Welcome to the ADA Legal Webinar Series

A collaborative program between the

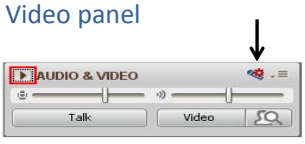
Southwest ADA Center and Great Lakes ADA Center, members of the ADA National Network

The Session is Scheduled to begin at 2:00pm Eastern Time
We will be testing sound quality periodically

Audio and Visual are provided through the on-line webinar system. This session is closed captioned. Individuals may also listen via telephone by dialing
1-712-432-3066 Access code 148937 (This is **not** a Toll Free number)

Listening to the Webinar

- The audio for today's webinar is being broadcast through your computer. Please make sure your speakers are turned on or your headphones are plugged in.
- You can control the audio broadcast via the Audio & Video panel. You can adjust the sound by "sliding" the sound bar left or right.
- If you are having sound quality problems check your audio controls by going through the Audio Wizard which is accessed by selecting the microphone icon on the Audio & Video panel



2

Listening to the Webinar, *continued*

If you do not have sound capabilities on your computer or prefer to listen by phone, dial:

712-432-3066

Pass Code: 148937

This is **not** a Toll Free number

3

Listening to the Webinar, *continued*

MOBILE Users (iPhone, iPad, or Android device (including Kindle Fire HD))

Individuals may listen** to the session using the Blackboard Collaborate Mobile App (Available Free from the Apple Store, Google Play or Amazon)

**Closed Captioning is not visible via the Mobile App and limited accessibility for screen reader/Voiceover users

4

Captioning

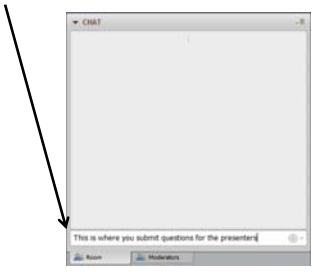
- Real-time captioning is provided during this webinar.
- The caption screen can be accessed by choosing the CC icon in the Audio & Video panel.

- Once selected you will have the option to resize the captioning window, change the font size and save the transcript.

5

Submitting Questions

- **You may type and submit questions in the Chat Area Text Box or press Control-M and enter text in the Chat Area**
- **If you are connected via a mobile device you may submit questions in the chat area within the App**
- **If you are listening by phone and not logged in to the webinar, you may ask questions by emailing them to webinars@ada-audio.org**

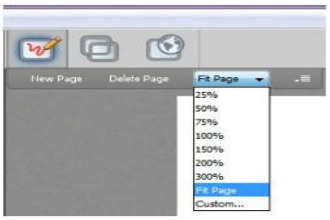


Please note: This webinar is being recorded and can be accessed on the www.ada-audio.org within 24 hours after the conclusion of the session.

6

Customize Your View

- Resize the Whiteboard where the Presentation slides are shown to make it smaller or larger by choosing from the drop down menu located above and to the left of the whiteboard. The default is “fit page”



7

Customize Your View *continued*

- Resize/Reposition the Chat, Participant and Audio & Video panels by “detaching” and using your mouse to reposition or “stretch/shrink”. Each panel may be detached using the  icon in the upper right corner of each panel.

8

Technical Assistance

- If you experience any technical difficulties during the webinar:
  1. Send a private chat message to the host by double clicking “Great Lakes ADA” in the participant list. A tab titled “Great Lakes ADA” will appear in the chat panel. Type your comment in the text box and “enter” (Keyboard - F6, Arrow up or down to locate “Great Lakes ADA” and select to send a message); or
  2. Email webinars@ada-audio.org; or
  3. Call 877-232-1990 (V/TTY)

9

The ADA and Return to Work Issues

Presented by:

Barry Taylor, VP for Civil Rights and Systemic Litigation, Equip for Equality

Rachel Weisberg, Staff Attorney, Equip for Equality

Valuable assistance provided by:

Kayla Higgins, Legal Intern, Equip for Equality

Michelle Mbekeani-Wiley, Volunteer Attorney, Equip for Equality

January 13, 2015

ada National Network
Information, Guidance and Training on the Americans with Disabilities Act

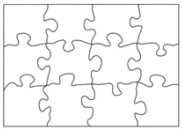
10

Continuing Legal Education Credit for Illinois Attorneys

- This session is eligible for 1.5 hours of continuing legal education credit for Illinois attorneys.
- Illinois **attorneys** interested in obtaining continuing legal education credit should contact Barry Taylor at: barryt@equipforequality.org
- Participants (non-attorneys) looking for continuing education credit should contact the Great Lakes ADA Center at: 312-413-1407 or www.adagreatlakes.com
- This slide will be repeated at the end.

