


ADA Overview &
Recent Employment Cases
Under the ADA

Saturday, November 2, 9:00 – 10:30 am
Bryne Moore, U.S. EEOC Investigator



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Americans
with
Disabilities Act




ADA Title I prohibits discrimination on the basis of

- Actual disability
- Record of disability
- Perceived disability

Disparate Treatment and Retaliation – Perceived disability

Reasonable Accommodation – Actual disability or Record of disability

Disability-related medical inquiries


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Disparate Treatment

1. Condition not both temporary and minor
2. Performing satisfactorily/was qualified
3. Adverse employment action (e.g. failure to hire, discharge, etc.)
4. Someone not disabled but otherwise similarly situated was treated better.

- Legitimate, Non-Discriminatory Reason
- Pretext



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Retaliation

- Engaged in protected activity
 - objected to disability discrimination or
 - requested/ received a reasonable accommodation)
- Subjected to a materially adverse employment action
- Causal nexus

- Legitimate, Non-Discriminatory Reason
- Pretext




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Disability-Related Questions and Medical Examinations

- Pre-Offer: Employer cannot ask
 - May ask about ability to perform specific functions
 - May make conditional offer pending satisfactory results of a post-offer exam
- Post-Offer: Employer may ask
 - Job-related and consistent with business necessity
 - Equally applied
- Once employed: Employer may ask
 - Job-related and consistent with business necessity
 - Evidence of a problem, required to comply with other laws, voluntary exams that are part of employee health programs

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ADA requires that employers provide a "reasonable accommodation" to individuals who are disabled (actual disability or record of a disability) unless the Charging Party cannot perform the "essential functions" of the job with/without an accommodation or the accommodation creates an undue hardship on the employer.

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Factors to Consider in Determining Essential Function:
Supporting Evidence


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

Evidence of Whether Function is Essential

- employer judgment
- terms of a written job description
- terms of a collective bargaining agreement
- amount of time spent performing the function
- consequences of not performing the function
- experience of current and previous employees in the job

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Reasonable Accommodation



- A change in the workplace or in the way things are customarily done that is needed because of a disability

Accommodations are available –


- for the application process
- to enable someone to perform the essential functions of a job
- to enable an employee to enjoy equal benefits and privileges of employment

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Requests for Reasonable Accommodation

Generally, individual w/ disability must request R/A Request for some change in the workplace or in the way things are done that's needed because of medical condition

- Does not have to be in writing
- Does not have to use "magic words"
- May come from a third party (e.g., an employee's family member or doctor)



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Interactive Process

- **Employee** is the best position to know limitations/needs
- **Employer** in the best position to determine undue burden
- Multiple options? **Employer** gets to choose
- **Ongoing** obligation to continue interactive process if accommodation does not work

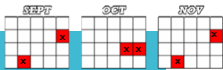
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Reasonable Accommodation Examples

- Providing or modifying equipment or devices
- Making the workplace accessible and usable to persons with disabilities
- Providing readers or interpreters
- Adjusting schedules (part-time, flex time, etc.)
- Leaves
- Transfers to vacant positions
- Modifying policies

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Attendance as Essential Function

Williams v. AT&T Mobility Servs., LLC, 847 F.3d 384 (6th Cir. 2017)
Regular attendance essential function for customer service representative where:

- Employer maintained strict attendance guidelines
- Guidelines identified attendance as essential function
- Guidelines existed prior to litigation
- Managers testified as to why attendance was essential
- Plaintiff provided no contrary evidence

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Hostettler v. College of Wooster No. 17-3406 (6th Cir. July 17, 2018)

- Hostettler, pregnant, was hired as an HR Generalist in 2013.
- Diagnosed w/ severe postpartum depression, doctor only cleared her to return to p/t schedule (anticipated duration: 6 months)
- Despite getting all of her tasks done working p/t ("Heidi is a great colleague and a welcome addition to the HR team!") – when she asked for 2 more months p/t or gradual increase of hours, she was fired.

Sixth Circuit: "Although '[r]egular, in-person attendance is an essential function' of most jobs, ... it is not unconditionally so; courts must perform a fact-intensive analysis."

P/T schedule as Reasonable Accommodation

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Mosby-Meachem v. Memphis Light, Gas & Water, 883 F.3d 595 (7th Cir. 2018)

- An in-house attorney asked to work from home for 10 weeks while on bedrest for pregnancy complications
- Employer says physical presence was an essential function
- Court upheld jury's verdict for the plaintiff, noting that while trying cases and deposing witnesses were in attorney's job description, she never had to do either in 8 years working for the employer
- Thus, physical presence was not an essential function for in-house attorney and an accommodation of telework was reasonable.
- \$92,000.00 in compensatory damages and \$18,184.32 in backpay.


