

# Legal Briefings

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## “Disability Harassment, Retaliation and Discipline Three Emerging ADA Issues”

### I. Introduction

An employee with a disability is called “platehead” and other derogatory names by co-workers after returning to work after brain surgery. Is such conduct actionable as disability harassment under the ADA?

An employee with a disability files with the EEOC after her employer refuses to accommodate her. Six months later she is terminated. Is there a sufficient causal connection between filing with the EEOC and the termination to give rise to claim of retaliation under the ADA?

An employee with post-traumatic stress disorder violates a professional conduct rule and is disciplined by his employer. The employee claims that the discipline should be rescinded once the employer learns of his disability. Is there a basis for an ADA claim for improper discipline against an employee with a disability?

These scenarios raise questions about three emerging ADA issues: Disability Harassment, Retaliation and Discipline. All three of these issues are complex and provide challenges for employers and employees. This legal brief will examine the nature of these different legal theories under the ADA and how courts have interpreted them.

### II. Disability Harassment

Disability harassment under Title I of the ADA is a developing area of law, and this cause of action is being explicitly or implicitly recognized by a growing number of courts. The U.S. Supreme Court and the lower federal courts have previously recognized a cause of action for workplace harassment under Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. See 42 U.S.C. §2000e-2(a)(1)

# Disability Harassment, Retaliation and Discipline

## Three Emerging ADA Issues

A review of Title VII harassment cases reveals that there is no exact science to determining what conduct rises to the level of actionable harassment. The courts, however, have set a high bar for what conduct constitutes harassment under Title VII. Courts that have recognized a disability harassment claim under Title I of the ADA have analogized such a claim to a Title VII harassment claim.

As more and more individuals with disabilities enter the workforce, the more important this issue will become for employers. Training and anti-harassment policies that address other forms of harassment, based on race and sex, for example, should be modified to include disability.

### A. Disability Harassment Claims Under Title I of the ADA

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

Courts that have recognized a cause of action for disability harassment have focused on the similarities between this provision of the ADA and Title VII. Although harassment is not expressly prohibited in Title VII, the U.S. Supreme Court has recognized that harassment based on a protected status is implicitly prohibited by Title VII. Both Title I of the ADA and Title VII use the language “**terms, conditions, and privileges of employment.**” Courts have interpreted this to be the relevant portion of the statutes from which to draw a harassment claim. The courts have established that, should conduct rise to a level that is severe and pervasive, and creates an abusive work environment that interferes with an employee’s ability to perform the job, it is a form of discrimination, because it adversely effects the

“terms and conditions” of that individual’s employment.

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

### B. The Legal Standard for Disability Harassment

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

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

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In disability harassment cases, as in sexual harassment cases under Title VII, plaintiffs frequently have had difficulty establishing the fourth element, that the harassment was severe or pervasive enough to alter a term, condition, or privilege of employment.

The case summaries below contain several examples of factual scenarios where employees asserted harassing conduct by co-workers and supervisors. Yet, in analyzing the facts and applying them to the legal standards, even in the cases that led to a decision for the plaintiff, courts have differed in the requisite severity or pervasiveness necessary to conclude that there was a hostile environment or actionable harassment. Where the harassment causes tangible injury, however, the courts find it easier to hold that severe harassment occurred. In many cases, verbal insults, intimidation, or threats alone have not been sufficient to support a harassment claim. It has taken years to set the parameters of harassment claims under Title VII, so this is clearly a developing area of law under the ADA.

It should be noted that Section 504 of the Rehabilitation Act of 1973 (Rehab Act), which prohibits discrimination by entities that receive federal funding, applies in the employment context. Because the ADA incorporates by reference many of the terms of the Rehab Act, courts have held that the standard for proving a disability harassment claim under the Rehab Act is parallel to that established under Title I of the ADA. The only additional element a plaintiff must show is that the employer is a recipient of federal funds. Therefore, references to cases that involve federal employees are discussed below with the understanding that the standards are the same under both disability discrimination laws for purposes of identifying and describing disability harassment claims.

## C. The First Two Major Cases Recognizing a Claim for Disability Harassment

In 2001, two cases were decided within a couple of weeks of each other that were the first two circuit courts of appeal to recognize a cause of action of

disability harassment. These two cases, which ended up providing very different results to the plaintiffs, have formed the basis for the development of disability harassment case law under the ADA.

In *Fox v. General Motors Corp.*, 247 F.3d 169 (4th Cir. 2001), the plaintiff, Robert Fox, worked for General Motors in different jobs for many years. He sustained back injuries and, upon his return to work, had light-duty work restrictions. Although Fox was assigned to a light duty table, his foreman asked him to perform tasks that he was unable to do because of his injury. When Fox refused to perform the tasks, his foreman verbally abused Fox, often using profanity, and some other officials at work also made fun of Fox and other workers with disabilities, calling them “hospital people,” “handicapped motherf\*\*\*ers,” and “911 hospital people.” The foreman instructed other employees not to speak to those with disabilities, encouraging them to ostracize workers with disabilities and not to bring supplies to the light-duty table. The foreman eventually made Fox work in a hazardous area at a table that was too low, which re-aggravated Fox’s back injury. The foreman also refused to allow Fox to take the physical required to apply for a truck driver position, which met Fox’s medical restrictions and for which he was otherwise qualified.

Fox testified that the harassment he endured caused him both physical and emotional injuries. His psychiatrist ordered that Fox take a leave for a few weeks because of the harassment. His physician concluded that, although Fox was physically capable of performing light-duty work, the constant harassment caused him to be depressed and anxious, which in turn led to a worsening of Fox’s physical condition, and ultimately meant that Fox could no longer work at the plant. Fox filed a lawsuit alleging that GM discriminated against him and subjected him to a hostile work environment in violation of the ADA.

A jury in the federal district court awarded Fox \$200,000 in compensatory damages, \$3,000 for medical expenses, and \$4,000 for lost overtime. The Fourth Circuit Court of Appeals affirmed the jury’s verdict for Fox (except for the \$4000 dollars in overtime pay).

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In its decision, the Fourth Circuit first addressed whether a claim for disability harassment was cognizable under the ADA. Because the ADA uses similar language to Title VII and the Supreme Court had previously recognized harassment claims under Title VII, the court concluded that a claim for disability harassment was cognizable under the ADA. The court also noted that the two statutes have the same purpose, the prohibition of illegal discrimination in employment, and that the EEOC regulations implementing the ADA mentioned harassment. (29 C.F.R. §1630.12(b) states “[i]t is unlawful to coerce, intimidate, threaten, *harass* or interfere with any individual in the exercise or enjoyment of any right granted or protected by” the employment provisions of the ADA.)(*emphasis added*).

