EEOC

ADA, FMLA and Reasonable Accommodation

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Learning Objectives

Who is Protected?
- Definition of Disability Under ADA as amended (ADAAA)

What Does the Law Do?
- FMLA & Reasonable Accommodations
- Disclosure, Medical Exams and Inquiries
- Harassment, Retaliation, Confidentiality

Case Law / Practical Tips / Resources

Questions
The U.S. Equal Employment Opportunity Commission (EEOC) enforces Title I of the Americans with Disabilities Act (ADA). The ADA prohibits discrimination on the basis of disability in employment and requires that covered employers (employers with 15 or more employees) provide reasonable accommodations to applicants and employees with disabilities that require such accommodations due to their disabilities.
Let’s Start With Some Facts

- 53 Million People (19.3% of the population) have some level of disability
- 40% of people over the age of 65 have a disability
- 32% of Americans with Disabilities aged 18-64 are working
  - 2/3 of the 68% who are unemployed would rather be working
Labor Statistics

People with Disabilities

July 2016

• Labor Force Participation
  – People with disabilities: 20.4%
  People without disabilities: 69.2%

• Unemployment Rate
  – People with disabilities: 11.1%
  People without disabilities: 4.9%
Disability Facts

- 16% of people with disabilities use mobility devices (crutches, canes, wheelchairs, etc.)
  - Face greatest # of physical barriers in community
- 49% of people with disabilities have either vision or hearing impairment
- 33% of people with disabilities have major medical/emotional condition (Head Injury, Mental Illness, diabetes, heart disease, HIV, etc.)
- Majority of disability is “invisible”
The Aging Workforce

• The Census Bureau states that the 45 to 64 year-old U.S. population grew by nearly 18.6 million (29.7%) from 2000 to 2015*

• This group will accounts for nearly half (44%) of the working age population (20-64) in 2015**

• The prevalence of disability grows with age

• By 2020, the number of people with disabilities between the ages of 50 and 65 will have doubled, and will be significantly larger than at any other age***

*From U.S. Census Bureau population projects http://www.census.gov/ipc/www/usinterimproj/
**From U.S. Census Bureau population projects http://www.census.gov/ipc/www/usinterimproj/
***From “The Economic Consequences of Disability Onset Near Retirement,” mimeo, Robert Weathers
ADA Amendments Act Redefines Disability (2008)

• Individuals with physical or mental impairments that substantially limit one or more major life activities
  • Less emphasis on “severity”
  • Episodic Conditions covered
• Individuals who have a record of such an impairment
  • Recovered Alcoholics, Drug Addicts, Cancer Survivors, etc.
• Individuals who are regarded as having such an impairment
  • Do not actually have a limitation that is a disability but treated as if they do
How the Statute Changed the Definition

• Provides illustrative list of major life activities that includes “major bodily functions”

• Specifically rejects high standards used by EEOC and Supreme Court to define “substantially limits”

• Positive effects of mitigating measures (other than ordinary eyeglasses or contact lenses) cannot be considered in determining “disability”
How the Statute Changes Definition (Con’t.)

• Impairment can be substantially limiting even if episodic or in remission

• “Regarded as” definition rewritten and expanded

• Remember: Goal was to broaden definition and make it much easier/quicker to find disability without a demanding analysis
Illegal Use of Drugs and Alcohol

- Individuals currently addicted to alcohol are covered by the ADA
- Individuals currently using illegal drugs are not covered by the ADA
- Illegal Use of Drugs and Alcohol may be prohibited in the workplace
- Employees may be required to not be under the influence of illegal drugs and alcohol in the workplace
- Drug testing is permitted of applicants and employees
Major Life Activities

- Statute and EEOC regulations provide **two non-exhaustive lists of major life activities**

- First list of major life activities should look familiar because most of these activities are ones previously recognized by EEOC and most courts:

  - Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.
Major Bodily Functions

• New category of major life activities will make it easier for individuals with many different types of impairments to establish disability

• Examples include functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, reproductive

• Also includes operations of an individual organ within a body system, such as the operation of kidney, liver, or pancreas.
Possible Application of Bodily Functions

- **Immune system**: HIV/AIDS, autoimmune disorders, lupus
- **Normal cell growth**: cancer
- **Digestive**: Crohn’s disease, celiac disease
- **Bowel**: ulcerative colitis
- **Bladder**: kidney disease
- **Reproductive functions**: infertility
- **Neurological**: multiple sclerosis, epilepsy
- **Brain**: schizophrenia, developmental disabilities
- **Respiratory**: asthma
- **Circulatory**: heart disease, high blood pressure
- **Endocrine**: diabetes
Rules for Major Life Activities

• Individual can show substantial limitation (or record of) in just one major life activity from either category

• Regulations state that in determining other examples of major life activities, “the term ‘major’ shall not be interpreted strictly to create a demanding standard for disability”

• Whether something is a major life activity is not determined by reference to whether it is of “central importance to daily life.”
Three Important Points

• The ADAAA does not change the definition of reasonable accommodation or address specific issues relating to reasonable accommodation

• Because of broadened definition of “disability,” employers likely will have to provide accommodations to more applicants and employees (except for individuals only “regarded as” having a disability)

• Employers should spend less time deciding whether individual has a disability and more time determining whether an accommodation can be provided
Pre-Employment and Medical Inquiries

What can and can’t be asked and when
Pre-Employment Questions Regarding Reasonable Accommodation

- When employer observes something during the interview which they reasonable believe will require accommodation
- When interviewee discloses need for an accommodation during the interview process
- When interviewee discloses a disability that the employer believes will require accommodation during the interview process
Conditional Offer of Employment

• Conditional Offer of Employment contingent upon:
  – Completion of medical examination
    • Withdrawal of offer based on direct threat
  – Determination of reasonable accommodation
    • Withdrawal of offer based on undue hardship
• Permissible to ask medical questions and/or conduct medical exams at this stage of employment
  – Medical Inquiry permissible if all applicants or individuals in similar positions subject to inquiry.
  – Additional inquiry allowed to follow-up on information found in initial inquiry
Post-Employment/Medical Inquiry

- No medical inquiry unless consistent with business necessity
- Employer has a right to medical information to substantiate the need for an accommodation when it is requested
  - reasonable accommodation should be addressed as an ongoing process
- Participation in wellness or other health promotion activities sponsored by employer must be voluntary
- Fitness for duty examination under limited circumstances
- Each time position is changed or altered employer has obligation to readdress accommodation needs
- Position is not protected and subject to change and modification
Fitness for Duty Examinations

• A fitness for duty examination may be conducted if it is job-related and consistent with business necessity.....
  – when an employer has a reasonable belief, based on **objective evidence**, that
    (1) an employee’s ability to perform essential job functions will be impaired by a medical condition (physical or psychological); or
    (2) an employee will pose a direct threat due to a medical condition (physical or psychological)
What is Business Necessity?

- Business necessity standard – not “mere expediency”
  - Is there genuine reason to doubt whether an employee can perform job functions? Have health problems had substantial & injurious impact on job performance?
  - Have we sufficiently guarded against improper reasons for evaluation (pretext to harass, fishing expedition)?
  - Type of job & risks to employer (ex: dangerous jobs, jobs with children, police officer, public safety)
  - EEOC Guidance: Employee’s actual job performance is the best measure of ability to do job
  - Need accurate, detailed information about essential job functions
What is Objective Evidence?