Telework as Reasonable Accommodation

modified by Linda U

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Guzman v. Brown County, 884 F.3d 633 (7th Cir. 2018)


- Employee fired for tardiness
- At time of termination, she presented doctor's note stating she has sleep apnea, but there is no evidence employer knew of the condition before that
- Fitness for duty exam conducted 2 years before indicated only that plaintiff no longer had "excessive need" for sleep and was feeling "more normal"
- R/A does not include excusing past misconduct



Employee Failed to Request Reasonable Accommodation

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Failure to Accommodate: Anti-Theft Policy




EEOC v. Walgreen Company, Case No. CV 11-04470

- Former cashier with Type II Diabetes was fired by Walgreens because of her disability after she ate a \$1.39 bag of chips during a hypoglycemic attack in order to stabilize her blood sugar level.
- She had worked for Walgreen for almost 18 years with no disciplinary record, and Walgreens knew of her diabetes.
- Yet the company security officer testified that he did not understand nor did he seek clarification when she wrote, "My sugar low. Not have time," in reply to his request for an explanation of why she took the chips before paying.
- July 2014 settlement: \$180,000 + revised policies and training

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Indefinite Leave Not Reasonable




Eschevarria v. AstraZeneca Pharm., 856 F.3d 119 (1st Cir. 2017)

- Plaintiff took short-term disability leave for 5 months due to depression. Employer extended benefits 3 times.
- After being told to return to work, plaintiff submitted doctor's note requesting continued leave for 12 months.
- Court of Appeals affirms trial court, holding that requests for leave must be "facially reasonable"

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Inflexible Policies



EEOC v. Corizon Health Inc., and Corizon LLC, No. 2:18-cv-02942-PHX-DLR (2019)

- Terminated employees with disabilities who exhausted their leave under Corizon's 30-day medical leave policy.
- Corizon repeatedly failed to consider accommodations, including, but not limited to, reassignment, unpaid leave and modified work schedules that would have allowed employees with disabilities to return to work.
- Required employees with disabilities to be 100% healed or to be without any medical restrictions before they could return to work.

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Inflexible Leave Policy

EEOC v. United Parcel Service (Chicago, IL) 2017 Settlement: \$2 million

- EEOC alleged that UPS violated the ADA by failing to provide R/As and by maintaining an inflexible leave policy where company fired disabled employees automatically when they reached 12 months of leave, without engaging in the interactive process required by law.
- August 2017 Settlement: \$2 million to victims, UPS to update its reasonable accommodation policies, conduct training, three-year period of reporting.


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R/A in Training

EEOC v. Kroger, Case No. 1:18-cv-03095-WMR-AJB

- Kroger offered Michael Haugabrook a courtesy clerk position at its Jonesboro, Ga., store on or about March 15, 2016. Haugabrook accepted the position and was required to attend an orientation session on March 23.
- Due to his visual impairment, Haugabrook requested an accommodation to complete the computer-based portion of the orientation. Kroger's management refused to accommodate him. While Haugabrook was completing the computer assessment, he was summoned to the store manager's office where he was immediately fired.
- Kroger settled the case for \$40,000 plus policy revisions and training.

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"100% Healed" Policy

100%

EEOC v. Nevada Restaurant Services (D. Nev.)


- Employer maintained policy that employees had to be 100% healed before returning to work
- Suit also alleged employer terminated employees regarded as having disabilities, with a record of disability, and due to their "association" with individuals with disabilities
- Consent decree 6/6/18: \$3.5 million to compensate victims of discrimination, employer to retain consultant to review and revise policies, training, reporting to EEOC, development of tracking system for R/A requests

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Failure to
Accommodate
Restrictions

EEOC v. Murphy Oil USA (W.D. Texas)

- Murphy Oil required 10 year employee with serious back impairment to perform duties that violated work restrictions imposed by his treating physician.
- Employee complained about the failure to accommodate the medical restrictions and was fired in retaliation.
- August 13, 2018 two-year consent decree: \$100,000
- Lesson: Failure to make adjustments for the manager's physical impairment resulted in the loss of a solid employee.



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TRIFECTA

Failure to
Accommodate
Restrictions

100% + transfer + leave

EEOC v. Associated Fresh Market (Salt Lake City, UT)

- Qualified individual with disability and a group of other individuals with medical conditions were denied R/A to perform their jobs. Investigation revealed a practice of denying R/A, requiring employees to have "no restrictions" or be "100% ready to return"
- R/A would have included additional leave, working with restrictions and reassignment. Employees were terminated
- Consent Decree July 12, 2018: \$832,500 and change of practices


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Failure to
Accommodate
Legally
Prescribed
Medications

- EEOC v. Appalachian Wood Products, Inc., Civil Action No. 3:18-cv-00198
- Employer refused to hire an applicant for a factory position because he was taking suboxone, a medically prescribed treatment for opioid addiction, without considering whether it affected his ability to do the job safely.
- The company also unlawfully required applicants to disclose their use of medications prior to making conditional job offers. Further, the company refused to hire individuals into certain jobs or assigned them to less desirable positions based on their answers to these illegal medical inquiries
- \$42,500 in damages for two claimants + non-monetary relief.

