

# Legal Briefings

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## **Invisible Disabilities and the ADA**<sup>1</sup>

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

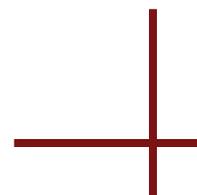
1. Whether the condition constitutes a disability under the ADA as amended;
2. Medical inquiries, examinations, and disability disclosure;
3. Confidentiality;
4. Disabilities must be known by the employer to establish an ADA violation; and
5. Disability harassment.

Direct threat issues often involve people with invisible disabilities, however many issues in direct threat cases seem more related to employer stereotypes or misperceptions regarding the disability, rather than relating to the invisible nature of certain disabilities. For a detailed discussion of direct threat issues, please see the DBTAC: Great Lakes ADA Center legal brief and webinar on Direct Threat found at [www.adagreatlakes.org](http://www.adagreatlakes.org).

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

The first question in any ADA case is whether the employee is a person with a disability under the ADA. This question will be more liberally construed under the ADA Amendments Act of 2008 (ADAAA) which went into effect in 2009.<sup>2</sup> It is anticipated that the ADAAA will provide greater protections for individuals with invisible disabilities due to several changes made in the law. These changes include: liberalizing the definition of disability, including removing the requirement that mitigating measures be taken into account when assessing whether an individual has a substantial limitation, and adding additional major life activities including a separate category that includes “major bodily functions.” Congress’ primary focus in enacting the ADAAA was to make clear that the Supreme Court and lower courts had unduly narrowed the definition of disability and, as a result, many people with impairments that it had intended to be covered, had been deemed not to have an ADA disability.<sup>3</sup>

#### **A. The ADAAA’s Definition of Disability**



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

- The definition of disability is to be construed in favor of broad coverage to the maximum extent permitted;
- “Substantially limits” shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008 as the regulations defining the term “substantially limits” as “significantly restricted” proved too limiting;
- An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active, such as mental illness, HIV, cancer, epilepsy and diabetes; and
- Whether an impairment substantially limits a major life activity shall be made without taking into account mitigating measures (excluding ordinary eyeglasses and contact lenses).<sup>4</sup>

The ADAAA provisions regarding episodic conditions and mitigating measures are very important to people with invisible disabilities. Further, as most ADA cases had focused on an individual’s medical condition rather than on the alleged discrimination, Congress specifically stated that the issue of whether a person’s impairment constitutes an ADA disability should “not demand extensive analysis.”<sup>5</sup>

## B. Major Life Activities

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

- Concentrating and thinking;
- Caring for oneself;
- Lifting;
- Bending;
- Eating;
- Speaking;
- Sleeping;
- Breathing;
- Learning;
- Concentrating and thinking;
- Reading (not previously recognized by the EEOC);
- Bending (not previously recognized by the EEOC);
- Communicating (not previously recognized by the EEOC).<sup>6</sup>

In addition, Congress listed a number of “major bodily functions” under the definition of “major life activities.” This is consistent with recent court decisions that have found that limitations of certain bodily functions have qualified as a disability under the ADA.<sup>7</sup> Again, Congress has made clear that this is not an exhaustive list. The list of major bodily functions in the ADAAA follows with impairments that may involve the function listed parenthetically:

- **immune system:** (HIV/AIDS, auto-immune disorders, lupus);
- **neurological:** (multiple sclerosis, epilepsy);
- **normal cell growth:** (cancer);
- **brain:** (schizophrenia, developmental disabilities);
- **digestive:** (Crohn’s disease, celiac disease);
- **respiratory:** (asthma);
- **bowel:** (ulcerative colitis);
- **bladder:** (kidney disease);
- **circulatory:** (heart disease, high blood pressure);
- **endocrine:** (diabetes); and
- **reproductive functions:** (infertility).<sup>8</sup>

This new category of major bodily functions in the ADAAA should make it much easier for individuals with invisible disabilities to show a substantial limitation of a major life activity. The EEOC Regulations under the ADAAA have not been

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finalized as of the date of this Legal Brief. However, it is anticipated that the regulations should provide additional protections for people with invisible disabilities.

## II. Medical Inquiries, Examinations, and Disability Disclosure

When Congress enacted the ADA, it found that historically people with disabilities have been “subjected to a history of purposeful unequal treatment” in many areas including employment.<sup>9</sup> The ADA is unique among civil rights laws because it strictly prohibits certain inquiries and examinations. Specifically, Title I of the ADA bars employers from questioning about the existence, nature or severity of a disability and prohibits medical examinations until after a conditional offer of employment has been made.<sup>10</sup> Even once a conditional offer is made, the ADA provides certain restrictions and safeguards.<sup>11</sup>

### A. ADA Statutory Requirements Regarding Medical Inquiries and Examinations

The ADA differentiates between three stages of employment in determining what medical information may be sought by employers. At the pre-offer stage, the employer is only entitled to ask about an applicant's ability to perform the essential functions of the job.<sup>12</sup> The ADA's restriction against pre-employment inquiries reflects the intent of Congress, to prevent discrimination against individuals with “invisible” disabilities, like HIV, heart disease, cancer, mental illness, diabetes and epilepsy, as well as to keep employers from inquiring and conducting examinations related to more visible disabilities like people who are deaf, blind or use wheelchairs. The ADA's prohibition against pre-employment questioning and examinations seeks to ensure that the applicant's disability is not considered prior to the assessment

of the applicant's qualifications.

After a conditional offer is made, employers may require medical examinations and may make disability-related inquiries if they do so for all entering employees in that job category.<sup>13</sup> If an examination or inquiry screens out an individual because of a disability, the exclusionary criterion must be job-related and consistent with business necessity.<sup>14</sup> In addition, the employer must show that the criterion cannot be satisfied and the essential functions cannot be performed with a reasonable accommodation.<sup>15</sup>

Once a person is employed, an employer may make disability-related inquiries and require medical examinations *only* if they are job-related and consistent with business necessity.<sup>16</sup> An employer can ask about the ability of the employee to perform job-related functions and may also conduct voluntary medical examinations, which are part of an employee health program.<sup>17</sup> The *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, states that an employer may request medical information in response to a request for a reasonable accommodation, “when the disability and/or the need for accommodation is not obvious” as is usually the case with invisible disabilities. The information sought by the employer can relate to “functional limitations” as an “employer is entitled to know that the individual has a covered disability for which s/he needs a reasonable accommodation.”

All disability related information obtained from disability inquiries and examinations at any stage of employment must be maintained on separate forms in separate medical files and treated as a confidential medical record.<sup>18</sup>

### B. EEOC Guidance on Medical Inquiries and Examinations

Congress charged the EEOC with enforcing the statutory requirements of Title I of the ADA referenced above. Over the years, the EEOC has issued several documents that provide more in-depth analysis on disability related inquiries and medical examinations, including: *Enforcement Guidance: Preemployment Disability-Related*

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**Questions and Medical Examinations Under the Americans with Disabilities Act (1995); EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (2000); Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act; and Fact Sheet: Job Applicants and the Americans with Disabilities Act (2003).** All of these documents can be found on the EEOC's website at [www.eeoc.gov](http://www.eeoc.gov). Unlike other provisions of the ADA, the courts have generally been very deferential to the EEOC's guidance on disability-related inquiries and medical examinations.<sup>19</sup> Additional information about disability-related medical inquiries can be found in the DBTAC - Great Lakes ADA Center legal brief on the this topic that is found at [www.adagreatlakes.org](http://www.adagreatlakes.org).

In a document titled, "Questions And Answers: Enforcement Guidance On Disability-Related Inquiries And Medical Examinations Of Employees Under The Americans With Disabilities Act (ADA),<sup>20</sup> the EEOC summed up it's guidance regarding when an employer may make medical inquiries. In addition to the statutory information provided above, this Guidance provides more detail on some of the terms used in the statute. The Guidance provides the following information:

## **What is a "disability-related inquiry"?**

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

## **What is a "medical examination"?**

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

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

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

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

- Generally, an employer only may seek information about an employee's medical condition when it is **job related and consistent with business necessity**. This means that the employer must have a reasonable belief based on objective evidence that:
  - an employee will be unable to perform the essential functions his or her job because of a medical condition; or,
  - the employee will pose a direct threat because of a medical condition
- Employers also may obtain medical information about an employee when the employee has requested a **reasonable accommodation** and his or her disability or need for accommodation is not obvious.
- In addition, employers can obtain medical information about employees when they:
  - are required to do so by another **federal law or regulation** (e.g., DOT medical certification requirements for interstate truck drivers);
  - offer **voluntary** programs aimed at identifying and treating common health problems, such as high blood pressure and cholesterol;

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- are undertaking **affirmative action** because of a federal, state, or local law that requires affirmative action for individuals with disabilities or voluntarily using the information they obtain to benefit individuals with disabilities.