After the court recognized that a cause of action existed, the court adopted the five-element test discussed above. The court reasoned that, to recover on a hostile work environment claim, the plaintiff must demonstrate not only that the plaintiff subjectively perceived the workplace as hostile, but also that a reasonable person would perceive the workplace as hostile. The court explained that the factors to consider when determining the objectively hostile component of the claim include “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”

The court then applied this test to the evidence presented at trial and held that the harassment was severe and pervasive. Although not necessary to the success of his claim, the court also found that Fox had suffered both physical and emotional injury. Medical witness testimony showed that the worsening of Fox’s back injury, which led to increased pain and suffering, may have been triggered solely by the harassment Fox experienced at work.

The nature and type of harm or injury a plaintiff presents and the amount plaintiff is able to prove is attributable to disability-based harassment will directly affect the amount of damages plaintiff may receive. In *Fox*, the plaintiff had medical experts, his treating psychiatrist and neurologist, to support his claim that he sustained emotional injury as a

result of the workplace harassment. He was able to establish he had physical and mental symptoms caused by the harassment at work. More significantly, one of his medical experts testified that Fox’s physical disability was likely further aggravated by the harassment including the physical tasks that Fox’s supervisors forced him to do.

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

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

The jury found that Flowers was subjected to unwelcome harassment based on her HIV-positive status and that the harassment was so severe and pervasive that it unreasonably interfered with her job performance.

Like the Fourth Circuit, the Fifth Circuit held that, because Title VII covers hostile work environment claims, claims for disability harassment are

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actionable under the ADA. The court adopted the five-element test discussed above. Under this test, the court concluded that the jury could have reasonably found that the supervisor's and the president's conduct was sufficiently severe or pervasive to create a hostile work environment and unreasonably interfered with Flowers' work performance. Furthermore, Southern Regional did not contest that it was aware of the harassment, and the evidence showed that Southern Regional failed to take prompt action to remedy the harassment.

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

### D. Summary of Cases Allowing Disability Harassment Cases to Proceed

Although a significant percentage of disability harassment claims have been dismissed (see Section E. below), some plaintiffs have been successful in ADA disability harassment cases:

In ***EEOC v. BobRich Enterprises, No. 3:05-CV-01928-M (N.D. Tex. Jul. 27, 2007)***, a jury awarded \$165,000 to a Subway manager who is hard of hearing finding that she had been harassed and forced to resign because of her disability. The jury verdict followed the presentation of evidence by the EEOC that plaintiff was forced to resign her position after both the owner and human resources/training manager repeatedly mocked her privately and in front of other employees, creating

a hostile workplace, with taunts such as: "Read My Lips" and "Can you hear me now?" and "You got your ears on?"

In ***Navarre v. White Castle System, Inc., 2007 WL 1725382 (D. Minn. June 14, 2007)***, the court denied summary judgment to an employer on an ADA harassment claim. The plaintiff, who had ADHD and Tourette's syndrome, was hired to work the night shift at White Castle. Plaintiff alleged his supervisor used derogatory language ("f\*\*\*ing retard"), physically pushed him down and threatened violence. Taking plaintiff's deposition testimony as true for summary judgment purposes, the court found that plaintiff had submitted sufficient evidence that he had experienced harassment related to his disability that was severe and pervasive, and that White Castle management had not effectively responded to his harassment complaints.

In ***Spencer v. Wal-Mart Stores, Inc., 2005 WL 697988 (D. Del. Mar. 11, 2005)***, the court affirmed the jury's award of \$12,000 damages for emotional distress to a hard of hearing employee for claims of hostile work environment and failure to accommodate. The court found evidence that her supervisor and other employees yelled at her, refused to facilitate communications with her, and used obscene gestures directed towards her, and thus, supported the jury's determination of a hostile work environment.

In ***EEOC v. Luby's, Inc., 2005 WL 3560616 (D. Ariz. Dec. 29, 2005)***, a floor attendant with a mental impairment was allowed to move forward with her hostile work environment claim against the employer restaurant. The employee alleged she was subjected to repeated name-calling, barking, and threats of violence, which may establish a hostile working environment.

In ***Arrieta-Colon v. Wal-Mart Stores, 434 F.3d 75 (1st Cir. 2006)***, the court upheld a \$230,000 jury verdict in a case where the employer did not take action against harassment employee with Peyronie's Disease experienced because of his penile implant. Employee was subjected to repeated teasing and harassment by co-workers and managers about his condition, including over the store's paging system. Co-workers testified that supervisors knew about the harassment

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and failed to prevent it. Employer cannot shield itself from liability by relying on a grievance policy that is not consistently used.

In **Quiles-Quiles v. Henderson, 439 F.3d 1 (1st Cir. 2006)**, the court found that evidence was sufficient for the jury to find a hostile work environment where employee was subject to such constant ridicule about his depression that he was hospitalized and eventually withdrew from the workforce. The court rejected the argument that it was the sort of conduct common in “blue-collar” workplaces.

## E. Cases Dismissing Disability Harassment Claims

While the preceding cases indicate that some plaintiffs have been successful in disability harassment cases, courts have dismissed the vast majority of disability harassment cases brought under the ADA. As the case summaries below indicate, most of the dismissals have occurred because the plaintiff has been unable to convince the court that the harassment was sufficiently severe and pervasive to alter the terms, conditions and privileges of employment.

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

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

In **Meszes v. Potter, 2007 WL 4218947 (M.D. Fla. Nov. 28, 2007)**, a postal worker with AIDS filed an employment discrimination suit under the Rehabilitation Act (since he was a federal employee) alleging various causes of action including hostile work environment. The court dismissed his hostile work environment claim finding that the alleged harassment was not severe or pervasive. The court stated that “simple teasing ... offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.”

In **Kaufmann v. GMAC, 164, 2007 WL 1933913 (3d Cir. Jul. 5, 2007)**, an employee with multiple-chemical sensitivity was terminated for failing to meet the organization's attendance policy. She claimed that prior to her termination, she experienced harassment because she had requested the accommodation of having a perfume free workplace. The Third Circuit affirmed the lower court's entry of summary judgment in favor of the defendant finding that the plaintiff failed to provide any evidence of harassment. Plaintiff argued that her breaks were monitored and that she was denied opportunities for overtime, but the court found that plaintiff was not singled out among her co-workers or that the issues she complained about were contrary to company policy. Moreover, the plaintiff failed to demonstrate that the alleged harassment was severe or pervasive enough to alter her employment.

