was no informed decision that keeping the plaintiff in his job was untenable. New manager had relied only on the job description after jus one day on the job.

# Essential Functions (cont.)

- Hawkins v. Schwan's Home Serv., Inc., 778 F.3d 877 (10th Cir. 2015) – Having a valid DOT certification and driving trucks were essential functions for a facilities supervisor where –
  - The position description required DOT certification and a good driving record for all facilities supervisors.
  - Supervisors might be required to drive trucks to facilitate repairs, fueling, or loading or unloading of goods.
  - Employer might not be able to predict when a supervisor was needed to relieve another driver who had exceeded maximum number of driving hours under DOT regulations.

# Essential Functions (cont.)

- Wagner v. Sherwin-Williams Co., 647 Fed. Appx. 645 (6th Cir. 2016) – Driving was an essential function of Plaintiff's job as store manager where –
  - Employer said that conducting sales meetings and product demonstrations out of the store were critical to the brand;
  - Job description of store manager included driving (although not in the "Essential Duties" section);
  - Plaintiff spent 12-25% of his workweek driving;
  - Past and present job incumbents agree that driving was an essential part of their work.
  - Not important that the employer did not provide managers with company vehicles, gas allowances, or liability insurance or any specialized driving training.

# Essential Functions (cont.)

- Stephenson v. Pfizer, Inc., No. 14-2079, 2016 WL 806071 (4th Cir. March 2, 2016)
  - Pharmaceutical representative developed eye condition that prevented her from driving.
  - Asked that she be provided a driver. Employer did not challenge cost but argued that driver was inherently unreasonable.
  - Argued company would face significant increased liability due to vehicular accident, workers' compensation, and misappropriation of drug samples.

# Essential Functions (cont.)

- Stephenson v. Pfizer, Inc., No. 14-2079, 2016 WL 806071 (4th Cir. March 2, 2016)
  - Driving not included in job description.
  - Plaintiff maintained traveling, not driving, was essential function.
  - Court agreed that genuine issues of fact precluded summary judgment.

# Essential Functions (cont.)

- Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562 (4th Cir. 2015) – working at the front counter might not be essential function for deputy clerk with anxiety disorder where –
  - Only 4 or 5 out of 29 deputy clerks performed the function.
  - Other employees were available to perform the function.
  - Not all junior clerks had been required to work at the front counter.
  - Employer could not demonstrate that "mastery" of working at the front counter was essential to successful performance or that plaintiff's inability to do so would negatively affect operations.

# Essential Functions (cont.)

- Jordan v. City of Union City, Ga., No. 15—12038, 2016 WL 1127739 (11th Cir. March 23, 2016)
  - Plaintiff was not qualified to be a police officer because he was unable to react quickly an calmly to high-stress and potentially life-threatening situations due to anxiety and panic disorders.
  - ". . . even an infrequent inability to perform the essential functions of the position is enough to render a plaintiff not a 'qualified individual' under the ADA."

# Definition of Reasonable Accommodation

- A reasonable accommodation is a change in the workplace or in the way things are customarily done that is needed because of a disability.
- Accommodations are available –
  - For the application process
  - To enable someone to perform the essential functions of a job
  - To enable an employee to enjoy equal benefits and privileges of employment

# Requests for Reasonable Accommodation

- Generally, an individual with a disability must request reasonable accommodation.
- Request for some change in the workplace or in the way things are done that is needed because of a medical condition.
- Does not have to be in writing.
- Does not have to use “magic words.”
- May come from a third party (e.g., an employee’s family member or doctor).

# Requests for Reasonable Accommodations (cont.)

- Foster v. Mountain Coal Co., LLC, --- F.3d ---, 2016 WL 3997425 (10th Cir. 2016)
  - Request by employee with neck injury for employer's "cooperation" with upcoming surgery and recovery is direct and specific enough to constitute a request for reasonable accommodation
  - Employer's termination of employee days or even hours after accommodation request sufficient to raise fact issue on whether employer retaliated against employee for accommodation request
  - Employer gave inconsistent reasons for termination, raising issue of fact concerning pretext

# Requests for Reasonable Accommodations (cont.)

- Nebecker v. National Auto Plaza, 643 Fed. Appx. 817 (10th Cir. 2016).
  - Plaintiff terminated because of her absences and tardiness due to health problems.
  - Plaintiff did not ask for FMLA leave or an accommodation because she "'didn't feel that [she] could' and believed there was 'no point in asking.'"
  - Did not meet the "futile gesture doctrine" requirements because employer did not have a policy of refusing accommodation, and the employer did not take any explicit actions that foreclosed the interactive process
  - The employer berating and yelling at Plaintiff did not qualify as foreclosing the interactive process.