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

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

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

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

## ***May employers require employees to have periodic medical examinations?***

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

While the ADA's provisions covering disability-related inquiries and medical examinations have not resulted in as much litigation as other provisions of the ADA, several interesting issues

have been examined by the courts. Some of these cases are discussed below.

## **C. Pre-Employment Inquiries**

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

### **1. Driver's License Requirement**

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

### **2. Pre-employment Medical Examinations**

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Medical examinations and inquiries are allowed after an employer extends a conditional job offer to an individual. As the cases below illustrate, an employer must acquire all non-medical information first, before extending a conditional job offer and seeking medical information. If this is not done and non-medical information is sought along with medical information, then courts have held that the alleged conditional job offer was not an actual job offer under the ADA.

## Cases finding for the Employee

In *Leonel v. American Airlines, Inc.*, 400 F.3d 702 (9<sup>th</sup> Cir. 2005), the court reversed the lower court's granting of summary judgment for an employer. The case involved three HIV-positive applicants who alleged the employer conducted unlawful medical examinations during the application process by extending a job offer that was contingent on results of a medical examination. The court held that employers could only conduct medical examinations as the last step of the application process and only after making a real job offer.

Similarly, in *Birch v. Jennico 2*, 2006 WL 1049477 (W.D. Wis. Apr. 19, 2006), plaintiff, a person living with HIV, was required to undergo a medical examination prior to being hired. After undergoing the examination, the company did not hire him. Plaintiff filed suit, and the issue before the court was whether a *real* conditional offer had been made prior to administering a medical exam. The court denied the defendant's motion for summary judgment, explaining that if the plaintiff had been "required to get a medical examination before he was hired," then "the ADA may have been violated." The court noted that the ADA requires medical examinations to "be conducted as a separate, second step of the selection process, after an individual has met all other job prerequisites."

## Cases finding for the Employer

The employer did convey a bona fide conditional offer of employment in *O'Neal v. City of New Albany*, 293 F.3d 998 (7<sup>th</sup> Cir. 2002), where the court stated that if a job offer is conditioned not only on the applicant successfully passing a medical examination, but also a myriad of

non-medical screening tests, then the offer is not real. However, in this case, the plaintiff, an individual with high blood pressure, had already completed all non-medical screening tests, and signed statement of understanding entitled "conditional offer of employment." Consequently, the court granted the summary judgment for the employer and dismissed the plaintiff's ADA claims. The court noted that post-offer medical examinations are proper if given for "all entering employees... regardless of disability," the information is "maintained on separate forms and in separate medical files and is treated as a confidential medical record," and the information is used in a way that is job-related and consistent with business necessity.

### 3. Safe Harbor

The court found for the employer in *Bloch v. Rockwell Lime Company*, 2007 WL 4287275 (E.D. Wis. Dec. 4, 2007). In *Bloch*, the employer sought competitive bids for group health insurance and requested its employees authorize the disclosure of their protected 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. Plaintiff believed that the employer considered him a health risk and would use the information adversely against him. However, the Plaintiff's disability, if indeed he has one, is not disclosed in the court decision. 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 held that the employer's information request was covered by the "safe harbor" provisions of the ADA and were not illegal. The ADA's "safe harbor" provision, "expressly authorizes employers to request employee medical information when establishing a benefit plan... in accordance with accepted principles of risk management." 42 U.S.C. §12112(d)(4)(A). Thus, the court found that the retaliation provisions did not apply because an employee's actions were not protected because he was protesting activity that did not violate the law. Moreover, the court found that the employer had a legitimate business reason for discharging the plaintiff based on plaintiff's numerous workplace

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arguments and use of inappropriate language that occurred many months after the issue involving the request for health information.

## 4. Personality Testing

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

Although the ADA expressly prohibits medical examinations at the pre-employment stage, many employers administer “personality” tests ostensibly to obtain information about job applicants, such as honesty and temperament, as a way to determine whether the person would be a good hire. These tests have become widespread and studies have found that approximately 44% of private employers administer some type of personality test as part of the application or promotion process. Mental health advocates oppose these tests because they can be used to identify psychiatric disabilities resulting in the screening out of people with certain diagnoses. Accordingly, some employers are using personality tests to obtain illegal disability-related information in a more indirect way. This then leads to the ultimate question: Is a personality test is considered a medical examination under the ADA?

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

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

- (7) whether medical equipment is used.

**ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations” (1995), [www.eeoc.gov](http://www.eeoc.gov).**

The most prominent case addressing the issue of whether a personality test is a medical test under the ADA is *Karraker v. Rent-A-Center*, 411 F.3d 831 (7<sup>th</sup> cir. 2005). In *Karraker*, a group of current and former employees filed a class action alleging that the employer's policy requiring employees seeking management positions to take the Minnesota Multiphasic Personality Inventory (MMPI) violated the ADA. Management applicants that had a certain score on the MMPI were automatically excluded from consideration. The plaintiffs alleged that the MMPI could identify conditions such as depression, paranoia, schizoid tendencies and mania. The trial court found that the test did not violate the ADA because it was used for “vocational” purposes to predict future job performance and compatibility rather than for “clinical” purposes. The plaintiffs appealed and the Seventh Circuit reversed holding that the MMPI is a test designed to diagnose mental impairments, and has the effect of hurting the employment prospects of people with mental illness, it is an improper medical examination that violates the ADA. The court held it was not dispositive that the employer did not use a psychologist or other health care professional to interpret the test. Rather, who interprets the test results is only one of seven factors identified by the EEOC that a court should consider when determining if a test is a medical examination under the ADA. The court further stated that “the practical effect of the use of the MMPI is similar no matter how the test is used or scored—that is, whether or not RAC used the test to weed out applicants with certain disorders, its use of the MMPI likely had the effect of excluding employees with disorders from promotions.”

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

## D. Fitness for Duty Tests

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A similar issue involves fitness for duty tests. These tests may be given to job applicants after a conditional job offer is extended or to current employees that are returning from medical leave. One determinative factor may be the information that the test is measuring. Is the test measuring an employee's ability to perform a particular task, e.g., lifting 50 pounds, or is it measuring a physiological response that occurs during a task, e.g., measuring an employee's blood pressure or heart rate when lifting 50 pounds.

## Cases finding for the Employer

In *Shannon v. Verizon New York, Inc.*, 2009 WL 1514478 (N.D.N.Y. May 29, 2009), the employer requested that an employee undergo a mental health exam based on the employee's statements after learning about the suicide of a co-worker. The parties disputed what the employee actually said. Plaintiff claimed he stated, "...I thought his suicide was a waste of a life and you would think that if things were bothering him that much, he would find other ways to deal with it and eliminate the problem." In contrast, the Defendant claimed that the employee said, "What a waste of life. If someone was bothering me, I would go postal and that would solve the problem and I would laugh from my jail cell." The court ruled that an employer's concern about the safety of its employees could justify its requirement that a worker who has exhibited threatening behavior undergo a mental fitness-for-duty evaluation despite the prohibition in the ADA against medical examinations and inquiries that are not job-related and consistent with business necessity. The employee had been involved in ongoing disability discrimination litigation with the employer when he allegedly made a comment to a coworker that he would "go postal" and "laugh from his jail cell" rather than deal with his problems by killing himself. The comment was reported and the employer placed the employee on paid administrative leave on the condition that he undergo a mental fitness-for-duty evaluation and sign a form allowing the evaluator to confirm his attendance and cooperation, as well as indicate any treatment ordered. The employee refused and was consequently placed on unpaid leave. The court held that the employer could assert the business necessity exception to the ADA's prohibition against unwarranted medical inquiries

because the employee's comments raised concern that he might engage in workplace violence.

