

Americans with Disabilities Act Update

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What We Will cover

- Definition of Disability”
- What Does it Mean to Be “Qualified”
- Reasonable Accommodation
- Direct Threat, Undue Hardship, and Employee Misconduct
- Disability-Related Questions and Medical Examinations
- Harassment and Retaliation

Definition of “Disability”

Disability Means ...

- 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 such an impairment, meaning that an employer takes a prohibited action based on an impairment that is not BOTH transitory AND minor.

Evidence of Substantial Limitation Still Required

- Alston v. Park Pleasant, Inc., No. 116-1464, 2017 WL 627381 (3d Cir. Feb. 15, 2017) p. 1
 - ADA still requires individualized assessment of disability, even if limitation may seem self-evident.
 - Plaintiff never alleged in her complaint or during course of litigation that any major life activity was substantially limited as a result of early stage breast cancer.

Documentation Does Not Support Substantial Limitation

- Holton v. First Coast Serv. Options, Inc., --- Fed. App'x ---, 2017 WL 3446880 (11th Cir. Aug. 11, 2017) p. 1
 - Letter from doctor can establish that employee has a disability.
 - Here, though, letter from plaintiff's chiropractor only said he was treating plaintiff for cervical, thoracic, and lumbar back pain and recommended that plaintiff be limited to 4-hour days for 2 weeks.
 - Letter did not mention any major life activities that plaintiff identified.

Obesity Must Have Physiological Cause to Be Disability

- Morriss v. BNSF Railway Co., 817 F.3d 1104 (8th Cir. 2016) p. 2
 - BNSF 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 BMI 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 as Disability

- Alexander v. Washington Metropolitan Area Transit Auth., 826 F.3d 544 (D.C. Cir. 2016) p. 2
 - 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 then employer refused and gave conflicting reasons for its decision.
 - 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) p. 3 – fragrance sensitivity may be a disability protected by the ADA where –
 - It substantially limited plaintiff’s 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.
 - 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.

Who Is “Qualified”?

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

- Qualification standards may include licenses, certifications, degrees, experience, etc.
- Also may include physical or mental qualifications for the job.
- Qualification standards may intentionally or unintentionally screen out individuals with disabilities.
- A qualification standard that screens out an individual or class of individuals based on disability must be job-related and consistent with business necessity, meaning it must accurately measure the ability to do essential functions.

Qualification Standards (cont.)

- EEOC v. Norfolk Southern Corporation and Norfolk Southern Railway Company, Case No. 2:17-cv-01251)
- EEOC alleges company excluded individuals based on a number of disabilities, including cancer (individuals who received chemotherapy treatments within the past year); diabetes or elevated blood glucose levels; past drug addiction or drug treatment (including individuals who were not drug-free for at least a year); arthritis; nonparalytic orthopedic impairments; cardiopulmonary or cardiovascular impairments; and PTSD.

Qualification Standards (cont.)

- McNelis v. Pa. Power & Light Co., 867 F.3d 411 (3d Cir. 2017) p. 3
 - Nuclear power plant worker found unfit for duty and lost unescorted access to facility.
 - Court referred to requirements for the security officer position under NRC regulations as “essential functions.”
 - Inability to satisfy requirements of NRC regulations made plaintiff unqualified.

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.

Qualification Standards (cont.)

- EEOC v. Stevens Transport, Civil Action No. 3:16-cv-03325-N (N.D. Tex. 2016)
 - Company refused to hire veteran as truck driver because of medications he took for bipolar disorder.
 - No federal regulations that prohibit commercial motor vehicle drivers from taking these medications.
 - Charging party passed DOT-mandated physical and had a commercial driver's license; subsequently obtained employment as truck driver with another company.

Qualification Standards: Individualized Assessment Required

- EEOC v. Georgia Power Co., Civil Action No. 1:13-cv-03225-AT (N.D. Ga. 12/15/16)
 - 24 employees denied employment or not returned to work after medical leave.
 - EEOC alleged company applied seizure policy and drug and alcohol policy without doing an individualized assessment of applicants or employees.
 - Consent decree results in \$1.5 million in monetary relief and injunctive relief.