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In ***Aina v. City of New York*, 2007 WL 401391 (S.D.N.Y. Feb. 6, 2007)**, the court denied plaintiff's claim for disability harassment, explaining that most of the alleged comments were unrelated to her hearing disability. While the employee alleged that her colleagues often gathered to jeer and point in her direction, she could not hear what the others were saying. The court explained that the plaintiff did not know if they were talking about her, or if they were, whether it had anything to do with a disability. Further, despite the employee's allegation that her lunch was removed from the refrigerator and discarded three times, she did not know who did this or why. Comments that did refer to her disability were isolated, and were neither severe nor pervasive. For instance, her supervisor once stated, "I don't see why you make such a fuss about your disability." The court held that this was insufficient to constitute a hostile work environment.

In ***Gilmore v. Potter (USPS)*, 2006 WL 3235088 (E.D. Ark. Nov. 7, 2006)**, the court determined that the employer's conduct was not so severe or pervasive to constitute harassment. The court made this determination despite the employer's comment that the employee was worthless, threatened to terminate her employment if she emerged, and told her not to talk with co-workers.

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

In ***Ferraro v. Kellwood Co.*, 440 F.3d 96 (2d Cir. 2006)**, an employer was not liable for a supervisor's harassing behavior when it exercised reasonable care to prevent and promptly correct discriminatory behavior and the employee complaining of harassment failed to avail herself of the preventative opportunities provided by the employer.

In ***Mason v. Wyeth, Inc.*, 2006 WL 1526601 (4th Cir. May 31, 2006)**, an employer was not liable for disability harassment when the plaintiff failed to show that his manager's pranks were motivated by

plaintiff's hearing impairment, despite the fact that evidence showed that the manager specifically exploited the plaintiff's inability to hear by sneaking up on him and that, while the manager played pranks on other employees, the manager played more frequent pranks on the plaintiff.

In ***Rozier-Thompson v. Burlington Coat Factory Warehouse*, 2006 WL 1889651 (E.D. Va. Jul. 7, 2006)**, plaintiff filed suit for disability harassment after her supervisor made several disability related comments (supervisor called her "crippled", said she "should quit and go on disability," called her "stupid for trying to have a baby," and that she was "no good for the company.") The court rejected plaintiff's claims because they were made over a two year period, and were not "physically threatening" or the "type of deeply repugnant, humiliating treatment prohibited by the ADA."

## F. Potential Claim For Disability Harassment Under Title V of the ADA

Mark C. Weber, Professor of Law at DePaul University, among other authors, has argued that a claim for disability harassment could be based on provisions found in Title V of the ADA. Mark C. Weber, *Disability Harassment* (2007) Under 42 U.S.C. § 12203(b) in Title V, it is "unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of . . . any right granted or protected by this chapter." Professor Weber argues, that this unique and separate provision that focuses on coercion, interference and intimidation under Title V of the ADA, is a separate cause of action from a harassment claim, and therefore does not require the strict and difficult burdens of proof as those in a traditional harassment claim.

A cause of action crafted under this provision of Title V would require a lower standard of proof for plaintiffs because coercion and intimidation could include verbal harassment, insults and threats that might not rise to the level of severe or pervasive currently required by the courts. And, a cause of action under this section of the ADA would not require plaintiff to be a qualified individual with a disability since this section says "any individual" instead of "a qualified individual with a

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disability." Therefore, if courts did recognize a cause of action for disability harassment under Title V, plaintiffs would have a higher likelihood of success on those claims, and would not be intimidated or coerced out of a job without recourse.

There is very little case law under this section of the Title V of the ADA, so it is unclear whether this theory will be a way for people with disabilities to obtain redress for the harassment they experience. There is one case that provides some guidance. See ***Brown v. City of Tucson*, 336 F.3d 1181 (9th Cir. 2003)** (stating that "the ADA's anti-interference provision appears to protect a broader class of persons against less clearly defined wrongs, compared to the anti-discrimination provisions from which the hostile environment standard is derived.")

## G. Tips for Employees With Disabilities

As noted previously, the employee must show that the alleged harassment was severe or pervasive. Thus far, the case law indicates that courts are less likely to find that name-calling alone meets the standard for disability harassment. Although courts say that actual physical harm is not necessary, courts seem more sympathetic to disability harassment claims when the employee actually experienced physical or emotional harm on the job as a direct result of the harassment. If employees suffer these types of injuries, they should make sure to plead them in their claims, and if possible, utilize experts to support their claims.

Since they may face a difficult burden in court, employees should consider addressing the situation directly with their employer before pursuing legal action. This can include informing the harasser that the conduct is unwelcome, informing supervisors about the unwelcome behavior, and utilizing the employer's internal procedures for reporting and investigating harassment. If an amicable approach is not successful, the employee should keep a record of the unwelcome behavior including the date, time, place, witnesses, and any attempts that were

made to remedy the situation with the employer and the employer's responses to those attempts.

Finally, employees should educate themselves about their rights, remedies and statutes of limitations, should they decide to file a disability discrimination charge. Statutes of limitations will differ depending on the local, state or federal jurisdiction in which an employee intends to file a charge, the size and type of entity the employer is, and the type of claim the employee is bringing. Generally, if the employee is seeking relief by filing a charge of discrimination under Title I of the ADA, she should contact the Equal Employment Opportunity Commission (EEOC). Claims for disability discrimination in employment based on prohibited discrimination defined in Title I must be filed within 180 days of the alleged discriminatory act of the employer, unless the EEOC has a work share agreement with the state human rights commission, and in those cases, charges must be filed within 300 days. Claims based on hostile work environment require a careful analysis of events in order to determine when the statute of limitations begins to run because these claims can be characterized as an ongoing violation and thus not tied to an incident on a particular date. It is recommended that potential plaintiffs seek legal counsel in order to understand and protect their rights.