The court also found for the employer in another case involving employee threats. In *Menchaca v. Maricopa Comm. Coll. Dist.*, 595 F.Supp.2d 1063, (D.Ariz. January 26, 2009), a school counselor had a mental impairment due to a traumatic brain injury. Her disability resulted in a "some disturbances in behavioral control." After a meeting discussing job responsibilities, Menchaca was, in her words, "'distressed,' 'paranoid,' and 'totally stressed out,' with an 'anxiety level [that] was off the charts.'" A few hours after the meeting, Menchaca shouted at her supervisor that if he reported her, she would "come back and kick your ass." As a result, the employer requested that Menchaca submit to a fitness for duty exam and she agreed. When the first exam was inconclusive, the employer requested a second examination. The second doctor concluded that Menchaca suffers from "a narcissistic personality disorder and that she is unable to function as a counselor because 'she lacks the empathy that's necessary to understand what a concerned or troubled student might feel...'" The dr. also noted that Menchaca "might find comments by a student as an occasion for anger and a more explosive reaction than the student would deserve." Based on these findings, the employer terminated Ms. Menchaca's employment as there were no vacant positions for which she was qualified. The court agreed with the employer that the medical examinations were warranted by the employee's actions.

In *Thomas v. Corwin*, 2007 WL 967315 (8th Cir. April, 3, 2007), the court concluded that the defendants' request for a fitness for duty (FFD) examination was job-related and consistent with business necessity. The plaintiff was required to take the FFD after visiting the emergency room for an anxiety attack that was attributed solely to work related stress and anxiety. In his position, the employee interacted with parents or guardians of troubled children, assisted detectives, and served in a back-up security capacity. Thus, the defendant had legitimate reasons to doubt the plaintiff's capacity to perform her work duties without being overcome by stress and anxiety, to take proactive steps to ensure the safety, and to seek reliable attendance from the employee.

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## Case finding for the Employee

In *Indergard v. Georgia-Pacific Corp.*, 2009 WL 3068162 (9th Cir. Sept. 28, 2009) In *Indergard*, an employee took medical leave to recover from a knee injury. When she sought to return to work, the employer required her to undergo a two-day Physical Capacity Evaluation (PCE), which included treadmill and lifting tests. A state-licensed occupational therapist hired by her employer conducted the PCE. The plaintiff's heart rate was measured after she performed the treadmill test and the occupational therapist noted that plaintiff required "increased oxygen" and demonstrated "poor aerobic fitness." The therapist concluded that plaintiff was unable to perform the lifting requirements of her position. Plaintiff believed that the PCE was a prohibited medical examination under the ADA and filed suit. The district court found that the examination was not a medical examination, but rather a proper fitness exam. However, on appeal, the Ninth Circuit reversed the district court, finding the exam was a medical examination that sought a wide range of information capable of detecting disabilities. The exam therefore violated the ADA unless the employer could demonstrate it was job-related and consistent with business necessity. The court relied on various factors identified in the Guidance by the EEOC, including that the evaluation was made by a licensed occupational therapist, who interpreted performance and made recommendations, inquired broadly about current pain, use of medication and assistive devices, and finally that the therapist recorded heart rate and breathing pattern after the treadmill test. The court quoted extensively from the EEOC criteria, specifically noting that tests such as physical agility or fitness tests are "generally not medical examinations ... as long as these tests do not include examinations that could be considered medical (e.g., measuring heart rate or blood pressure)." (Emphasis in original).

## E. Drug Testing

Generally, company-wide drug tests are not considered medical examinations under the ADA. See *EEOC Guidance on Disability-Related Inquiries*. However, if the employer uses the test results in a way that screens out or tends to screen

out individuals with disabilities, than the employer may be in violation of Section 12112(b)(6) of the ADA prohibiting "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity." In addition, the employer must show that the criterion cannot be satisfied and the essential functions cannot be performed with a reasonable accommodation. (42 U.S.C. §12111 (8))

In *Connolly v. First Personal Bank*, 2008 WL 4951221 (N.D. Ill. Nov. 18, 2008), a job applicant had a neck condition and was legally prescribed a controlled substance. She was conditionally offered employment pending passing a pre-employment drug test. When the test results showed the presence of the controlled substance, the bank rescinded its offer without allowing her to provide documentation that the positive test was for a substance she had obtained legally via a prescription. She then sued under the ADA. The employer sought to dismiss the case, but the court denied the employer's motion. Although pre-employment drug tests for illegal drugs do not violate the ADA, when the tests cover legally prescribed drugs and are used to make employment decisions beyond the prohibition of illicit drug use, then those tests can violate the ADA.

A similar result was reached in a case involving company-wide drug testing of sitting employees. In *Bates v. Dura Automotive Systems, Inc.*, 650 F.Supp.2d 754 (M.D. Tenn. 2009), the employer had employees submit to drug testing because of concerns about illegal drug use in the workplace. As a result, several employees were removed from work because they failed initial drug screening tests due to their legal use of prescription drugs. The court found there was a question of fact as to whether the test illegally screened out a class of people with disabilities without demonstrating a realistic connection between the test and work performed. (The employees had presented medical documentation that their use of the prescription drugs did not impact their ability to safely perform their jobs, yet they were

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automatically removed from their jobs because of the positive drug test results.) None of the employees were found to have a current disability, (although some employees did demonstrate a “record of” a disability), but the court held that an individual need not meet the ADA definition of disability to claim that a medical inquiry violated the ADA.<sup>21</sup> The court further held that where:

[M]edical screening of employees is company-wide, not prompted by the individual conduct of the plaintiff and results in the *per se* exclusion of individuals with certain medical conditions, the propriety of such testing is properly evaluated under... the ADA subsection prohibiting use of “qualification standards, employment tests or other selection criteria” that screen out or tend to screen out individual or class of individuals with disabilities, unless shown to be job-related for position in question and consistent with business necessity,” rather than subsection prohibiting medical examinations and inquiries.

The court held that the inflexibility of the employer’s policy and the fact that it tended to screen out people with disabilities raised questions of discrimination that needed to be resolved at trial.

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

As noted above, the ADA limits the amount of information that an employer may require of employees to only information that is “job-related and consistent with business necessity.”<sup>22</sup> EEOC Guidance notes that, this means that there must be a reasonable basis to believe that an employee is not qualified, poses a direct threat, or needs a reasonable accommodation. In response to a reasonable accommodation request, employers may request “reasonable documentation” about an individual’s “disability and its functional limitations that require reasonable accommodation” in situations “when the disability or the need for the accommodation is not known or obvious...”<sup>23</sup> In addition, the Guidance notes that employers may not generally ask what prescription medications employees are taking.<sup>24</sup>

## Cases Finding for the Employer

The court found that the employer met ADA requirements in *Kirkish v. Mesa Imports*, 2010 WL 364183 (D. Ariz. Feb. 1, 2010). In *Kirkish*, plaintiff has peripheral neuropathy, which causes numbness, burning and a stinging sensation to his feet and legs. He openly discussed this with his colleagues and supervisors. Plaintiff took Neurontin, a prescription drug that potentially causes drowsiness, dizziness, unsteadiness, and fatigue, and cautions the patient to “use caution engaging in activities requiring alertness such as driving.” Plaintiff worked at an automobile dealership and was required to drive. After Plaintiff misquoted a couple of customers and forgot a customer’s name, defendant became concerned and asked about his medications. Defendant then sent a work release form to plaintiff’s doctor, who instead of signing the release, submitted a letter saying that plaintiff does not suffer from any symptoms of his medication. Because plaintiff’s doctor did not complete the release form, defendant’s insurance provider found him plaintiff to be “uninsurable.” Defendant then terminated plaintiff’s employment. Plaintiff sued under the ADA for an improper medical inquiry and disability discrimination. The court granted summary judgment to the defendant. It found that defendant’s medical inquiry was job-related and consistent with business necessity because defendant had good cause to determine whether plaintiff was capable of safe driving, as it was an essential function of his job, and also had good cause to address the plaintiff’s “insurability” under the company’s policy.

The employer’s request for a medical review was deemed proper in *Hatzakos v. Acme American Refrigeration, Inc.*, 2007 WL 2020182 (E.D.N.Y. Jul. 6, 2007). The employer requested the medical review as an employee with mental illness frequently missed work due to associated depression. When a manager inquired if the employee had depression, the employee disclosed it, and the manager placed the employee on leave pending a medical review of whether he was safe in the workplace. The court ruled that the request for the medical review was lawful, although as noted below, the court disagreed with the employer’s determination that the employee was not qualified. See also, *Wyland v. Boddie-Noell*

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**Enterprises, Inc., 165 F.3d 913, 1998 WL 795173 (4<sup>th</sup> Cir. 1998)**, where the court ruled a medical inquiry was proper when the medication an employee was taking may impair his ability to perform the essential job function of driving.

