

The ADA and Healthcare Workers with Disabilities

By Equip for Equality¹

I. Introduction

Title I of the ADA is intended to protect individuals from disability-related discrimination in the workplace and when applying for employment.² Such discrimination includes employers “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.”³ Reasonable accommodations are defined as “[m]odifications or adjustments ... that enable a qualified individual with a disability to perform the essential functions of [a] position ... or ... enjoy equal benefits and privileges of employment.”⁴ An employer is required to provide such accommodations absent a showing of undue hardship, which is defined as “an action requiring significant difficulty or expense.”⁵ To be considered “otherwise qualified,” an employee must demonstrate his ability to perform the essential functions of a given position with or without a reasonable accommodation.⁶ An employer is obliged to engage in an interactive process with any otherwise-qualified employee with a disability who has requested an accommodation to identify accommodations that may be reasonable and appropriate for the situation at hand.⁷ Following is an exploration of recent federal case law examining and applying these Title I standards to employment cases arising in the healthcare field.

A. Essential Job Functions

Courts have identified ensuring patient safety as one of the very most essential job functions of healthcare workers, and thus true risks to patient safety can be adequate grounds for denying employment or accommodations requested by employees. However, employers must remember to always consider whether an accommodation would enable the employee to meet the essential function of ensuring patient safety when engaging in this analysis. Further, as the cases below outline, issues of patient safety can also be evaluated as a direct threat.

For example, in *Leme v. Southern Baptist Hospital of Florida*, a Florida district court reviewed the Title I claim of a plaintiff with a visual impairment who had been employed by a hospital as an anesthesia technician.⁸ During plaintiff’s initial training period, he had had difficulty on account of his limited vision in performing some of the standard functions of his position. For example, he had difficulty visually inspecting lines to ensure that they were free of bubbles before connecting those lines to patients, as well as correctly connecting the lines themselves.⁹ In light of these difficulties and defendant’s resulting concerns for patient safety, defendant advised plaintiff that he could no longer work in this position, and allowed him to apply for other positions at the hospital.¹⁰ In response, plaintiff proposed various possible accommodations to enable him to continue in the role of technician. However, the record provided evidence as to why each of these accommodations was either an undue burden or presented further safety risks.¹¹ As such, the court found that plaintiff failed to establish that he was a qualified individual who was able to perform the essential functions of the job with or without accommodation, and granted defendant’s motion for summary judgment.¹²

Other courts have also found for employers on the grounds that plaintiffs have failed to identify any available reasonable accommodations at all in light of the essential nature of the job or workplace in question. In *Dickerson v. Secretary, Dept. of Veterans Affairs Agency*, the Eleventh Circuit reviewed a Rehabilitation Act discrimination claim brought by a nurse with scent allergies and chemical sensitivities against the VA medical center where she had been employed.¹³ The court found that plaintiff had failed to identify any reasonable accommodation that would enable her to perform the essential functions of her job on defendant's premises, as she had identified no areas where she could work free of exposure to the substances to which she would react adversely.¹⁴ Therefore, the court affirmed the summary judgment ruling in favor of defendant.

Elsewhere, in *Wulff v. Sentara Healthcare*, a nurse sued her former employer, a hospital, based upon its refusal to accommodate her total restriction from lifting in the workplace, as prescribed by her doctor.¹⁵ Defendant had in fact accommodated plaintiff's initial prescribed lifting limit of ten pounds with one arm.¹⁶ However, after plaintiff's doctor changed the restriction to ban plaintiff from lifting altogether, defendant asserted that lifting was an essential function of plaintiff's job, and that as such this accommodation could not be granted.¹⁷ Defendant placed plaintiff on medical leave in light of this total lifting restriction, prompting plaintiff to sue claiming that her rights under the ADA had been violated. In her suit, plaintiff did not focus directly upon defendant's failure to accommodate her total lifting restriction. Rather, she claimed that her doctor erred in so broadening the restriction, and that defendant should have recognized in light of all circumstances that plaintiff was fit to continue working within the original limit.¹⁸ However, the Fourth Circuit disagreed and affirmed summary judgment for defendant. The court noted that it had been plaintiff's duty to present her disagreement with the total ban to her prescribing physician, rather than to defendant, though she never did so.¹⁹ Additionally, the court found that Title I affords employers the right to rely upon the opinions of employees' physicians, and that employers have no duty to conduct their own analyses or formulate their own medical conclusions in such circumstances.²⁰

