

## Welcome to the 2010 Legal Issues Webinar Series

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## “Invisible Disabilities” and the ADA

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## Overview – “Invisible Disabilities” and the ADA



Focus on issues unique to disabilities that are “hidden” or “invisible.”

1. Invisible Disabilities and the ADA Amendments Act (ADAAA)
2. Medical Inquiries, Examinations & Disclosure
  - a. Pre-Employment Medical Examinations
  - b. Personality Testing
  - c. Fitness for Duty Examinations
  - d. Drug Testing
  - e. Limitations on Seeking Medical Information
  - f. Disclosure and Qualified / Direct Threat Issues
3. Confidentiality
4. Disabilities Must Be Known
5. Disability Harassment

## Does the Condition Constitute a Disability Under the ADAAA?

See DBTAC: Great Lakes ADA Center briefs on the  
ADAAA and Major Life Activities, at:  
<http://adagreatlakes.org/Publications/>.

## EEOC NPRM: General Rules



- Definition of disability “shall be construed in favor of broad coverage” ... to the maximum extent permitted by the terms of this Act.”
- Episodic conditions are examined when active.
- Mitigating measures are not included when assessing substantial limitation (except ordinary eye glasses and contact lenses).
- **Note:** Often, invisible disabilities such as diabetes, epilepsy, cancer, and mental illness, are episodic in nature and/or involve issues relating to mitigating measures.

## ADAAA Major Life Activities

### New Major Life Activities in the ADAAA

- Reading
- Bending
- Communicating
- Interacting with others (**Not in ADAAA but in NPRM**)
- **Note:** These new listed activities should benefit people with invisible disabilities.

## ADAAA Major Bodily Functions

### New ADAAA Category: Major Bodily Functions

In ADAA		Added in EEOC NPRM
immune system	neurological	special sense organs & skin
normal cell growth	brain	genitourinary
digestive	respiratory	cardiovascular
bowel	circulatory	hemic
bladder	endocrine	lymphatic
reproductive functions		musculoskeletal

**Lists are not exhaustive - no negative implication by omission**

## Application of Major Bodily Functions to Invisible Disabilities

- **immune system:** HIV/AIDS, auto-immune 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, intellectual disabilities, mental illness
- **respiratory:** asthma
- **circulatory:** heart disease, high blood pressure
- **endocrine:** diabetes

## EEOC NPRM: List of Consistently Limiting Impairments

- (A) Autism
- (B) Cancer
- (C) Cerebral palsy
- (D) Diabetes
- (E) Epilepsy
- (F) HIV or AIDS
- (G) Multiple sclerosis and muscular dystrophy
- (H) Major depression, bipolar disorder, PTSD, OCD, or schizophrenia

**Note:** Many of these relate to invisible disabilities.

## EEOC NPRM: Impairments That May Be Disabling for Some But Not Others

- **General Rule:** Interpret in favor of “broad coverage”
  - **These Impairments:** May require “more analysis”
    - ◊ But “should not demand an extensive analysis.”
- Some EEOC Examples relating to invisible disabilities:**
- High Blood Pressure
  - Hyperthyroidism
  - Learning Disability
  - Carpal tunnel syndrome
  - Hyperthyroidism
  - Certain psychiatric impairments such as panic disorder, anxiety disorder, and some forms of depression other than major depression.

## Medical Inquiries, Examinations, and Disclosure

See DBTAC: Great Lakes ADA Center Briefs  
on Medical Inquiries, Direct Threat, ADA, and  
other relevant topics available at:  
[www.adagreatlakes.org/Publications](http://www.adagreatlakes.org/Publications)

## Pre- Employment Medical Examinations

*O'Neal v. City of New Albany*, 293 F.3d 998 (7th Cir. 2002)

- **Facts:** Police applicant required to take medical tests based on pre-employment physical to confirm he did not have “heart problems.”
- Submitted Medical Information showing no coronary disease.
- Medical Board Dr. still refused to certify without tests costing \$1500.
  - ❖ Applicant refused to pay for tests and was not hired.
- **Court:** Exam was proper - Post-offer exam does not have to be job-related.
- However, results must be used in a way that is job-related and consistent with business necessity.
  - ❖ Plaintiff completed all non-medical screening & acknowledged “conditional [job] offer.”
    - (A) all entering employees are subjected to such an examination...;
    - (B) information is kept confidential, and;
    - (C) use of test results must comply with ADA medical inquiry criteria (“job-related and consistent with business necessity.” 42 U.S.C. §12112(d)(3).

## Pre-Employment Inquiries (?)

*Birch v. Jennico 2*, 2006 WL 1049477 (W.D. Wis. April 19, 2006)

- Medical exam required of a person living with HIV and cancer prior to being hired by company where working as a temp. (new position).
  - ❖ Co. requested exam from agency after hearing about cancer.
  - ❖ After the examination, plaintiff was not hired.
- **Issues:** Who was the employer?
  - ❖ Was this a prohibited pre-employment examination?
  - ❖ Was exam “job-related and consistent with business necessity” due to a direct threat? (would work with toxic chemicals)
- **Court:** Denied defendant’s motion for summary judgment
- If exam required prior to hiring, then “ADA may have been violated.”
  - ❖ Medical exams must “be conducted as a separate, second step of the selection process, after an individual has met all other job prerequisites.”