11

Outline of Today's Webinar



- Background on Return to Work Issues
- ADA & FMLA: Differences and Interplay
- ADA Issues Raised When Employees Return to Work
  - Medical Exams and Inquiries
  - Qualified
  - Reasonable Accommodations
  - Direct Threat
  - Retaliation
- Questions

12

Background on Return to Work Issues

- Reasons employees with disabilities take leave
- Various leave rights
  - Reasonable accommodation under the ADA
  - FMLA
  - Employer policies
  - Workers' compensation laws
  - State/local laws

13

ADA v. FMLA: Key Differences

- ***Employer Coverage***
  - FMLA: Private employers with at least 50 employees working within 75 miles; public agencies regardless of the number of employees they employ; and public or private elementary or secondary schools, regardless of the number of employees they employ www.dol.gov/whd/regs/compliance/whdfs28.pdf
  - ADA: State and local government employers, and private employees with at least 15 or more employees
- ***Employee Eligibility***
  - FMLA: Employees with a "serious health condition" who have been employed for at least 12 months by a covered employer and have performed 1,250 hours of work during those 12 months 29 C.F.R. § 825.110 – 112.
  - ADA: Qualified individuals with a disability; no tenure req'd
- ***Agency Enforcement***
  - FMLA: Department of Labor. No exhaustion requirement
  - ADA: EEOC. Must exhaust administrative remedies

14

ADA v. FMLA: Key Differences

- ***Leave to Care for Family Members***
  - FMLA: Eligible employees may take leave to care for family members with a serious health condition
  - ADA: Reasonable accommodation requirement applies only to employees with disabilities – it does not enable employees to take leave to care for family members with disabilities
- ***Must a Leave Request be Granted***
  - FMLA: Yes, if employee is eligible
  - ADA: General reasonable accommodation principles apply – fact-specific as to whether request is reasonable; effective v. preferred accommodation; undue hardship defense
- ***Leave Extensions – Interplay Between ADA & FMLA***
  - FMLA: Leave is capped at 12-weeks
  - ADA: Requests for leave extensions must be considered as a reasonable accommodation

15

ADA & FMLA Interplay – Leave Extension

Bernhard v. Brown & Brown of Lehigh Valley, Inc.
720 F. Supp. 2d 694 (E.D. Pa. 2010)

- Insurance agency employee took a 3 week leave of absence to undergo surgery for neck and throat cancer
- Employee returned while receiving radiation treatments
- After 2 weeks of treatment, side effects required employee to take additional leave, and the employee requested FMLA leave
- Employee exhausted FMLA leave
- Employee requested an additional 3 month leave to recover, supported by medical documentation
- Employee was terminated
- **Court:** Extension of FMLA leave could have been a reasonable accommodation under the ADA

16

ADA & FMLA Interplay

- ***Reinstatement Rights***
  - FMLA: *Guaranteed* right to return to same position or virtually identical position, with certain exceptions 29 C.F.R. § 825.215(a)
  - ADA: Employee *should* be reinstated to the same position absent an undue hardship www.eeoc.gov/policy/docs/accommodation.html
- ***Accommodated Returns***
  - FMLA: No right to restoration/reassignment if "employee is unable to perform an essential function of the position." 29 C.F.R. § 825.216(c)
  - ADA: Employee can seek accommodations in current position or reassignment if he is no longer able to do previous position
  - FMLA/ADA: FMLA regs acknowledge obligations under ADA
  - *See also Lafata v. Church of Christ Home for Aged*, 325 Fed.Appx. 416, 418 (6th Cir. 2009) (ADA case can proceed where employee returning from FMLA leave was told that she was being reinstated to a different position and she could "take it or leave it" without engaging in the interactive process)

17

Medical Exams and Inquiries

- ADA restricts employers' ability to require medical exams and pose disability-related inquiries under certain circumstances
- Rule for current employees = Medical exams and inquiries must be "job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A)
- EEOC Guidance: 29 C.F.R. pt. 1630, App'x 1630.13(b)
  - ADA requirement prevents "medical tests and inquiries that do not serve a legitimate business purpose"
  - Standard = objective inquiry

See also Owusu-Ansah v. Coca-Cola Co., 715 F.3d 1306 (11th Cir. 2013) (noting that the employer had a "reasonable, objective concern")

18

Med Exams/Inquiries: General Rules

It is legally irrelevant whether a medical exam for a returning employee is administered by a "medical doctor" or another entity

- *Medlin v. Rome Strip Steel Co.*, 294 F. Supp. 2d 279 (N.D.N.Y. 2003) (Functional capacity exam for returning employee was a medical exam despite administration by company specializing in physical therapy)

Employers may generally require medical exams/pose disability-related inquiries prior to permitting an employee to return from a medical leave

- *Rodriguez v. School Board of Hillsborough County,* 2014 WL 5100635 (M.D. Fla. Oct. 10, 2014) ("Employers may require a medical evaluation to assess an employee's fitness to return to work after a health-related absence.")
- *Clink v. Or. Health & Sci. Univ.*, 2014 WL 3850013 (D. Or. Aug. 5, 2014) ("[A]n employer can require a fit-for-duty certification upon an employee's return to employment after taking FMLA leave without violating FMLA so long as the requested examination is consistent with the ADA's requirements of job-relatedness and business necessity.")

19

Med Exams/Inquiries: General Rules

Med exam/inquiry may be appropriate when employee takes leave due to a work-related exacerbation of symptoms arising from a disability, and seeks to return to the same position

Thomas v. Corwin
483 F.3d 516, 528 (8th Cir. 2007)

- Police officer required to undergo a fitness-for-duty exam when she was returning from a three-week leave of absence necessitated by the "stress and anxiety" of her position, which was "severe enough to mandate a trip to the emergency room" and require a leave of absence
- **Court:** No ADA violation – requirement was permissible

See also Owusu-Ansah v. Coca-Cola Co., 715 F.3d 1306 (11th Cir. 2013) (finding psychiatric FFD was "job-related and consistent with business necessity" because it assessed employee's ability to handle stress and work well with others)

20

Med Exams/Inquiries: General Rules

Med exam/inquiry may be appropriate if given in response to conflicting information after employee returns from leave

Leonard v. Electro-Mechanical Corp.