## H. Tips for Employees

Employers should be aware that, as with harassment and hostile work environment claims based on sex, race, religion, ethnicity, age or other protected status under Title VII of the Civil Rights Act, and other employment rights laws, employers can be subject to liability for disability harassment claims under the ADA. To avoid such liability and to promote a positive workplace environment, employers should modify any anti-discrimination or anti-harassment training to include training about disabilities. Additionally, employers should put in place disability harassment policies and appropriate grievance procedures for persons with disabilities to report workplace harassment. Employers should also train supervisors to respond promptly to an employee's internal complaint of harassment. The employer

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will need to show that it took the claim seriously, investigated the complaint, maintained employee confidentiality to the extent practicable, and took appropriate disciplinary action against any employee or supervisor who was found to be harassing another employee, or who knew the work environment was abusive and did nothing to prevent or stop the harassment.

While plaintiffs typically carry a heavy burden, disability harassment is still an emerging area of law, and as the cases above demonstrate, plaintiffs can prevail in disability harassment cases. Accordingly, employers should put systems in place that will prevent workers with disabilities from facing disability harassment and provide avenues to promptly address harassment if it occurs. Preventing harassment will ensure a better working environment and also avoid the expense and workplace disruption of any potential litigation.

## III. Retaliation

### A. Overview

Under the ADA, it is unlawful for an employer to retaliate against an employee based upon the employee's efforts to exercise his or her civil rights. Specifically, in Title V, the ADA provides: "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act." 42 U.S.C. 12203(A) The rationale behind this anti-retaliation provision is to provide protection for employees who exercise their civil rights and to promote the full and fair enforcement of the ADA.

### B. Who Can Bring Retaliation Claims?

In most ADA cases, plaintiffs must prove that they are "qualified individuals with a disability." And thus, plaintiffs must show that they are substantially limited in one or more major life activities or that they are "regarded as" or have a "record of" such an impairment. However, the majority of courts have found that proving disability is not required in retaliation cases because the

retaliation section of the ADA refers to "person" instead of "qualified individual with a disability." Given the narrow way that courts have interpreted the definition of disability under the ADA, this makes it easier to bring retaliation claims than most other claims under the ADA.

For instance, in *Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183 (3rd Cir. 2003), an employee with allergies claimed she was terminated because she filed an ADA charge with the EEOC. The employer argued that because the employee could not prove she had an ADA disability, she could not pursue a cause of action for retaliation. The Third Circuit held that a person's status as a "qualified individual with a disability" is not relevant in assessing the person's claim for retaliation under the ADA. The court explained that its decision arises from "the unambiguous text of the ADA. The Act not only applies to those who are protected because they are disabled as defined therein. It also protects 'any individual' who has opposed any act or practice made unlawful by the ADA or who has made a charge under the ADA. This differs from the scope of the ADA disability discrimination provision, ...which may be invoked only by a 'qualified individual with a disability.' Thus, an individual who is adjudged not to be 'a qualified individual with a disability' may still pursue a retaliation claim under the ADA."

### C. What Constitutes an Adverse Employment Action?

Over the years, courts have differed on what type of action by an employer rises to the level of retaliation. Some courts had adopted a position that to state a cause for retaliation, the employer had to engage in the ultimate act, i.e. termination. Two years ago, the United States Supreme Court decided a major retaliation case that resolved this conflict among the lower courts:

In *Burlington Northern & Santa Fe Railway Co.*, 126 S. Ct. 2405 (2006), plaintiff was the only female forklift operator in Burlington Northern's maintenance department in the Memphis office. After complaining of gender discrimination, she was reassigned to a less desirable laborer position. She then filed a charge with the EEOC about the demotion. Subsequently, she was accused of

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insubordination toward a supervisor and suspended without pay. More than a month later, the company found she had not been insubordinate, reinstated her and awarded her back pay. She then sued Burlington Northern for retaliation based on the transfer and the suspension. The U.S. Supreme Court ruled that suspending plaintiff and transferring her to a less desirable job independently established an actionable retaliation claim. Previously, some courts had ruled that a plaintiff could only bring a retaliation claim if it involved an "ultimate employment decision" such as a firing. The Supreme Court held that any action that materially injures or harms an employee who has complained of discrimination and would dissuade a reasonable worker from making a charge of discrimination could be the basis for a retaliation claim. Although the Supreme Court's decision was a gender discrimination case, it is likely that judges will apply the same standard in ADA cases because the retaliation provisions in Title VII and the ADA mirror each other.

Subsequent lower court decisions have further defined what constitutes an adverse employment action in ADA retaliation cases:

In ***Norden v. Samper*, 2007 WL 2219312 (D.D.C. Aug. 3, 2007)**, after nearly two years on disability leave, an employee resumed work but was placed back on leave when exposure to a chemical caused her migraines and nosebleeds. She filed an EEO complaint and requested accommodations. Her employer responded with a "return-to-work proposal," conditioning her return on adherence to performance standards and her agreement to waive future complaints. The plaintiff refused the proposal and filed a second EEO complaint for retaliation. The court granted summary judgment for plaintiff holding that she successfully proved a retaliation claim. It found the "return-to-work proposal" to be an adverse employment action, which the employer conceded was offered in response to the plaintiff's first EEO complaint and request for accommodations. It contained a "blatantly unlawful" provision that the plaintiff waived her right to file grievances.

In ***Gilmore v. Potter (USPS)*, 2006 WL 3235088 (E.D. Ark. Nov. 7, 2006)**, the court determined that an individual did not experience an adverse employment action. She was isolated in a small

room, threatened with being fired, told that she was worthless, and told not to talk to her coworkers. Still, the court explained that a change of location did not produce a material employment disadvantage. The statement about her worthlessness amounted to a "petty slight, minor annoyance, and simple lack of good manners" that did not constitute an adverse employment action.

In ***Serino v. U.S. Postal Service*, 2006 WL 1073163 (7th Cir. Apr. 25, 2006)**, a postal worker with deep vein thrombosis, peroneal palsy, phlebitis and a stroke, sued the Post Office alleging that it retaliated against her when she returned from medical leave by placing her in another unit. The lower court found that her week-long transfer was meant to accommodate her disabilities by providing her with light-duty assignments; her transfer did not result in a reduction of pay and did not significantly affect her working conditions. The plaintiff alleged that during her transfer, she would frequently find her chair missing, and she lacked necessary supplies for her job. The court concluded that her transfer was not a sanction against her, but rather was motivated by her own request for an accommodation.