## What is a “Real” Job Offer?

*Leonel v. American Airlines, Inc.*, 400 F.3d 702 (9th Cir. 2005)

- Three applicants who were HIV-positive alleged the employer conducted unlawful pre-employment medical examinations.
- Employer extended job offer contingent on results of a medical examination and on background checks, including employment verification and criminal history checks.
- **Court:** Possible violation of ADA - employers can only conduct medical examinations as the “last step” of the application process and only after making a “real” job offer.
- Company must establish that it could not reasonably have completed the background checks before subjecting the appellants to medical examinations and questioning. “It has not done so.”

## Personality Testing – Are Personality Tests Medical Examinations?

*Karraker v. Rent-A-Center*, 411 F.3d 831 (7<sup>th</sup> Cir. 2005)

- **Facts:** RAC used MMPI for job applicants.
- **Issue:** Is the MMPI a medical examination?

### Some MMPI Questions

- I see things or animals or people around me that others do not see.
- I commonly hear voices without knowing where they are coming from.
- At times I have fits of laughing and crying that I cannot control.
- My soul sometimes leaves my body.
- At one or more times in my life I felt that someone was making me do things by hypnotizing me.
- I have a habit of counting things that are not important such as bulbs on electric signs, and so forth.

## Medical Examination Criteria



### Court Cited EEOC Guidance on Medical Inquiries:

- “Psychological tests that are ‘designed to identify a mental disorder or impairment’ qualify as medical examinations, but psychological tests “that measure personality traits such as honesty, preferences, and habits” do not.”
- “RAC argues that ... the test only measured ... ‘the extent to which the test subject is experiencing the kinds of feelings of ‘depression’ that everyone feels from time to time (e.g., when their favorite team loses the World Series).”
- “Although that particular example seems odd to us (can an Illinois chain really fill its management positions if it won't promote disgruntled Cubs fans?), the logic behind it doesn't seem to add up, either...”



## Karraker – Personality Testing A “Poor Predictor”?

- “Either the MMPI was a very poor predictor ..., (which might be one reason it is no longer used by RAC), or it actually was designed to measure more than just an applicant's mood on a given day...”
- **Court Holding:** “MMPI is best categorized as a medical examination.”
- **Designed** to diagnose mental illness.
  - ❖ Even if vocational, not a medical, scale is used.
- “Likely had the effect of excluding” people with mental illness.
- **Query:** Would the MMPI be lawful if given after a job offer?
- **Query:** Might personality tests also discriminate against people with:
  - ❖ Intellectual disabilities or cognitive or learning impairments
  - ❖ Communication barriers. ASL ≠ English
  - ❖ Limited English skills or people from different cultures?

## Fitness for Duty Tests (FFD)

*Shannon v. Verizon New York, Inc.*, 2009 WL 1514478 (N.D.N.Y.  
May 29, 2009)

- Employer requested a mental health exam based on an employee's statements after a co-worker's suicide.
  - ❖ Dispute as to what the employee actually said.
- **Court:** A mental fitness for duty exam may be required when an employee exhibits threatening behavior due to safety concerns (business necessity exception).

*Thomas v. Corwin*, 2007 WL 967315 (8th Cir. April, 3, 2007)
- Fitness for Duty lawful after a juvenile police officer visited an E/R for an anxiety attack related to workplace stress and anxiety.
  - ❖ Officer interacted with parents or guardians of troubled children, assisted detectives, and served in a back-up security capacity.

## Fitness for Duty Tests

*Menchaca v. Maricopa Comm. Coll. Dist.*, 595 F.Supp.2d 1063,  
(D.Ariz. Jan. 26, 2009)

- School counselor had a mental impairment due to a TBI.
- Exam requested after told supervisor - "come back and kick your ass."
  - ❖ Exam showed "narcissistic personality disorder" & unable to function as a counselor - 'lacks the empathy that's necessary to understand what a concerned or troubled student might feel...'
  - ❖ "Might" get angry and give a student an "explosive reaction."
- **Court:** Exams were lawful, although court disagreed with conclusion.
  - ❖ Employer did not sufficiently explore the possibility of reasonable accommodations such as a job coach.
  - ❖ Outburst may not constitute a "legitimate, non-discriminatory" for the termination. (**9th Circuit Rule:** "Conduct resulting from a disability is considered to be part of the disability and is not a separate basis for termination.")

## EEOC Guidance: Drug Tests

- **General Rule:** Drug tests are not medical examinations.
- But, employers cannot use "qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability... unless the... criteria,... is shown to be job-related for the position in question and is consistent with business necessity." 42 U.S.C. § 12112(b)(6)
- Employer must show that the criterion cannot be satisfied and the essential functions cannot be performed with a reasonable accommodation. 42 U.S.C. §12111 (8).

*EEOC Guidance on Disability-Related Medical Inquiries*

## ❖ Drug Testing

### ***Connolly v. First Personal Bank,***

2008 WL 4951221 (N.D. Ill. Nov. 18, 2008)

- Applicant took a legally prescribed controlled substance.
  - ❖ Was given an injection of phenobarbital for a back condition.
- After a drug test, bank rescinded its offer without opening information from the employee documenting that she had a prescription(s).
- **Court:** Denied bank's S/J motion - Although pre-employment drug tests for illegal drugs do not violate the ADA, when the tests cover legally prescribed drugs and are used to make employment decisions beyond the prohibition of illicit drug use, then the use of those tests can violate the ADA.