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Failure to Accommodate Restrictions



EEOC v. Home Depot (Chicago, IL)

- Employee with irritable bowel syndrome and fibromyalgia needed an emergency break as an accommodation. Employee left her station to go to the bathroom and was promptly fired for leaving her station. Home Depot made no attempt to accommodate the employee.
- Consent Decree August 17, 2018: \$100,000
- Lesson: Accommodation was reasonable. During EEOC investigation, employer could not establish an "undue hardship" if the employee had to unexpectedly go to the bathroom.

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Failure to Hire Because of Disability - Deafness

"This is at least the sixth charge the federal job rights watchdog has filed on behalf of a deaf worker in the past 12 months."
<https://bnanews.hna.com/daily-labor-report/safeway-accused-by-eeoc-of-not-accommodating-deaf-job-seeker-1>

EEOC v. Safeway case No. 2:18-cv-01352 Filed September 13, 2018

- Joel Sibert applied online in July 2017 for jobs at Safeway and was selected for an interview based on his qualifications and experience working similar jobs
- After he explained that he is deaf / would need interpreter, in-store hiring recruiter told him she did not know anything about providing interpreters.
- When he offered names and contact information for qualified interpreters, recruiter declined offer but said she would get back to him.
- Sibert heard nothing further, so he placed multiple calls to the store over the following week, only to be placed on hold or told no one was available

EEOC v. Jacksons Food Stores case No. 2:17-CV-01285 Settled Sept. 7, 2018

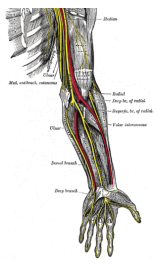
- Nathaniel Prugh applied online for a position at JFS Sammamish WA store and was selected for an interview based on his qualifications and experience working similar jobs.
- Once he explained that he was deaf and would need an interpreter, the store manager balked and refused to give him that opportunity
- The Idaho-based convenience store chain will pay \$88,000 and hire a deaf worker as well as provide other relief

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Failure to Hire: Predicting Future Disability

EEOC v. Amsted Rail (Granite City, Illinois)

- Leading manufacturer of steel castings for the rail industry disqualified job applicants based on the results of nerve conduction test for carpal tunnel syndrome (performed by a third party contractor) rather than conducting an individual assessment of each applicant's ability to do the job safely. Applicants sought work as "chippers" who use a hammer or grinder to remove metal protrusions from steel casings. **Court ruled that nerve conduction test was unlawful and had no value in predicting the likelihood of future injury.**
- Consent Decree June 12, 2018: \$4.4 million



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Failure to Hire:
Use of Job Coach

EEOC v. Northwest Petroleum, LP and Travis County Investments, LP, Civil Action No. 18-cv-703-PRW

- Burger King Franchisee withdrew a job offer from an applicant who sought employment as a dining room and bathroom attendant.
- The applicant was accompanied to his job interview by a representative from Community Access Inc. (CAI), an organization which provides services to Oklahomans with intellectual and developmental disabilities, but when he requested that a job coach provide onsite support at no cost to NWP, the company withdrew the job offer.
- Employer settled for \$30,000 + non-monetary terms

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9th Circuit Affirms ADA Ruling:
Employer Must Bear Cost of Additional Medical Information from Applicant

EEOC v. BNSF (9th Cir. 16-35457 8/29/18)
<http://cdm.ca9.uscourts.gov/datastore/opinions/2018/08/29/16-35457.pdf>

"Allowing employers to place the burden on people with perceived impairments to pay for follow-up tests would subvert the goal of the ADA to ensure that those with disabilities have 'equality of opportunity' § 12101(a)(7), and would force people with disabilities to face costly barriers to employment."

U.S. District Court for the Western District of Washington (Case No. C14-1488 MJP) March 2016: \$95,000 judgment + permanent injunction.

- Russell Holt receives conditional job offer from BNSF as Senior Patrol Officer, contingent on post-offer medical review.
- Holt discloses prior back injury, provides old MRI, passes BNSF's physical exam.
- BNSF required new MRI, Holt could not afford \$2,000+ (insurance would not cover since he was not in pain), BNSF withdrew job offer.

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Trends in ADA Employment

1. Improving technology
 - Reasonable Accommodations
 - Telework
 - Big Data in Hiring
2. Aging of the Workforce
 - Disabilities
 - Caregiving Responsibilities
3. Use of Opioids/Other Drugs
 - Illegal vs. Legal use
 - Federal vs. State laws

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