## D. Was There A Non-Retaliatory Cause for the Adverse Action?

Employers will be able to defeat a retaliation claim if they can demonstrate to the court that there was a non-retaliatory cause for the adverse action against the plaintiff. The following are some cases addressing this issue:

In ***Ozlek v. Potter*, 2007 WL 4440051 (3<sup>rd</sup> Cir. Dec. 17, 2007)**, employee had a stress-related health condition and subsequently was terminated. The federal employee filed suit under the Rehab Act on various theories including retaliation. Specifically, the plaintiff alleged that the employer retaliated against him after he requested a reasonable accommodation and filed a complaint with the EEO office. The court dismissed the plaintiff's retaliation claim finding that the employer provided a legitimate, non-retaliatory reason for the termination (i.e. that the employer needed to resolve inconsistencies related to Ozlek's medical status and his inappropriate behavior) and the plaintiff provided no evidence to rebut the employer's position.

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In ***Hughes v. City of Bethlehem***, 2007 WL 9540120 (E.D. Pa. Mar. 27, 2007), the court dismissed the employee's retaliation claim because the defendant possessed a legitimate justification for her termination (calling in sick while taking a vacation in Las Vegas).

In ***Mitchell v. GE Healthcare***, 2007 WL 601759 (E.D. Wis. Feb. 23, 2007), an employee asserted retaliation because she was referred to the Employee Assistance Program, which included placing her on a leave of absence. The court found that this claim failed because her employer proffered a legitimate and non-invidious reason for this referral. The plaintiff's co-workers reported that she was disruptive and intimidating, often raising her voice and refusing to comply with her manager's directives. Thus, plaintiff's retaliation claim failed.

## E. Was the Employee Engaged in a Protected Activity?

Retaliation claims will only succeed when plaintiffs can demonstrate that they were engaged in protected activities. The following cases explore what are "protected activities" for ADA retaliation cases:

In ***Bloch v. Rockwell Lime Company***, 2007 WL 4287275 (E.D. Wis. Dec. 4, 2007), the employer sought competitive bids for group health insurance and requested its employees to authorize the disclosure of their health information to insurance companies for the purpose of pre-enrollment underwriting and risk rating. Plaintiff alleged that the employer retaliated against him by disciplining him and ultimately terminating his employment after he publicly opposed the employer's request. After the termination, plaintiff filed suit under the retaliation provisions of the ADA and the court granted summary judgment in favor of the employer. The court found that the retaliation provisions did not apply because the employee's actions were not protected since he was protesting activity that did not violate the law.

In ***Mosley v. Potter***, 2007 WL 1100470 (S.D. Tex. Apr. 11, 2007), plaintiff missed two weeks of work after a workplace accident aggravated his back condition. USPS terminated his employment based on the conclusion that the accident was preventable. The court rejected the plaintiff's

argument that he was retaliated against for filing for workers' compensation following his termination because filing for workers' compensation is not a protected activity.

In ***Sanchez v. City of Chicago***, 2007 WL 647485 (N.D. Ill. Feb. 28, 2007), the court awarded summary judgment to the city on an employee's disability discrimination claim, but allowed the plaintiff to proceed with his retaliation claim. The court found that the plaintiff engaged in a protected activity – requesting accommodations – and was terminated a few weeks later. Based on this, a jury could reasonably infer that he was terminated in retaliation for his request.

In ***Montanye v. Wissahickon***, 2007 WL 541710 (3d Cir. Feb. 22, 2007), a teacher had a student in her classroom with psychological and emotional difficulties. At the student's request and with the parent's permission, the teacher accompanied the student to some therapy sessions. After the student's condition worsened, the teacher received a notice from the district superintendent that there would be a hearing regarding the charges against her of inappropriate activity with a student. The Third Circuit rejected the teacher's argument that the school's action constituted illegal retaliation under the Rehabilitation Act. Though the teacher argued she had engaged in a protected activity of providing assistance to an at-risk child through a federally funded program, the court found that "mere assistance" of special needs children is not protected by the Rehabilitation Act. Rather, the Rehabilitation Act protects "affirmative action in advocating for, or protesting discrimination related to, unlawful conduct by others."

## F. Was There a Causal Connection Between the Employee's Exercise of Protected Activity and the Employer's Adverse Action?

In order to prove a retaliation claim, plaintiffs must demonstrate a causal connection between their exercise of a protected activity (e.g. filing an EEOC claim) and the employer's adverse action (e.g. termination). In many of these cases, the court will look at the "temporal proximity" of the two events to determine if there was a causal connection:

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In **Garrett v. University of Alabama at Birmingham Board of Trustees**, 507 F.3d 1306 (11th Cir. 2007), the Eleventh Circuit upheld the dismissal of plaintiff's retaliation claim. Plaintiff had alleged that she was demoted after she requested leave under the ADA. The court held that plaintiff's retaliation claim ultimately failed because plaintiff did not show a causal connection between her request for a leave of absence and her demotion. Plaintiff pointed to the temporal proximity between the two events, she requested leave before March of 1995 and was demoted in July. The court opined that there were more than four and one-half months in between these two dates, so these events were not temporally close.

In **Satchel v. School Bd. of Hillsborough County**, 2007 WL 3023948 (11th Cir. Oct. 16, 2007), the court granted the school board's motion for summary judgment after finding no evidence that her termination was in retaliation to her reasonable accommodation request. The court relied on the fact that the plaintiff requested a reasonable accommodation and was not terminated until two years later.

In **Kaufmann v. GMAC**, 2007 WL 1933913 (3d Cir. Jul. 5, 2007), an employee with multiple-chemical sensitivity was terminated for failing to meet the organization's attendance policy. In addition to claims of discriminatory termination and harassment, she also claimed that she was retaliated against for exercising her rights under the ADA when she requested reasonable accommodations. The Third Circuit upheld the lower court's decision rejecting the retaliation claim and finding summary judgment for the employer. The court found that plaintiff failed to show the requisite causal connection between exercising her ADA rights and the termination. The employer was able to show that the reasons for the termination (poor performance and attendance problems) had already been a problem prior to her request for an accommodation.

In **Erbel v. Department of Agriculture**, 2007 WL 1387331 (E.D. Tenn. May 8, 2007), plaintiff worked as a veterinarian for the Department of Agriculture. After disclosing her depression and ADHD to her supervisor, plaintiff was denied a requested accommodation. After filing a charge with the EEOC, plaintiff alleged that her supervisor repeatedly criticized and disciplined her in ways

that he did not criticize other employees. The court found that plaintiff's retaliation claim was based upon conduct that occurred after contact was made to the EEOC and thus, allowed plaintiff to proceed with her retaliation claim as there was a reasonable basis to show a causal connection between the plaintiff's engaging in protected activity and the adverse employment action.