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

Position Description

- Bush v. Compass Group USA, Inc., No. 16-6258, 2017 WL 1097140 (6th Cir. Mar. 23, 2017) p. 4
 - Position description for chef manager says lifting 10 pounds is required.
 - Supervisor describes job as “mostly a supervisory role.”
 - Plaintiff’s experience contradicts PD; he frequently has to move heavy objects up to 50 pounds.
 - Court finds he’s not qualified.

Position Description (cont.)

- EEOC v. Vicksburg Healthcare, LLC, No. 15-60764, 2016 WL 5939424 (5th Cir. Oct. 12, 2016) p. 4
 - Nurse returned from rotator cuff surgery; no lifting, pushing, or pulling more than 10 pounds.
 - Deference to position description not dispositive
 - Testimony from CP and from co-worker that lifting, pushing, or pulling more than 10 pounds is rarely required.

Infrequently Performed Function Still Essential

- Jordan v. City of Union City, Ga., No. 15—12038, 2016 WL 1127739 (11th Cir. March 23, 2016) p. 5
 - Plaintiff was not qualified to be a police officer because he was unable to react quickly and 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.”

Attendance and Work Schedules

- Williams v. AT&T Mobility Servs., LLC, 847 F.3d 384 (6th Cir. 2017) p. 5 – regular attendance essential function for customer service representative where –
 - Employer maintained strict attendance guidelines.
 - Guidelines identify attendance as essential function.
 - Guidelines existed prior to litigation.
 - Managers testified as to why attendance was essential.
 - plaintiff provided no contrary evidence.

Employee on Leave May Still Be Qualified

- Terre v. Hobson et al, --- Fed. App'x ---, 2017 WL 3775266 (6th Cir. Aug. 31, 2017) p. 10
 - School teacher's job is eliminated while he is on extended leave.
 - Court finds there is evidence plaintiff is still qualified: he was on approved leave; there is no evidence he failed to communicate or to comply with policies for requesting leave; and he intended to return to work.
 - Also, there is evidence of discrimination, including the fact that the principal referred to plaintiff's health in discussions about eliminating his job.

Driving and Travel

- Driving is not, or may not be, essential function --
 - Stephenson v. Pfizer, Inc., No. 14-2079, 2016 WL 806071 (4th Cir. Mar. 2, 2016) p. 5
 - Brown v. Smith, 827 F.3d 609 (7th Cir. 2016) p. 6
 - Shell v. Smith, 789 F.3d 715 (7th Cir. 2015) p. 6

Multiple Factors Considered

- Stevens v. Rite Aid Corp., 851 F.3d 224 (2d Cir. 2017) p.7 – Pharmacist with fear of needles unable to give immunizations is not qualified.
 - Position description required immunization certification of licensure and designated immunizations among essential duties.
 - Other employees required to perform the function; one who could not was terminated.

Multiple Factors Considered (cont.)

- Credeur v. La. Through Office of Attorney Gen., 860 F.3d 785 (5th Cir. 2017) p. 7 -- Full-time telework not a reasonable accommodation for litigating attorney.
 - Employer allowed telework only rarely and temporarily.
 - Supervisors testified the job was “interactive and team oriented.”
 - Supervisor who teleworked did so in addition to normal business hours and another attorney who teleworked was not a litigator.
 - Other employees had to assume some of plaintiff’s responsibilities and plaintiff failed to complete certain required job tasks, such as adequately accounting for time.

Multiple Factors Considered

- Wickware v. Johns Manville, No. 15-6028, 2017 WL 167460 (10th Cir. Jan. 17, 2017) p. 7 -- Plaintiff not qualified for relief foreman position where he could perform only 2 of 5 required functions.
 - Position description said all 5 functions were required.
 - Manager testified that one of the values of relief foreman position was ability to perform all 5 functions.
 - Testimony affidavits from co-workers that one relief foreman could not perform one of the functions lacked factual basis.

Multiple Factors Considered (cont.)