Similarly, in *Anderson v. Eastern Connecticut Health Network*, plaintiff was an experienced surgeon who had begun to decline in his work due to depression.²¹ He sometimes "slurred his speech and mumbled," "repeatedly sutured his own glove" during surgery, had toothpaste on his face while meeting patients, and asked an anesthesiologist to give him an injection of painkillers for his back pain while in the middle of an operation.²² Plaintiff took 60 days of paid leave and began to negotiate the terms of his return. Defendant hospital proposed to accommodate plaintiff by limiting the kind of procedures he could perform and providing a proctor to monitor him until his performance improved. Plaintiff objected to these terms on the basis that they would technically constitute a disciplinary action that would have to be reported to the national medical malpractice oversight board.²³ The court ruled for defendant, finding its proposed accommodations to have been adequate, and that it was unreasonable to expect an employer to tailor accommodations in order to avoid standard reporting procedures designed to ensure patient safety.²⁴

However, courts have also found that patient safety cannot be used as an excuse to disqualify an applicant or employee without true evidence to support it, especially when the defendant claims the employee posed a direct threat. For instance, in *Osborne v. Baxter Healthcare Corp.*, the

Tenth Circuit reviewed a Title I claim brought by a woman who was deaf and who had been conditionally hired as a monitor for plasma donors, but whose employment offer was rescinded by defendant plasma donation center after her physical examination revealed her disability.²⁵ The hiring managers contended that plaintiff's disability would make it impossible for her to fulfill essential functions of the job, including hearing audible alarms on medical equipment and hearing donors calling for assistance when in need or distress.²⁶ Defendant argued that both these limitations presented direct threats to donor safety. Plaintiff proposed several possible accommodations to mitigate the risks, including the installation of flashing or vibrating alerts and providing call buttons for individual donors. However, defendant was unwilling to accept any of the proposed accommodations in order to facilitate plaintiff's employment.²⁷

The Tenth Circuit reversed the district court's grant of summary judgment for defendant and remanded for further proceedings, finding that material issues of fact existed as to whether defendant could provide plaintiff with the requested accommodations. In its ruling, the court considered the statistical evidence presented by both sides and applied the direct threat criteria set forth in *School Board of Nassau County v. Arline*.²⁸ It noted that donors experienced adverse reactions to plasmapheresis fewer than 5 times annually. And while it acknowledged that relatively minor adverse reactions such as dizziness can progress to serious conditions without prompt medical attention, nevertheless it noted that "plasma donation carries a historically low risk—about 0.0004%—of significant adverse donor reactions," a risk that would be further decreased by the proposed accommodations.²⁹ The court found that the "infinitesimal risk" that a donor would experience a significant adverse reaction *and* that plaintiff would fail to notice a visual or vibrating alert did not constitute a direct threat.³⁰ Plaintiff "must only show that her proposed accommodation is reasonable on its face...she need not show that the accommodation would eliminate every de minimis health or safety risk that [defendant] can hypothesize."³¹

Employers should also consider reasonable accommodations that would reduce the threat; the following cases are examples where employers prevailed due, in part, to their exploration and attempts to find workable accommodations to address safety issues. In *Stern v. St. Anthony's Health Ctr.*, the Seventh Circuit affirmed summary judgment in favor of a hospital that had terminated one of its doctors on account of the doctor's memory problems.³² The court agreed with the hospital's conclusion that the doctor's memory issues precluded him from performing essential functions of his job, and that the accommodations that the doctor had proposed prior to being terminated were less than reasonable in light of the hospital's legitimate concern for the safety of its patients.³³ Indeed, the court noted that "[t]he ADA does not require an employer to walk on a razor's edge – in jeopardy of violating the [ADA] if it fired such an employee, yet in jeopardy of being deemed negligent if it retained him and he hurt someone."³⁴