# Interactive Process

- Dillard v. City of Austin, Texas, No. 15-50779, 2016 WL 4978363 (5th Cir. Sep. 16, 2016).
  - City offered Plaintiff an administrative assistant position after permanent injury prevented him from returning to his previous position.
  - Because Plaintiff did not make an "honest effort to learn and carry out the duties of his new job with the help of the training the City offered him," the fact that the City objectively knew that the new position was a poor fit was not a failure to accommodate.
  - Plaintiff's misconduct and poor performance caused the breakdown in the interactive process.

# Interactive Process (cont.)

- Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562 (4th Cir. 2015)
  - Deputy clerk asked to have her time working at the office's front counter limited due to social anxiety disorder.
  - Supervisor said only clerk of court could approve the request.
  - Supervisor then refused to grant plaintiff leave until the clerk returned from vacation.
  - Clerk immediately fired plaintiff after returning to the office without considering accommodation request.
  - Held: evidence employer failed to engage in good faith in interactive process.

# Interactive Process (cont.)

- Demarce v. Robinson Property Group Corp., No. 14—60011, 2016 WL 1127185 (5th Cir. March 21, 2016)
  - Casino dealer with arthritis could work only games where she could be seated.
  - Table where she worked did not remain open all the time, sometimes requiring her to leave early.
  - Attendance policy that assessed employees points for days missed or for arriving late or leaving early.
  - Employee terminated when she exceeded 10 points in 12-month period.

# Interactive Process (cont.)

- Demarce v. Robinson Property Group Corp., No. 14—60011, 2016 WL 1127185 (5th Cir. March 21, 2016)
  - Employee asked to be trained to work another game.
  - Employer agreed if she would get formal training.
  - Employee requested that she be trained by having a more experienced dealer shadow her.
  - Court found an accommodation was available to the plaintiff but she failed to take advantage of it.

# Interactive Process (cont.)

- Lawler v. Peoria School District No. 150, No. 15-2976, 2016 WL 4939538 (7th Cir. Sep. 16, 2016).
  - Due to PTSD, Plaintiff requested medical leave and a transfer to a classroom with fewer students with severe behavioral and emotional disorders.
  - District's refusal to transfer Plaintiff to one of the vacant positions in a less stressful classroom was a failure to accommodate.
  - Two-week medical leave did not qualify as a reasonable accommodation because it did not address the long-term issues that both Plaintiff and her doctor raised.

# Interactive Process (cont.)

- Dawson v. Akal Security Inc., No. 12-16789, 2016 WL 4363169 (9th Cir. Aug. 16, 2016).
  - Once Plaintiff requested a reasonable accommodation, Employer's decision to place Plaintiff on unpaid leave while it delayed the interactive process for two months may have been a violation of the interactive process.
  - Unpaid leave can be an adverse action, particularly where the employee is placed on unpaid leave involuntarily.

# Interactive Process (cont.)

- EEOC v. Dolgencorp, LLC, No. 3:14-CV-441-TAV-HBG, 2016 WL 3774492 (E.D. Tenn. July 7, 2016).
  - Atkins told her supervisor she was a diabetic and asked to keep juice at the register to prevent hypoglycemic attack.
  - Supervisor told her that employees could not keep food or drink near the register.
  - This was a request for accommodation even though Atkins did not go through her employer's formal channels.
  - Although the employer had an accommodation policy that could have allowed Atkins to keep juice near the register, no one at the store knew about it.
  - Her employer failed to engage in the interactive process when it did not offer any reasonable accommodations to Atkins that did not require her to violate store policy without permission.

# Interactive Process (cont.)

- EEOC v. Dolgencorp, LLC, No. 3:14-CV-441-TAV-HBG, 2016 WL 3774492 (E.D. Tenn. July 7, 2016).
  - Once when Atkins was alone in the store and could not leave the cash register unattended, Atkins took and drank a bottle of orange juice from the store to treat her hypoglycemic symptoms before paying for the bottle.
  - Atkins was fired because she violated the employer's policy requiring employees to purchase any products before consuming them.
  - May have been a discriminatory discharge because other employees commonly violated the same policy and were not fired.