- Mason v. United Parcel Serv., Inc., No. 16-10560, 2017 83381 (11th Cir. Jan. 10, 2017) p. 7 – Truck driver with permanent 25-pound lifting restriction not qualified for jobs to which she sought reassignment
 - HR determination she was qualified for some jobs was preliminary.
 - Co-worker declaration said heavy lifting not required for 2 jobs, but did not define heavy lifting or how often plaintiff would need assistance.
 - Facility is leanly staffed; inability to perform functions could result in service disruptions.

Multiple Factors Considered (cont.)

- Everett v. Grady Memorial Hosp. Corp., --- Fed. App'x ---, 2017 WL 3485226 (11th Cir. Aug. 15, 2017) p. 8 – Full-time telework not required during plaintiff's pregnancy because essential functions of job required presence in the workplace. Court considered --
 - Employer judgment;
 - Terms of job description;
 - Testimony from supervisors;
 - Time spent performing functions that required presence in the workplace (10 of 32 hours per week); and
 - Effect on other employees of shifting plaintiff's duties.

Reasonable Accommodation

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 Accommodation (cont.)

- EEOC v. Vicksburg Healthcare, LLC, No. 15-60764, 2016 WL 5939424 (5th Cir. Oct. 12, 2016) p. 13
 - Nurse out for rotator cuff surgery made request for reasonable accommodation: gave certification from her doctor releasing her to work with restrictions.
 - Plaintiff not required to use “special words.” All she had to do was “explain that the adjustment in working conditions or duties she is seeking is for a medical condition-related reason.”

Requests for Reasonable Accommodation (cont.)

- Cady v. Remington Arms Co., Case No. 16-5035, 2016 WL 7030989 (6th Cir. Dec. 2, 2016) p. 14 – Engineer for firearms manufacturer made request for accommodation when he –
 - informed HR director he was going to a neurologist due to back pain and provided her with a copy of his MRI;
 - informed one of his supervisors the following week that he was concerned about hurting his back as the result of a job constructing workstations at one of the company’s plants; and
 - told the plant manager that he would have to “mix it up” and not work exclusively on building the workstations.

Requests for Reasonable Accommodation (cont.)

- Kowitz v. Trinity Health, 839 F.3d 742 (8th Cir. 2016) p. 14 – Respiratory therapist/lead lab technician made request where she –
 - had been on leave for the condition for which she sought accommodation;
 - returned to work with restrictions; and
 - mentioned surgery, leave, and neck pain when she told employer she would need additional time to complete basic life support certification.

Requests for Reasonable Accommodations (cont.)

- Foster v. Mountain Coal Co., LLC, 830 F.3d 1178 (10th Cir. 2016) p. 14
 - Request for employer’s “cooperation” with upcoming surgery and recovery is request for reasonable accommodation.
 - Employer’s termination of employee days or even hours after accommodation request raises fact issue on whether employer retaliated.
 - Employer gave inconsistent reasons for termination, raising issue of fact concerning pretext.

Requests for Reasonable Accommodations (cont.)

- Nebecker v. National Auto Plaza, 643 Fed. App'x 817 (10th Cir. 2016) p. 15
 - 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 did not take any explicit actions that foreclosed the interactive process.

Requests for Reasonable Accommodations (cont.)

- Dugger v. Stephen F. Austin State Univ., Case No. 2:15-CV-1509-WCB, 2017 WL 478297 (E.D. Tex. Feb. 6, 2017) p. 15
 - Employer claimed employee did not follow its written policy for requesting reasonable accommodation.
 - There was evidence employee substantially complied with policy.
 - Fact that employee may not have complied with all requirements of the policy, “is not, standing alone, enough to establish conclusively that he failed to provide adequate notice to the university of his desire for an accommodation.”

Interactive Process

- Ortiz-Martinez v. Fresenius Health Partners, 853 F.3d 599 (1st Cir. 2017) p. 16
 - Social worker with bilateral carpal tunnel syndrome submitted note from her doctor requesting “necessary adjustments” in her work activities.
 - Employer’s attempt to get additional information unsuccessful.
 - Court holds that attempts to get additional information were reasonable.

Interactive Process (cont.)