In **Rivera v. Smith, 2009 WL 124968 (S.D.N.Y. Jan. 20, 2009)**, a doctor was stalking a nurse after she ended their romantic relationship. The hospital asked the doctor to submit to a psychological examination and he refused. The hospital terminated him and he filed suit under the ADA, claiming the hospital made an impermissible medical inquiry. Although employers are generally prohibited from making disability-related inquiries and requiring examinations, here the court found that the hospital as it had a legitimate business reason for requiring the examination, and dismissed the ADA case.

## Cases Finding for the Employee

The court found for the employee in **Green v. CSX Hotels, Inc., 2009 WL 113856 (S.D. Va. Jan. 15, 2009)**, a waitress injured her back on the job and took medical leave. When she sought to return to work, the employer required her to undergo three functional capacity examinations, with the third one being very strenuous and involving activities that did not relate to her job. She refused to perform all the activities in the exam and was terminated. She sued under the ADA and the employer sought dismissal of the case. The court refused to dismiss the case finding that the employer's insistence that the employee undergo a third examination that did not relate to her job duties supported her allegations of disability discrimination.

## G. Disclosure and Qualified and/or Direct Threat Issues<sup>25</sup>

### Cases Finding for the Employer

The U.S. Supreme Court addressed the direct threat issue involving an individual with an invisible disability in **Chevron v. Echazabal, 536 U.S. 73 (2002)**. In *Echazabal*, plaintiff was offered a job contingent on passing a medical examination. The examination revealed elevated liver enzymes and he was eventually diagnosed as having

asymptomatic chronic active hepatitis C. Accordingly, his employer rescinded the employment offer on the basis that plaintiff would pose a direct threat to his own health and safety. The Supreme Court held that direct threat included "threat to self" and upheld the employer's decision not to hire Mr. Echazabal.

It was held that the company complied with the ADA in **Ward v. Merck & Co., 2007 WL 760391 (3<sup>rd</sup> Cir. 2007)**, when it terminated a pharmaceutical company chemist with mental illness, including anxiety and panic disorders, for failing to comply with the company's demand for a fitness for duty evaluation. Mr. Ward's co-workers & supervisors became concerned about his performance and behavior when "Ward began to engage in strange behavior" including having a "temper tantrum," walking around like a "zombie," and causing a disruptive "episode in Merck's cafeteria" that resulted from a "brief psychotic disorder."<sup>26</sup> As a result of Mr. Ward's behavior, his difficulties interacting with others, and his limited productivity and participation at work, Merck requested that he undergo a fitness for duty evaluation with the company's physician. Mr. Ward refused, was suspended without pay, and terminated when he did not respond to a follow-up letter insisting that he undergo the examination.<sup>27</sup>

The court held that Merck's requirement for the fitness for duty examination did meet the "business necessity" test under the ADA. The court placed the burden of proof on Merck to show that Mr. Ward posed a "direct threat" and found that the possible "threats to employee safety" based on the conduct cited above "were sufficient to meet the business necessity element..."<sup>28</sup>

If an employer does an "individualized assessment" of an individual's diabetes or other medical condition, and finds that the individual's condition causes a "direct threat," it may be justified in terminating or refusing to hire the individual. For example, in **Darnell v. Thermafiber, Inc., 417 F.3d 657, 659 (7th Cir. 2005)**, a Seventh Circuit case involving an individual with insulin dependent Type 1 diabetes, the plaintiff admitted that his diabetes was not under control (unlike Mr. Branham). As a result, the court affirmed summary judgment for the

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employer after it refused to rehire the job applicant.<sup>29</sup> Before applying for employment, Mr. Darnell had worked for Thermafiber as an Operator through a temporary placement agency from October 2000 through May 2001.<sup>30</sup> The position requires working around heavy machinery in extremely hot conditions. Before starting work, Mr. Darnell passed a pre-employment physical given by a “nurse practitioner.” In April 2001, Mr. Darnell applied for employment directly with Thermafiber. While working there, he had not had “any debilitating episodes... related to his diabetes.”<sup>31</sup>

When Mr. Darnell applied in April 2001 for direct hire, he was required to undergo a pre-employment physical with a physician consisting of “a urine glucose test and interview.”<sup>32</sup> Based on these two procedures, Thermafiber’s physician, “whose practice includes 180 diabetes patients,” determined that Mr. Darnell’s “diabetes was not under control; as a result he felt there was no need to conduct further tests or review Darnell’s medical chart.” The physician was “shocked” by Mr. Darnell’s “disinterest” in his condition and concluded that his uncontrolled diabetes rendered him unqualified for the position as he posed a “direct threat.”<sup>33</sup> The doctor based the conclusion on his belief that the risk of harm was “significant,” and that there was “a very definite likelihood” that “harm could occur.” The doctor stated that it was “a reasonable medical certainty that Darnell would pass out on the job ... sooner or later ....”<sup>34</sup>

Mr. Darnell argued that this limited examination did not constitute an “individualized assessment,” that he did not pose a “direct threat” as he has not experienced any hypoglycemic events, and that Thermafiber failed to investigate or provide reasonable accommodations such as “additional food and water breaks.”<sup>35</sup> The court did not agree with any of Mr. Darnell’s arguments stating, “where the plaintiff’s medical condition is uncontrolled, of an unlimited duration, and capable of causing serious harm, injury may be considered likely to occur.”<sup>36</sup> The court noted that Thermafiber’s physician assumed that the requested accommodations would be in place. The court found that harm was likely even though Darnell worked safely on the job for ten months.<sup>37</sup>

## Cases Finding for the Employee

The U.S. Court of Appeals for the Fifth Circuit came to a different conclusion in a case involving an individual with allegedly uncontrolled Type II diabetes. In *Rodriguez v. ConAgra Grocery Product Co.*, 436 F.3d 468, 479 (5th Cir. 2006), the court held that the fact that the diabetes was not controlled was irrelevant as the employer did not conduct an independent, individualized assessment and based its decision on generalizations and false beliefs. The court distinguished this case from other cases involving uncontrolled diabetes by noting that this case involved an impairment that was “regarded as” being substantially limiting even though it was actually was not so limiting. Therefore, the court concluded that, “applying the supposed ‘failure to control’ rule in a ‘regarded as’ case just makes no sense.”<sup>38</sup>

*Rodriguez* demonstrates that employees with invisible disabilities may be found to be unqualified once the disability is disclosed, not based on an individualized assessment, but rather due to stereotypes and misperceptions regarding their disability. Another case that demonstrates this is *Hatzakos v. Acme American Refrigeration, Inc.*, 2007 WL 2020182 (E.D.N.Y. Jul. 6, 2007), a case involving an employee with mental illness who frequently missed work due to associated depression. When a manager inquired if the employee had depression, the employee disclosed it, and the manager placed the employee on leave pending a medical review of whether he was safe in the workplace. Subsequently, the employee’s doctor indicated the employee was stable, although did not provide employer with the assurance that absolutely no threat existed. The manager then discharged the employee for poor attendance and possible risk. The employee filed suit under the ADA, alleging disability discrimination. The court denied the employer’s motion for summary judgment, finding that the employer failed to present evidence that the employee posed a significant risk of substantial harm. The employer failed to identify the nature of the risk posed by the employee’s psychological disorders or medications and the likelihood or imminence of potential harm.

Similarly, in *Holiday v. City of Chattanooga*, 206 F.3d 637 (6<sup>th</sup> Cir. 2000), a job applicant was not hired as a police officer after he voluntarily disclosed that he was living with HIV. The Appellate Court for the Sixth Circuit reversed the district court's ruling for the employer finding that the City improperly relied on an outside physician's "cursory and cursory medical opinion" and failed to make the required individualized assessment. The court noted that the City "does not normally test employment applicants for HIV or AIDS" and therefore, may have improperly withdrawn the job offer that was made to the applicant.