Likewise, in *Olsen v. Capital Region Medical Center*, the Eighth Circuit affirmed summary judgment in favor of a healthcare facility which had removed plaintiff as a mammography technician after finding that her epilepsy posed a risk to patient safety and prevented her from performing the essential functions of her job.³⁵ The court found that plaintiff's epileptic seizures caused her to frequently lose consciousness, including while performing her work and caring for patients, and thus posed a clear and imminent risk with regard to her own safety and that of others in the workplace.³⁶ Plaintiff's seizures persisted despite the various measures that defendant had implemented in its earnest efforts to accommodate plaintiff's condition.³⁷ The

court thus found the evidence to establish that the direct threat posed by plaintiff's disability could not be adequately mitigated through reasonable accommodations in order to ensure patient and workplace safety.

In *EEOC v. St. Joseph's Hospital*, the Eleventh Circuit reviewed a Title I claim brought by a nurse who had been reassigned from her position based on defendant's contention that she posed a direct threat in light of her disability.³⁸ Defendant required a cane in order to ambulate, and defendant said that the cane posed a safety hazard within the psychiatric ward within which the nurse was working. The hospital removed her from her station in the psychiatric ward, whereupon she was permitted to apply for other positions within the hospital.³⁹ However, plaintiff was never hired for any of the other positions for which she applied, and was then terminated at the end of defendant's standard internal transfer period.⁴⁰ The court found that defendant had provided plaintiff with a reasonable accommodation by allowing her to apply for other positions through the hospital's internal job board, even though defendant did not exempt plaintiff from its competitive hiring process. The court noted that the ADA "does not require reassignment without competition for, or preferential treatment of, the disabled."⁴¹

In *Stevens v. Rite Aid Corp.*, a pharmacist brought a Title I discrimination claim against defendant employer after it removed him from his position on the grounds that he posed a direct threat to pharmacy customers.⁴² Plaintiff had typanophobia (a fear of needles), thus could no longer fulfill all his job responsibilities after defendant changed its corporate policy and began requiring its pharmacists to administer injections to patients who needed them. Plaintiff was unable to safely administer shots because his condition made him prone to fainting.⁴³ He contended that defendant should have accommodated him by offering desensitization therapy or by hiring a nurse to administer shots in his stead.⁴⁴ However, the Second Circuit ruled that the ADA does not require employers to offer medical treatment or to create altogether new position simply in order to accommodate employees whose disabilities do genuinely pose a direct threat in the workplace.⁴⁵

B. Overcoming the "undue hardship" defense

Some courts have taken a more employee-friendly approach to the question of reasonable accommodations in the healthcare workplace. For example, in *Searls v. Johns Hopkins Hospital*, a Maryland district court considered the matter of a hospital which had rescinded its job offer to a deaf nurse after she requested a full-time ASL interpreter as an accommodation.⁴⁶ The nurse was subsequently hired by a different hospital, where she was provided with her requested accommodation and consistently received positive work evaluations.⁴⁷ In response to the nurse's Title I discrimination claim, defendant offered three justifications for its refusal to provide the interpreter and its decision to cancel the job offer. First, it maintained that, even with an ASL interpreter, the nurse would not have been able to communicate with patients, which was an essential function of the job.⁴⁸ Second, it claimed that the cost of providing the nurse with a full-time interpreter presented an undue burden for defendant.⁴⁹ Third, defendant alleged that the nurse's inability to hear audible alarms in the workplace presented a direct threat to patient safety.⁵⁰