- Cash v. Lockheed Martin Corp., No. 16-2194, 2017 WL 1352072 (10th Cir. Apr. 13, 2017) p. 16
 - Employee wore hearing aids but sometimes turned them down to reduce ambient noise.
 - He is disciplined for failing to communicate with others.
 - Brings in a doctor's note asking for meeting with co-workers to discuss communication strategies with employees who have hearing loss.
 - Employer did not violate ADA by holding the meeting when employee was not present.

Interactive Process

- Dillard v. City of Austin, Texas, No. 15-50779, 2016 WL 4978363 (5th Cir. Sep. 16, 2016) p. 16
 - 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.)

- Lawler v. Peoria School Dist. No. 150, No. 15-2976, 2016 WL 4939538 (7th Cir. Sep. 16, 2016) p. 17
 - 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) p. 17
 - 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.
 - 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) p. 17
 - 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) p. 17
 - Once when Atkins was alone in the store and could not leave the cash register unattended, she 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.

Whether Accommodation Is “Reasonable”

- Punt v. Kelly Servs., 862 F.3d 1040 (10th Cir. 2017)
p. 18
 - Temporary receptionist had several absences, some of them unexplained, and requested additional time off for tests and radiation treatment for cancer.
 - Court found additional request for leave was unreasonable.
 - Whether an accommodation is reasonable depends on the employee’s disability and the nature of the job.

Whether Accommodation Is “Reasonable” (cont.)

- Punt v. Kelly Servs., 862 F.3d 1040 (10th Cir. 2017)
p. 18
 - Employee has to give employer information about the expected duration of the impairment, so that the employer can determine whether the employee can return to work in the near future.
 - Court said employee was “vague” about the amount of leave she would need.
 - Employer would have to assign other employees to perform plaintiff’s duties or accept a “super-temporary” employee.

Whether Accommodation Is “Reasonable” (cont.)

- Roberts v. Kaiser Found. Hosp., No. 2:12–cv–2506–CKD, 2015 WL 545999 (E.D. Cal. Feb. 10, 2015) (aff’d mem., Roberts v. Permanente Med. Grp., No. 15-15540, 2017 WL 1806546 (9th Cir. May 4, 2017) p. 19
 - Court holds that employee’s request for only “incidental contact” with her supervisor is functionally equivalent to a request for a new supervisor, which is not reasonable.
 - Further, employer would have to restructure the plaintiff’s department in order to make this accommodation.

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 Corp., 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.
 - Applicant's sister had agreed to interpret.
 - Never contacted, even though restaurant management continued to interview and hire workers.

Reasonable Accommodation/Failure to Hire

- EEOC v. S&B Industry, Civil Action No. 3:15-cv-00641 (N.D. Tex. 2/23/17)
 - 2 applicants with hearing impairments who use ASL requested supervisor to write information about jobs for which they are applying at cell phone repair facility.
 - Supervisor initially does, but then refuses.
 - Both applicants denied jobs.
 - \$110,000 in monetary relief; training for employees, including on reasonable accommodation; log disability complaints; report to EEOC semi-annually; post notice of settlement.

Reasonable Accommodation: Benefits and Privileges of Employment

- EEOC v. The Cheesecake Factory, Inc. and The Cheesecake Factory Restaurants, Inc., 2:16-CV-1942 (W.D. Wash. 2016)
 - Charging party a part-time dish washer who is deaf.
 - Employer chooses to communicate in writing at interview, during post-hire orientation, and during significant meetings.
 - No sign language interpreter provided for training in use of scheduling and timekeeping system.

Job Restructuring

- Cummins v. Curo Health Servs., LLC, Civil Action No. 1:15—CV—102—SA—DAS, 2017 WL 473896 (N.D. Miss. Feb. 3, 2017) p. 20 – Evidence hospice nurse with 10-pound lifting restriction might have been accommodated by changing her patient list and/or having an aide accompany her on some visits.

Modified Work Schedule

- Williams v. AT&T Mobility Servs., LLC, 847 F.3d 384 (6th Cir. 2017) p. 20 -- Customer service rep failed to show how modified start time and 10-minute breaks each hour would be reasonable accommodations where --
 - She claimed she needed breaks to calm down after stressful calls, but admitted she could not work during anxiety attack or predict when anxiety attacks would occur; and
 - Evidence showed she was unable to work at all during a significant period of time.