Similarly, in *Kapache v. U.S. Department of Justice, Federal Bureau of Investigation*, 2009 WL 2903698 (D.D.C. September 11, 2009), a conditional job offer was revoked after medical screening. In *Kapache*, an applicant with diabetes applied for a special agent position with the FBI, and the FBI gave him a conditional offer. However, the FBI ultimately revoked his offer when it determined that plaintiff lacked sufficient control over his diabetes such that he was unable to perform the position. The applicant sued, and his case went to trial. The jury found in favor of plaintiff and awarded him \$100,000 in damages. After the trial, defendant filed a motion for a judgment as a matter of law and a motion for a new trial. The court denied both motions. Defendant argued that employee's condition did not substantially limit a major life activity (pre-ADAAA) and that the employee was not able to perform the essential job functions. The court rejected both arguments, noting that ADA inquiries must be individualized. There was enough evidence to show that the employee's diabetes substantially limited his ability to eat and care for himself. In addition, the employee's physician testified that the employee could perform the essential functions of an FBI special agent using an insulin pen.

In the case of *Menchaca v. Maricopa Comm. Coll. Dist.*, 595 F.Supp.2d 1063, (D.Ariz. January 26, 2009), discussed above regarding a fitness for duty examination, the court did disagree with the employer's conclusion that the employee was not qualified. The court stated that the employer did not sufficiently explore the possibility of reasonable accommodations such as a job coach, as

suggested by the employee. The court also found for the employee on the issue of whether the employee's outburst constituted a "legitimate, non-discriminatory" for the termination. The Ninth Circuit found for the employee on this issue as it has a rule "that conduct resulting from a disability is considered to be part of the disability and is not a separate basis for termination." The court then found that this isolated outburst did not constitute an "egregious and criminal" action necessary to justify an exception to the Circuit's rule.

### III. Confidentiality Issues

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

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

Medical information may only be shared by employers "in limited circumstances with supervisors, managers, first aid and safety personnel, and government officials investigating compliance with the ADA."<sup>39</sup> While there have been relatively few reported decisions on this provision of the ADA, the following cases provide some additional analysis and show the importance of keeping medical information confidential.

### A. Confidentiality Regarding the Disability

#### Cases Finding for the Employer

The ADA provides that confidential information may be shared with individuals involved in the hiring process who need to know the information. In *O'Neal v. City of New Albany*, 293 F.3d 998 (7th

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Cir. 2002), mentioned previously, the employer disclosed results of a medical examination for a police officer applicant to members of the local pension board. The officer had high blood pressure. This board claimed it needed to certify the plaintiff's examination as part of the hiring process, and thus, needed to know the information. As a result, the court found that the ADA had not been violated because the disclosure was proper.

The EEOC interprets the confidentiality provision to apply to medical information even it is voluntarily disclosed. (See EEOC Guidance on Disability-Related Inquiries cited above.) However, some courts have taken a more restrictive view. In *Cash v. Smith*, 231 F.3d 1301 (11th Cir. 2000), an employee voluntarily disclosed her diabetes to her supervisor, and subsequently the supervisor disclosed that information to the employee's co-workers. The plaintiff brought an ADA case for, among other things, the improper disclosure of her disability. Contrary to the EEOC's position on this issue, the court held that the provision prohibiting disclosure of disability-related information did not apply to voluntary disclosures.

The voluntary disclosure issue was also discussed in *Grimsley v. Marshalls of MA, Inc.*, 284 Fed. Appx. 604 (11th Cir. 2008), although the court found that plaintiff did not properly plead this claim. In *Grimsley*, an individual with bipolar disorder, worked at Defendant's warehouse. After Plaintiff's supervisor joked in employee meetings about Plaintiff's disability, called Plaintiff crazy, advised Plaintiff to take more medication in front of other employees, and frequently asked Plaintiff if he was taking his medication, Plaintiff resigned and sued under the ADA, alleging that Defendant improperly disclosed Plaintiff's medical condition. (The employer also made derogatory racial comments to and about Plaintiff). The Eleventh Circuit Appellate Court upheld summary judgment for Defendant, explaining that Plaintiff had disclosed his condition to Defendant voluntarily, not in response to an inquiry or exam, thereby precluding an improper disclosure claim. Plaintiff then argued that his ADA claim was actually meant to be an improper medical inquiry claim, not improper disclosure, and was therefore not precluded by Plaintiff's voluntary disclosure. However, the court held that Plaintiff had not properly pled an

improper medical inquiry claim his complaint, so he could not present the issue in the appellate court.

## Cases Finding for the Employee

In *Tucker v. CAN Holdings, Inc.*, 2008 WL 5412829 (W.D. Ky. Dec. 30, 2008), an employee had a medical condition as a child that required implementation of a corrective device. She disclosed the condition to her employer during a work-related physical examination. Subsequently, another company acquired her employer's business. Thereafter, she injured her back and a representative of the new employer sent an e-mail to all employees worldwide describing the employee's medical condition and the corrective device, and incorrectly asserting that the pre-existing condition caused her recent injury. The employee sued under the ADA for unlawful disclosure of her medical records. The court refused to dismiss the employee's claim noting that employee medical information must be treated as confidential and only disclosed for special work-related reasons.

An employee's disability was also blatantly disclosed by the employer in *EEOC v. Ford Motor Credit Company*, 2008 WL 152780 (M.D. Tenn. Jan. 14, 2008). In *EEOC v. Ford*, an employee with HIV needed intermittent medical leave to participate in a clinical trial. To obtain the leave, the employee was required to disclose his HIV status to his direct supervisor, who then disclosed his HIV to his co-workers causing him shame, humiliation and depression. The employee filed suit under Title I of the ADA alleging violations of confidentiality. Ford moved for summary judgment claiming that the employee voluntarily disclosed his HIV status and therefore not protected by the ADA's confidentiality provisions. The court denied summary judgment finding that the disclosure was not voluntary, as it was a pre-requisite to receive leave from work. The court held that the disclosure was job-related and therefore, subject to the ADA's confidentiality requirements.

Inadvertent or careless disclosure is also prohibited by the ADA. In *Cripe v. Mineta*, 2006 WL 1805728 (D.D.C. June 29, 2006), the attorney of an employee with HIV sent a letter to the employer regarding work accommodations. The employer failed to keep the letter confidential (the

letter was sitting on a desk without an envelope) and, as a result other employees learned of the plaintiff's HIV status. The court rejected the employer's argument that the information did not have to be protected since it was not marked as confidential.<sup>40</sup>

## B. Confidentiality Regarding the Accommodation

If an employer unnecessarily divulges that an individual with a disability is receiving a reasonable accommodation, this may be tantamount to the disclosure of the medical condition itself. EEOC Enforcement Guidance explains that employers may only disclose reasonable accommodations to co-workers on a "need-to-know basis." Otherwise, an employer may only respond to co-worker questions about accommodation issues by saying that it is acting for legitimate business reasons or in compliance with federal law.<sup>41</sup> The EEOC suggests that providing all employees with background information about the ADA and confidentiality right may be helpful. Further, EEOC Guidance on Reasonable Accommodation states that an employer:

May not disclose that an employee is receiving a reasonable accommodation because this usually amounts to a disclosure that the individual has a disability. The ADA specifically prohibits the disclosure of medical information except in certain limited situations, which do not include disclosure to coworkers.<sup>42</sup>

Employers may respond to co-worker inquiries "by emphasizing its policy of assisting any employee who encounters difficulties in the workplace" and emphasizing that all workers' privacy is respected in such situations.<sup>43</sup>

### Case Finding for the Employer

There are few federal court cases discussing this important issue. One case that did discuss this issue was brought by the EEOC. In ***EEOC v. ESAB Group, Inc.***, 208 F.Supp.2d 827 (N.D. Ohio February 19, 2002), a case brought by the EEOC, the employer posted a schedule available to the "human resources department and those

with a 'need to know.'" Designations such as "ADA" (for employees "working with accommodation schedule according to physician)," and "DIS" (indicating a "non-occupational disability)" were contained in the schedule. One employee with diabetes, Stowers, was receiving an accommodation of a fixed shift and began being harassed as co-workers felt he was "receiving preferential treatment." The co-workers made threats of violence and referred to Stowers' "ADA" designation as "American Dick head Association." In addition, a company nurse disclosed Stowers' condition to one of his co-workers. The employer argued that it did not violate the ADA as:

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

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

EEOC Guidance on confidentiality was also not followed in ***Ross v. Advance America Cash Advance Centers, Inc.***, 605 F.Supp.2d 1025 (E.D.Ark. March 24, 2009). In *Ross*, an employee disclosed his bipolar disorder to his supervisor in connection with a request for an adjusted schedule. The supervisor then disclosed the condition to another employee. In the case, *Ross* did not raise the confidentiality issue but rather claimed that she was retaliated against for complaining about the disclosure, which she considered unlawful. While the employer admitted the disclosure violated company policy, the court held that *Ross* did not offer any evidence to show that the disclosure violated the ADA. The court stated that the disclosure was "ill-mannered," but "there is nothing in the ADA that requires, or could reasonable be

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read to require, that the employer keep that information secret from other employees.”