In light of the nurse's successful job performance at the other hospital, the court found that she had been capable of performing the essential functions of the original position. Furthermore, the court noted that, although an interpreter relays information between the nurse and her patients, it is the nurse who decides which questions to ask and who makes medical decisions for herself. The court accepted this as proof that she could have performed the essential functions of the original job. The evidence also indicated that the primary reason the defendant had revoked its job offer to plaintiff was the \$120,000 annual cost of providing the interpreter plaintiff had requested.⁵¹ However, the court noted that this cost still constituted only a negligible portion of defendant's annual operating budget, and thus was unpersuaded by defendant's argument that this cost presented an undue burden. Indeed, defendant presented no evidence to this effect, instead emphasizing the fact that the budget included no provision for such accommodations.⁵² The court ruled that whether an employer budgeted for reasonable accommodation is "an irrelevant factor in assessing undue hardship." If it were relevant, "the employer could budget \$0 for reasonable accommodations and thereby always avoid liability."⁵³

The court was similarly unpersuaded by defendant's direct threat argument, finding it to be based on "post-hoc rationalizations and [was] therefore suggestive of pretext."⁵⁴ Defendant had made no individual assessment of the nurse's ability to do her job with the assistance of an interpreter; it simply assumed that she would not be able to respond to auditory alerts.⁵⁵ Finding all three of defendant's arguments to have failed, the court granted plaintiff's motion for partial summary judgment.

C. Employee leave as a reasonable accommodation

The question of employee leave as a reasonable accommodation is another issue that arrives frequently in the healthcare context. The U.S. Equal Employment Opportunity Commission ("EEOC") has weighed in on this issue by way of some of its recent regulatory actions. In one recent example, the EEOC reached a settlement with a healthcare clinic which had terminated one of its nurses who had taken medical leave in order to undergo breast cancer treatment.⁵⁶ When the nurse had exhausted the initial three months of leave to which she was legally entitled, she advised her employer that she was still undergoing treatment, and thus was not yet able to return to work. After four months, the clinic terminated the nurse, despite her advising them that she would be able to return to her job without restrictions in just two more months. After her termination, the nurse brought suit against the clinic alleging employment discrimination based on her disability, and the EEOC ultimately reached a settlement wherein the clinic agreed to substantial financial damages for the nurse, as well as to revise its leave policies and to enhance disability-awareness training for its staff and administrators. The Commission reached a similar settlement with a healthcare provider which had a policy of awarding attendance points for medical-related absences, did not permit intermittent leave, and did not allow leave or extensions of leave as a reasonable accommodation.⁵⁷

D. Medical marijuana use by employees as a reasonable accommodation

With their focus on ensuring patient and workplace safety, many healthcare employers require drug testing for their employees and applicants, and have commonly maintained zero-tolerance policies with regard to employee use of drugs, including marijuana. Until very recently,

employers were consistently able to defend against wrongful termination claims brought by employees who were licensed medical marijuana users under their respective state laws, simply by claiming preemption under the federal Controlled Substance Act (“CSA”).⁵⁸ The CSA classifies marijuana as an illegal controlled substance, and makes no exception for its medicinal use. Additionally, the ADA excludes “any employee or applicant who is currently engag[ed] in the illegal use of drugs, when the covered entity acts on the basis of such use.”⁵⁹ However, recently a number of courts in states with laws authorizing medical marijuana use, and which provide explicit employment protections in that context, have ruled in favor of employees who used medical marijuana, and have specifically found that federal law does not preempt the applicable state law protections. With a majority of states now having adopted legislation authorizing the legal use of medical marijuana, this trend in the case law suggests that employers will no longer simply be able to rely on CSA preemption, will need to take greater care to engage in the interactive process with employees who are medical marijuana users, and must be prepared to accept this use at least in certain cases as a reasonable accommodation in accordance with Title I.