Modified Work Schedule (cont.)

- EEOC v. Wal-Mart Stores East, LP, Civil Action No. 2:17-cv-70 (E.D. Wis. 2017)
 - Employee with Down syndrome has had same schedule for 15 years.
 - Then assigned longer and later times based on new computerized scheduling system.
 - Sister asks that employee be given her regular schedule; employer refuses.
 - Employee fired when she does not show up at scheduled times.

Part-Time Work

- Green v. BakeMark USA, LLC, No. 16-3141, 2017 WL 1147168 (6th Cir. Mar. 27, 2017) p. 19 – Part-time schedule for a month not required where:
 - Managers testified working 50 hours per week was required;
 - Plaintiff admitted he could not perform all functions working 8 hours per day, 5 days a week; and
 - Position description required supervision, including interacting with department associates.

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.

Modification of Workplace Policies (cont.)

- EEOC v. Austin's FEC, LLC, No.1-15-cv-00873 (W.D. Tex. June 28, 2016)
 - Charging Party, 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 CP 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 CP.

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
 - Employer provides no leave;
 - Employee is ineligible for leave under employer's policy; or
 - More is needed than is provided for under employer's policy or FMLA or similar leave laws

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 or other similar laws allow.
- 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

- Capps v. Mondelez Global, LLC, No. 15-3839, 2017 WL 393237 (3rd Cir. Jan. 30, 2017) p. 22
 - Employee fired when employer concluded he had fraudulently used FMLA leave to attend court proceedings for DUI.
 - Court held that request for FMLA leave can constitute request for accommodation.
 - Plaintiff's accommodation claim failed because at the time he requested leave, employer granted it.

Inability to Return Following Leave

- Moss v. Harris County Constable Precinct One, 851 F.3d 413 (5th Cir. March 15, 2017) p. 22 (employee's requested retirement date preceded his projected return date)
- Whitaker v. Wis. Dep't of Health Serv., 849 F.3d 681 (7th Cir. 2017) p. 22 (multiple requests for leave; doctor's notes do not describe condition, course of treatment, or likelihood of returning to work).
- Aston v. Tapco Int'l Corp., No. 14—2476, 2015 WL 7434652

Request for Leave Not Reasonable

- *Severson v. Heartland Woodcraft, Inc.*, --- F.3d ---, 2017 WL 4160849 (7th Cir. Sep. 20, 2017) p. 21
 - Plaintiff had back condition; requested FMLA leave; then had surgery on the last day of his leave.
 - Asked for an additional 2 or 3 months of leave.
 - Court affirmed earlier decision which said multi-month leave is not a reasonable accommodation because it does not enable employee to perform essential functions.
 - Leave of a couple of days or a couple of weeks may be accommodation; resembles part-time work schedule.

Leave and Termination

- EEOC v. AccenCare, Inc., Civil Action No. 3:15-CV-3157-D, 2017 WL 2691240 (N.D. Tex. June 21, 2017) p.22
 - Employee had several absences during probationary period due to bipolar disorder.
 - Court finds that termination due to excessive absenteeism is legitimate, nondiscriminatory reason, but that employer may have been required to grant a few days of additional leave as a reasonable accommodation.

Leave and Termination (cont.)

- EEOC v. Pioneer Health Services, Inc., Case No. 1:17-cv-00016-GHD-DAS (N.D. Miss. 2017)
 - Social worker/therapist goes on leave for liver transplant.
 - Requests an additional 4 weeks of leave beyond what company originally approved; she has 4 weeks of sick leave left.
 - Company denies leave, fires her after company-approved leave ends, then refuses to hire her for social worker position after she complains.

Maximum Leave Policies and “100% Healed” Rules

- EEOC v. UPS, Case No. 09-cv-5291 (CONSENT DECREE 8/8/2017)
 - EEOC alleged company applied inflexible leave policy and fired employees without engaging in interactive process to find accommodations.
 - \$2 million in monetary relief for 90 individuals. Company will update reasonable accommodation policies, improve implementation, provide training to those responsible for administering accommodation process, and report to EEOC.

