ADA and Workplace Safety

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David was named to the 2018 Super Lawyers® and the 2007, 2010-2017 Rising Star® listings. He teaches in the Otterbein MBA and undergraduate Business Administration programs as an adjunct professor of Business Law, Ethical Leadership, and Communications & Negotiations. In 2015, he was chosen to receive the Otterbein Part-Time Faculty Award for teaching in the discipline. David is a past recipient of the Otterbein University Young Alumni Award for Community Engagement and is a Columbus Bar Foundation Fellow. David has served as the Nationwide Children's Hospital Development Board President, Vice President, Treasurer and twice a Committee Chairperson. He was an inaugural inductee into the Sts. Peter & Paul School (Wellston, OH) Alumni Hall of Fame. Currently, David also volunteers as an assistant track and cross-country coach, and Assistant Scout Master with Boy Scout Troop 85, at St. Paul school (Westerville).

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I. ADA GENERALLY

A. Purpose. The Americans with Disabilities Act of 1990 (ADA) was enacted to ensure that individuals with disabilities are given the same consideration for employment that individuals without disabilities are given. 42 U.S.C. 12112(a) (1994); 42 U.S.C. 12112 (b)(4) (1994).

B. Protection. The ADA makes it unlawful for an employer to discriminate against a qualified individual on the basis of disability. The ADA also prohibits discrimination against individuals with disabilities in state and local government services, public accommodations, transportation and telecommunications.

C. Employers Subject to the ADA

1. To be covered by the ADA, the employer must have had at least 15 employees for each working day in each of at least 20 weeks in the preceding year. 29 C.F.R. §1630.2(e).

2. Title II of the ADA encompasses employment discrimination by employers. *Bledsoe v. Palm Beach Cty. Soil and Water Conservation Dist.*, 133 F.3d 816 (11th Cir. 1998).

D. Individuals Covered by the ADA

1. The ADA covers employees and job applicants who are qualified for the position held or desired, and prevents discrimination against these individuals on the basis of disability. 42 U.S.C.A. § 12112.

    a. Who is an employee? The mere fact that a person has a particular title in the organization (e.g. partner, director, vice president) does not necessarily mean that the person is an "employee" under the ADA. Nor does the mere existence of an employment agreement or contract automatically mean that the person is an employee. Instead, whether a person is an employee depends all on the incidents of the relationship between the company and the organization. Courts will apply the "right to control" test to determine if the individual is an employee, analyzing the following six factors:

        i. Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;

ii. Whether and, if so, to what extent the organization supervises the individual's work;

iii. Whether the individual reports to someone higher in the organization;

iv. Whether and, if so, to what extent the individual is able to influence the organization;

v. Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and

vi. Whether the individual shares in the profits, losses, and liabilities of the organization.

Clackamas Gastroenterology Associates, P.C. v. Wells, 537 U.S. 1169 (2003).

b. Volunteers are generally not considered employees under the ADA. *Tawes v. Frankford Volunteer Fire Company*, 2005 U.S. Dist. LEXIS 786; 16 Am. Disabilities Cas. (BNA) 660, (U.S. Dist. Del. Jan. 13, 2005). Title II of the ADA subtitle A, protects qualified individuals with disabilities from discrimination by state and local governments on the basis of disability in services, programs, and activities provided by State and local government entities. Thus, public entities must closely review volunteer requests for accommodation or other ADA related matters. For example, a volunteer teaches GED classes to inmates in the county jails requests that her service dog accompany her at all times.

E. Elements of a Disability Discrimination Claim

To prove a claim of discrimination under the ADA, plaintiffs must establish that:

1. They have a disability;

2. They are otherwise qualified for the position; and

3. Their employer discriminated against them on the basis of their disability.

F. Remedies

1. Disabled individuals alleging an act of unlawful discrimination can obtain the right to sue for reinstatement or hiring, back pay, and any other equitable relief that the court deems appropriate after exhausting the administrative remedies available with the EEOC.

2. In accordance with the Civil Rights Act of 1991, amending Title VII, disabled individuals who are discriminated against in employment are entitled to compensatory and punitive damages and trial by jury.

3. The prevailing party can recover reasonable attorney's fees for administrative and judicial proceedings at the agency's or the court's discretion.

II. WHAT IS A DISABILITY UNDER THE ADA?

A. Generally. An individual has a disability under the ADA if that individual:

1. Has a physical or mental impairment that substantially limits a major life activity;

2. Has a record of a substantially limiting impairment; or

3. Is regarded as having a substantially limiting impairment.

B. Physical or Mental Impairment

1. A physical or mental impairment is any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of several body systems, or any mental or psychological disorder. 29 C.F.R. § 1630.2(h).

C. Major Life Activity

1. The definition of "major life activities" under the ADA includes:

a. eating;
b. sleeping;
c. reading;
d. concentrating;
e. thinking;
f. communicating;
g. operation of the immune system;
h. normal cell growth; and
i. digestive, bowel, bladder, brain, neurological, respiratory, circulatory, reproductive functions.

2. Further examples of "Major life activities" are listed in the EEOC's regulations at 29 C.F.R. §1630.2(i):

a.	hearing;	h.	learning;
b.	seeing;	i.	working;
c.	speaking;	j.	concentrating;
d.	breathing;	k.	paying attention;
e.	performing manual tasks;	l.	exercising judgment; and
f.	walking;	m.	interacting with others.
g.	caring for oneself;		

3. Prior to ADA Amendments in 2009, a major life activity had to be "of central importance to daily life." *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002). This standard resulted in very few employees being able to actually qualify as "disabled" under the ADA. The ADA Amendments, however, expressly overturned *Toyota*. Instead, the Amendments mandate that the question of whether someone's impairment limits a major life activity should be liberally construed and "should not demand extensive analysis."