The first state court rule signaling this new trend appears to have been *Callaghan v. Darlington Fabrics*, wherein the Rhode Island Superior Court found that an employer had violated the anti-discrimination provisions of the state’s medical marijuana law by denying employment to an applicant who held a state-issued medical marijuana card.⁶⁰ In its ruling, the court noted that plaintiff’s possession of the card should have put the employer on notice of plaintiff’s status as a person with a disability (in this case, a chronic and debilitating medical condition), which the employer should have recognized was the basis on which plaintiff had qualified for the card to begin with.⁶¹ This in turn placed an obligation upon the employer to engage in the interactive process with plaintiff and to provide reasonable accommodations, and its failure to do either constituted disability discrimination.⁶² Furthermore, the court found that the CSA did not preempt the anti-discrimination provisions of the state law, as the purposes of the state and federal laws were different.⁶³

Also, in *Barbuto v. Advantage Sales and Marketing*, the Massachusetts Supreme Judicial Court ruled in favor of an employee with Crohn’s Disease and who used marijuana legally, but who was terminated from her job after failing a drug test.⁶⁴ The court reversed an earlier dismissal in favor of the defendant employer, finding that the employee could make a cognizable claim under the state’s anti-discrimination statute.⁶⁵ Recognizing potential legitimate purposes for the off-site use of medical marijuana, and that such use is not automatically preempted by the CSA, the court found that in some cases employers may have a duty to permit such use by employees as a reasonable accommodation.⁶⁶

And, at the federal level, in *Noffsinger v. SSC Niantic Operating Co. LLC*, the U.S. District Court for the District of Connecticut ruled in favor of a medical marijuana user whose employment was terminated after she tested positive for marijuana in the course of the job application process.⁶⁷ The court found that the ADA did not preempt the state medical marijuana law’s anti-discrimination employment provision, and that the state statute did not conflict with the relevant federal laws because the latter were not intended to preempt state anti-discrimination laws.⁶⁸ This represents the first federal ruling to recognize that the CSA does not preempt a state law’s anti-discrimination provisions.

E. Employee rights to medical privacy

1. Medical examinations

Courts have also examined the issue of employee medical privacy in the context of Title I. For example, courts have reviewed the extent to which employees and applicants are entitled to keep their medical information confidential where this information may be relevant to their work performance. In *Port Authority Police Benevolent Association, Inc. v. Port Authority of New York and New Jersey*, a New York federal district court reviewed a suit brought by a union of police officers, challenging their employer's administration of three different medical examinations as a condition of their employment.⁶⁹ These included an annual general examination as well as two fitness for duty ("FFD") examinations. In considering the viability of defendant's policy requiring these examinations in light of plaintiff's concerns regarding the medical privacy of union members, the court noted that, per the requirements of the ADA, such examinations must be job-related and consistent with business necessity.⁷⁰ More specifically, it stated that defendant's policy must be vital to defendant's business, that the group subject to the policy must be consistent with the policy's purpose, and that the policy must be narrowly tailored to serve its objectives.⁷¹

With regard to the annual general examination, the court granted summary judgment in favor of the union. While as a general matter the court acknowledged that these examinations served the vital purpose of ensuring that officers were capable of performing their safety-sensitive jobs, it also noted that the subject class was too broad, as defendant administered these examinations to all officers, regardless of their titles and job assignments, which the court noted was not consistent with the policy's public safety rationale.⁷² Additionally, the court found that the exam was overbroad in its own scope, as it could identify conditions that had no bearing on officers' abilities to do their jobs.⁷³

As to defendant's FFD examination for workplace injuries, the court granted summary judgment in favor of defendants. The court found that these examinations did serve vital purposes, insofar as they helped to determine workers' eligibility for compensation, and helped defendant to review workers' claims before authorizing treatment.⁷⁴ Additionally, the court recognized that defendant applied these examinations to only a narrow group, those officers who were injured on the job, and that the examination itself was narrow in scope, investigating only each employee's "chief complaint" and limited to formulating a working diagnosis.⁷⁵