2014 WL 1385356 (W.D. Va. Apr. 9, 2014)

- Janitor with degenerative disc disease took leave to receive epidural steroid injections; returned with 2 return to work certificates
- Employee's doctor also reviewed employee's job description and attested that employee could return to work without restrictions
- 2 months later, employee submitted FMLA request form, where same doctor said employee was unable to perform any job function when his condition flared up (1-2/month, 3-5 days); Employee also disclosed limitations to manager (need to sit/rest)
- Employee was sent to an independent medical examination and terminated when he refused to go
- **Court:** Independent medical exam was proper based on doctor's "seemingly conflicting opinions" and the employee's own statements

21

Med Exams/Inquiries: General Rules

Employers should consider all facts before terminating an employee for failing to provide medical documentation

Bloomfield v. Whirlpool Corp.

984 F.Supp.2d 771 (N.D. Ohio 2013) (denying reconsid. Feb. 7, 2014)

- Employee took 6 month leave to receive mental health treatment
- Her doc cleared her return; she was required to undergo a psychiatric independent medical examination
- Employee attended the examination, but then disclosed that she taped the discussion, refused to delete the tape, and left the psychiatrist's office without signing a release authorizing the disclosure of the examination results to her employer
- Employer fired employee for failing to provide exam documentation
- **Court:** Case can proceed - employer's rationale could be pretextual
  - Employer failed to ask the psychiatrist if employee could return to to sign the consent form, which it easily could have done

22

Med Exams/Inquiries: General Rules

Whether a request for specific information is permissible depends on whether it is job-related and consistent with business necessity

Conroy v. New York State Dep't of Corr. Svcs.
333 F.3d 88 (2d Cir. 2003); 2005 WL 1502146 (N.D.N.Y. June 23, 2005)

- Plaintiffs challenged policy requiring all correctional officers returning from a medical/sick leave of 4 or more days to submit medication certification, including a "general diagnosis."
- **2nd Cir:** A "general diagnosis" is a disability-related inquiry invoking the ADA's protections, as it tended to reveal a disability
  - Remanded to district court to determine whether the question was job-related and consistent with business necessity
- **District court:** Not job-related and consistent with business necessity
  - No evidence that it ensured safe/secure performance
  - No evidence that it prevented spread of disease
  - Problematic to "lump" all correctional officers together, as their duties varied significantly

23

Med Exams/Inquiries: Confidentiality

Information obtained from a returning employee pursuant to a medical examination or a disability-related inquiry must be held in confidence

Medlin v. Rome Strip Steel Co.
294 F. Supp. 2d 279 (N.D.N.Y. 2003)

- Employee returned from medical leave to recover from an off-the-job injury – required to undergo a functional capacity evaluation
- Employer shared the results with co-workers at a meeting, including that employee grew short of breath shortly after the evaluation began
- Employer argued (1) employee signed a release authorizing the disclosure of info; (2) shortness of breath was not disability-related
- **Court:** Found for employee
  - ADA limits the release of confidential information to supervisors and managers involved in the decision-making process with respect to a particular employee
  - ADA protects employees from the "perception of disability" as much as an actual disability

24

Is Returning Employee Still Qualified ?

- Qualified: Individual "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8)
- Two prong inquiry: 29 C.F.R. 1630.2(m)
  - (1) Employee must "satisf[y] the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires."
  - (2) Employee must be able to "perform the essential functions of such position . . . with or without reasonable accommodation."
- "Essential functions" are "the fundamental job duties of the employment position the individual with a disability holds or desires" which do "not include the marginal functions of the position." 29 C.F.R. 1630.2(n)(1)

25

Qualified: Essential Functions

EEOC Factors: 29 C.F.R. 1630.2(n)

- Employer's judgment
- Written job descriptions prepared before advertising or interviewing applicants for the job
- Amount of time spent on the job performing the function
- Consequences of not requiring the incumbent to perform the function
- Terms of a collective bargaining agreement
- Work experience of past incumbents in the job
- Current work experience of incumbents in similar jobs
- The position exists to perform the function
- There are a limited number of employees available who can perform the function
- The function is highly specialized so the individual is hired for his expertise or ability to perform the function

26

Qualified: EEOC Factors & Importance of Job Descriptions

Henschel v. Clare County Road Commission

737 F.3d 1017, 1024-25 (6th Cir. 2013), *reh'g denied (Feb. 10, 2014)*

- Excavator operator sought to return to work after a multi-month medical leave where he recovered from a motorcycle accident
- Had an above-the-knee amputation and a prosthetic leg – could no longer "haul"
- Issue: Whether returning excavator was qualified to do his job if he could no longer haul equipment – was hauling essential?
- **6th Cir:** ADA case can proceed
  - Employer judgment "carries weight" but is "only one factor to be considered"
  - Excavator stayed at the job site 90% of the time
  - Minimal adverse consequences if the excavator did not haul
  - Job description did not include hauling equipment – especially persuasive because descriptions for other jobs mentioned it
  - "Other duties assigned" did not include hauling