D. "Record" of a Substantially Limiting Impairment

1. Having a "record of" an impairment includes individuals who previously had an impairment, even if they are not currently impaired or if they were wrongly classified as having an impairment.

2. Examples of records that may contain history of impairments:

a. education;
b. medical; and
c. employment.

E. "Regarded as" Substantially Limited in a Major Life Activity

1. An individual is "regarded as" having an impairment if the individual is subjected to an action prohibited by the ADA because of an actual or perceived impairment that is not transitory and minor.

2. An individual does not have to be "substantially limited" in any major life activity in order to be "regarded as" having a disability by the employer (i.e., there is no functional test).

3. In determining whether the employee is "regarded as" having a disability, courts will often look to the employer's conduct and interactions with the employee. Employers often have concerns that may result in excluding individuals with disabilities. Such concerns include:

   a. productivity;
   b. safety;
   c. insurance;
   d. liability;
   e. attendance;
   f. cost of accommodation and accessibility;
   g. workers' compensation costs; and
   h. acceptance by coworkers and customers.

   29 C.F.R. Part 1630 Appendix

4. An individual is "regarded as" having a disability by the EEOC if either:

   a. The individual has a physical or mental impairment that does not substantially limit a major life activity but is treated by the employer as having such limitation;

      i. Example: An individual who has an anxiety disorder and is reassigned to less stressful work because the employer fears he may suffer a panic attack.

   b. The individual has a physical or mental impairment that substantially limits a major life activity only as the result of the attitudes of others toward the impairment;

      i. Example: An individual has a learning disability. This impairment is substantially limiting only because of the attitude of others towards the disability.

   c. The individual has none of the impairments defined by the act but is treated by the employer as having an impairment;

      i. Example: The employer hears a rumor that the employee has a personality disorder and treats the employee as if such disorder exists.

      29 C.F.R. Part 1630 Appendix

5. Employees can establish that the employer regarded them as disabled "whether or not the impairment limits or is perceived to limit a major life activity." This substantially broadens the scope of regarded as claims.

III. WHO IS A "QUALIFIED INDIVIDUAL" UNDER THE ADA?

A. Generally

1. *Reminder*: Employers may not discriminate against "qualified individuals" on the basis of disability. 42 U.S.C.A. § 12112.

2. To be afforded the ADA's protections, the individual with a disability must be qualified to perform the essential functions of the position with or without reasonable accommodation.

3. The individual must satisfy educational, experience, skill, license, and any other job qualification standards.

4. The ADA does not interfere with the right of an employer to hire the best-qualified applicant. There are no affirmative action requirements; meaning that the employer does not have to choose a disabled employee over a more qualified applicant. The ADA simply prohibits employers from discriminating against qualified applicants or employees because of a disability.

B. Two-Step Process

The determination of whether an individual is a "qualified individual" under the ADA is a two-step process:

1. **Step One:** Does the individual satisfy the prerequisites for the position? (e.g., education, experience, skills, licenses, etc.).

    a. For example, an employer must determine whether an accountant who is paraplegic is qualified for a certified public accountant's position by first finding out whether the applicant is a licensed accountant with a CPA.

2. **Step Two:** Can the individual perform the essential functions of the position, with or without a reasonable accommodation?

    a. This is to ensure that individuals with disabilities who can perform the essential functions of the position are not denied employment

opportunities because they are not able to perform marginal functions of the position.

C. Essential Functions

1. Essential functions are the fundamental job duties that an employee must be able to perform, with or without reasonable accommodation.

2. A job function may be considered "essential" for many reasons, including, but not limited to, the following:

   a. The reason the position exists is to perform that function;

   b. There is a limited number of employees available who can perform the function; and

   c. The function is be highly specialized and requires a high degree of expertise.

   29 C.F.R. § 1630.2(n)(2).

3. Evidence of essential function that the EEOC and courts will consider:

   a. The employer's judgment as to which functions are essential;

   b. Written job descriptions prepared before advertising or interviewing for a job;

   c. The work experience of current and past employees in that position;

   d. The amount of time actually spent performing that function;

   e. The consequences of not requiring that employee to perform that function; and

   f. The terms of a collective bargaining agreement.

   29 C.F.R. §1630.2(n)(3).

4. Employer is not required to cut an essential job function to accommodate an employee with a disability. Plaintiff worked in a juvenile detention facility and was responsible for direct care and supervision to youth offenders when he injured his knee when breaking up a fight between two

detainees. After returning to work on light duty and undergoing knee surgery, the Employee was denied his requested accommodation, i.e., reassignment to a job involving no interaction with the youth at the facility. Plaintiff alleged that the Employer refused to make reasonable accommodations and subsequently removed him from the position. However, the District Court held that an employee's request to modify a position by removing an essential job function is not a reasonable accommodation under the ADA or the Rehabilitation Act. The Court held that his requested accommodation would have effectively eliminated the position's undisputed essential function of providing direct care and supervision to youth. *Raiford v. Md. Dep't of Juvenile Services*, 2015 WL 4485497 (D. Md., July 21, 2015).