## Drug Testing

### ***Bates v. Dura Automotive Systems, Inc.,*** 650 F.Supp.2d 754 (M.D. Tenn. April 23, 2009)

- Employer had employees submit to drug testing due to concerns and several employees were removed due to use of prescription drugs.
- **Court:** Question of fact – Did the test unlawfully screen out a class of people with disabilities without showing the “selection criteria” was “job-related and consistent with business necessity”? (JR&CBN)
  - ❖ Employees submitted medical information showing ability to perform jobs.
  - ❖ None of the employees were found to have a current disability
  - ❖ Some employees did demonstrate a “record of” a disability
- Inflexibility of the employer's policy and tendency to screen out people with disabilities raised questions of fact for trial.
- **Tip:** Accept medical information showing drugs are used legally.

## Limitations on Seeking Medical Information

***Hatzakos v. Acme American Refrigeration, Inc.***, 2007 WL 2020182  
(E.D.N.Y. Jul. 6, 2007)

- Employer requested a medical review when an employee with mental illness frequently missed work due to associated depression.
  - Disclosed depression in response to a manager's direct question.
- **Court:** Medical review was lawful, although court disagreed with the employer's determination that the employee was not qualified.
  - Was discharged as dr. could not "guarantee" that no threat existed although his condition was stable & he was qualified.

***Rivera v. Smith***, 2009 WL 124968 (S.D.N.Y. Jan. 20, 2009)

- Psychological examination request was proper for a doctor who stalked a nurse after she ended their romantic relationship.
- Dr. refused and was terminated – Court upheld the termination.

## Limitations on Seeking Medical Information

***Wyland v. Boddie-Noell Enterprises, Inc.***, 165 F.3d 913, 1998 WL 795173 (4<sup>th</sup> Cir. 1998)

- Medical inquiries were proper when the medication may impair an employee's ability to perform the essential job function of driving.

***Green v. CSX Hotels, Inc.***, 2009 WL 113856 (S.D. Va. Jan. 15, 2009)

- Waitress with back injury needed 3 FCEs when returning from leave.
- 3<sup>rd</sup> Functional Capacity Evaluation (FCE) was very strenuous and included activities unrelated to her job.
- She refused to perform all the activities and was terminated.
- **Court:** Employer's insistence that the employee undergo a third examination that did not relate to her job duties supported her allegations of disability discrimination.

## Disclosure and Qualified and/or Direct Threat Issues

### *Chevron v. Echazabal*, 536 U.S. 73 (2002)

- Plaintiff was offered a job contingent on passing a medical exam.
- Examination revealed elevated liver enzymes leading to a diagnosis of asymptomatic chronic active hepatitis C.
- Offer rescinded due to direct threat to self.
- **Supreme Court:** Direct threat includes “threat to self.”
- **Note:** Many direct threat cases involve people with invisible disabilities (e.g., HIV, mental illness, epilepsy and diabetes) which seems to demonstrate the stereotypes attached to invisible disabilities.
- See DBTAC: Great Lakes ADA Center brief on Direct Threat, <http://adagreatlakes.org/Publications/>.

## Disclosure and Qualified and/or Direct Threat Issues

### *Ward v. Merck & Co.*, 2007 WL 760391 (3<sup>rd</sup> Cir. 2007)

- Pharmaceutical company chemist with mental illness, including anxiety and panic disorders, was terminated after failing to comply with the company’s demand for a fitness for duty evaluation.
- Concern arose when “Ward began to engage in strange behavior” including having a “temper tantrum,” walking around like a “zombie,” and causing a disruptive “episode in Merck’s cafeteria” that resulted from a “brief psychotic disorder.”
- **Court:** Merck has the burden of showing a “direct threat.”
- Exam was lawful: Possible “threats to employee safety ... were sufficient to meet the business necessity element...” of the ADA.
- Request was based on an “individualized assessment.”

## Disclosure and Qualified and/or Direct Threat Issues

### *Darnell v. Thermafiber, Inc.*, 417 F.3d 657 (7th Cir. 2005)

- An individual with insulin dependent Type I diabetes was not hired as his diabetes was (admittedly) not under control.
  - ❖ Had not had any debilitating episodes... related to his diabetes" in 10 months as a temporary worker – new job required heavy machine work.
- Thermafiber's physician: "Diabetes was not under control."
  - ❖ Unqualified for the position and posed a "direct threat."
  - ❖ Risk of harm was "significant" & "a very definite likelihood" of harm.
  - ❖ "Reasonable medical certainty that Darnell would pass out on the job ..."
- Court found for the employer, noting that dr. assumed that the requested accommodations would be in place. (food & water breaks).
- *But see, Branham v. Snow*, 392 F.3d 896 (7th Cir. 2005)(employee with controlled Type I diabetes was qualified as IRS criminal investigator.);

## Disclosure and Qualified and/or Direct Threat Issues

### *Kapache v. Holder*, 652 F.Supp.2d 24 (D.D.C. September 11, 2009)

- FBI revoked job offer claiming Type I diabetes was not under control.
- Employee's Dr. testified that the employee could perform the essential functions of an FBI special agent using an insulin pen.
- **Court:** Upheld \$100,000 jury award for plaintiff.
- *See also, Rodriguez v. ConAgra Grocery Product Co.*, 436 F.3d 468 (5th Cir. 2006)(Uncontrolled Type II diabetes does not justify a failure to hire as there was no independent, individualized assessment.); and
- *Holiday v. City of Chattanooga*, 206 F.3d 637 (6th Cir. 2000)(City improperly relied on an "unsubstantiated and cursory medical opinion" in denying an applicant with HIV a police officer job - no individualized assessment.)
  - ❖ Court noted the City "does not normally test... applicants for HIV or AIDS."
- **Employer Tip:** Follow EEOC Guidance when analyzing direct threat.