• Important to avoid relying on speculation, fears, stereotypes
• Self-disclosure by employee
• Observable behaviors and information from co-workers and supervisors
• Opinion from qualified medical professional
Direct Threat

• Definition: “A significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”

• Factors are:
  – Duration of risk;
  – Nature and severity of potential harm; likelihood of potential harm will occur and imminence of potential harm

• If there is no accommodation that reduces the risk of harm, the employer may refuse reinstatement or continuation in position due to direct threat but may need to reassign to different position, absent undue hardship
Fitness for Duty Recap

• Be mindful of triggers for Fitness For Duty

  – Employee disclosure of medical condition, circumstances creating reasonable basis to believe employee cannot perform essential functions or employee cannot safely perform them

  – Importance of decisions based on appropriate criteria (i.e., not an excuse to set up employee for termination or to determine what’s wrong with the employee)

  – Provide education to front-line supervisors

  – Keep track of incidents that triggered Fitness For Duty to ensure consistency
Fitness for Duty Recap (con’t.)

– Obtain appropriate medical expertise and make necessary arrangements, being careful in providing information to expert;

– Set expectations with employee regarding medical appointment and next steps;

– Follow consistent accommodation process and document accordingly;

– Ensure consistency, collaboration with policies/programs in which Fitness for Duty may arise or have implications, e.g. workplace violence prevention, performance management, workers compensation, leaves of absence or return to work
Confidentiality of Medical Information

• All medical information is considered “confidential”,
  – Maintained in separate files
    • Limited access to employees who “need to know”

• Supervisors/managers do not need to know “what” the disability is, only what the needs for accommodation are
  – Limited situation where additional information may be needed to “manage” an accommodation for safety/risk

• Applies to **ALL** employees, not just those known to have a disability or who have requested an accommodation
Modification or adjustment to a job, the work environment, or the way things usually are done.

REASONABLE ACCOMMODATION
When is it required?

• During the application process
  – Accessible format, testing accommodations, etc.

• During the Interview Process
  – Sign Language Interpreter, etc.

• To perform the essential functions of the job
  – Modified schedule, accessible facility, etc.

• To enjoy the same privileges as other employees
  – i.e. Parking, etc.
Principles of Reasonable Accommodation

• A reasonable accommodation must be an effective accommodation.
• The reasonable accommodation obligation applies only to accommodations that reduce barriers to employment as they relate to an individual’s disability.
• A reasonable accommodation need not be the best accommodation as long as it is effective.
Principles - Continued

• An employer is not required to provide an accommodation that is primarily for personal use.

• ADA requirements do not prevent an employer from providing accommodation beyond what is required by the ADA.
Who Initiates Request For Accommodation?

- Employee must initiate request
- May use “plain English”
- No need to use terms “reasonable accommodation” to initiate request
- Family member, friend, health professional or others may request on behalf of someone
Reasonable Accommodation Documentation

• When an obvious disability exists:
  – If the employer reasonably believes that the requested accommodation may not be related to the disability or a functional limitation from a disability

• As needed to establish that the individual has an ADA qualifying disability
Can not ask for Documentation when:

• Both the disability and the need for reasonable accommodation are obvious

• Individual has already provided the employer sufficient information to substantiate that s/he has an ADA disability and needs accommodation requested
Reasonable accommodation process is initiated by employer when:

1) knows that an employee has a disability that may be interfering with their job performance;
2) knows, or has reason to know, that the employee is experiencing workplace problems because of disability;
3) knows, or has reason to know, that the disability prevents the employee from requesting reasonable accommodation.
Disciplinary Action

• Must provide reasonable accommodation to enable employee with a disability to meet workplace standards
  – may need to suspend disciplinary action if the need for accommodation is identified in course of the action but prior to termination until a reasonable accommodation can be implemented
Retaliation and the ADA

“No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.” 42 U.S.C. 12203(A)
Retaliation

- Retaliation occurs when an employer, employment agency, or labor organization takes an **adverse action** against a **covered individual** because he or she engaged in a **protected activity**.
  - Adverse Action – employer’s action that may dissuaded an employee from making or supporting a charge of discrimination
  - Covered Individual – person with a disability under the ADA
  - Protected Activity - participation in a statutory complaint process or opposition to discrimination
Reasonable Accommodation Analysis