D. Job Descriptions

1. Although not required by the ADA, employers can benefit from developing well-written and accurate job descriptions that set forth the "essential functions" for each employment position in at least two significant ways:

    a. **First:** Written job descriptions are extremely helpful in defending against a claim of disability discrimination, since it is evidence of a position's "essential functions."

        i. When a charge of discrimination is brought under the ADA, an initial issue will be whether the disabled individual could perform the essential functions of the position, with or without reasonable accommodation. Employers will have an effective defense if they can readily establish that the disabled individual could not perform one or more of the position's essential functions, even with reasonable accommodation. A well-written job description that was prepared ***before*** advertising or interviewing applicants is evidence of what a position's essential functions actually are, and can be persuasive in establishing a defense.

    b. **Second:** Written job descriptions help employers identify whether an applicant will be able to perform the essential tasks required of a particular position and help employers formulate accommodation solutions, if necessary.

        i. During the interview process, employers are not allowed to ask whether a person has a disability that would prevent them from performing certain job tasks. However, employers may ask applicants whether they are able to

perform the "essential functions" of a position, such as the ability to meet attendance or to operate a particular machine. By having these essential functions clearly articulated in the job description, employers will be able to readily assess whether an individual can perform the essential function, and can help guide the inquiry as to whether a "reasonable accommodation" can be made.

c. Written job descriptions can also be helpful to employers when conducting performance evaluations and in returning an employee with or without restrictions from leave.

2. Writing Effective Job Descriptions

a. When identifying the "essential function" of a position for a job description, employers should focus on the **purpose** of the function and the **result** to be accomplished, rather than the manner in which the function is presently performed.

i. A job description will be most helpful if it focuses on the results or outcome of a job function, not solely on the way it customarily is performed. A reasonable accommodation may enable a person with a disability to accomplish a job function in a manner that is different from the way an employee who is not disabled may accomplish the same function.

b. Some phrases and words are better than others in writing job descriptions. Certain words can exclude individuals with disabilities (e.g., see or hear), so it is better to choose words that actually convey the desired outcome rather than the method or process.

i. For example:

- "Records notes during weekly meetings" instead of "Writes down notes during meetings;"
- "Enters information into database" instead of "Types information into database;"
- "Communicates with supplier" instead of "Talks with supplier;" and
- "Identify" instead of "See."

3. Fit for Duty and Job Descriptions

A fitness for duty exam must be job related and consistent with business necessity. Job descriptions can help employers determine whether an employee is "fit for duty" and defend against any subsequent discrimination claim.

a. In one recent Ohio case, a teacher suffering from renal failure was terminated after failing two fitness for duty examinations, based on her inability to perform essential job functions as described in the job description—namely, supervising students, ensuring their safety, and responding in emergencies—with or without a reasonable accommodation. In ruling for the school district, the court held that: 1) the fitness for duty examinations were justified based on the evidence that she was frequently absent and had trouble managing the classroom; and 2) the fitness for duty examinations accurately assessed the teacher's ability to perform the essential functions of her job, since both examiners were provided a copy of the job description and independently concluded that she was not capable of performing the essential functions listed. The Sixth Circuit affirmed this ruling, and additionally held that there was no reasonable accommodation that would allow the teacher to perform the essential functions of her position. *Belasco v. Warrensville Heights City Sch. Dist.*, 86 F. Supp. 3d 748, 764–65 (N.D. Ohio), *aff'd*, 634 F. App'x 507 (6th Cir. 2015); *Belasco v. Warrensville Heights City Sch. Dist.*, 634 F. App'x 507, 515 (6th Cir. 2015).

b. In another case, the court relied on the written job description as evidence of the essential functions of a corrections officer when the CO failed a fitness for duty examination due to loss of use in her right foot. The job description of a CO stated that one of the prerequisites for the position was the ability to demonstrate physical fitness. This was necessary because a CO was expected to perform "all functions required" of the several areas to which he or she would be rotated. *Batiste v. Cuyahoga Cty. Sheriff's Dep't*, 2005-Ohio-6230, ¶¶ 29-30.

4. Recommendations:

a. Complete an objective job analysis to identify essential functions for each employment position;

b. When listing the essential functions on a job description, focus on the desired outcome/result and not the method/process;

c. Include a separate section in the job description for essential functions; and

d. Use words that do not exclude individuals with disabilities.

IV. REASONABLE ACCOMMODATIONS UNDER THE ADA

A. Generally

1. *Reminder:* To be afforded the ADA's protections, the individual with a disability must be qualified to perform the essential functions of the position with or without reasonable accommodation.

2. A reasonable accommodation is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of the job, or to enjoy the benefits and privileges of employment equal to those enjoyed by employees without disabilities. The ADA requires that the employer make reasonable accommodations for known physical or mental limitations of an otherwise qualified employee or applicant with a disability. 42 U.S.C. § 12112(b)(5)(A) (1994). However, the employer need not make the requested accommodation if it would result in further harm to the employee or applicant. *Chevron, U.S.A., Inc. v. Echazabal*, 122 S. Ct. 2045 (2002).

3. The challenging employee initially bears the burden of identifying an accommodation, the costs of which facially do not exceed its benefits. If the employee satisfies the burden, the employer then has the burden to demonstrate that the proposed accommodation creates an "undue hardship."

4. There are three categories of reasonable accommodation:

   a. Those that are required to ensure equal opportunity in the application process;

   b. Those that enable the employer's employees with disabilities to perform the essential functions of the position held or desired; and

   c. Those that enable employees with disabilities to enjoy equal benefits and privileges of employment that are enjoyed by employees without disabilities.