In **Demshick v. Delaware Valley Convalescent Homes, Inc.**, 2007 WL 1244440 (E.D. Pa. Apr. 26, 2007), plaintiff had Meniere's Disease, which caused severe vertigo, nausea, vomiting, and difficulty balancing. She told her employer that she would not be able to work on the facility's second floor. Her employer initially agreed, but later scheduled her on the second floor. When the plaintiff presented a physician's note to verify that she could not work on the second floor, her employer responded that the documentation was immaterial because she had not mentioned her condition in her application. The court found sufficient evidence that the plaintiff was terminated in retaliation for requesting an accommodation. Though the employer argued that nine months had passed between the initial grant of the plaintiff's request to work and her termination, the court found the relevant time frame to be when the plaintiff renewed her request not to work on the second floor. Because only a week passed between her renewed request and termination, she presented sufficient evidence of a causal connection to support retaliation.

In **Travis v. U.S. Postal Service**, 2007 WL 686621 (5th Cir. Mar. 7, 2007), plaintiff experienced a permanent shoulder injury. He had been disciplined prior to the injury for attendance problems and altercations with co-workers. He was suspended after he sustained his injury for a physical confrontation with a co-worker. Because the disciplinary action began before the plaintiff's EEOC complaint, there was no causal connection to support a retaliation claim.

In **Blades v. Burlington County Jail**, 2007 WL 674687 (D.N.J. Feb. 28, 2007), plaintiff sustained a back injury, for which he was granted an accommodation of temporary light duty. After undergoing back surgery, the plaintiff remained absent without leave and his employment was terminated. Prior to his injury, the plaintiff had been extensively disciplined, including six

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suspensions within six years for insubordination and attendance problems. The court rejected plaintiff's argument that the termination was in retaliation for seeking an accommodation of extended light duty. Because the termination occurred nearly three years after the plaintiff's request, there was no causal connection between the request and the adverse action.

In ***Satchel v. School Bd. of Hillsborough County*, 2007 WL 570020 (M.D. Fla. Feb. 20, 2006)**, the plaintiff requested certain accommodations for a disability in 2002. In 2004, she was terminated for violating three provisions of the Teacher Tenure Act. The court rejected her allegations of retaliation. According to the court, she did not prove a causal connection because the decision-makers for her termination did not know about her accommodation request. Further, the two years between these two actions cast doubt about a causal connection required for retaliation claims.

In ***Wagers v. Arvinmeritor*, 2007 WL 178618 (S.D. Ind. Jan. 18, 2007)**, an employee sufficiently alleged retaliation to surpass a motion for summary judgment. In this case, an employee requested an accommodation, but was given work he was unable to perform. He complained immediately and soon thereafter his employment was terminated. The employer argued that the temporal proximity between his complaint (protected activity) and termination (adverse action) was insufficient to prove causation. The court agreed, but explained that the timing was just one of the suspicious actions. The fact that the employer failed to engage in the interactive process to find and institute a reasonable accommodation, and chose instead to place him in production jobs that he was unable to perform, suggested pretext for retaliation.

In ***Mastronicola v. Principi*, 2006 WL 3098763 (W.D. Pa. Oct. 30, 2006)**, an individual pleaded retaliation, saying that after he filed an EEOC complaint, his employer treated him in an adverse manner. The court denied the individual's claim, explaining that the individual failed to prove causation between his protected activity and the adverse action. Because six months passed between the employee's EEOC complaint and the potentially adverse treatment, the court found the timing was not "unduly suggestive."

In ***Edwards v. U.S. E.P.A.*, 456 F.Supp.2d 72 (D.D.C. Oct. 18, 2006)** the court dismissed the employee's retaliation claims. Although the court acknowledged that the employee suffered adverse employment action (suspensions and significant changes in her work assignments), the employee failed to prove causation between her protected action and this adverse treatment. Over a year had passed from the time she filed an EEO complaint to the time she experienced adverse employment actions. The court will not infer causation if the time lapse is over a year.

## G. Are Retaliation Claims Limited to Current Employers?

In ***Carr v. Morgan County School District*, 2007 WL 2022055 (D. Colo. Jul. 9, 2007)**, a teacher with multiple sclerosis left his position after reaching a settlement agreement related to his disability discrimination complaint to the EEOC. Subsequently, the teacher got a tutoring job with a local community college and was assigned to tutor a student at his former high school. The representative from the college called the assistant principal at the former teacher's school who, in turn said it was not a good idea for the teacher to return to the campus because there were "still hard feelings from before." As a result, the college representative did not give the teacher any assignments at his former school, which limited the number of tutoring hours for the teacher. The teacher filed a retaliation claim under the ADA and the school filed a motion to dismiss. The court refused to dismiss the claim finding that an adverse action for retaliation purposes would include something that harms a former employee's future employment prospects. The court did not accept the district's argument that retaliation should only be limited to actions against a current employer.

## H. Are Damages Available in ADA Retaliation Cases?

The courts are split over whether plaintiffs can recover damages in an ADA retaliation claim. In addition to limiting damages, plaintiffs may also be denied access to a jury trial if there are no claims in which damages can be awarded. The remedies

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under the ADA generally emanate from the Civil Rights Act of 1964 which provided that a court may order certain equitable relief including, but not limited to, back pay, but does not provide for compensatory or punitive damages.