The request must be:

• “reasonable” – i.e., plausible on its face or feasible in the run of cases (low burden on the individual requesting the accommodation per the Supreme Court’s Barnett decision);

• “effective” – i.e., enable the individual to participate in the application process, perform the essential functions of the job, or enjoy equal access to the benefits and privileges of employment; and

• must not impose an undue hardship on the employer’s operations
Reasonable Accommodation Does Not Include:

• Elimination of an essential function
• Lowering production standards
• Provision of personal use items
• Provision of “light duty” position
Managing the Accommodation Process

• Define the Situation
  – What specific functional limitations are creating barriers to accessing the workplace or performing job tasks?
  – Is the individual's condition progressive, stable or unpredictable?
  – Is documentation needed to support the accommodation?
  – What specific job tasks, work environments, equipment or policies are creating barriers to successful job performance?
Managing the process (con’t.)

• Perform a needs assessment:
  – Is it necessary to modify the job?
    • restructuring the job by eliminating marginal job functions;
    • changing a shift or hours worked;
    • providing a flexible schedule;
    • sharing job duties or providing an assistant for non-essential functions;
    • work from home schedule;
    • providing leave to address disability related issues (medical or personal)
Managing the process (con’t)

• Is it necessary to modify a policy or practice?
  – attendance requirements;
  – food and beverages at workstations;
  – wearing or use of fragrances;
  – shifting “when” tasks are performed during the day
  – service animal in the workplace, etc.
Managing the process (con’t)

• Is it necessary to modify the facility
  – installing ramps at the entrance;
  – modifying restrooms;
  – Modifying the workspace/cubicle;
  – providing an accessible parking space;
  – installing an emergency alert system that has both a visual and an audible alert;
  – Removing physical obstacles for someone who is blind, etc.
Managing the process (con’t)

• Is it necessary to use a product or piece of equipment?
  – assistive technology
  – ergonomic workstation
  – independent living aids

• Is it necessary to modify or design a product?
  – modify an existing product in-house
  – work with a rehabilitation engineer, electrician, IT professional or the manufacturer of the product to customize
Managing the process (con’t)

• Is it necessary to obtain a service?
  – qualified sign language interpreter;
  – real time captioner;
  – qualified reader;
  – contracting for Braille transcription services;
  – video captioning services for training tapes or videos;
  – requesting an ergonomic, industrial hygiene or work-site evaluation
Managing the process (con’t.)

• Explore Alternative Placement (reassignment) Options
  – When accommodation in existing position not possible, explore alternative options
    • Is the employee qualified?
    • Are there equivalent vacant positions?
    • Will the employee have an equal opportunity to interact with coworkers and benefit from advancement in the new position as any other employee would?
Managing the process (con’t.)

• Monitor Accommodations
  – check-in with the employee to ascertain if the accommodation(s) provided are effective
  • determine whether any change has occurred that would alter current accommodation needs
    – Who is responsible for monitoring?
    – Is the employee receiving necessary support to sustain the accommodation that was implemented?
    – If not working, re-evaluate and begin the process over if necessary
What Happens When it Does not Work?

- The accommodation process is interactive
  - Employee/applicant has an obligation to cooperate in the process
  - Keep lines of communication open between parties
  - Place timelines on responses needed from employee/applicant for documentation, etc.
  - Set timelines for reviewing the accommodation to determine if still needed and or changes needed
  - Document all steps taken
  - Do not say “no” to an accommodation request until options are fully explored
Accommodations for the Application Process