5. Examples of reasonable accommodations include:

   a. The acquisition or modification of equipment or devices;

   b. Job restructuring;

   c. Part-time or modified work schedules;

   d. Reassignment to a vacant position;

   e. Adjusting or modifying examinations, training materials or policies;

   f. Providing readers and interpreters; and

   g. Making the workplace readily accessible to and usable by people with disabilities.

6. If an applicant or employee refuses to accept a reasonable accommodation, then the individual may be considered non-qualified. *Hankins v. The Gap*, 84 F.3d 797 (6th Cir. 1996).

7. The identification of a reasonable accommodation:

   a. Often, when a qualified individual with a disability requests a reasonable accommodation, the appropriate accommodation is obvious.

   b. The individual can make an accommodation request based upon the individual's life and work experience.

   c. When the appropriate accommodation is not obvious, then the employer must make a reasonable effort to identify a reasonable accommodation by engaging in an interactive process with the employee. The best method is to ask the employee or applicant about potential accommodations that would allow them to perform the essential functions of the job or participate in the application process.

      i. Accommodations must be made on a case-by-case basis, depending on the nature and extent of the disability and the requirements of the job.

ii. The principal test is effectiveness, e.g. does the reasonable accommodation allow the individual to perform the essential functions of the job?

d. Courts may require employers to look deeper and more creatively into the various possibilities suggested by an employee with a disability. *See, Skerski v. Time Warner Cable Company*, No. 00-3199, 2001 U.S. App. Lexis 1504 (3rd Cir. July 9, 2001), *C.f. U.S. Airways, Inc. v. Barnett*, 122 S. Ct. 1516 (2002) (holding that employers are not required to disturb established seniority systems to make an accommodation).

e. The accommodation does not need to be the best accommodation or the accommodation that the individual would prefer, although primary consideration should be given to the individual involved.

Employers need not grant the employee's preferred accommodation; instead, employers need only provide an accommodation that is effective.

f. The employer has the final determination of effectiveness and may choose an accommodation that is less expensive or easier to provide.

i. *Core v. Champaign County Board of Commissioners*, 3:11-cv-166 (S.D. Ohio, Oct. 17, 2012). Beginning in 2008, Core, a social worker, claimed to have difficulty breathing when exposed to perfumes and fragrances. Later she claimed Japanese Cherry Blossom perfume triggered her asthma and that exposure to this specific perfume jeopardized her life. Core reported approximately five incidents of perfume exposure from 2008 to early 2010 and her treating nurse practitioner opined that Core needed a work environment free of perfumes, fragrances and/or allergens.

Over a period of several years the Employer diligently attempted to accommodate Core's alleged condition. For example, it offered her the ability to use an inhaler, exit the building, notify employees to contact her via email/phone if possible, post notices requesting that people refrain from wearing Japanese Cherry Blossom perfume among other offers of accommodation. Core refused them all and demanded a fragrance-free/allergen-free workplace or to work from home. The Employer advised that it is impossible

to meet her demands so Core filed suit for violation of the ADA.

The Court granted summary judgment to the Employer on all claims for several reasons. First, even assuming she is disabled, a perfume-free environment and/or working from home are unreasonable based upon her job duties. Second, the Employer engaged in the interactive process as required by the ADA and offered several reasonable accommodations all of which were rejected without rationale by Core.

8. Increased job duties not necessarily an "adverse employment action" under the ADA.

An employee held various different positions during his tenure with the company. His most recent position was a lateral transfer which did not alter his pay or benefits, and was a "dynamic, fluid" position in which job duties evolved from week to week. As his assignments and responsibilities increased, the Employee claimed his job was "unmanageable" and requested accommodations for mental health issues. He eventually took medical leave and did not return, alleging that his higher workload constituted an adverse employment action. The Eighth Circuit held that the increase in job duties and responsibilities, while fast-paced and stressful, did not constitute a material change in the terms or conditions of his employment ("that was the job [Plaintiff] signed up for"). As such, Plaintiff failed to establish an adverse employment action under the ADA or the ADEA, and the Eighth Circuit upheld the District Court's grant of summary judgment to the employer on all charges. *Sellers v. Deere & Co.*, 2015 U.S. App. LEXIS 11506 (8th Cir., July 2, 2015), affirming *Sellers v. Deere & Co.*, 23 F. Supp. 3d 968, 2014 U.S. Dist. LEXIS 69227 (N.D. Iowa, May 19, 2014).

9. An employee cannot compel his or her employer to provide a specific accommodation if another reasonable accommodation is available. *Hankins v. The Gap*, 84 F.3d 797 (6th Cir. 1996). *See also, Keever v. City of Middletown*, 145 F.3d 809 (6th Cir. 1998) (Stating that an employer offering an injured police officer a desk job was a reasonable accommodation even though it was not the employee's preferred accommodation).

10. Nor does an employer have to create a position that does not exist to accommodate an injured employee. *Hoskins v. Oakland County Sheriff*, 227 F.3d 719 (6th Cir. 2000); *Treanor v. MCI Telecommunications Corp.*, 200 F.3d 570 (8th Cir. 2000).