# Delay

- Hill v. Clayton County School Dist., No. 13–14951, 2015 WL 4663755 (11th Cir. Aug. 7, 2015) – Two months wait, without pay, for defendants to search for a reasonable accommodation may be unreasonable and is distinguishable from cases where
  - The employee was on paid leave.
  - The employee worked from home for various lengths of time.
  - The employee was on unpaid leave for a mere fifteen days.

# Types of Accommodations

- Job restructuring
- Modified work schedules
- Telework
- Leave
- Changing supervisory methods
- Job coach
- Reassignment

# Types of Accommodations

- Physical modifications
- Sign language interpreters and readers
- Assistive technology and modification of equipment or devices

# Accommodations for the Application Process

- EEOC v. McDonald's Corporation, et al, 4:15-cv-01004-FJG (W.D. Mo.)
  - Applicant with previous experience as a cook and clean-up team member at another McDonald’s.
  - Informs employer he needs sign language interpreter for interview.
  - Interview canceled, even though applicant’s sister had agreed to interpret.
  - Never contacted, even though restaurant management continued to interview and hire workers.

# Job Restructuring/Modified Work Schedule

- Spears v. Creel, 607 Fed. App'x 943 (11th Cir. 2015)
  - Plaintiff's job as lieutenant corrections officer in medical unit of county jail is eliminated.
  - No lieutenant positions in the corrections unit; told to apply for a detention deputy position.
  - Takes FMLA leave for cancer treatment.
  - At end of leave, asks to be transferred to a lieutenant position, to work in the deputy position on a part-time basis with light duty, or to have 3 more months of donated leave.

# Job Restructuring/Modified Work Schedule (cont.)

- Spears v. Creel, 607 Fed. App'x 943 (11th Cir. 2015)
  - Did not have to bump employee from lieutenant position where there were no vacancies.
  - Working in deputy position on a part-time basis and performing light duty was not reasonable and would have caused undue hardship -- scheduling problems; other employees being held over on shifts; overtime.
  - Plaintiff did not complete paperwork that would have allowed her to received donated leave.

# Modification of Workplace Policies

- EEOC v. Wal-Mart Stores, Inc., No. 14-CV-50145 (N.D. Ill. Aug. 12, 2016).
  - As a workplace accommodation for his intellectual disabilities, Clark needed a written list of daily tasks.
  - After years of providing the list, Wal-Mart decided to stop providing Clark the accommodation he needed.
  - Wal-Mart alleged that it terminated Clark because he failed to perform certain job duties. EEOC charged that Clark's purported failure to perform certain job duties was due to Wal-Mart no longer providing Clark an accommodation.
  - As part of the settlement, Wal-Mart will pay $90,000 in monetary relief to Plaintiff.

# Recent EEOC Cases (cont.)

- EEOC v. Austin's FEC, LLC, No.1-15-cv-00873 (W.D. Tex., June 28, 2016).
  - Plaintiff, who had a disability caused by childhood traumatic brain injuries, worked part-time at Austin's Park N Pizza, an amusement park and restaurant, performing custodial work.
  - New management decided that Plaintiff could not perform his job duties because he did not correctly operate a new electronic system for clocking in and out of work.
  - Employer was unwilling to consider an alternative clock-in procedure as a reasonable accommodation.
  - As part of the settlement, Employer will pay $20,000 in monetary relief to Plaintiff.

# Leave as a Reasonable Accommodation

On May 9, 2016, EEOC issued "Employer-Provided Leave and the Americans with Disabilities Act," https://www.eeoc.gov/eeoc/publications/ada-leave.cfm.

# Leave as a Reasonable Accommodation

- Generally, leave is a reasonable accommodation when
  - More is needed than is available under the employer's policy or under the FMLA; and/or
  - Leave is needed for a disability-related reason that is not covered by the employer's policy or by the FMLA.

# Types of Leave Provided as a Reasonable Accommodation

- Extended leave – leave for a continuous period of time beyond what employer normally grants as a benefit of employment or what the FMLA allows.
- Intermittent leave -- leave needed on an occasional basis that may or may not be predictable (e.g., absences attributable to brief flare-ups of a condition).