However, Congress subsequently passed the Civil Rights Act of 1991, which expands the remedies under the Civil Rights Act of 1964 to include compensatory and punitive damages when the defendant has engaged in “unlawful intentional discrimination.” Some courts have held that this provision is broad enough to encompass retaliation retaliation [see *Kramer v. Banc of America Securities*, 355 F.3d 961 (7<sup>th</sup> Cir. 2004), *Johnson v. Bozarth Chevrolet*, 297 F. Supp. 2d 1286 (D. Colo. 2004), *Cantrell v. Nissan North America*, 2006 WL 724549 (M.D. Tenn. Mar. 21, 2006)]; whereas other courts have held that retaliation is outside of the scope of the Civil Rights Act of 1991, and therefore no compensatory or punitive damages are available. [See *Rumler v. Dept. of Corrections*, 2008 WL 215699 (M.D. Fla. Jan. 28, 2008), *Edwards v. Brookhaven Science Associates, LLC*, 390 F.Supp. 2d 225 (E.D. N.Y. 2005), *Ostrach v. Regents of the Univ. of California*, 957 F. Supp. 196 (E.D. Cal. 1997)]

## IV. Discipline

How workplace discipline interfaces with the ADA can be a complicated and confusing area. The following are some issues that address this intersection:

### A. Knowledge of Disability Prior to Instituting Discipline

When a disability is known prior to instituting discipline, reasonable accommodations should be considered to enable an employee to comply with reasonable workplace and conduct rules. In *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281 (7<sup>th</sup> Cir. 1996), a janitor with mental illness had taken leave from work. Prior to his leave he had been provided various reasonable accommodations. He was subsequently requested by his employer to return to work and to undergo a fitness for duty examination. Plaintiff was told that the accommodations that were previously in place would not be continued. He agreed to return to work, and inspected the new work site with his

foreman. Plaintiff and his foreman agreed that he would not be able to do the job without the reasonable accommodations that were previously provided. Plaintiff feared that if he reported for the fitness for duty examination he would be found able to return to work but would soon be terminated as he would not be able to adequately perform his job without reasonable accommodations. Therefore, plaintiff did not show up for the examination or work. However, he did present a note from his psychiatrist seeking a “less stressful” environment unaware that the employer had already mailed a notice of termination due to his not reporting for the examination or work. Although the employer was aware of the past accommodations, it ignored the psychiatrist’s note. The Seventh Circuit ruled that the employer’s implementation of discipline was inappropriate given its past knowledge of his disability and needed accommodations. The court stated that if the employer had accommodated the employee by finding him another position or by simply sitting down with him and talking about the situation, he may have been willing and able to take the physical and report for work. In the employee’s previous position a simple adjustment in his duties was enough of an accommodation to enable him to work there. But the employer was unwilling to engage in the interactive process and accommodate the employee, and instead moved forward with discipline leading to termination.

In a case involving discipline and apparent harassment, *Taylor v. Phoenixville School District*, 184 F.3d 296 (3<sup>rd</sup> Cir. 1999), an elementary school principal’s secretary who worked at the school district for twenty years before she had an onset of bipolar disorder. Mrs. Taylor had been an exemplary employee through the years but the arrival of her mental illness coincided with the arrival of a new principal. After her hospitalization, Mrs. Taylor’s husband and son spoke with the personnel department in order to arrange for reasonable accommodations upon her return to work. Medical information to support the accommodation request was provided at the school’s request.

The school did not provide any reasonable accommodations for Mrs. Taylor. However, at the advice of an administrative assistant in the personnel department, the principal started

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documenting errors that Mrs. Taylor committed. Beginning four days after Mrs. Taylor returned to work, the principal started compiling his secretary's errors into a "bullet-format list" and calling Mrs. Taylor in for frequent disciplinary meetings. Although she had not previously been disciplined in twenty years with the school district, Mrs. Taylor began receiving formal disciplinary notices almost every month for about a year until she was terminated. The principal "did not speak to her informally and in-person about problems as they arose." The principal did, however, save "letters containing typos, photographed her desk and trash can, ...the office refrigerator, and waited to confront her with the evidence in the disciplinary meetings."

In addition to these actions, the principal made many changes to Mrs. Taylor's job upon her return to work. These changes included: new office policies, new forms, relocating documents, rearranging furniture, discarding Mrs. Taylor's "old filing system," throwing out files, including files in Mrs. Taylor's desk, and increasing the number of responsibilities in Mrs. Taylor's job description from twenty-three to forty-two. A new computer system was also installed. Mrs. Taylor was disoriented by the changes and felt that they made it more difficult for her to do her job. The court acknowledged that it is expected for a new principal would make changes but was troubled by the "abrupt, seemingly hostile manner" in which the changes were made.

Less than one year after returning to work, Mrs. Taylor's employment was terminated. She then filed an employment discrimination lawsuit under the ADA. The appellate court held that the school district had notice of Mrs. Taylor's disability and her need of reasonable accommodations due to the conversations between the personnel department and her family. Possible reasonable accommodations identified by the court included: increasing "job responsibilities slowly," giving Mrs. Taylor more time and/or training to learn the computer, and lessening the amount of "formal, written reprimands." The appellate court found that the employer's actions in disciplining and terminating Mrs. Taylor while denying her any reasonable accommodations may constitute discrimination.

*Taylor* demonstrates that putting an employee with

a disability under a microscope or treating them in a more hostile manner than other employees is not a good idea, especially when the employee has significant mental illness. Discipline should always be applied in an even-handed manner although reasonable accommodations should be considered if they would help an employee comply with workplace rules.

## B. Workplace Conduct Rules

It is permissible for employers to have workplace conduct rules on a variety of issues including drug and alcohol use, workplace safety, workplace violence and attendance. The EEOC has stated that employers may hold all employees, disabled and nondisabled, to the same performance and conduct standards. EEOC Compliance Manual, 902.2(c)(4) nn. 11&12.

Courts have generally upheld conduct rules even when the violation of the conduct rule arose from a person's disability. In *Raytheon Co. v. Hernandez*, 124 S. Ct. 513 (2003), at issue was whether a company's "no rehire" policy violated the ADA's provisions prohibiting discrimination against former drug addicts. Hernandez was a technician for Raytheon. He resigned in lieu of termination after he tested positive for cocaine use. Two years later, Hernandez was no longer using drugs and he reapplied for a position with the company, but Raytheon refused to rehire him. Hernandez argued that Raytheon's policy discriminated against him and other former drug addicts who had successfully rehabilitated themselves. The Ninth Circuit held that the employer's policy against rehiring former employees who were terminated for any violation of its misconduct rules violated the ADA because Hernandez had a record of drug addiction and therefore was covered by the Act. The Supreme Court reversed holding that the policy was neutral on its face and the employer had a legitimate non-discriminatory reason to refuse to rehire workers who break rules, including former employees with addictions. This case does not mean that the ADA does not apply to former drug users. Instead, it merely upheld a policy that excluded former employees terminated for misconduct.