## Confidentiality

See DBTAC: Great Lakes ADA Center Brief  
on Medical Inquiries available at:  
[www.adagreatlakes.org/Publications](http://www.adagreatlakes.org/Publications)

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## ADA Statute and Regulations on Confidentiality

- **ADA Statute:** Information obtained regarding the medical condition or history of the applicant must be collected and maintained on “separate forms and in separate medical files and treated as a confidential medical record, except that
  - (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties... and necessary accommodations;
  - (ii) first aid and safety personnel.. when appropriate; and
  - (iii) government officials investigating compliance...”  
42 U.S.C. §12112(d)(3)(B)
- **Regs. - 29 C.F.R. § 1630.14:** Confidentiality applies to: entrance exams; JR&CBN exams; and info for “voluntary” health programs.
- **EEOC Guidance:** Expands confidentiality to specifically include any medical information voluntarily disclosed by an employee.

## What Information is Protected from Disclosure?

### *O'Neal v. City of New Albany*, 293 F.3d 998 (7th Cir. 2002)

- OK to disclose exam results to the local pension board as it needed to certify the plaintiff's examination as part of the hiring process.

### *Cash v. Smith*, 231 F.3d 1301 (11<sup>th</sup> Cir. 2000)

- Employee voluntarily disclosed her diabetes to a new supervisor, who disclosed the information to co-workers.
- **Court:** Confidentiality did not apply to voluntary disclosures by an employee (did not follow EEOC Guidance).

### *Grimsley v. Marshalls of MA, Inc.*, 284 Fed. Appx. 604 (11th Cir. 2008)

- Cited *Cash* - confidentiality does not apply to voluntary disclosure.
  - ❖ Employee seemingly disclosed bi-polar condition due to racial taunts.
  - ❖ Supervisor started calling him "crazy" and ask if he was on his medication in front of other co-workers.

## What Information is Protected from Disclosure?

### *Tucker v. CAN Holdings, Inc.*, 2008 WL 5412829 (W.D. Ky. Dec. 30, 2008)

- Employee's childhood medical condition required inserting a corrective device.
  - ❖ Employee disclosed condition at a work-related physical examination.
  - ❖ Another company acquired her employer's business.
- Injured her back and a representative of the new employer sent an e-mail to all employees worldwide describing the employee's medical condition and the corrective device, and incorrectly asserting that the pre-existing condition caused her recent injury.
- **Court:** Refused to dismiss the employee's claim noting that employee medical information must be treated as confidential and only disclosed for special work-related reasons.



## What Information is Protected from Disclosure?



*EEOC v. Ford Motor Credit Co.*, 2008 WL 152780 (M.D. Tenn. Jan. 14, 2008)

- Employee with HIV needed intermittent FMLA leave to participate in a clinical trial and disclosed his HIV status to his direct supervisor.
- Supervisor disclosed condition to his HIV to his co-workers causing him shame, humiliation, and depression.
- **Court:** Disclosure was not voluntary and was job-related as it was a pre-requisite to receive leave from work, so confidentiality applied.

*Doe v. U.S.P.S.*, 317 F.3d 339 (D.C.Cir. 2003)

- HIV status disclosed in request for FMLA leave is confidential.
- **Note:** There may also be state laws regarding confidentiality in addition to HIPAA and ADA requirements.

## Confidentiality Regarding the Accommodation

- **EEOC Guidance on Reasonable Accommodation:** Disclosure of a reasonable accommodations usually amounts to a disclosure of a disability.  
*EEOC v. ESAB Group, Inc.*, 208 F.Supp.2d 827 (N.D. Ohio Feb. 19, 2002)
- Employer posted a schedule available to the HR dept. and those with a “need to know” containing designations such as “ADA” (accommodations) and “DIS” (“non-occupational disability”).
- One employee with diabetes began being harassed by co-workers due to perceived “preferential treatment,” including threats of violence.
  - ✦ Referred to “ADA” designation as “American Dickhead Association.”
  - ✦ Also, a company nurse disclosed diabetes to a co-worker.
- **Court:** Information was not confidential.
- Did not follow EEOC Guidance holding that information regarding the accommodation does not fit into one of the three confidentiality categories.
- **Tip:** Even though found lawful, this is probably not a “best practice.”

## Confidentiality Regarding the Accommodation

### *Ross v. Advance America Cash Advance Centers, Inc.*, 208 F.Supp.2d 827 (N.D. Ohio Feb. 19, 2002)

- An employee disclosed his bipolar disorder to his supervisor in connection with a request for an adjusted schedule.
- Supervisor then disclosed the condition to another employee.
- Ross did not raise confidentiality, but rather claimed she was retaliated against for complaining about the disclosure, which she considered unlawful.
- Employer admitted the disclosure violated company policy.
- **Court:** No evidence offered showing the disclosure violated ADA.
- Disclosure was “ill-mannered,” but “there is nothing in the ADA that requires, or could reasonable be read to require, that the employer keep that information secret from other employees.”