# Purpose of Leave as a Reasonable Accommodation

- To obtain treatment for a disability
- To recover from symptoms of a disability
- For disability-related training (e.g., training a service animal)
- To make repairs to equipment needed because of a disability
- To avoid temporary adverse conditions in the workplace

# Leave, Accommodation, and the FMLA

- Walker v. NF Chipola, LLC, (N.D. Fla. March 28, 2016)
  - Certified nursing assistant (CNA) requests 6 months of leave for shoulder surgery.
  - Employer gives her the option of being terminated or resigning following the end of her FMLA leave, which was three months before her projected return date. She resigned.
  - Jury finds for plaintiff, and employer asks for judgment as a matter of law.
  - Employer's motion is denied.
  -

# Leave, Accommodation, and the FMLA

- Walker v. NF Chipola, LLC, (N.D. Fla. March 28, 2016)
  - Courts cites availability of other CNAs, high turnover, and accuracy of the doctor's projected return date.
  - "[N]othing in the ADA suggests the requirement to provide a reasonable accommodation is somehow preempted by the FMLA."
  - Court relies on EEOC guidance as partial support for its position that leave in addition to FMLA may be required as reasonable accommodation.

# Leave and Termination

- EEOC conciliation agreement with Presence Health (3/3/16)
  - EEOC alleged Presence Health (largest Catholic healthcare system in Illinois) failed to return employees on leave to their original jobs or to reassign them to jobs they could perform.
  - Resolved for $500,000 for those affected, training at three facilities, revision and dissemination of ADA and reasonable accommodation policies and procedures, reporting to EEOC, notification to employees of agreement.

# Reassignment

- Accommodation of **last resort**
- Position must be **vacant**
- Must be **equal** in terms of pay, status, etc., or as close as possible
- Is not limited **geographically**
- Employee must be **qualified** for the new position, but does not have to be best qualified

# Reassignment (cont.)

- **Vacant** means that the position is available or will become available within a reasonable time
- Does not have to be a **promotion**
- Employer does not have to **bump another employee**
- Reassignment that would violate seniority system **generally is not reasonable**
- Employer does not have to pay cost of relocation, unless it does so for other employees who transfer voluntarily

# Reassignment (cont.)

- Kelleher v. Wal-Mart Stores, Inc., 817 F.3d 624 (8th Cir. 2016).
  - Plaintiff's multiple sclerosis symptoms worsened to the point she could no longer perform the essential functions of her job as a stocker.
  - Job transfer to overnight cashier was not an adverse employment action because the new position fit her restrictions and also included a pay raise
  - Plaintiff's preference for the stocker position because she felt humiliated and uncomfortable performing the customer service functions of the cashier position did not qualify the transfer as an adverse action.

# Reassignment (cont.)

- Vazquez-Robles v. CommoLoco, Inc., No. 12-1600 (FAB), 2016 WL 2851323 (D.P.R. May 13, 2016).
  - Plaintiff requested demotion from branch manager to assistant manager as reasonable accommodation to address stress resulting from her injury.
  - Employer offered her a different lower-level position.
  - Court found third position may not have been a reasonable accommodation because it was more stressful than either the branch manager or assistant manager positions, and there was evidence that an assistant manager position may have been vacant.

# Reassignment (cont.)

Reyazuddin v. Montgomery County, Maryland, 789 F.3d 407 (4th Cir. 2015)

- Plaintiff, who was blind, could no longer perform her job when the County changed software programs.
- County assigned plaintiff a new slate of "make work" that only occupied about half the work day and varied from day to day.
- District court held that this was "comparable employment" and thus reasonable.
- Fourth Circuit reversed, held that this was a fact question.

# Reassignment (cont.)

- Adams v. Anne Arundel County Public Schools, 789 F.3d 422 (4th Cir. 2015) – Middle school assistant principal's reassignment to a smaller middle school was "plainly reasonable" where
  - Transfer was consistent with doctor recommendations.
  - The Board acted in a timely manner.
  - The new school's less stressful environment was appropriate given his disability, PTSD.
  - Plaintiff had not objected to his reassignment.
  - The decrease in plaintiff's salary had resulted from a systemwide collective bargaining agreement, not the transfer.