Similarly, in *Sever v. Henderson*, 2007 WL 990268 (3<sup>rd</sup> Cir. April 4, 2007), a postal worker

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with post-traumatic stress disorder made threats of violence in the workplace and was terminated. The court held that an employer is not prohibited from discharging an employee for misconduct, even if that misconduct is related to his disability. (See also, **Fullman v. Henderson**, 146 F.Supp. 2d 688 (E.D. Pa. 2001) (even assuming the employee had a disability, the ADA was not violated when employee was discharged for filing a false workers' compensation claim); **Darcangelo v. Verizon Maryland, Inc.**, 2006 WL 1888882 (4<sup>th</sup> Cir. Jul. 10, 2006) (employer can enforce a co-worker courtesy rule, even though the employee's abusive behavior may have been related to her bipolar disorder); **Pernice v. City of Chicago**, 237 F.3d 783 (7<sup>th</sup> Cir. 2001) (employer can enforce workplace substance abuse policy even if the employee's violation of that policy occurred under the influence of a disability); and **Sena v. Weyerhaeuser Co.**, 168 F.3d 501 (9<sup>th</sup> Cir. 1999) (even if unsatisfactory performance or behavior is related to drug use or alcoholism, employer may hold employee to its regular workplace standards of conduct.)

However, the EEOC has also stated that if misconduct resulted from a disability, the employer must be prepared to demonstrate the conduct rule is job-related and consistent with business necessity. EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities (3/25/97), at p. 29. Cases embracing the EEOC's position include:

In **Dark v. Curry County**, 451 F.3d 1078 (9<sup>th</sup> Cir. 2006), a truck driver with epilepsy was terminated after he had a seizure while driving following a pre-seizure aura that he ignored. The court denied summary judgment to the employer finding that the termination decision was not solely because of a violation of a conduct rule, but arguably was related to the plaintiff's disability and therefore, defendant would have to show that its termination decision was job related and consistent with business necessity. (See also, **Humphrey v. Memorial Hospitals Association**, 239 F.3d 1128 (9<sup>th</sup> Cir. 2001) (conduct resulting from a disability is considered to be part of the disability rather than a separate basis for termination; the link between the disability and termination is particularly strong where it is the employer's failure to reasonably accommodate a known disability that leads to discharge for performance inadequacies resulting from that disability); and **Nielsen v. Moroni Feed**

**Company**, 162 F.3d 604 (10<sup>th</sup> Cir. 1998) (disability-caused misconduct is subject to performance criteria that are job-related and consistent with business necessity, so long as the disabled employee is given the opportunity to meet such performance criteria by a reasonable accommodation.)

However, if an employee's misconduct is not related to the disability, discipline may be appropriate. In **Davila v. Qwest Corp., Inc.**, 2004 WL 2005915 (10<sup>th</sup> Cir. Sept. 9, 2004), an employee with bipolar disorder engaged in misconduct by failing to report an accident involving the company vehicle. The court held that this misconduct was unrelated to his disability and therefore, the employer did not violate the ADA by disciplining the employee.

Similarly, in **Russell v. TG Missouri Corp.**, 340 F.3d 735 (8<sup>th</sup> Cir. 2003), an employee with bipolar disorder left work without permission. Her employer told her that if she left, it would be an unscheduled absence. Although the employer was aware of the employee's bipolar disorder, the employee did not indicate that her need to leave was related to her disability, but instead she simply stated, "I need to leave and I need to leave right now." After leaving without permission and then failing to show for work the next day, the employer instituted workplace discipline and terminated her. The Eighth Circuit upheld the employer's actions stating that the discipline was warranted and the employee failed to request a reasonable accommodation under the ADA. The fact that the employer was aware of the employee's disability prior to the discipline did not alter the court's decision.

## C. Consistent Enforcement of Discipline

It is critical that employers enforce conduct rules and impose discipline in a consistent manner. If an employer imposes a greater degree of discipline against an employee with a disability than an employee without a disability, the employer may be subject to a disparate treatment claim based on disability. For example in **Moore v. County of Cook**, 191 F.3d 456 (7<sup>th</sup> Cir. 1999), plaintiff was a data entry worker who had an amputated leg. She missed work related to her amputation and

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subsequently was terminated for failing to meet work production standards. However, a non-disabled employee who had similarly failed to meet work production standards was only given a three-day suspension. The Seventh Circuit held that there was sufficient evidence that the harsher discipline imposed on the plaintiff emanated from the fact that she had a disability.

## D. Rescinding Discipline as a Policy Modification

Must an employer rescind discipline after learning of a disability? EEOC Guidance states that employers are not required to excuse past misconduct, as “reasonable accommodation is always proactive.” EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities (3/25/97), at page 31. Because an employer generally must provide a reasonable accommodation only after it is requested, the employer does not have to rescind any warnings that had previously been imposed prior to the accommodation request. However, employers “must make reasonable accommodation to enable an otherwise qualified employee with a disability to meet such a conduct standard in the future, barring undue hardship, except where the punishment for the violation is termination.” *Id.*

In *Davila v. Qwest Corp., Inc.*, 2004 WL 2005915 (10<sup>th</sup> Cir. Sept. 9, 2004), an employee argued that an employer was required to retroactively excuse misconduct once the employer was made aware of the employee’s mental illness. However, the court rejected this argument finding that excusing workplace misconduct to provide a fresh start to an employee whose disability could be offered as an after-the-fact excuse is not a required accommodation under the ADA.

Similarly, in *Hill v. Kansas City Area Transportation Authority*, 181 F.3d 891 (8<sup>th</sup> Cir. 1999), the court held that the employer was not required to give a “second chance” to a bus driver who twice fell asleep in her bus, even though she alleged that her drowsiness was caused by her hypertension medication.

However, in the *Bultemeyer* case discussed above, the employer had sent out the termination notice before receiving the note from plaintiff’s

psychiatrist seeking a “less-stressful” environment. The employer argued that, as the decision to terminate had already been made, the psychiatrist’s note was “too little, too late.” The court disagreed and held that the employer had a duty to rescind the termination as it had knowledge of the employee’s disability and his need for reasonable accommodations before deciding to terminate the employee.

## Conclusion

Disability Harassment, Retaliation and Discipline can be challenging issues for employers and employees to navigate. The case law is still developing and for many of the issues, there are splits in the lower courts and resolution may need to come from the U.S. Supreme Court. In the meantime, it is critical that employers put in place fair employment policies that are applied consistently and non-discriminatorily, that efforts be made to avoid problems by exploring possible accommodations through the interactive process, and that managers and employees receive the training necessary to ensure that they do not run afoul of the law in these emerging areas.

## Notes

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