## Confidentiality Regarding the Accommodation

### *EEOC v. Teamsters Local 804*, 2006 WL 988138 (S.D.N.Y. April 12, 2006)

- EEOC alleged a union disclosed a member’s AIDS to a “disgruntled” co-worker.
  - ✦ Learned of employee’s condition as part of a job transfer process
  - ✦ Information was submitted at the employer’s (UPS) request.
- Employee did disclose lymphoma and chemotherapy at work.
- **Court:** Denied summary Judgment for the employer. Questions of fact for the jury regarding:
  - ✦ Did UPS disclose the condition to the union?
  - ✦ Did the alleged disclosure take place?
  - ✦ Did the co-worker learn about the condition from other sources?
- Disclosure may violate the ADA if it occurred as alleged.
  - ✦ Interesting legal question regarding confidentiality duties of third-parties.

## Need to Know

***Medlin v. Rome Strip Steel Co., Inc.***, 294 F.Supp.2d 279 (N.D.N.Y. December 10, 2003)

- Employee with a back condition was sent for a Functional Capacity Evaluation (FCE) and heard detailed findings of the FCE, (e.g., that he became short of breath during the examination), from a co-worker before hearing results from his supervisor or the doctor.
- **Court:** Disclosure may be an ADA confidentiality violation as the co-worker may not have needed to know the information.
- Denied summary judgment for the employer despite the employer's arguments that a signed medical release authorized the disclosure.

## Guidance for Employers from EEOC Cases

***Williams v. Astrue (SSA)***, 2007 EEOPUB LEXIS 4206 (EEOC 2007)

- **EEOC:** When responding “to a question from... about why a coworker is receiving what is perceived as ‘different’ or ‘special’ treatment,”
- An employer might explain “that it has a policy of assisting any employee who encounters difficulties in the workplace,” and that “many of the... issues... are personal, and that it is the employer’s policy to respect employee privacy.”

***Dozbush v. Mineta (DOT)***, 2002 EEOPUB LEXIS 484 (EEOC 2002)

- **EEOC:** Not unlawful for an employer to disclose to co-workers that an employee was “medically disqualified” from performing certain duties.
  - Distinguished this as a disclosure of “work status” – can be for reasons unrelated to disability.
- ✦ EEOC noted info regarding a diagnosis or symptoms must be kept confidential.

## Confidentiality of Medical Information from Doctors

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

*EEOC Guidance on Reasonable Accommodation and Undue Hardship Under the ADA found at:*

<http://www.eeoc.gov/policy/docs/accommodation.html>

## Confidentiality of Medical Information from Doctors

*Barger v. Bechtel BWXT Idaho LLC, 2008 WL 4411441 (D. Idaho Sept. 25, 2008)*

- Employer insisted employee with stress-related issues including anxiety and insomnia see EAP Dr.
- Dr. recommended discharge to the Personnel Action Advisory Group.
- **Court:** Employer did not violate the ADA when the Co. Dr. disclosed exam results to PAAG.
- Only shared general job-related observations
- Need-to-know exception applies.

## Confidentiality of Medical Information from Doctors

*Fleming v. State University of New York*, 502 F.Supp.2d 324  
(E.D.N.Y. August 6, 2007)

- Dr. with sickle cell anemia brought suit under §504 and ADA Title II alleging a violation of confidentiality by the director of the residency program who disclosed his condition to a potential employer.
- Disclosed when director called asking why he was in the hospital.
- **Court:** Confidentiality provisions were violated – disclosure was not voluntary and was in response to a medical inquiry.
- Confidentiality requirements of ADA Title I of the ADA also apply to §504 and ADA Title II.
- **Note:** Dr. was an independent contractor, therefore no Title I case.

**Disabilities Must Be Known By the Employer to Establish an ADA Violation**



## “Invisible Disabilities”

***Cordoba v. Dillard's, Inc.***, 2003 WL 21295143 (M.D.Fla. Feb. 24, 2003)

- Employee requested reduced hours prior to being diagnosed with a congenital cardiac condition.
- **Court:** Summary judgment granted for the employer.
- “Unlike gender or racial discrimination statutes, the ADA does not presuppose that the employer is always aware” of a disability.
- Many times, the “disability is generally invisible to the naked eye.”
- Therefore, plaintiffs must produce “probative evidence of Defendant’s actual knowledge of [a] disability” in order to establish a violation.
- “Serious reason to doubt even that Plaintiff considered herself to be disabled at any time during her tenure at Dillard’s.”
  - ✦ Disclosure to “low-level employees” did not create a finding that the employer had “constructive knowledge” of a disability.

## Accommodating Known Disabilities

***Rask v. Fresenius Medical Care North America***, 2007 WL 4258620 (8th Cir. 2007)

- Rask let her employer know that she was “having problems” with her medication and might “miss a day here and there because of it.”
- **Court:** Even if Ms. Rask had advised her employer that she had depression and suggested “what a reasonable accommodation might be, no reasonable person could find that Ms. Rask ‘specifically identified’ her ‘...limitations.’”
- “Where, as here, ‘the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, as is often the case when mental disabilities are involved, the initial burden rests primarily upon the employee ... to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations.’”