11. Reasonable accommodation does not require accepting decreased performance standards.

B. Defenses to Not Making a Reasonable Accommodation

1. Undue hardship

a. The failure to provide reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability is an ADA violation, unless doing so would place an undue hardship on the employer's business.

b. Undue hardship means that an accommodation would be unduly costly, substantial or disruptive, or would fundamentally alter the nature or operation of the business.

c. Some factors to consider in determining if an accommodation is an undue hardship include: 29 C.F.R. §1630.2 (p)(1)

i. The nature and the cost of the required accommodation, taking into account the availability of tax credits and deductions and/or outside funding;

ii. The overall financial resources of the facility(s) involved;

iii. The number of employees at such facility;

iv. The impact on expenses and resources, and the impact upon other aspects of the operation of the facility;

v. The overall financial resources of the covered entity;

vi. The number of employees and number, type and location of its facilities;

vii. The type of operation(s) of the covered entity, including its composition, structure, and work force functions; and

viii. The geographic separateness, administrative or physical relationship of the facility (or facilities) in question to the covered entity.

29 C. F. R. §1630.2(p)(2)

d. If a particular accommodation poses an undue hardship:

i. The employer must make efforts to identify another accommodation that will not pose an undue hardship.

ii. Because of cost, the employer must consider:

- whether funding is available from an outside source;
- if the cost of providing the accommodation can be offset by state or federal tax credits or deductions; and
- whether the applicant or employee could provide the accommodation or pay for the portion of the accommodation that constitutes the undue hardship.

e. Uncertain Return Dates from Leave Constitutes Undue Hardship:

Even though the Employer, a manufacturing company, admitted to terminating an employee due to his disability, the Sixth Circuit determined it did not violate the ADA. Plaintiff had already been on an extended leave once before, and at the time of his termination, was on his second leave of unknown duration. He had exhausted his FMLA leave in addition to 14 weeks of short-term disability. The Court determined the Employee was unable to physically perform the essential job functions, which included physical labor, with or without an accommodation. Further, the Employee's impending need to take additional leave beyond the maximum leave allowed by the Employer (12-weeks of leave required by the FMLA) constituted an undue hardship to the Employer. *Aston v. Tapco Int'l Corp.*, 631 Fed. Appx. 292, 2015 U.S. App. LEXIS 20610 (6th Cir., Nov. 23, 2015).

2. Known limitations. The employer's obligation to provide reasonable accommodation applies only to known physical or mental limitations. The employer has knowledge of a disability if the employee tells the employer or if the disability and need for accommodation is obvious, e.g. the applicant uses a wheelchair.

3. Misconduct. The requirement of reasonable accommodation does not necessarily include a duty to tolerate misconduct by the employee. This area has proven especially problematic for the courts and administrative agencies because it is often difficult to separate the employee's behavior from the disorder itself. The following cases provide some examples:

   a. In one case, a physician was recorded on a hidden video camera stealing or destroying mail from other physicians' hospital mailboxes. After the hospital suspended his staff privileges, he brought suit under the Rehabilitation Act, contending that he suffered from a bipolar mental disorder, and that he should not have been disciplined. The Court of Appeals affirmed the granting of judgment in the hospital's favor on a variety of grounds, including the fact that the hospital was unaware of the physician's mental disorder and the lack of trust that would exist even after he sought treatment. *Landefeld v. Marion General Hospital, Inc.,* 994 F.2d 1178 (6th Cir. 1993).

   b. In another case, the Employee was a writer and editor who missed three to four months of work over a nine-month period. After he was discharged, he brought suit contending that the inconvenience caused to the Employer for his absence was "no more of an inconvenience to the Houston Post than if he had a long vacation." A jury entered a verdict in favor of the Employee, but the Court of Appeals reversed, concluding that absences of that duration were unreasonable as a matter of law. *Leatherwood v. Houston Post Co.,* 54 F.3d 553 (5th Cir. 1995).

C. Application of the Reasonable Accommodation Requirement

The actual decision on whether a reasonable accommodation is required should be made in light of the particular facts of each case. In general, to avoid litigation, an employer should attempt to be flexible and creative when determining the reasonable accommodation. The following discussion may provide guidance on the proper ways to comply with the ADA.

1. Changing existing facilities

   a. Covered employers may be required to alter existing facilities so that mentally disabled individuals may use them. Creating a workplace that is conducive to concentration and reduced anxiety has been considered a reasonable accommodation under the Rehabilitation Act. *Arneson v. Sullivan*, 946 F.2d 90 (8th Cir. 1991).

b. However, the Sixth Circuit decided that it would be unreasonable under the Rehabilitation Act to require an employer who had already placed the employee in the least stressful job, to place him in a virtually stress-free environment and immunize him from any criticism to accommodate his psychological handicap. *Pesterfield v. Tennessee Valley Authority*, 941 F.2d 437 (6th Cir. 1991).

Other possible accommodations:

i. Minimize distractions in the work area; and

ii. Build partitions or move an employee to a closed office.

2. Job restructuring/job training

a. The law does not require an employer to change the essential nature of a job in order to accommodate a disabled worker. *Boleman v. Manson State Bank*, 522 N.W. 2d 73, 81 (Iowa 1994). However, an employer may be required to restructure a job by reassigning a nonessential or marginal job functions if that function would prohibit a disabled individual from performing the job. In one case, a court found that an employer fulfilled its duty to accommodate by offering the Plaintiff another position with comparable but reduced responsibilities at a reduced salary. *Boytek v. Univ. of California*, 5 AD Cases (BNA) 1344 (9th Cir. 1996).

b. Essential functions need not be eliminated or reallocated to another employee, but instead the timing or method of performance may be modified. Even if the restructured job reduces efficiency, an employer must make the adjustments unless the inefficiency becomes an undue hardship.