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

- **Nebecker v. National Auto Plaza, 643 Fed. App’x 817 (10th Cir. 2016)**
  - Plaintiff terminated because of her absences and tardiness due to health problems.
  - Plaintiff did not ask for FMLA leave or an accommodation because she “‘didn’t feel that [she] could’ and believed there was ‘no point in asking.’”
  - Did not meet the “futile gesture doctrine” requirements because employer did not have a policy of refusing accommodation, and the employer did not take any explicit actions that foreclosed the interactive process.
Interactive Process Elements

- Employee makes a request and includes information about the impairment, limitations, and preferred accommodation, if known.
- Employer responds timely; may request limited additional information.
- Employee provides additional information, if necessary.
- Employer provides a “reasonable” and “effective” accommodation.
Consequences of Not Engaging

- Failure/refusal of employee to engage in the interactive process may result in their case being dismissed; losses their rights under ADA.

- Failure/refusal of employer to engage in the interactive process may support a finding of discrimination against the employer.
Interactive Process

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

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

  - Once Plaintiff requested a reasonable accommodation, Employer’s decision to place Plaintiff on unpaid leave while it delayed the interactive process for two months may have been a violation of the interactive process.
  - Unpaid leave can be an adverse action, particularly where the employee is placed on unpaid leave involuntarily.
Interactive Process (cont.)

  – Atkins told her supervisor she was a diabetic and asked to keep juice at the register to prevent hypoglycemic attack.
  – Supervisor told her that employees could not keep food or drink near the register.
  – This was a request for accommodation even though Atkins did not go through her employer’s formal channels.
  – Although the employer had an accommodation policy that could have allowed Atkins to keep juice near the register, no one at the store knew about it.
  – Her employer failed to engage in the interactive process when it did not offer any reasonable accommodations to Atkins that did not require her to violate store policy without permission.
Interactive Process (cont.)

  - Once when Atkins was alone in the store and could not leave the cash register unattended, she took and drank a bottle of orange juice from the store to treat her hypoglycemic symptoms before paying for the bottle.
  - Atkins was fired because she violated the employer’s policy requiring employees to purchase any products before consuming them.
  - May have been a discriminatory discharge because other employees commonly violated the same policy and were not fired.
Other Employees Available to Perform Function

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

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

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

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


  - As a workplace accommodation for his intellectual disabilities, Clark needed a written list of daily tasks.
  - After years of providing the list, Wal-Mart decided to stop providing Clark the accommodation he needed.
  - Wal-Mart alleged that it terminated Clark because he failed to perform certain job duties. EEOC charged that Clark's purported failure to perform certain job duties was due to Wal-Mart no longer providing Clark an accommodation.
  - As part of the settlement, Wal-Mart will pay $90,000 in monetary relief to Plaintiff.
Recent EEOC Cases (cont.)

  – Plaintiff, who had a disability caused by childhood traumatic brain injuries, worked part-time at Austin's Park N Pizza, an amusement park and restaurant, performing custodial work.
  – New management decided that Plaintiff could not perform his job duties because he did not correctly operate a new electronic system for clocking in and out of work.
  – Employer was unwilling to consider an alternative clock-in procedure as a reasonable accommodation.
  – As part of the settlement, Employer will pay $20,000 in monetary relief to Plaintiff.
Leave as a Reasonable Accommodation

On May 9, 2016, EEOC issued “Employer-Provided Leave and the Americans with Disabilities Act,”

Leave as a Reasonable Accommodation

Generally, leave is a reasonable accommodation when

– Employer provides no leave
– Employee is ineligible for leave under employer’s policy
– More is needed than is provided for under employer’s policy or FMLA or similar leave laws
Leave as a Reasonable Accommodation

- Leave can be provided under the Family and Medical Leave Act (FMLA), the ADA, or through workers compensation.
- Leave may be needed for a variety of reasons.
- Leave can be intermittent.
- When leave is granted as a reasonable accommodation an employee is entitled to return to his/her same position unless it would impose an undue hardship.
- Employees should not be penalized for using approved leave.
- Paid accrued leave should be offered before unpaid leave is provided.
Types of Leave Provided as a Reasonable Accommodation

• **Extended leave** – leave for a continuous period of time beyond what employer normally grants as a benefit of employment or what the FMLA allows.