## Accommodating Known Disabilities – No Knowledge by Employer

***Smith v. Grattan Family Ent., LLC*, 2009 WL 3627953 (E.D. Mich. Oct. 30, 2009)**

- An employee with significant leg pain mentioned the pain stating he “couldn’t stand on it much longer.”
- **Court:** “An employer cannot be deemed to be on notice of a ‘disability’ every time an employee complains.”

***Burkhart v. Intuit, Inc.*, 2009 WL 528603 (D.Ariz. March 2, 2009)**

- Employee “commented” he had a “mental ... or stress related disability.”
  - ✦ Did not disclose impairment was PTSD or request an accommodation.
- **Court:** Plaintiff did not “put Defendant on notice” that he had a substantially limiting impairment that “necessitated accommodation.”

***Russell v. T.G. Missouri Corp.*, 340 F.3d 735, 742 (8<sup>th</sup> Cir. 2003)**

- Employee told supervisor, “I need to leave and I need to leave right now,” but did not mention her bi-polar condition as the reason why.

## Accommodating Known Disabilities – No Knowledge by Employer

***Keeler v. Florida Department of Health*, 2009 WL 1111551 (11<sup>th</sup> Cir. Apr. 27, 2009)**

- Plaintiff who asked for a transfer, claiming her current position was too stressful and overwhelming, did not properly request a reasonable accommodation.
  - ✦ Fact that she later “broke down” and started to cry was not sufficient notice.
  - ✦ Subsequently, disclosed ADHD and OCD and was terminated 5 weeks later.
- **Court:** Employer did not know of impairments when denying request.

***Stewart v. St. Elizabeth's Hospital*, 589 F.3d 1305 (D.C. Cir. 2010)**

- Employee who said she was distressed when found “crying, shaking, [and] talking to herself,” did not put the employer of notice of an ADA disability.

***Freadman v. Metropolitan Prop. and Cas. Ins. Co.*, 484 F.3d 91 (1<sup>st</sup> Cir. 2007)**

- Employee with ulcerative colitis who received accommodations in the past did not provide a “sufficiently direct and specific” notice of a disability when she told her supervisor she needed time off because she was “starting not to feel well.”

## Accommodating Known Disabilities – Sufficient Notice

***Boice v. Southeastern Pennsylvania Transp. Authority***, 2007 WL 2916188 (E.D. Pa. Oct. 5, 2007)

- Requests to remain on the day shift to monitor medication for diabetes, and a closer parking spot because of a shrapnel wound may constitute reasonable accommodation requests.

***Bultemeyer v. Fort Wayne Community Schools***, 100 F.3d 1281 (7<sup>th</sup> Cir. 1996)

- After being told prior accommodations would not be continued, a psychiatrist's request for a "less stressful" environment required an interactive process.
- See also, ***Taylor v. Phoenixville School District***, 184 F.3d 296, 312 (3<sup>rd</sup> Cir. 1999) (What matters under the ADA are not formalisms...)
  - ❖ **Tip for Employers:** Inquire further if unclear whether an accommodation is being requested or if medical information seems vague or contradictory.
  - ❖ **Tip for Employees:** Identify specific limitations and accommodations, if possible.

## Submitting Supporting Information

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

- Teacher, who developed seasonal affective disorder, was assigned to a noisy 1st grade classroom without outside windows.
- As a result, teacher requested assignment to a quieter room with natural light and better ventilation.
- School worked to remedy noise distractions and ventilation problem, but did not reassign teacher to a room with natural light, despite repeated requests.
- Depression and anxiety worsened, requiring medical leave.
- During leave, teacher repeated her requests for a room switch.



## Submitted Information – *Ekstrand*

- Dr. provided a note to the school district indicating the importance of natural light for an individual with seasonal affective disorder, and the link between teacher's room location and symptoms.
- **Court:** *Prior* to Dr.'s note, the school took accommodating steps to resolve teacher's concerns. Because school had no evidence that natural light was crucial to alleviating symptoms, it acted reasonably and was not required to provide the *preferred* accommodation of a room with natural light.
- **Court:** *After* Dr.'s note, the school district had notice of the importance of natural light, and had an obligation to "provide the specifically requested, medically necessary accommodation," (or preferred accommodation) absent undue hardship.

## Known Disabilities and Adverse Employment Actions

***Miller v. University of Pittsburgh Medical Center*, 2009 WL 3471301  
(3d Cir. Oct. 29, 2009)**

- Plaintiff worked as a surgical technologist and contracted Hepatitis C, requiring three separate leaves of absence for treatment.
- Had 13 unscheduled absences & received verbal & written warnings.
  - ✦ Was later suspended and terminated for violating attendance policy.
- When calling in sick, never indicated that her absences were attributed to Hepatitis C, just that she was not feeling well.
- **Court:** Plaintiff is not qualified and termination was proper.

## Known Disabilities and Adverse Employment Actions

*Mayhew v. T-Mobile USA, Inc.*, 2009 WL 5125642 (D. Or. Dec. 22, 2009)

- Customer service representative requested a "work-when-able" schedule to accommodate a heart condition, but defendant terminated her employment before addressing her request.
- **Court:** Termination was improper - Employer never responded to request to "work-when-able" due to newly disclosed heart condition.
- Due to the unique nature of a customer service job, attendance is less significant than with other jobs.
  - ❖ Plaintiff presented evidence that her unpredictable absences had little to no effect on defendant's call center, customer wait times, or call quality.
- **Employer Tip:** Take even a "last-minute" disclosure seriously.
- **Employer Tip:** Disclose once performance problems are evident.