3. Modifying existing work schedules

a. Attendance: In general, employers may consider predictable, reliable, and regular attendance of its employees as an essential job requirement. Employers are not required to accommodate erratic or unreliable attendance, as this does not constitute a reasonable accommodation.

The District Court determined that an employer may treat regular attendance as an essential job function, so long as such requirements are job-related, uniformly enforced, and consistent with business

necessity. Accordingly, the Court held that the Employer did not violate the ADA when it terminated an employee, who worked as a customer service representative for AT&T, for violating the company's attendance policy, which was documented in AT&T's employee handbook (i.e., a condition of employment is "the responsibility of being on the job as scheduled … good attendance and punctuality are required"). Under these circumstances, the District Court found that AT&T was not required to accommodate the Employee's repeated requests for erratic and indeterminate leave. *Solis v. AT&T*, 2015 U.S. Dist. LEXIS 89344 (W.D. Tex., July 9, 2015).

D. Recent Decisions:

Mosby-Meachem v. Memphis Light, Gas & Water Division, 883 F.3d 595 (6th Cir.2018): The U.S. Court of Appeals for the Sixth Circuit held that working from home was a reasonable accommodation for a pregnant attorney. The attorney, who was an in-house attorney for Memphis Light, Gas, & Water, was denied her request to work from home for ten weeks while she was on bed rest due to pregnancy complications. The plaintiff, who had previously suffered three miscarriages, had to undergo surgery in her 23rd week of pregnancy after doctors discovered a problem.

After requesting the accommodation, the Plaintiff worked remotely for three weeks without issue, until she received a letter stating that her request was denied. The letter stated that the request conflicted with the company's policy against telecommuting and that physical presence was an essential function of her job. She received sick leave for four weeks under FMLA and short-term disability for the remainder of the ten-week period. Following her ten-week restriction, the plaintiff returned to work up until her baby was born.

The attorney brought suit in federal court for claiming that her employer had violated the Americans with Disabilities Act ("ADA") by failing to accommodate her disability. The case went to trial and the jury found in favor of the plaintiff, awarding her $92,000 in compensatory damages. She was also awarded $18,184.32 in back pay and the reinstatement of her benefits by the district court.

On appeal, the Court distinguished the case from prior cases which held that "regular and predictable attendance" at a work site was are essential job functions. The court stated that it left the door open in those cases for telecommuting to be considered a "reasonable accommodation" under the ADA. Thus, it was reasonable for the jury to conclude that the attorney was "otherwise qualified" for the job with the requested accommodation of telecommuting.

Russ v. Memphis Light Gas & Water Div., 2017 U.S. App. LEXIS 26089 (6th Cir. 2017). Plaintiff, a supervisor and longtime employee of the company, suffered from Type 2 Diabetes and had recently been on leave due to a stroke. After the stroke, Plaintiff's doctor recommended that Plaintiff not work more than 40 hours per week, which the company agreed to accommodate. Plaintiff didn't have a scheduled start time, and usually came in around 10 or 11 AM each morning, which the company allowed as long as her work was completed. However, the company eventually asked Plaintiff to arrive no later than 9:30 AM and then moved the start time up to 8:30 AM. Plaintiff cited Memphis' early morning traffic as a major source of stress and requested a later start time, but this request for accommodation was denied. Plaintiff also requested that the company add three more employees to help her in order for her to complete her work in the agreed 40 hours per week, which was also denied.

Plaintiff retired and filed suit, alleging, among other things, failure to accommodate under the ADA and retaliation under Title VII and the ADA. The trial court dismissed the majority of the claims on summary judgment and the rest lost at trial, and Plaintiff appealed.

The Sixth Circuit held that Plaintiff had failed to adequately exhaust her administrative remedies for the Title VII claim, as she had not sufficiently detailed them in her EEOC charge. The Court then affirmed the trial court's holding regarding the denial of Plaintiff's requests for accommodations, ruling that the Plaintiff had failed to satisfy her burden to propose a reasonable accommodation.

The Court stated that while it may be a reasonable accommodation to shift some of a disabled employee's work to others, that work can only consist of a disabled employee's nonessential duties. The Court held that Plaintiff had failed to explain how the additional employees would assist her in only her nonessential duties. This failure to explain how the extra employees would be used didn't satisfy Plaintiff's burden to show that it was a reasonable accommodation. Additionally, while the Sixth Circuit did not consider whether the late start time was a reasonable request because Plaintiff failed to argue that point on appeal, the trial court noted that the ADA does not require an employer to accommodate an employee's commute.

Preston v. Great Lakes Specialty Fin., Inc., 2018 U.S. App. LEXIS 6755 (6th Cir. 2018). Plaintiff was hired by Great Lakes in May of 2012 as a senior financial analyst. But, Plaintiff struggled to meet deadlines over his first four months of work. Plaintiff attributed these delays to issues with the assignments and a sensitivity to light that made it difficult for him to work at his cubicle.

Plaintiff then informed Great Lakes that he had Autism Spectrum Disorder, and the company agreed to accommodate him by letting him work from home. On November 5, 2012, the day Plaintiff started working from home, he was given a

project that was due 8 days later, on November 13. The deadline was later extended to November 26, yet Plaintiff still had failed to complete the project by the time he was ultimately fired on December 7. Plaintiff claimed that the project wasn't completed due to a variety of reasons, including that the project violated "accepted convention in the field of finance."

Plaintiff then filed suit, claiming failure to accommodate and disability discrimination in violation of the ADA. The trial court granted summary judgment to Great Lakes, holding that Plaintiff was unqualified for the position with or without reasonable accommodation, which Great Lakes had provided, and showed no evidence of discrimination.