27

Qualified: EEOC Factors & Importance of Job Descriptions

Rorrer v. City of Stow

743 F.3d 1025 (6th Cir. 2014)

- Firefighter became blind in his right eye – took leave
- Received medical clearance to return to work, but was denied opportunity to return because he could not operate fire apparatus
- **6th Cir:** Firefighter produced evidence demonstrating that it would have been "very easy" for the firefighter to return to work while being excused from his driving duties – not essential
  - Minimal consequences of failing to drive a fire apparatus during an emergency
  - Not a highly specialized task
  - Not a task that only a limited number of employees could perform
  - Job description stated that firefighters *may* operate emergency vehicles - only task out of 17 listed to use conditional language

28

Qualified: Requirements of Federal Law/Regulations

Generally, a returning employee is not qualified for a job if his disability prevents him from meeting standards required by *federal* law or regulation. 29 C.F.R. 1630.15(e)

Jarvela v. Crete Carrier Corp.
754 F.3d 1283 (11th Cir. 2014)

- Driver with alcoholism sought to return from 1.5 month medical leave
- Employer cited DOT regs, which disqualify individuals with "current clinical diagnosis of alcoholism" from operating a commercial vehicle
- **11th Cir:** Found for employer: Driver was not qualified, as he no longer met the position's qualifications required by the DOT – a federal reg

Note: Employers cannot successfully use this defense if the requirement in question is applied too broadly. *See Samson v. Federal Express Corporation*, 746 F.3d 1196 (11th Cir. 2014) (rejecting employer's reliance on the Federal Motor Carrier Safety Regulations because the regulations did not apply to the specific position in question).

29

Reasonable Accommodations

- ADA defines "discrimination" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112 (b)(5)(A).

- Issues for returning employees
  - Leave and leave extensions as an accommodation
  - Accommodations upon returning from leave

30

Leave as a Reasonable Accommodation

Courts have looked at how employers characterize requested leave extension to determine whether leave is reasonable

Barfield v. Donahoe

2014 WL 4638635 (N.D. Ill. Sept. 17, 2014)

- Mail processor with anxiety, depression and hypertension stopped coming to work for many months and provided a series of medical documentation stating that she was "totally incapacitated"
- Final document submitted stated that she could not return until December 15, 2011, but failed to return
- Employer scheduled a pre-disciplinary interview citing employee's failure to provide documentation supporting her leave since December 15, 2011, and then fired employee
- Rehabilitation Act case: Employer argued that a multi-month leave was not a reasonable accommodation
- **Court:** Found for employee - relevant issue was not whether the entire leave was reasonable, but rather, whether an additional 16 days of leave would have been reasonable, which it could have been

31

Leave as a Reasonable Accommodation

Employees tend to be successful in cases where they are cleared to return to work shortly after their leaves expire

Moore v. Maryland Dep't of Public Safety and Corr. Svcs.

2011 WL 4101139 (D. Md. Sept. 12, 2011)

- Correctional officer took 8 month medical leave for cancer treatments – used accrued paid leave, FMLA and donated leave
- 8/4/10: Told that she would be placed on unpaid medical leave
- 8/5/10: Cleared to return to work and planned to return on 8/13/10. Alleges that employer then said she had been terminated, effective 8/4/10
- Employer argued that officer's 8 month leave amounted to indefinite leave, and that it imposed an undue hardship on the State
- **Court:** Rejected employer's argument – reasonableness of leave was a question of fact
  - Emphasized that officer was cleared to work just one day after she was allegedly terminated

32

Leave as a Reasonable Accommodation

Indefinite leave is generally not a reasonable accommodation

- *Corder v. Lucent Technologies Inc.*, 162 F.3d 924, 928 (7th Cir. 1998)
  - "Nothing in the ADA requires an employer to give an employee indefinite leaves of absence."
- *Hudson v. MCI Telecomm. Corp.,* 87 F.3d 1167, 1168 (10th Cir.1996)
  - Concluded that indefinite leave was not a reasonable accommodation under the ADA

However, employers cannot call a request "indefinite" to escape liability

- *Bernhard v. Brown & Brown,* 720 F. Supp. 2d 694 (E.D. Pa. 2010)
  - Employer argued that request for additional 3 month leave of absence after expiration of FMLA was indefinite; court rejected argument as "disingenuous[]" and "absurd"
- *Feldman v. Law Enforc. Ass. Corp.*, 779 F. Supp. 2d 472 (E.D.N.C. 2011)
  - Rejected employer's assertion that an employee with Multiple Sclerosis sought "indefinite" leave, as the employee sought leave for "at least three weeks" on two separate occasions

33

Leave as a Reasonable Accommodation

Leave may not be reasonable if employee would still be unable to return to work following the leave

Sclafani v. PC Richard & Son
668 F. Supp. 2d 423 (E.D.N.Y. 2009)

- Employee was diagnosed with PTSD after surviving an assault in employer's parking lot; she exhausted FMLA leave and sought additional unpaid leave under ADA
- Doctor stated that she could never work at her place of employment
- **Court:** Employee's requested leave would not have rendered her qualified so employer did not violate ADA by denying additional leave

See also Basden v. Professional Transport Inc., 714 F.3d 1034 (7th Cir. 2013) (upholding employer's decision to deny employee's request for a 30-day leave of absence, even though the employer failed to engage in the interactive process, because employee suggested that she would remain unable to return to work following the requested leave time).