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

- An employee must show that the employer had knowledge of the "record of" a disability though it need not be from a written record, must just have knowledge of a history of a disability.

*Trafton v. Sunbury Primary Care PA*, 2009 WL 2986666 (D.Me. Sept. 15, 2009)
- Employee claimed terminated due to her "record of" having major depression and PTSD.
  - ❖ Supervisor made numerous comments to her seeming to indicate that he had knowledge of her disability although she never disclosed it to him.
  - ❖ Told her he thought the job was "too much for her," that she could not handle the job because she was "unstable," that she tended "to get out of control," and once stated, "now don't go out and burn the building down."
- Employee also asserted that she had "numerous, highly visible" scars on her arms from a suicide attempt that were visible at work.

## Knowledge of a “Record of” an Invisible Disability – *Trafton*

- Received treatment from a company physician who expressed having “serious reservations about noting [her] work stress and depression in her medical record,” as the physician “suspected the privacy of employees’ medical records... was not scrupulously maintained.”
- **Dr.:** He never informed plaintiff’s supervisor of her disability.
- **Court:** To find that employer had knowledge of a “record of” a disability would be “tenuous and conjectural even if it is conceivable.”
- Employee “is entitled to have reasonable inferences drawn in her behalf, but she is not entitled to speculative inferences” and concluded that, “On this record, it would require speculation to determine that [employee’s supervisor] had knowledge of Trafton’s mental health history, including her prior suicide attempts.”

### Disability Harassment

See DBTAC: Great Lakes ADA Center brief on  
Disability Harassment at:  
<http://adagreatlakes.org/Publications/>.

## ADA Statute and Regulations on Harassment

- **Title I:** Discrimination prohibited in all “terms, conditions, and privileges of employment.” See 42 U.S.C. §12112 (a)
- U.S. Supreme Court has recognized that harassment based on a protected status is implicitly prohibited by Title VII.
- No federal court has ruled that a disability harassment claim is not actionable under Title I of the ADA.



## ADA Statute and Regulations on Harassment

- Conduct created a hostile work environment interfering with an employee’s ability to perform the job. Employees must prove that:
  1. Plaintiff is a qualified individual with a disability;
  2. Plaintiff was subjected to unwelcome harassment;
  3. The harassment was based on plaintiff’s disability;
  4. The harassment was sufficiently severe or pervasive to alter a term, condition, or privilege of employment; and
  5. Some factual basis exists to impute liability for the harassment to the employer (i.e. the employer knew or should have known of the harassment and failed to take prompt, remedial action).
- Element #4 is usually the hardest one to prove.

## What is “Severe and Pervasive”?

### *Flowers v. Southern Regional Physician Services, Inc.*, 247 F.3d 229 (5th Cir. 2001)

- Flowers was good friends with her supervisor until disclosing HIV status.
  - ✦ Supervisor then stopped socializing with Flowers, refused to shake her hand, began intercepting Flowers’ telephone calls, eavesdropping on her conversations, and hovering around her desk.
- After disclosure, Flowers underwent four “random” drug tests within a one-week period.
  - ✦ Previously only one random test in two years.
  - ✦ Also, written up consistently and placed on two 90-day probation periods despite prior positive performance evaluations.
  - ✦ Eventually was terminated.
- **Court:** Upheld jury verdict for plaintiff, the harassment was so severe and pervasive that it unreasonably interfered with job performance.

## What is “Severe and Pervasive”?

### *Shaver v. Independent Stave Co.*, 350 F.3d 716 (8th Cir. 2003)

- Plaintiff had epilepsy and had an operation in which part of his brain was removed and a metal plate was inserted.
- Supervisor disclosed this to co-workers without permission.
- Supervisors and co-workers called Shaver “platehead” as a nickname for a period of over two years.
  - ✦ Also called him “stupid” or said he was “not playing with a full deck.”
- **Employer:** Name-calling was not related to disability, merely a nickname, and many employees had nicknames at that workplace.
- **Court:** Summary judgment for the employer as insufficient evidence that the harassment he experienced was severe or pervasive.
  - ✦ “Conduct that is merely rude, abrasive, unkind, or insensitive does not come within the scope of the law.”
  - ✦ Even if unauthorized, disclosure did not rise to “hostile work environment.”

## What is “Severe and Pervasive”?

### *Meszes v. Potter*, 2007 WL 4218947 (M.D. Fla. Nov. 28, 2007)

- After disclosing HIV status, employee was put on “graveyard shift,” cited him for minor infractions, and told another employee with AIDS who was missing work was “getting what he deserved.”
- **Court:** No harassment. “Simple teasing ... offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.”

### *Ferraro v. Kellwood Co.*, 440 F.3d 96 (2d Cir. 2006)

- Employee who had surgery for breast cancer felt singled out for “harsh verbal abuse” and demotion but failed to complete harassment complaint form provided by the employer.
- **Court:** While the supervisor had “hot temper and foul tongue... there is no evidence in the record that [the] outburst was motivated by any prohibited discriminatory animus.”
  - ✦ Employee also failed to follow through on harassment complaint.
- **Employee Tip:** Follow through on harassment complaints.