## Cases Finding for the Employee

In *Medlin v. Rome Strip Steel Co., Inc.*, 294 F.Supp.2d 279 (N.D.N.Y. December 10, 2003), an employee had a back condition that included multiple fractures. He was sent for a Functional Capacity Evaluation (FCE) and heard detailed findings of the FCE, (e.g., that he became short of breath during the examination), from a co-worker before hearing them from his supervisor or the doctor. The court held that this disclosure may be an ADA confidentiality violation as the co-worker may not have needed to know the information. Therefore, the court denied summary judgment for the employer despite the employer’s arguments that a medical release signed by the employee authorized the disclosure.

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

in a rare move for a written decision, the court strongly encouraged that the parties try to settle the case “In light of the limited monetary exposure and the complex questions that must be resolved on this imperfect record...”

Two cases decided by the EEOC, (not a federal court), in situations involving federal employees discussed the issue of disclosure of a reasonable accommodation to co-workers. In *Williams v. Astrue (SSA)*, 2007 EEOC LEXIS 4206 (EEOC 2007), the EEOC stated that, when responding “to a question from an employee about why a coworker is receiving what is perceived as ‘different’ or ‘special’ treatment,” the employer might explain “that it has a policy of assisting any employee who encounters difficulties in the workplace,” and that “many of the workplace issues encountered by employees are personal, and that, in these circumstances, it is the employer’s policy to respect employee privacy.”

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

## C. Confidentiality of Medical Information from Doctors

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

Since a doctor cannot disclose information about a patient without his/her permission, an employer must obtain a release from the individual that will permit his/her doctor to answer questions. The release should be clear as to what information will be requested. Employers must maintain the confidentiality of all medical information collected during this process, regardless of where the information comes from.<sup>44</sup>

# Invisible Disabilities and the ADA

## Case Finding for the Employer

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

## Case Finding for the Employee

In ***Fleming v. State University of New York*, 502 F.Supp.2d 324 (E.D.N.Y. August 6, 2007)**, a doctor with sickle cell anemia brought suit under the Rehabilitation Act and Title II of the ADA alleging a violation of confidentiality by the director of the residency program. The plaintiff alleged that the director disclosed his condition to a potential employer, the Yuma Regional Medical Center, leading to plaintiff's being denied employment. The court rejected defendant's claim that the plaintiff's disclosure to the director was voluntarily made, was not in response to a medical inquiry, and was therefore not covered by the ADA's confidentiality provision. Rather the court pointed to plaintiff's claims that he did not openly discuss his sickle cell anemia with his colleagues or supervisors and that he told the residency director of the condition when the director telephoned plaintiff while he was in the hospital asking why plaintiff was there. The court also found that the confidentiality requirements of Title I of the ADA also applied to cases brought under Title II and/or the Rehabilitation Act. The doctor's disclosure to a potential employer, therefore violated the ADA and Rehabilitation Act.

Generally, employers will not be found to have violated the ADA if the disability is not known. This is true whether the complaint involves a failure to accommodate or asserts other adverse employment actions on the basis of disabilities. Employers need only accommodate known disabilities. In requesting accommodations, employees with invisible disabilities should let the employer know of the existence of a disability, identify the limitations that result from the disability, and try to identify possible accommodations, if possible. See *EEOC Guidance on Reasonable Accommodation and Undue Hardship*.

## A. Reasonable Accommodation and Disclosure - Accommodating Known Disabilities

As discussed above, medical inquiries from an employer must be "job-related and consistent with business necessity." Regarding voluntary disclosure, an individual does not have to disclose a disability unless a reasonable accommodation is needed. The request does not need to be written or expressed formally as long as the individual (or his/her representative) informs the employer know "an adjustment or change at work for a reason related to a medical condition" is needed.<sup>45</sup>

## Cases Finding for the Employer

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

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

Therefore, the court stated that plaintiffs must "show by a preponderance of the evidence that their employers... knew of their disabilities" to establish a claim of discrimination. The plaintiff must produce "probative evidence of Defendant's actual knowledge of [a] disability" in order to

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

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establish an ADA violation. The *Cordoba* court found for the employer as there was “serious reason to doubt even that Plaintiff considered herself to be disabled at any time during her tenure at Dillard’s.” While plaintiff realized “she was ill,... it does not follow from this that she regarded herself as statutorily disabled.” The court noted that plaintiff’s request for reduced hours was based “on her own judgment, not the advice of a physician.”

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

This reasoning is followed in many other cases. In ***Smith v. Grattan Family Enterprises, LLC*, 2009 WL 3627953 (E.D. Mich. Oct. 30, 2009)**, an employee who had a hip and bone problems was experiencing severe leg pain. He mentioned the pain to his employer and that he “couldn’t stand on it much longer.” The employee claims this should have triggered the employer to provide him with some type of reasonable accommodation. The court held that an employer cannot be deemed to be on notice of a disability when an employee does nothing more than complain of having difficulties with his or her job, but never tells the employer that those difficulties stem from a condition of disability. Accordingly, there was no viable claim for failure to accommodate.

In ***Keeler v. Florida Department of Health*, 2009 WL 1111551 (11th Cir. Apr. 27, 2009)**, plaintiff claimed that her former employer failed to accommodate her mental illness and then terminated her employment in violation of the ADA. Plaintiff had asked her employer to transfer her to another position, claiming that her current position was too stressful and overwhelming. Her employer denied her request and said that she was “doing fine” in her current position. During a subsequent meeting, she “broke down” and started to cry. During the week after this meeting, she was reprimanded twice; once for working late without

approval and once for failing to complete her assigned tasks in a timely manner. After these incidents, Keeler disclosed to her employer that she was diagnosed with Attention Deficit Hyperactivity Disorder and Obsessive Compulsive Disorder. Prior to these events, she had not told her employer about her mental impairments. The plaintiff was terminated from her position shortly after the disclosure. She sued under the ADA and argued that her employer failed to accommodate her disability when it refused to transfer her to a new position. The court held that the employer did not violate the ADA because it did not know about her alleged impairments when it denied her request. She did not reveal her disability until after the employer made its decision. She argued that her behavior – complaining about how stressful her job was and crying during a meeting – should have put her employer on notice on her disability. The court found that these behaviors were not sufficient to put the employer on notice because they did not suggest that she was substantially limited in a major life activity.<sup>46</sup>

In ***Thompson v. Rice*, 2008 WL 5511260 (D.C. Cir. Dec. 30, 2008)**, an employee, who experienced a subarachnoid hemorrhage, told her employer that she should not be subjected to stress in the workplace or a hostile work environment. She subsequently sued the employer for failing to provide her with the requested accommodations. The court found in favor of the employer because the employee had failed to adequately inform her employer of her disabling condition. The court held that an employer must know that an employee has a disability in order for a violation of employer’s duty to accommodation can be established.

In ***Burkhart v. Intuit, Inc.*, 2009 WL 528603 (D.Ariz. March 2, 2009)**, an employee “commented” that he had a “mental ... or stress related disability” but did not disclose that the impairment was post-traumatic stress disorder and never requested a reasonable accommodation. The court held that the plaintiff did not “put Defendant on notice” that he had “an impairment that substantially limited a major life activity and necessitated accommodation.” Therefore, Defendant’s duties to engage in the interactive process were not triggered.