• **Intermittent leave** -- leave needed on an occasional basis that may or may not be predictable (e.g., absences attributable to brief flare-ups of a condition).
Purpose of Leave as a Reasonable Accommodation

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

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

The interactive process may continue even after an initial request for leave has been granted, particularly if the employee's request did not specify an exact or fairly specific return date, or when the employee requires additional leave beyond that which was originally granted.
Leave and Termination

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

- Kelleher v. Wal-Mart Stores, Inc., 817 F.3d 624 (8th Cir. 2016)
  - Plaintiff’s multiple sclerosis symptoms worsened to the point she could no longer perform the essential functions of her job as a stocker.
  - Job transfer to overnight cashier was not an adverse employment action because the new position fit her restrictions and also included a pay raise.
  - Plaintiff’s preference for the stocker position because she felt humiliated and uncomfortable performing the customer service functions of the cashier position did not qualify the transfer as an adverse action.
Reyazuddin v. Montgomery County, Maryland, 789 F.3d 407 (4th Cir. 2015)

– Plaintiff, who was blind, could no longer perform her job when the County changed software programs.

– County assigned plaintiff a new slate of “make work” that only occupied about half the work day and varied from day to day.

– District court held that this was “comparable employment” and thus reasonable.

– Fourth Circuit reversed, held that this was a fact question.
Reassignment (cont.)

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

**General Rule:** It would be an undue hardship for an employer to violate a consistently enforced seniority policy or CBA term in order to place an individual in an open position as a reasonable accommodation.

**Exception:** Reassignment may be available if an individual can show the seniority provision or CBA term was not strictly followed.
Undue Hardship

  - Candidate for nurse clinician job who is deaf rejected because of cost of sign language interpreters.
  - Salary for nurse’s position is $60,000 and the estimated annual cost of interpreter is $120,000.
  - Department in which plaintiff would have worked had a budget of $3.4 million, and no money budgeted for the cost of reasonable accommodations.
Undue Hardship (cont.)

  – Court granted summary judgment in plaintiff’s favor on undue hardship claim.
  – Fact that the department had no budget for reasonable accommodation was irrelevant.
  – Operating budget for the entire hospital was $1.7 billion; interpreter would have been 0.007% of that budget.
  – Employer’s “direct threat” defense as based on post-hoc rationalization.
Improper Conduct & Discipline

- Employees with disabilities are held to the same standard of conduct as non-disabled employees.
- Employer may impose the same discipline to all employees.
- An employer is not required to excuse past misconduct as an accommodation, even if it is the result of the individual’s disability.
ADA & Pregnancy

• Pregnancy-related impairments are disabilities if they substantially limit one or more major life activities.

• Covers pregnant employees who are regarded as having disabilities.
  • Takes adverse employment action due to actual or perceive pregnancy-related impairment.
ADA & Pregnancy

• Major life activities that may be affected by pregnancy-related impairments include walking, standing, and lifting, as well as major bodily functions such as the musculoskeletal, neurological, cardiovascular, circulatory, endocrine, and reproductive functions.

• Lactation is a pregnancy-related medical condition.
Publicizing Accommodations

• Medical information about employees with disabilities must be kept in the strictest of confidence.

• ADA prohibits disclosure of medical information except in certain limited situations: supervisors/managers (need to know); first aid/safety personnel; government officials investigating compliance with ADA.
Protected Activities
Retaliation

- When an employee requests an accommodation or aids another in getting an accommodation, that activity may be protected by the ADA.