## What is “Severe and Pervasive”?

### *Quiles-Quiles v. Henderson*, 439 F.3d 1 (1st Cir. 2006)

- Sufficient evidence for the jury where employee was subject to such constant ridicule about his depression that he was hospitalized and eventually withdrew from the workforce.
  - ✦ Called “crazy” on a daily basis.
  - ✦ Court rejected the argument that it was the sort of conduct common in “blue-collar” workplaces.

### *EEOC v. Luby’s, Inc.*, 2005 WL 3560616 (D. Ariz. Dec. 29, 2005)

- GM called a person with an intellectual disability a “retard,” told her to “shut up” on numerous occasions, and slapped her on the face.
- Co-workers hid her bicycle in the men's room, blocked her way, barked at her, and threatened to cut her arm with a bread slicer.
- **Court:** Employer was aware of disability, summary judgment denied.

## What is “Severe and Pervasive”?

### *Arrieta-Colon v. Wal-Mart Stores*, 434 F.3d 75 (1st Cir. 2006)

- Court upheld a \$230,000 jury verdict in a case where the employer did not take action against harassment an employee with Peyronie’s Disease experienced because of his penile implant.
- Constant comments about his needing to use a pump to get an erection, such as: I’m going on a date tomorrow, can I use your pump, why don’t you use Viagra, comments about his “baton,” ...
  - ✦ Comments even made over the store’s paging system.
- Co-workers testified that supervisors knew about the harassment and failed to prevent it.
- **Court:** Sufficient evidence of harassment.
- Employer cannot shield itself from liability by relying on a grievance policy that is not consistently used or followed.

## “Invisible Disabilities”

### Practice Tips

## Practical Tips for Employers



- Offer periodic ADA training, including new hires
- Engage in interactive process when accommodations are requested.
  - ❖ Request limited additional information if the disability or need for accommodation is not known or apparent. (Use Medical Releases)
- **Formulate and enforce policies on:** reasonable accommodations, confidentiality, harassment, retaliation.
- **Document:** Medical disclosures, job duties, discipline, performance improvement plans, and reasonable accommodation efforts.
- Use objective evidence to support direct threat defenses
- Act quickly on harassment complaints.

## Practical Tips for Employees

- Medical conditions do not have to be disclosed unless a reasonable accommodation is needed.
  - ❖ Balance confidentiality concerns with the need for an accommodation.
  - ❖ If performance is at issue, requesting an accommodation may help an employee meet qualification standards.
- Requests for reasonable accommodations should identify the impairment, limitations, & accommodation preference, if known
- **Document:** Reasonable accommodation requests, medical disclosures, harassment, retaliation, disparate treatment, ...
  - Know and follow procedures and policies.
- Provide medical information when appropriate.
- It's best if the employee, (not the employer), obtains info from the Dr.
- **Personnel Files:** Feel free to add information or request a copy.



## Disability-Specific Resources

- **Epilepsy Foundation -** [www.epilepsyfoundation.org](http://www.epilepsyfoundation.org)
- **American Diabetes Association -** [www.diabetes.org](http://www.diabetes.org)
- **National Alliance on Mental Illness –** [www.nami.org](http://www.nami.org)
- **American Cancer Society –** [www.cancer.org](http://www.cancer.org)
- **Information on HIV and AIDS –** [www.cdc.gov/hiv/](http://www.cdc.gov/hiv/)

## General ADA Resources

- **DBTAC: Great Lakes ADA Center:** [www.adagreatlakes.org](http://www.adagreatlakes.org); 800/949 – 4232(V/TTY)
- **ADA Disability and Business Technical Assistance Center –** [www.adata.org](http://www.adata.org)
- **Equip For Equality:** [www.equipforequality.org](http://www.equipforequality.org); 800/537-2632 (Voice); 800/610-2779 (TTY)
- **Job Accommodation Network:** [www.jan.wvu.edu](http://www.jan.wvu.edu)
- **Equal Employment Opportunity Commission (EEOC):** [www.eeoc.gov](http://www.eeoc.gov)

## Thank you for Participating In Today's Session

Please join us for the next session in this series:

**August 4, 2010**

**The EEOC and the ADA**

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The logo features the text "ADA ONLINE" in a serif font, with a green sunburst icon between "ADA" and "ONLINE". Below this, the word "LEARNING" is written in a sans-serif font, underlined by a green horizontal line. There are decorative grey squares in the top left and bottom right corners of the slide.

ADA ONLINE  
LEARNING

**“Invisible Disabilities” and the ADA**

**The End**

Presented by:

Barry Taylor, Legal Advocacy Director and  
Alan Goldstein, Senior Attorney,  
Equip for Equality

Equip for Equality is providing this information under a subcontract with the  
DBTAC - Great Lakes ADA Center, University of Illinois at Chicago, U.S.  
Department of Education, National Institute on Disability of Rehabilitation and  
Research Award No. H133A060097.

The logo includes the text "DBTAC" in a small sans-serif font, "great lakes" in a blue script font, and "ADA Center" in a blue sans-serif font. Below this, it says "A member of the ADA National Network". There are decorative grey squares in the bottom right corner of the slide.

DBTAC  
*great lakes*  
ADA Center  
A member of the ADA National Network