In ***Freadman v. Metropolitan Property and Casualty Insurance Co.*, 484 F.3d 91 (1st Cir.**

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2007), the First Circuit ruled in favor of an employer because an employee was not sufficiently specific in her request for an accommodation. The plaintiff had ulcerative colitis, for which she had received accommodations in the past. She alleged that when her symptoms returned, she told her supervisor that she was working too much and needed time off because she was “starting not to feel well.” She claimed that her employer told her to wait until she finished an important upcoming presentation. Finding the presentation unsatisfactory, her employer terminated her. The court held that an employee has the burden to be specific regarding an accommodation request. The employer’s awareness of the plaintiff’s condition allowed an inference that her request for time off was linked to her colitis. The vagueness of her statement, however, did not constitute a request for an accommodation. It was not “sufficiently direct and specific” because it did not indicate exactly when she would need time off.

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

In *Russell v. T.G. Missouri Corp.*, 340 F.3d 735, 742 (8<sup>th</sup> Cir. 2003), an employee with bipolar disorder stated to her supervisor, “I need to leave and I need to leave right now” and then left work before completion of her shift. The employee claimed to be having an anxiety attack but did not mention any medical reason for her need to leave. Therefore, the court held that this statement was not sufficient to constitute a request for a reasonable accommodation under the ADA. Although the employer was previously aware of the employee’s disability, the employee’s failure to mention a medical basis for her statement was fatal to her case.

Similarly, in *Rask v. Fresenius Medical Care North America*, WL 4258620, 1 (8<sup>th</sup> Cir. 2007), a kidney dialysis technician with clinical depression sought a reasonable accommodation due to adverse side effects from the medication used to

treat her condition. The technician worked two days per week and had a poor attendance history. After being terminated from her job, she filed suit claiming that she should have been provided with a reasonable accommodation under the ADA. The court further found that there was no duty to accommodate Ms. Rask, as she never sufficiently requested a reasonable accommodation. Ms. Rask had let her employer know that she was “having problems” with her medication and that she might “miss a day here and there because of it.” The court held that even if Ms. Rask had advised her employer that she had depression and suggested “what a reasonable accommodation might be, no reasonable person could find that Ms. Rask ‘specifically identif[ied]’ her ‘resulting limitations.’”

In *Rask*, the court put the “initial burden ... primarily upon the employee ... to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations.” This holding was based on the fact that the ADA requires that employers make reasonable accommodations “to the known physical or mental limitations” of an individual with a disability. The court stated, “Where, as here, ‘the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, as is often the case when mental disabilities are involved, the initial burden rests primarily upon the employee ... to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations.’”

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

## Cases Finding for the Employee

While the court in *Rask*, put the burden on the employee with a mental disability to properly

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articulate a reasonable accommodation request, the court in the case of ***Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281 (7<sup>th</sup> Cir. 1996)**, felt that employers needed to be understanding of employees with mental disabilities. In *Bultemeyer*, the employee's psychiatrist requested a "less stressful" environment. No other specific accommodation was requested other than a "less stressful" environment, yet the court required the employer to engage in the interactive process with the employee. The court stated that the psychiatrist's letter can be seen as requesting that accommodations that were previously in place be reinstated and that Mr. Bultemeyer be reassigned to a smaller school. The court stated that, if the employer thought that the doctor's letter was vague ambiguous, it should have sought clarification. The *Bultemeyer* court discussed the issue in some depth stating:

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

The above language from *Bultemeyer* was cited favorably in the case ***Taylor v. Phoenixville School District*, 184 F.3d 296, 312 (3<sup>rd</sup> Cir. 1999)**. In *Taylor*, the son and husband of a secretary with bipolar disorder requested accommodations although no specific accommodations were suggested. The court stated:

What matters under the ADA are not formalisms about the manner of the request, but whether the employee or a representative for the employee provides the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation.

***Ekstrand v. School District of Somerset*, 583 F.3d 972 (7<sup>th</sup> Cir. 2009)**, involved a teacher with

seasonal affective disorder. Due to the condition, the teacher requested a classroom with natural light and identified other issues that exacerbated her condition, including noise distractions, inadequate ventilation, and the untimely manner the school installed necessities. Although the school remedied some of these issues, it failed to reassign her to a room with natural light. As a result, plaintiff needed to take medical leave. On November 28, 2005, she provided a note to the school district from her doctor indicating the importance of natural light for an individual with seasonal affective disorder, and the link between teacher's room location and the symptoms of her disability. The school still did not provide her request. The teacher sued for failure to accommodate and the district court granted summary judgment to the school. The Seventh Circuit reversed and stated that an employer is not obligated to provide a specifically requested accommodation unless the employer is made aware of its medical necessity. In this case, once the teacher provided the school with medical documentation of the necessity of a classroom with natural light, the school had an obligation to try to accommodate her. It noted that this accommodation could have been accomplished, as one classroom with windows was empty, and a first grade teacher who was willing to switch used the other.

In ***Moore v. Wal-Mart Stores East, L.P.*, 2009 WL 3109823 (M.D. Ga. 2009)**, plaintiff requested and received a leave of absence from her employer after being injured in an automobile accident. Plaintiff alleged her employer violated the ADA by not allowing her to return to work after her leave of absence, and eventually terminating her. The defendant argued that plaintiff never informed defendant of her disability. The court denied defendant's motion for summary judgment. To prove a claim of discrimination under the ADA, a plaintiff must show that the defendant had actual or constructive knowledge of the disability. While "vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice," defendant knew of plaintiff's work restrictions and her accident due to information in medical notes and plaintiff's requested leave of absence. It was immaterial that plaintiff never asked for a reasonable accommodation in writing. Her oral requests for

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light duty work and reduced hours further demonstrated her employer's actual knowledge of her disability.

In ***Boice v. Southeastern Pennsylvania Transp. Authority*, 2007 WL 2916188 (E.D. Pa. Oct. 5, 2007)**, the court denied the defendant's motion for summary judgment, concluding that the plaintiff had established a genuine issue of material fact about whether or not SEPTA failed to engage in the interactive process. SEPTA argued that the plaintiff never requested a reasonable accommodation. The court applied the Third Circuit's standard that a request for an accommodation may be made in "plain English" as long as the plaintiff alerted his supervisor to his need for something and tied the need to a disability. In this case, evidence suggests that the plaintiff asked to remain on the day shift to monitor his medication for his diabetes. He also requested a closer parking spot, because of his shrapnel wound. Even though the plaintiff himself admitted that he did not request an accommodation during his deposition, the court concluded that there was enough evidence to create a genuine issue of material fact precluding summary judgment.

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

## B. Adverse Employment Actions

The cases above demonstrate that employers must be aware of an ADA disability before they can be found liable for failure to provide a

reasonable accommodation. The same reasoning applies to claims involving other adverse employment actions. In such a case, ***Stout v. Social Security Administration*, 2007 WL 707337 (E.D. Ark. Mar. 5, 2007)**, an employee was demoted but the court found no evidence that the employer knew of the employee's depression at the time of the demotion. The employer alleged the employee was demoted due to performance issues. Therefore, the employer could not be found guilty of discrimination on the basis of disability.

### Case Finding for the Employer

In ***Miller v. University of Pittsburgh Medical Center*, 2009 WL 3471301 (3d Cir. Oct. 29, 2009)**, plaintiff worked as a surgical technologist. During her employment, plaintiff contracted Hepatitis C, requiring three separate leaves of absence for treatment. Upon her return, she was restricted to forty hours each week and eight-hour shifts. During this time, plaintiff had thirteen unscheduled absences for which she received verbal and written warnings. She then received a suspension and was ultimately terminated for violating defendant's attendance policy. When she called in sick, plaintiff never indicated that her absence was attributed to Hepatitis C, just that she was not feeling well. The district court found that plaintiff was not qualified because she could not take calls and work shifts as required. The Third Circuit agreed. It explained that given the nature of the plaintiff's job, assisting during surgery performed in the hospital, it was evident that attendance is an essential element of this position.

### Case Finding for the Employee

In ***Mayhew v. T-Mobile USA, Inc.*, 2009 WL 5125642 (D. Or. Dec. 22, 2009)**, plaintiff worked as a customer service representative. She requested time off to care for her son's disabilities and was denied. She then requested a "work-when-able" schedule to accommodate her own heart condition, but defendant terminated her employment before addressing her request. Plaintiff then brought a lawsuit alleging a failure to accommodate, and defendant filed a motion for summary judgment. The court granted defendant's motion for summary judgment as to plaintiff's request to care for her son, because ADA

accommodations must be based on plaintiff's own disability—not that of a family member. However, the court denied defendant's motion as to plaintiff's request to have a "work-when-able" schedule due to her newly disclosed heart condition. The court noted that due to the unique nature of a customer service job, attendance is less significant than with other jobs. Plaintiff presented evidence that her unpredictable absences had little to no effect on defendant's call center, customer wait times, or call quality. This case demonstrates that employers should take even a "last-minute" disclosure seriously.