Telework

- Garrison v. City of Tallahassee, No. 16—10114, 2016 WL 6610210 (11th Cir. Nov. 9, 2016) p. 23
 - Telework on a long-term unscheduled basis not a reasonable accommodation for city purchasing agent.
 - Job required him to interact with internal department representatives, both in-person and by phone, and interact with vendors who might arrive at the worksite unannounced and need assistance.

Telework (cont.)

- EEOC v. Advanced Home Care, Inc., Civil Action No. 1:17-CV-00646 (M.D.N.C.)
 - Call center employee with asthma and COPD asks to telework following medical leave to avoid fragrances, scents, and odors in the workplace.
 - Telework denied; employee has to take additional leave; and is fired after exhausting all leave.

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.

No Vacant Position

- Audette v. Town of Plymouth, Mass., No. 15-2457, 2017 WL 2298070 (1st Cir. May 26, 2017) p. 23
 - Plaintiff, a patrol officer, had repeated ankle injuries and requested light duty assignment.
 - Employer had previously assigned another officer to a data entry position, and plaintiff asked for the same accommodation.
 - However, the data entry position was only temporary to assist an acting records sergeant until a permanent appointment could be made.
 - The records sergeant position would have been a promotion for plaintiff, which was not required as a reasonable accommodation.

No Vacant Position (cont.)

- Boyle v. City of Pell City, 860 F.3d 1280 (11th Cir. 2017) p. 23
 - Heavy equipment operator assigned to foreman position for 7 years, while foreman worked in another job.
 - A new streets superintendent assigned the foreman back to his original duties and assigned duties to plaintiff he said he could not perform.
 - Employer not required to assign plaintiff to foreman position.
 - Even if another foreman position existed, it would have been a promotion.

“Best Qualified” Rules

- EEOC v. St. Joseph’s Hosp., Inc., 842 F.3d 1333 (11th Cir. 2016) p. 25
 - Nurse sought reassignment.
 - Modifying “best qualified” rule not reasonable in “run of cases,” because it is not the best way to promote efficiency and good performance where a business operates for profit.
 - Undermining hospital’s best qualified policy imposes “substantial costs on the hospital and potentially on patients.”

Defenses

Direct Threat

- Direct threat means a **significant risk of substantial harm** to the individual or others.
- Must be based on the best available objective evidence of the risks and potential harm.

Direct Threat Factors

- The duration of the risk
- The nature and severity of the potential harm
- The likelihood that the potential harm will occur
- The imminence of the risk
- Where applicant or employee has an actual disability or record of a disability, whether reasonable accommodation would reduce or eliminate the risk

Direct Threat: Medical Evidence

- Stragapede v. City of Evanston, 865 F.3d 861 (7th Cir. 2017) p. 27
 - Plaintiff returned to work as water service worker following traumatic brain injury.
 - He experienced some performance problems (twice going to wrong address), and was once reported driving through an intersection while looking down at his lap.
 - Doctor for the city examines him and finds him medically unfit for duty.

Direct Threat: Medical Evidence (cont.)

- Stragapede v. City of Evanston, 865 F.3d 861 (7th Cir. 2017) p. 27
 - Jury finds in favor of employee, and court affirms.
 - Employee explained that he was looking down while driving through intersection to retrieve a clipboard that had fallen; the light was green and there were no pedestrians.
 - Jury could find that two incidents of reporting to wrong address were not safety issues.
 - Doctor's determination employee was unfit was based solely on information from the city.

Undue Hardship

Consider the following factors:

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

Employee Misconduct

- Vannoy v. Federal Reserve Bank of Richmond, 827 F.3d 296 (4th Cir. 2016) p. 29
 - Employer attempted to place plaintiff on PIP for violating conduct rule.
 - Employee terminated when he did not complete the paperwork for the PIP and left work without permission.
 - “ADA does not require an employer to simply ignore an employee’s blatant and persistent misconduct, even where that behavior is potentially tied to a medical condition.”
 - .

Employee Misconduct (cont..)

- Gogos v. AMS Mechanical System, Inc., No. 15-3603, 2017 WL 465678 (7th Cir. Feb. 3, 2017)
p. 29
 - Plaintiff not fired because of high blood pressure but because he “repeatedly” and “profanely” refused to provide requested documentation supporting absence.
 - Employer adequately explained apparently contradictory reasons provided in documentation of termination.