The Sixth Circuit upheld the trial court's decision, holding that he had failed to satisfy his burden of showing failure to provide a reasonable accommodation by providing sufficient evidence that he was "otherwise qualified to perform the essential functions of the position, with or without reasonable accommodation." Plaintiff argued that he would have been able to perform the essential functions of the job if he had been allowed to work from home all five days of the week instead of four. However, the Court pointed to his failure to complete the assigned project over a considerable amount of time as proof that he was unable to perform the job, with or without reasonable accommodations. Plaintiff also failed to allege any proof that he was unfairly discriminated against due to his disability.

E. Direct Threat Defense

1. The ADA permits the employer to require that the individual not pose a direct threat to the health and safety of the individual or others in the workplace.

2. Definition. Direct threat is a significant risk of substantial harm. 42 U.S.C. § 12111(3).

    a. **Substantial harm** is more than a slightly increased risk of harm and more than a speculative or remote risk. The determination that an individual poses a direct threat must be based on objective, factual evidence regarding an individual's present ability to perform the essential functions of the job.

3. Requires individualized assessment of the individual's present ability to safely perform the essential functions of the job;

4. Factors:
    a. duration of the risk;
    b. nature and severity of the potential harm;

c. likelihood that the potential harm will occur; and
d. imminence of the potential harm.

5. Effect of Accommodation. If the employee is determined to pose a direct threat of harm, then the employer must consider whether a reasonable accommodation would eliminate the harm or reduce the harm to an acceptable level.

6. An employer's determination that a person poses a "direct threat" for purposes of the ADA must be objectively reasonable. An employer's determination that a person is a direct threat is reasonable "when the employer relies upon a medical opinion that is itself objectively reasonable." However, an employer may also rely on testimonial evidence. Michael v. City of Troy Police Dept., 808 F.3d 304 (6th Cir.2015)

7. *Michael v. City of Troy Police Dept.*, 808 F.3d 304 (6th Cir.2015): Police department places the plaintiff on unpaid leave after the plaintiff had "engaged in a two-year pattern of aberrant behavior" and after the plaintiff underwent brain surgery for a benign brain tumor, two doctors concluded that the plaintiff "could not safely perform the functions of a patrol officer." The plaintiff brought suit alleging that his employer regarded him as disabled and discriminated against him. The aberrant behavior engaged in by the plaintiff included when his then-wife found a box of empty steroid vials which she turned over to the Chief of Police. The plaintiff demanded the vials back from the chief and when the Chief refused, the plaintiff "embarked on a two-year campaign to get them back, which included" secretly recording the Chief, suing the Chief in small-claims court, and attempting to serve the Chief with process at the Chief's retirement party. Additionally, the Plaintiff accompanied a cocaine dealer to several drug deals. The Department decided to suspend Plaintiff pending an investigation.

   The department discontinued the investigation when Plaintiff notified them that he had to undergo brain surgery for the third time. After the surgery, the Plaintiff's doctor cleared him for work but the Department was concerned about the plaintiff's fitness an requested that the plaintiff undergo a psychological evaluation. Two of three doctors determined that the Plaintiff was not fit for duty. One of the doctors who found that the plaintiff was not fit for duty examined the plaintiff for more than 7 hours and the other examined him for 90 minutes. The court held that he employer's reliance on these medical opinions was objectively reasonable and therefore the employer was not liable.

F. ADA Considerations

1. Are Drug/Alcohol Users Protected? Under the ADA, a person who is illegally using drugs is excluded from coverage. *Martin v. Barnesville Exempted Village Sch. Dist. Bd. of Ed.*, 209 F.3d 931 (6th Cir. 2000) ("The ADA does not protect plaintiff from his own bad judgment in drinking on the job."). The employer may hold illegal drug and alcohol users to the same performance and behavior standards to which it holds other employees. However, an individual who no longer engages in the use of illegal drugs may be an individual with a disability if he or she has: (1) Successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully; or (2) Is participating in a supervised rehabilitation program.

2. Is there a Duty to Accommodate Medical Marijuana? Marijuana use is still illegal under federal law. The Americans with Disabilities Act ("ADA") does not require employers to accommodate medical marijuana use. Therefore, employers are not liable under federal law for refusing to accommodate medical marijuana use.

    a. Under Ohio's new medical marijuana law, employers are not required to "permit or accommodate an employee's use, possession, or distribution of medical marijuana." See R.C. § 3796.28.

        i. *Swaw v. Safeway, Inc.*, W.D.Wash. No. C15-939 MJP, 2015 U.S. Dist. LEXIS 159761 (Nov. 20, 2015): A former employee brought suit against his former employer, alleging discrimination on the basis of disability under Washington Law. The plaintiff alleged that he was discriminated against when he was terminated after testing positive for marijuana. Plaintiff had a valid medical marijuana prescription and claimed that he used marijuana after hours to help with his medical condition. The employer maintained a drug-free workplace. Plaintiff claimed that the employer had a duty to accommodate his medical marijuana use, regardless of the policy. The court dismissed the action for failure to state a claim. Washington law, like Ohio law, does not require employers to accommodate medical marijuana use where the employer maintains a drug-free workplace, regardless of if it used off-site to treat a disability.

V. DRUG-FREE WORKPLACES AND ZERO-TOLERANCE DRUG POLICIES

A. Drug-Testing and the ADA

Employees and applicants currently engaging in the illegal use of drugs are not covered by the ADA when an employer acts on the basis of such use. A test for the illegal use of drugs is not considered a medical examination under the ADA; therefore, employers may conduct such testing of applicants or employees and make employment decisions based on the results.