34

Leave as a Reasonable Accommodation

While employers are generally able to choose which effective accommodation to provide, unpaid leave may be improper if another accommodation would enable employee to work

Mamola v. Group Mfg. Svcs., Inc
2010 WL 1433491 (D. Ariz. April 9, 2010)

- Employer denied salesman's request to telework for a 5 week recuperation period following a series of surgeries, citing the "security and integrity of the Company's computer network and data" and instead extended leave
- **Court:** "A reasonable fact finder could therefore conclude that unpaid leave actually prevented [the employee] from earning wages for work that he would have performed if [the employer] had granted the requested accommodation."

See also Reilly v. Revlon, Inc., 620 F.Supp.2d 524 (S.D.N.Y. 2009) ("Providing paid disability leave above and beyond the FMLA requirements is commendable, but providing benefits to a person who cannot work is not the same thing as making an accommodation in the workplace so the person can work.")

35

Inflexible Leave Policies

EEOC has successfully litigated cases regarding inflexible leave policies

EEOC v. Interstate Distributor Company
Civil Action No. 12-cv-02591-RBJ (D.Colo.)

- EEOC challenged trucking firm's "maximum leave policy" which automatically terminated employees who needed leave in excess of 12 weeks (+ no restrictions)
- EEOC: Employer has an obligation under the ADA to consider whether it would be reasonable to provide additional leave time as a reasonable accommodation
- 2012 Settlement: $4.85 million
  - Enjoined from engaging in further discrimination
  - Policy modifications
  - Training, reporting, monitoring requirements

www.eeoc.gov/eeoc/newsroom/release/11-9-12.cfm

36

Inflexible Leave Policies

EEOC v. Sears Roebuck & Co.
Civil Action No. 04-cv-7282 (N.D. Ill.)

- EEOC asserted that Sears had an inflexible workers' compensation leave policy, and terminated employees who exhausted leave instead of considering accommodations, including leave extension
- 2010 Settlement: $6.2 million
- www.eeoc.gov/eeoc/newsroom/release/2-5-10a.cfm

But see Hwang v. Kansas State Univ.
753 F.3d 1159 (10th Cir. 2014)

- Teacher took leave of absence for cancer treatments; Fired after 6 months under University's inflexible policy
- **Court:** University's inflexible leave policy was not impermissible, as leave in excess of 6 months is rarely reasonable
- **Note:** Opinion raises some questions about inflexible leave policies, however employers are still cautioned from relying on it too heavily, and should be reminded to engage in the interactive process to determine if a leave extension is reasonable in any given situation

37

"100% Healed" or No Restrictions Policies

Employer policies and practices refusing to allow employees to return until they are "100% healed" or until they have no restrictions have been found to be impermissible under the ADA because they fail to take the reasonable accommodation requirement into account

- *EEOC v. Interstate Distributor Company & EEOC v. Sears Roebuck & Co.*
  - EEOC's lawsuits also challenged policies where employees were only permitted to return from a leave of absence if they could do so without restrictions
- *EEOC Settlement with Supervalu / Jewel-Osco*
  - Case settled case for $3.2 million, requiring Supervalu to revise its policy to assure employees that they need not be 100% healed to be considered for a return to work
  - www1.eeoc.gov//eeoc/newsroom/release/1-5-11a.cfm

38

Interactive Process: What is an Accommodation Request?

It is well-established that employees seeking reasonable accommodations are not required to use "magic words" or specifically state ADA or reasonable accommodation in their request, but employees need to be clear that they have a medical need/disability and that they are requesting something related to that need. Best practice = use magic words.

Jenks v. Naples Cmty. Hosp., Inc
829 F. Supp. 2d 1235 (M.D. Fla. 2011)

- Employee took FMLA leave to seek treatment for breast cancer, and FMLA documentation stated that fatigue was a side effect of cancer
- Employee's estate brought a lawsuit alleging the hospital failed to provide employee with reasonable accommodations (additional breaks or approved long absences from her desk)
- Estate asserted that employee's FMLA documentation was a request for accommodation, and alerted hospital to the fact that employee needed additional break periods as an accommodation
- **Court:** Employee never requested a reasonable accommodation

39

Interactive Process: What is an Accommodation Request?

Some courts recognize that certain disabilities make the initial disclosure and request more difficult

Barfield v. Donahoe
2014 WL 4638635 (N.D. Ill. Sept. 17, 2014)

- Employee with depression and anxiety did not explicitly seek an accommodation request; supplied notes from her physician stating that she was "totally incapacitated" and could not work
- **Court:** Employee's case could move forward
  - Depression and anxiety can make it difficult for an employee to engage in meaningful communications. When that it is the case, "an employer has a duty to meet the employee half way."

See also Bultemeyer v. Fort Wayne Community Sch., 100 F.3d 1281, 1285 (7th Cir. 1996) ("[P]roperly participating in the interactive process means that an employer cannot expect an employee to read its mind and know that he or she must specifically say 'I want a reasonable accommodation," particularly when the employee has a mental illness. The employer has to meet the employee half-way.")

40

Interactive Process: What is an Accommodation Request?