- Filing a claim with the EEOC or MDCR.
EXAMPLES OF UNLAWFUL HARASSMENT BASED ON DISABILITY

- Imitating an employee's disability;
- Derogatory names or intimidating references to an employee’s mental or physical impairment;
- Repeated comments/references/concern related to person with disability, or reasonable accommodations received;
- Comments reflecting resentment of “special status” of person with disability, or reasonable accommodations received.
Co-worker blogs about work at the correctional facility (from home)

- Anonymous comments re: Ralph, i.e. “one handed bandit,” “rat claw”
- Co-workers read blog on work computers, would discuss at work.
- Ralph reported to supervisors.
- Management
  - Said they couldn’t do anything about anonymous comments (made outside of work & no way of knowing who was making them)
  - Reiterated non-discriminatory policy at safety meeting.
  - No other corrective action taken.
- Derogatory comments about Ralph continue.
Co-worker Blog

- Ralph files a charge against the employer. Could he have a viable claim?

- What if it was determined that all of the derogatory comments had been made by non-employees?

- The correctional facility has told the blogging employee that he must stop blogging about work. Co-workers are angered by this and start putting their right hand in their pocket whenever he is around to mock Ralph. What do you do?
ADA POLICY EXCLUSIONS
EXCLUSIONARY POLICY ONE:

100 PERCENT HEALED POLICIES

• In these cases, the employer requires that employees be "100 percent healed" before returning to work.
• Variations are "maximum medical improvement" and "no restrictions" policies.
• These policies violate the ADA because the employer does not engage in the individualized assessment of the ability of the employee to perform his or her job with reasonable accommodation.
EXCLUSIONARY POLICY TWO: MAXIMUM MEDICAL LEAVE

- Here, the employer states that an employee is entitled to only so much medical leave and no more. If the employee has not returned by the end of the provided leave, the employee is terminated.
- These cases vary by the length of the leave permitted or whether leave is permitted at all, such in where cases in which the employee is probationary or not FMLA-eligible.
- Again, these policies violate the ADA because they don't account for the employer's obligation to provide reasonable accommodation, which can include providing or extending the leave if it is not an undue hardship.
EXCLUSIONARY POLICY THREE:
TIME AND ATTENDANCE POLICIES

• In these cases, the employer has inflexible time and attendance policies.
• Most common type of exclusionary policy are "no fault" attendance policies.
• These policies can violate the ADA if the employer does not modify the policy for persons who require a reasonable accommodation under the ADA.
EXCLUSIONARY POLICY FOUR
REQUIRING COMPETITION FOR VACANT POSITIONS

- These cases arise when the employer refuses to re-assign a current employee to a vacant position as a reasonable accommodation, but instead requires competition among all "eligible" employees.

- These policies ignore the provision in the ADA that transfer of a person with a disability can be a reasonable accommodation in certain circumstances.
ADA – Practical Tips
Preventing Charges of Discrimination

• Focus on finding a reasonable accommodation rather than a reason to deny a reasonable accommodation
• Consider reassignment to a vacant position as a reasonable accommodation
• Do not have a 100% or “full duty” return to work policy
• Make Case by Case Decisions
ADA – Practical Tips
Preventing Charges of Discrimination

• Consider more than 12 weeks of unpaid leave
• Consider an ADA Coordinator
• Do not contract out discrimination
• Assure individuals conducting interviews, answering phones and greeting applicants have had training in the ADA.
Closing

• The expectation is for the employer to provide a Reasonable Accommodation unless it creates and Undue Hardship.

• The Reasonable Accommodation Process is very complex because each situation (request) is very unique and has to be assessed independently.
QUESTIONS?
Employment and the ADA Resources

• Equal Employment Opportunity Commission
  – 800-669-4000
  – http://www.eeoc.gov

• Job Accommodation Network
  – 800-526-7234
  – http://askjan.org

• ODEP (DOL Office Disability Policy)
  – 202-376-6200
  – www.dol.gov/dol/odep/
Contact Information

For Outreach / Training
Contact:
Lolita Davis
(313) 226-3783
Lolita.davis@eeoc.gov