Employee Misconduct (cont.)

- Dewitt v. Southwestern Bell Tel. Co., 845 F.3d 1299 (10th Cir. Jan. 18, 2017) p. 29
 - Employee hung up on 2 customers and was terminated.
 - Employee claimed she did not remember the calls and attributed hang-ups to low blood sugar.
 - Reasonable accommodation does not include overlooking past misconduct even where caused by a disability.

Misconduct/Threatening Behavior

- Felix v. Wisconsin Dep't of Transp., 828 F.3d 560 (7th Cir. 2016) p. 27
 - Plaintiff has several disabilities – PTSD, major depression, anxiety disorder, and OCD.
 - Sent for fitness-for-duty exam related to behavior in the workplace employer considered threatening.
 - FFDE concludes plaintiff continues to be at risk of violent behavior toward self and others.
 - Issue is not whether employer must show direct threat, but whether employer must tolerate “threatening” and “unacceptable” behavior because it results from a disability.

Disability-Related Inquiries and Medical Exams

Inquiries and Medical Exams

- Williams v. FedEx Corporate Servs., 849 F.3d 889 (10th Cir. Feb. 23, 2017) p. 30
 - Plaintiff legally prescribed oxycontin and then suboxen as replacement during withdraw from oxycontin.
 - Court remands to district court to determine whether employer could require employee to report prescription drug use.
 - “[T]he district court should consider whether FedEx implemented its purported disclosure requirement to learn whether Mr. Williams was suffering from any health defects, or for some other business purpose.

Inquiries and Medical Exams (cont.)

- EEOC v. Covenant Transport, Civil Action No. 1:16-CV-00142 (E.D. Tenn. Feb. 24, 2017)
 - Charging party with bladder exstrophy given a conditional offer of truck driver job
 - Cannot give urine sample; offers to give blood sample, but employer decides not to hire CP because of medical condition and inability to provide urine sample
 - \$30,000 in compensatory damages; written drug testing policy; training for recruiters and head of safety

Harassment and Retaliation

EEOC Select Task Force on the Study of Harassment in the Workforce

- Select Task Force Co-Chairs Report from June 2016:
www.eeoc.gov/eeoc/task_force/harassment/report.cfm
- Key findings included:
 - Workplace harassment remains a persistent problem
Nearly 1/3 of EEOC charges in FY2015 included workplace harassment allegation, with top bases being race, sex, and disability
 - Much of the training done over the last 30 years has not been an effective prevention tool because it's been too focused on simply avoiding legal liability

Enforcement Guidance

- EEOC Enforcement Guidance on Retaliation and Related Issues: www.eeoc.gov/laws/guidance/retaliation-guidance.cfm
- Questions and Answers: Enforcement Guidance on Retaliation and Related Issues:
 - www.eeoc.gov/laws/guidance/retaliation-qa.cfm
- Small Business Fact Sheet: Retaliation and Related Issues: www.eeoc.gov/laws/guidance/retaliation-factsheet.cfm

Harassment

- Patton v. Jacobs Engineering Group, Inc., 863 F.3d 419 (5th Cir. 2017) p. 32
 - Plaintiff claimed he was harassed based on his childhood onset fluency disorder, which caused him to stutter.
 - Court agreed that plaintiff's testimony concerning the frequency of name-calling and an incident in which his supervisor mocked his stuttering in front of 50 employees at a department-wide meeting was evidence of severe or pervasive harassment.
 - But, the court found plaintiff unreasonably failed to take advantage of corrective measures available to him.

Harassment and Retaliation

- EEOC v. Goodwill Industries of the Greater East Bay and Calidad Industries, Civil Action No. 4:16-CV-07093 (N.D. Cal. 2016)
 - Supervisor sexually harassed five night-shift janitors working in federal building under contract that is part of program for employing people with disabilities.
 - Supervisor also falsified results of time studies, which resulted in lower pay for employees.
 - Two managers who supported employees' sexual harassment complaints were disciplined; one was compelled to resign.