If employee can demonstrate that employer failed to engage in the interactive process, employee's case is able to survive summary judgment

Snapp v. United Trans. Union
547 Fed. Appx. 824 (9th Cir. Nov. 5, 2013)

- After an extended disability leave, employee sent employer a letter, as well as a letter from his doctor referring to his disability and need for an accommodation
- **9th Cir:** This could have been a request for reassignment
  - Included notification of disability and desire for reassignment
  - Thus, the interactive process was triggered
  - Employer did not engage in interactive process, so case allowed to proceed to trial

41

Interactive Process: Employer Information

Medlin v. Rome Strip Steel Co
294 F. Supp. 2d 279 (N.D.N.Y. 2003)

- Employer did not permit employee to return to work after an off-the-job injury; asserted that employee was unable to perform the essential functions of his previous position
- **Court:** Permitted employee's case to proceed
  - Employee may have been able to return if the slitter machine was equipped with a device that would have lessened the physical demands of the position
  - Employer was at least "constructively aware" of the option of adapting this equipment
  - "Employers are simply more knowledgeable about adapting or modifying an employee's position, especially since the means to secure such adaptation and modification are most often entirely within their control."
  - Employees should not have to "engage in solitary private investigation to uncover information that the employer may well already know, or have the ability to know with little effort."

42

Reasonable Accommodation: Reassignment

Hillman v. Costco Wholesale Corp
2014 WL 3500131 (N.D. Ill. July 14, 2014)

- Service assistant was injured pushing carts and was unable to do his original job
- Sought to return from a medical leave of absence in a position with limited sitting and walking
  - Argued that he should have been reassigned to part-time gas station attendant or major sales assistant
- **Court:** Reasonable jury could find employee was qualified for vacant position—major sales assistant (didn't analyze gas station attendant)

43

Reasonable Accommodation: Reassignment

Circuit split: Does reassignment require an employee to be placed in a position, or permit employee to compete for a position

Majority rule: ADA requires employer to place employees with disabilities into vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to that employer. *See EEOC v. United Airlines*, 693 F.3d 760 (7th Cir. 2012) (en banc), *cert. denied,* 133 S.Ct. 2734 (May 28, 2013); *see also Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (en banc); *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998) (en banc).

Minority rule: 8th Circuit is the only circuit that has reached the opposite conclusion, and it did so relying on pre-*United Airlines* precedent. *See Huber v. Wal-Mart,* 486 F.3d 480 (8th Cir. 2007) (adopting the reasoning from a Seventh Circuit case "wholesale" and "without analysis").

44

Reasonable Accommodation: Reassignment

When reassignment requires an employer to violate a collective bargaining agreement and/or seniority system, courts find reassignment to pose an undue hardship

- No "vacant" position when positions are based on seniority

Henschel v. Clare County Road Commission
737 F.3d 1017 (6th Cir. 2013)

- Employer declined to reassign an excavator returning from a leave
- Reassignment would have required employer to move a more senior employee from his position
- **6th Cir:** Employer had no legal obligation to reassign employee because "there is no requirement that an employer violate a collective bargaining agreement."

See also U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002) (recognizing that reassignment to a vacant position is specified in the ADA, and may be reasonable absent a bona fide seniority system)

45

Reasonable Accommodation: Reassignment

Reassignment has been characterized as an accommodation of last resort:

- Should be considered only when accommodation within the individual's current position would pose an undue hardship
- Employees are only required to be reassigned if a position is available

Fields v. Clifton T. Perkins Hospital
2014 WL 2802986 (D. Md. June 19, 2014)

- Employer held employee's position of security attendant open for 7 months while the employee was on various leaves
- Employee sought to return, but was restricted from performing the duties of a security attendant
- He was not reassigned to a different position
- **Court:** Employee had failed to proffer any evidence establishing that any position was available at the relevant time
  - Without this type of evidence, employee could not pursue his failure to accommodate claim

46

Reasonable Accommodation: Part-Time Employment

Part-time work is recognized as a possible accommodation in ADA
42 U.S.C. § 12111(9)(B)

Reilly v. Revlon, Inc.
620 F.Supp.2d 524 (S.D.N.Y. 2009)

- Employee with post-partum depression sought to return from her maternity leave on a part-time basis, and gradually increase her hours until she was working full time
- Employer denied request and argued that part-time work was unreasonable as a matter of law
- **Court:** ADA case can move forward
  - Part-time work, especially for a limited duration of time, could be a reasonable accommodation

But see White v. Standard Ins. Co., 529 Fed.Appx. 547 (6th Cir. June 28, 2013) (suggesting that part-time work was not reasonable for a customer service agent because full-time work was an essential function of her job, and the employer was not required to create a new part-time position)

47

Reasonable Accommodation: Part-Time Employment

At least one court has found it reasonable to permit an employee to return to work on a part-time basis, but to require the employee to use FMLA leave to account for the remaining time

Basta v. American Hotel Register Co.
2012 WL 88187 (N.D. Il. Jan. 11, 2012)

- Employee took 2 leaves to recover from an on-the-job shoulder injury, and asked to return to 4 hour work day
- Employer agreed but required employee to considered leave time under the FMLA
- **Court:** Not "improper for an employer to provide an employee with a reduced schedule as a reasonable accommodation while also attributing the unworked portion of the plaintiff's workday as leave time under the FMLA."
  - Emphasized that employer provided employee with notice of deduction, and that employee did not explicitly request to be automatically transferred to a part-time position

48

Reasonable Accommodation: Restructuring Job Duties

EEOC v. LHC Group, Inc

--- F.3d ---, 2014 WL 7003776 (5th Cir. Dec. 11, 2014)