# Actions Not Required as Reasonable Accommodations

- Removing essential functions
- Changing production or performance standards
- Excusing violations of conduct rules that are job-related and consistent with business necessity
- Actions that would result in undue hardship (i.e. significant difficulty or expense)

# Undue Hardship

Consider the following factors:

- Nature and cost of the accommodation
- Resources available to the agency
- Impact of the accommodation on the operation of the employer

# Undue Hardship (cont.)

- Serls v. Johns Hopkins Hosp., --- F. Supp. 3d ---, 2016 WL 245229 (D. Md. Jan. 21, 2016)
  - Candidate for nurse clinician job who is deaf rejected because of cost of sign language interpreters.
  - Salary for nurse's position is $60,000 and the estimated annual cost of interpreter is $120,000.
  - Department in which plaintiff would have worked had a budget of $3.4 million, and no money budgeted for the cost of reasonable accommodations.

# Undue Hardship (cont.)

- Serls v. Johns Hopkins Hosp., --- F. Supp. ---, 2016 WL 245229 (D. Md. Jan. 21, 2016)
  - Court granted summary judgment in plaintiff's favor on undue hardship claim.
  - Fact that the department had no budget for reasonable accommodation was irrelevant.
  - Operating budget for the entire hospital was $1.7 billion; interpreter would have been 0.007% of that budget.
  - Employer's "direct threat" defense as based on post-hoc rationalization.

# Employee Misconduct

- Henningsen v. City of Blue Earth, No. 14-4482 ADM/HB, 2016 WL 1627603 (D. Minn. Apr. 22, 2016).
  - Plaintiff allegedly had a multi-year history of engaging in misconduct.
  - Court found that there was a factual question as to whether or not the employer's decision to finally terminate Plaintiff for his misconduct only after Plaintiff had engaged in protected activity two months prior was mere pretext for discrimination.

# Employee Misconduct (cont.)

- Yarberry v. Gregg Appliances, Inc., No. 14–3960, 2015 WL 5155553 (6th Cir. Sept. 3, 2015) – Despite the fact that plaintiff's disruptive conduct resulted from his bipolar disorder, the plaintiff's termination was nonetheless permissible where the employee
  - Entered the defendant's store after hours, opened a safe, roamed around the store, used store equipment, and left the store without setting the alarm.

# Disability Related Inquiries and Medical Exams: Pre-Offer Stage

- No disability-related inquiries/medical exams, except –
  - Questions about whether applicant can meet job requirements are allowed.
  - Employers can ask all applicants if they will need accommodations for application process.
  - May ask a particular applicant if he or she needs accommodation for the job where employer reasonably believes an obvious disability will require accommodation.
  - Inquiries are allowed for affirmative action purposes under certain conditions.

# Post-Offer

- After employer has obtained and evaluated all non-medical information, employer can ask any disability-related questions and do medical exams if –
  - All entering employees are subject to same inquiries/exams; and
  - If employer withdraws offer from someone with a disability., employer can show that applicant cannot do essential functions or would pose a direct threat.
  - EXCEPTION: Inquiries or exams cannot include requests for genetic information (e.g., family medical history or results of genetic tests).

# During Employment

- Disability-related inquiries and medical exams permitted only where job-related and consistent with business necessity.
- Generally, this means employer has reasonable belief, based on objective evidence that:
  - Employee may be unable to perform essential functions because of a medical condition; or
  - Employer has reasonable belief that employee may pose a direct threat because of a medical condition.

# During employment

- Barnum v. Ohio State Univ. Med. Ctr., No. 15—3450, 2016 WL 683251 (6th Cir. Feb. 19, 2016) -- Request for psychological evaluation is job-related and consistent with business necessity where nurse anesthetist's co-workers report that she --
  - has trouble concentrating;
  - Has difficulty performing a routine task (adjusting height of operating table); and
  - expressed suicidal thoughts.

# Associational Discrimination

- EEOC v. New Mexico Orthopaedics Associates, P.C., No. 15-CV-00557 MV/KBM (D.N.M. Sep. 1, 2016).
  - After being offered full-time job, Plaintiff advised her employer that Plaintiff would need some time off because her daughter, who had several disabilities, would be needing surgery.
  - A day after being told that the hiring process was going forward, Plaintiff missed a day because both her children were sick; fired the same day.
  - Supervisor texted Plaintiff, "you have a child whom is medically disabled you do not belong in the workplace or in my clinic at NMO!"
  - As part of the settlement, the employer will pay $165,000 in monetary relief to Plaintiff for the associational discrimination claim.