If the results of a drug test reveal the presence of a lawfully prescribed drug or other medical information, such information must be treated as a confidential medical record.

B. Zero-Tolerance Policies

The new medical marijuana law in Ohio does not interfere with an employer's ability to adopt and enforce a zero-tolerance policy. Employers may prohibit use, possession or distribution of medical marijuana in the workplace.

1. Policy Update

    a. Although zero-tolerance policies remain unaffected, employers should consider updating drug policies to expressly state that regardless of the legalization of medical marijuana, its use, possession, and distribution is prohibited under the policy.

    b. The employer should distribute the updated policy to employees and obtain written acknowledgement that the employee has read and understands the policy.

C. Drug Testing and Employee Privacy

The Fourth Amendment of the U.S. Constitution which prohibits unreasonable searches and seizures does not encompass searches and seizures performed by private citizens or organizations. As a result, private employers have more freedom to administer drug tests as they believe necessary.

1. Case Example:

Seta v. Reading Rock, Inc., 654 N.E.2d 1061 (Ohio App. 12th Dist. 1995):

Reading Rock, Inc. (hereinafter "Reading") implemented a formal drug/alcohol screening policy. After the policy was implemented and Plaintiff signed an Employee Acknowledgment form, stating that Plaintiff had received, read, understood, and agreed to comply with the policy, Reading conducted a random drug and alcohol test of all its employees. Fourteen employees, including Plaintiff, tested positive for illicit drugs and Plaintiff, along with the other thirteen employees, were discharged. Plaintiff filed suit alleging several claims against Reading. Plaintiff alleged that Reading and its drug/alcohol policy violated her right to privacy. The Court found that Reading's mandatory drug testing did not constitute an invasion of privacy. According to the Court, generally Courts appear to be supportive of employers' attempts to create a safe working environment by holding that drug-testing does not constitute an invasion of the employees' common law right to privacy

2. Pre-Employment Drug Testing

Ohio has no law expressly regulating pre-employment drug or alcohol screening by private employers. Thus, employers can require pre-employment drug testing conditioned on the offer of employment. A private employer can deny employment to an applicant who tests positive for illegal drugs, including marijuana.

3. "Random" Drug Testing

Public and private employers are prohibited from unlawfully discriminating against employees. Therefore, drug testing must be administered on a nondiscriminatory basis (i.e. some basis other than age, disability, sex, race, national origin, ancestry, or religion). Random drug testing is the unscheduled, unannounced drug testing of randomly selected employees by a process designed to ensure that selections are made in a nondiscriminatory manner.

Unlike public sector employees, the Fourth Amendment protections do not extend to "searches or seizures" conducted by private entities in a private setting.

a. Case Example:

Sack v. Detroit Diesel Corporation, 1993 WL 385334 (Ohio App. 5 Dist.): Plaintiff was employed by Detroit Diesel until he was terminated from his employment after it was determined from Detroit Diesel's mandatory random drug test that Plaintiff's urine specimen contained an illegal substance (cocaine). Plaintiff alleged, amongst other allegations, that Detroit Diesel's mandatory random drug testing violated his right to privacy. The Court of Appeals Ohio for the Fifth District disagreed. Plaintiff argued that Detroit Diesel was a contractor with the United States government and, as such, was subject to the mandates of the United States Drug-Free Workplace Act (41. U.S.C. § 701, *et seq.*).

After reviewing the United States Drug-Free Workplace Act, the Court decided that the federal government did not require or even suggest that its contractors must perform mandatory random drug testing. Instead, the evidence in the record suggested that Detroit Diesel as a private entity incorporated its own mandatory drug testing procedures. Therefore, the drug testing performed by Detroit Diesel was not under compulsion of the Federal Government and such testing did not constitute governmental action subject to constitutional restrictions.

As such, the Court viewed the drug testing in a purely private setting and concluded that the right to privacy does not extend to an employee participating in a random drug testing procedure.

4. "Reasonable Suspicion" Testing

An employer may require an employee to submit to a drug or alcohol test when there is reasonable suspicion that an employee is under the influence of drugs or alcohol while on the job.

a. This reasonable suspicion should be based on objective facts or specific circumstances.

b. Examples of reasonable suspicion:
   i. Slurred Speech
   ii. Disorientation
   iii. Abnormal conduct or behavior

5. "Post-Accident" Drug Testing

   a. Testing following an accident can help determine whether drugs and/or alcohol were a factor. It is important to establish objective criteria that will trigger a post-accident test and how and by whom they will be determined and documented.

   b. Examples of criteria used by employers include, but are not limited to:

      i. Fatalities;

      ii. Injuries that require anyone to be removed from the scene for medical care;

      iii. Damage to vehicles or property above a specified monetary amount (i.e. dollar amount of damage and extent of injury); and

      iv. Citations issued by the police.

         - Some employers expand the test trigger to incidents even if an accident or injury was averted and hence use term "post-incident."

   c. Although the results of a post-accident test determine drug use, a positive test result in and of itself cannot prove that drug use caused an accident. When post-accident testing is conducted, it is a good idea for employers not to allow employees involved in any accident to return to work prior to or following the testing. Employers also need to have guidelines to specify how soon following an accident testing must occur so results are relevant.

      i. Substances remain in a person's system for various amounts of time, and it is usually recommended that post-accident testing be done within 12 hours.

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