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

To establish liability under the "record of" prong of the definition of disability in the ADA, an employee must show that the employer had knowledge that the "record of" a disability. However, the record of a disability need not be a written record, knowledge of a history of having a disability may establish liability. This situation would apply when an individual does not have a current disability. One case involving a "record of" an invisible disability is *Trafton v. Sunbury Primary Care PA*, 2009 WL 2986666 (D.Me. September 15, 2009). In *Trafton*, the employee raised claims that she was terminated due to having a "record of" a disability related to her major depression and post-traumatic stress disorder (PTSD).<sup>47</sup> Prior to her termination, plaintiff's supervisor made numerous comments to her that seemed to indicate that he had knowledge of her disability although she never disclosed the disability to him. At various times, the supervisor told plaintiff that that he thought the job was "too much for her," that she could not handle the job because she was "unstable," that she tended "to get out of control," and once stated, "now don't go out and burn the building down." In addition, plaintiff presented circumstantial evidence of two other facts indicating her employer's knowledge of her "record of" a disability. Plaintiff asserted that she had "numerous, highly visible" scars on her arms from a suicide attempt which she claimed were often visible around the workplace as she often had her sleeves rolled up or wore short sleeve. In addition, plaintiff had received treatment from a company physician for her mental illness. The physician expressed having "serious reservations

about noting [Trafton's] work stress and depression in her medical record," as the physician "suspected the privacy of employees' medical records... was not scrupulously maintained" and stated that he never informed plaintiff's supervisor of her disability.

Despite this evidence, the court held that to find that the evidence demonstrated knowledge of a "record of" a disability would be "tenuous and conjectural even if it is conceivable." The court noted that the employee "is entitled to have reasonable inferences drawn in her behalf, but she is not entitled to speculative inferences" and concluded that, "On this record, it would require speculation to determine that [employee's supervisor] had knowledge of Trafton's mental health history, including her prior suicide attempts."

## V. Disability Harassment<sup>48</sup>

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

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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.

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

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

In disability harassment cases, as in sexual harassment cases under Title VII, plaintiffs frequently have had difficulty establishing the fourth element, that the harassment was severe or pervasive enough to alter a term, condition, or privilege of employment. While people with visible or invisible disabilities may be subject to workplace harassment, it may be argued that there are more stereotypes, myths, misunderstandings, and mistreatment related to invisible disabilities than visible ones.

## Cases Finding for the Employer

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

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

The Eighth Circuit adopted the 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

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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 ***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 of an employee who had surgery for breast cancer 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. While the court described a supervisor as having "hot temper and foul tongue," and the employee needed to take medical leave due to "anxiety and stress" caused by her supervisor, the court denied her claim for disability harassment.

## Cases Finding for the Employee

An early case recognizing a cause of action for disability harassment for an individual with an invisible disability was ***Flowers v. Southern Regional Physician Services, Inc.*, 247 F.3d 229 (5th Cir. 2001)**. In *Flowers*, 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.

The court adopted the same 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,

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and the evidence showed that Southern Regional failed to take prompt action to remedy the harassment.

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

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

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.

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

## Conclusion

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

## Notes

1. This legal brief was written by Barry C. Taylor, Legal Advocacy Director, Alan M. Goldstein, Senior Attorney, and Rachel Margolis, Staff Attorney with Equip for Equality, the Illinois Protection and Advocacy Agency (P&A). Equip for Equality is providing this information under a subcontract with the DBTAC: Great Lakes ADA Center, University of Illinois at Chicago, U.S. Department of Education, National Institute on Disability Rehabilitation and Research Award No. H133A060097.
2. Please see the DBTAC: Great Lakes ADA Center legal brief on the ADAAA that is found at [www.adagreatlakes.org/Publications/](http://www.adagreatlakes.org/Publications/) for more information.
3. ADA Amendments Act Sections 2(a)(1)-(8) and 2(b)(1)-(6). Specifically, the ADAAA overruled the U.S. Supreme Court decisions in the Sutton trilogy, [*Sutton v. United Air Lines*, 527

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- U.S. 471 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999); *Albertsons Inc. v. Kirkingburg*, 527 U.S. 555 (1999)] and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).
4. ADA Amendments Act §§2(b)(1)-(6) and 4(a).
  5. ADA Amendments Act §2(b)(5).
  6. ADA Amendments Act §4(a).
  7. See, e.g., *Walton v. U.S. Marshals Service*, 476 F.3d 723 (9th Cir. Feb. 9, 2007).
  8. ADA Amendments Act §4(a).
  9. 42 U.S.C. §12101
  10. 42 U.S.C. §12112(d)(2)(A).
  11. 42 U.S.C. §12112(d)(3) and (4).
  12. 42 U.S.C. §12112(d)(2)(B).
  13. 42 U.S.C. §12112(d)(3).
  14. 42 U.S.C. §12112(b)(6).
  15. 42 U.S.C. §12111(8).
  16. 42 U.S.C. §12112(d)(4)(A).
  17. 42 U.S.C. §12112(d)(4)(B).
  18. 42 U.S.C. §12112(d)(3)(B).
  19. See e.g., *Grenier v. Cyanamid Plastics*, 70 F.3d 667 (1<sup>st</sup> Cir. 1995); and *Thompson v. Borg-Warner Protective Services Corp.*, 1996 WL 162990 (N.D. Cal. Mar. 11, 1996)).
  20. EEOC Guidance found at: <http://www.eeoc.gov/policy/docs/qanda-inquiries.html>.
  21. Courts have differed on whether a plaintiff must have an ADA disability in order to bring suit for discriminatory inquiries and medical exams. The majority of courts have held that you do not have to have an ADA disability to bring such cases. See, e.g., *Harrison v. Benchmark Electronics Huntsville, Inc.*, 2010 WL 60091 (11th Cir. Jan. 11, 2010) (involving an individual with epilepsy in a suit brought before the ADA Amendments Act).
  22. EEOC Guidance on Medical Inquiries Under the ADA found at: <http://www.eeoc.gov/policy/docs/qanda-inquiries.html>.
  23. EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) found at: <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.
  24. See *Roe v. Cheyenne Mountain Conference Resort*, 124 F.3d 1221 (10<sup>th</sup> Cir. 1997).
  25. For a detailed discussion of direct threat issues, please see the DBTAC: Great Lakes ADA Center legal brief and webinar on Direct Threat found at [www.adagreatlakes.org](http://www.adagreatlakes.org).
  26. *Ward v. Merck & Co.*, 226 Fed. Appx. at 132-133, 137; 2007 WL 750391 at 1, 3.
  27. *Ward v. Merck & Co.*, 226 Fed. Appx. at 133-134, 2007 WL 750391 at 1.
  28. *Ward v. Merck & Co.*, 226 Fed. Appx. at 138-140, 2007 WL 750391 at 6.
  29. *Id* at 663.
  30. *Id* at 658-659.
  31. *Id* at 659.
  32. *Id*.
  33. *Id*.
  34. *Id* at 662.
  35. *Id* at 659-660.
  36. *Id* at 662.
  37. *Id* at 663.
  38. *Id*.
  39. EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>
  40. See also, *Doe v. U.S.P.S.*, 317 F.3d 339 (D.C.Cir. 2003), where the supervisor's disclosure of HIV status in conjunction with request for leave under the FMLA may have violated the Rehabilitation Act, using the same standards as the ADA.
  41. See EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, Question 16.
  42. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act found at: <http://www.eeoc.gov/policy/docs/accommodation.html>.
  43. *Id*.
  44. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act found at: <http://www.eeoc.gov/policy/docs/accommodation.html>
  45. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act found at: <http://www.eeoc.gov/policy/docs/accommodation.html>.
  46. See also, *Stewart v. St. Elizabeth's Hospital*, 589 F.3d 1305 (D.C. Cir. 2010)(hospital not required to accommodate employee with mental illness when there was no actual or constructive knowledge of the employee's disability).