- Team Leader of nurses returned from leave following seizure
- Employer denied 2 reasonable accommodations: (1) assistance with driving; (2) temporary assistance with computer work
- **5th Cir:** Found for employee
- Driving was not necessarily an essential function of a Team Leader so may be reasonable to restructure
  - Despite job description, only drove a couple of hours a day; had many other office-related duties
  - Accommodations existed - public transit, or van/taxi service.
- Computer assistance
  - Employer failed to engage in interactive process
  - Suggests that it may be reasonable for an employee to make a request for an accommodation for a temporary issue

49

Reasonable Accommodation: Light Duty

Light duty: Typically analyzed either as either a request for reassignment or a request for modified job duties

Ammons v. Aramark Uniform Services

368 F.3d 809 (7th Cir. 2004)

- Boiler engineer/lead mechanic injured right knee on the job
- Alternated between light duty position and leave
  - Light duty: Various restrictions in the amount of time he could spend climbing, on his knees, bending, squatting, climbing stairs, lifting and using a ladder
- Terminated after 18 month absence
- **Court:** Light duty was not reasonable because it eliminated essential functions

Acker v. Coca-Cola North America, 2007 WL 2955595 (E.D. Pa. Oct. 9, 2007) *aff'd* 314 Fed.Appx. 409 (3d Cir. Nov. 8, 2008) (suggesting that indefinite light duty is not reasonable if it eliminates essential job functions, even though the employee had remained in light duty position for six years)

50

Reasonable Accommodation: Light Duty

Brunson v. Peake

2011 WL 3715084 (E.D. Pa. Aug. 24, 2011)

- Food service worker at VA Med Center was injured on the job, requiring months of leave due to his herniated disc and sprained back
- Returned with restrictions – requested to work in a light duty position, which was granted and then denied
- **Court:** Issue of material fact whether VA could have accommodated the employee in a light duty position
  - Employer failed to engage in interactive process in good faith
  - Supervisor had accommodated employee
  - Created a list of tasks employee could perform
  - Evidence that "agency was looking hard at not having a lot of light duty"

51

Reasonable Accommodation: Telecommuting

When determining whether telework is reasonable, courts consider whether employee's essential functions can be performed off site

Bisker v. GGS Information Services, Inc

2010 WL 2265979 (M.D. Pa. June 2, 2010)

- Parts lister with MS requested to work from home following leave
- Employer: Argued it was *per se* unreasonable for employees expected to interact with others to meet tight deadlines to work from home
- Court: Declined to adopt *per se* rule – employee's case could proceed
  - While employee's job description required "frequent contact with employees" and occasional interfacing, it did not specify that such interactions needed to be face-to-face

See also www.eeoc.gov/facts/telework.html ("Changing the location where work is performed may fall under the ADA's reasonable accommodation requirement of modifying workplace policies, even if the employer does not allow other employees to telework.")

52

Reasonable Accommodation: Telecommuting

McNair v. District of Columbia

11 F.Supp.3d 10 (D.D.C. Jan. 23, 2014)

- Hearing officer with a degenerative disc disease requested to telework 2-3 days a week while recovering from back surgery
- **Court:** An "employer must consider telecommunicating as a potential form of reasonable accommodation"
  - But here, not reasonable
  - Hearing officer needed to be in the office to perform essential functions of her position
  - Expected to conduct on-site administrative hearings on rent-adjustment petitions filed by landlords and tenants
  - Access registration records for housing accommodations and other records
  - Meet and confer with rent administrators
  - Handle walk-in and scheduled appointments with landlords and tenants

53

Reasonable Accommodation: Telecommuting

Other courts have found telework to be unreasonable if teamwork, personal interaction and supervision are essential functions

Anderson v. United Conveyor Supply Co

461 F.Supp.2d 699 (N.D. Ill. Nov. 15, 2006)

- Home office is rarely a reasonable accommodation because most jobs require teamwork, personal interaction, and supervision that cannot occur in a home office situation
- Note: Employee was required to supervise 2 other employees

Carlson v. Liberty Mutual Ins. Co

237 Fed.Appx. 446 (11th Cir. June 7, 2007)

- Employee's duties required her to be available to other employees, participate in weekly meetings, and hold weekly office hours
- Job description required her to provide "on-site" support, provide consultation, and to be able to work in a team/organization
- Acknowledged that part-time telework may have been reasonable

54

Direct Threat

- Employer may exclude an individual from a job if that individual would pose a "direct threat"
- Direct threat = "A significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3)
- EEOC regulations = "A significant risk of substantial harm to the health or safety *of the individual* or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. §1630.2(r)
  - *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 78 (2002) (upholding EEOC regulations)

55

Direct Threat

- Direct threat determination must be based on:
  - "An individualized assessment of the individual's present ability to safely perform the essential functions of the job"
  - "A reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence"
- Factors
  - Duration of the risk
  - Nature and severity of the potential harm
  - Likelihood that the potential harm will occur
  - Imminence of the potential harm

29 C.F.R. § 1630.2(r)

56

Direct Threat

Gaus v. Norfolk Southern Railroad Company

2011 WL 4527359 (W.D. Pa. Sept. 28, 2011)

- Journeyman electrician with ulcerative colitis, hernias, carpal tunnel syndrome, torn ligaments, gall bladder problems, Addison's disease, and chronic pain, sought to return to work
- Cleared to return by both his treating doctors and company doctor
- Employer's medical department denied his return due to concerns with employee's medication based on general information
- **Court:** Decision based on speculation and conclusory statements
  - Examined 4 factors – no objective evidence establishing that employee's pain/medication regimen created a significant risk
  - Relied too heavily on written guidelines and not employee's particular circumstances, including his reaction to medication
  - Evidence = Employee was not experiencing medication side effects and docs cleared his return

57

Direct Threat

EEOC v. Rexnord

966 F.Supp.2d 829 (E.D. Wis. 2013)

- Assembler with seizure disorder worked with various tools
- Conflicting testimony about whether the employee was having seizures, whether she was becoming unconscious at work, whether her condition was under control, and whether she was able to predict blackouts sufficiently to get to a safe location
- **Court:** Given conflicting testimony, rejected employer's argument that assembler posed a direct threat due to alleged seizure disorder

See also Garr v. Union Pacific Railroad, 2013 WL 68699 (N.D. Ill. Jan. 4, 2013) (rejecting employer's direct threat analysis because, among other reasons, it relied upon a statistic regarding the likelihood of sudden incapacitation, and the court noted that the specific statistic would not apply to the plaintiff given his medical interventions)

58

Direct Threat: Interplay with Medical Exams

At least one court held that employer can establish direct threat argument based on the information available when employee is not cooperative

Cleveland v. Mueller Copper Tube Co
2012 WL 1192125 (N.D. Miss. April 10, 2012)

- Employee with various restrictions from prior injuries (including lifting) sought to return from workers' compensation/FMLA leave
- She bid on position of block-crane operator, which required lifting in excess of her limitations
- Employer initially refused, but then asked employee to have a doctor evaluate her restrictions through a functional capacity evaluation
- Employee refused and was laid off
- **Court:** Applied interactive process principles – risk of allowing an employee with a permanent lifting restriction to return to a position that requires lifting in excess of that position, without first obtaining objective evidence that it was safe to do so, presents "a high probability of substantial harm to the individual."

59

Retaliation

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

- Employee must show:
  - Engaged in a protected activity
  - Suffered an adverse employment action
  - Employer was aware of the protected activity
  - Causal link between the protected activity and the adverse employment action

60

Retaliation: Causal Connection

Some courts find temporal proximity to sufficiently establish a causal connection on its own

Wagner v. County of Nassau
2014 WL 3489747 (E.D.N.Y. July 11, 2014)

- Laborer complained that her work environment was making her sick
- She was sent home, and pursuant to company policy, was not permitted to return until she submitted a doctor's note stating that she could return without restrictions
- She was then placed on involuntary sick leave
- **Court:** Found temporal proximity between adverse action (doctor's note complaining about conditions) and date she was involuntarily placed on sick leave – only 9 days

61

Retaliation: Causal Connection

Most courts require temporal proximity coupled with other factors to sufficiently establish a causal connection

Hudson v. Guardsmark, LLC
2013 WL 6150776 (M.D. Pa. Nov. 22, 2013)

- Employee returned from medical leave for anxiety and depression
- Supervisor commented that she was tired of having to find people to fill in, and that employee was missing a lot of work
- Subjected to discipline after his return to the workplace
- **Court:** Employee's case could proceed
  - While suspicious timing alone is insufficient, timing coupled with pattern of conduct was sufficient to establish causal connection

62

Retaliation: Causal Connection

Akerson v. Pritzker
980 F.Supp.2d 18 (D. Mass. 2013)

- Employee with an inflammatory bladder disease took 2 week leave; disclosed her condition to supervisor/HR upon return
- Supervisor asked personal questions and required her to advise him every time she left her desk for reasons other than using the restroom – not a requirement for others
- Employee's desk was moved to a different location, and many duties were reassigned. Fired 2 weeks later for poor performance
- **Court:** Employee's claim for ADA retaliation could proceed
  - Timing between request for accommodation and her termination was "highly probative of retaliation"
  - Especially when considering other factors, including her supervisor's alleged attitude toward her bathroom breaks and changes in her employment conditions

63

Conclusion

- Returning to work raises a number of legal issues
- Some principles are well-established; others are still evolving
- Best practices:
  - Engage in interactive process when considering accommodation requests
  - Consider accommodations to keep employees working
  - Conduct individualized inquiries when making decisions
  - Avoid inflexible policies regarding leave or restrictions
  - Remember other laws – FMLA, workers' compensation, state/local laws

64

Continuing Legal Education Credit for Illinois Attorneys

- This session is eligible for 1.5 hours of continuing legal education credit for Illinois attorneys.
- Illinois **attorneys** interested in obtaining continuing legal education credit should contact Barry Taylor at: barryt@equipforequality.org
- Participants (non-attorneys) looking for continuing education credit should contact the Great Lakes ADA Center at: 312-413-1407 or www.adagreatlakes.com

65

Session Evaluation

Your feedback is important to us

You will receive an email following the session with a link to the on-line evaluation

ada National Network
Information, Guidance and Training on the Americans with Disabilities Act

66

The ADA and Return to Work Issues

Presented by:
Barry Taylor, VP for Civil Rights and Systemic Litigation, Equip for Equality
Rachel Weisberg, Staff Attorney, Equip for Equality

Valuable assistance provided by:
Kayla Higgins, Legal Intern, Equip for Equality
Michelle Mbekeani-Wiley, Volunteer Attorney, Equip for Equality

January 13, 2015

Equip for Equality is providing this information under a subcontract with the Great Lakes ADA Center, University of Illinois at Chicago, U.S. Department of Education, National Institute on Disability of Rehabilitation and Research Award No.H133A110029.