However, the court granted summary judgment for plaintiffs with regard to the other FFD, which defendant administered to officers who had non-workplace injuries and who afterward took five days or more of sick leave. In its analysis, the court addressed each of defendant's justifications for this examination. It was unpersuaded by the defendant's argument that the examination served the vital purpose of curbing excessive employee absences (the court finding that this was not necessarily a vital business purpose), but agreeing that the examinations were essential to ensuring that employees were fit and safe to return to their positions after incurring injuries.⁷⁶ Even so, much as with the annual examinations, the court found these examinations to be overbroad, as they were administered to all such officers regardless of their job tasks, and as

defendant had offered no evidence that officers taking five or more days of sick leave posed any particular safety risks upon returning to work.⁷⁷

In another case considering medical examinations in light of ADA protections, *Wright v. Illinois Dep't of Children & Family Services*, the Seventh Circuit reviewed a claim brought by an Illinois social worker who had been removed from contact with children in her work in response to concerns expressed regarding her conduct.⁷⁸ Following plaintiff's encounter with a child who resided at a state-administered facility, the facility's doctor barred plaintiff from further contact with the child.⁷⁹ The doctor issued a medical report questioning plaintiff's ability to work with children, and stating that "her mental health needs to be assessed."⁸⁰ A supervising administrator had also expressed concern regarding plaintiff, given her long-standing behavior patterns including her failures to follow orders.⁸¹ Consequently, defendant ordered plaintiff to undergo a FFD examination, which plaintiff repeatedly refused to do, and then brought suit alleging that this examination constituted discrimination under Title I.⁸²

At trial, the jury found that the examination was neither job-related nor consistent with business necessity. The district court thus denied defendant's motion for judgment as a matter of law. On appeal, the Seventh Circuit upheld the decision in plaintiff's favor, reiterating the lower court's findings and noting that all employees, regardless of whether they have a qualifying disability under the ADA, are protected by the ADA's restrictions on medical examinations and inquiries.⁸³ An employer must have a reasonable belief based on objective evidence that a medical condition will impair the employee's ability to perform essential job functions OR that the employee will pose a threat due to a medical condition.⁸⁴ The employer bears the burden of establishing the existence of a business necessity, and this burden is "quite high."⁸⁵

The appellate court cited rather extensive evidence to support its conclusion regarding the lack of any apparent business necessity. It noted testimony that when a FFD examination was pending, standard agency practice was to place the employee on desk duty, and yet here Plaintiff was permitted to continue overseeing her normal case load (of 22 cases) for almost 2 months, and was actually assigned to an additional case during that time.⁸⁶ This inconsistent application of agency policy suggested that there was no genuine concern for children's safety.⁸⁷ Additionally, an administrator testified that had she truly believed that the Plaintiff was a risk to children, she would have removed her cases.⁸⁸ Internal agency e-mails also indicated that the examination was unrelated to the Plaintiff's ability to do her job.⁸⁹

Also, in *Kroll v. White Lake Ambulance Authority*, the Sixth Circuit reviewed a claim brought by an emergency medical technician who, several years into her employment with an ambulance company, begun a "tumultuous" affair with a married colleague.⁹⁰ After the affair went bad, plaintiff's co-workers began to report instances of plaintiff behaving erratically, including several occasions on which she was seen crying in the parking lot, and at least one on which she was seen arguing on her cell phone while driving an ambulance.⁹¹ Plaintiff's manager decided to force her to seek mental health counseling, observing that her "life was a mess" and stating his wish to help her.⁹² At no time did the manager express any concerns about plaintiff's job performance.⁹³ Plaintiff acknowledged that she had some emotional issues, but refused to enter treatment because she could not afford it.⁹⁴ After plaintiff refused treatment, she was not scheduled to work any further shifts.⁹⁵

Plaintiff filed a complaint alleging defendant had violated the ADA by forcing her to submit to a medical examination that was not “shown to be job-related with business necessity.”⁹⁶ Defendant argued that the examination was necessary because plaintiff’s recent behavior constituted a direct threat to patient safety. However, the court was not persuaded. In its ruling, the court acknowledged that in “public safety” workplaces, an employer may require a psychological examination on “slighter evidence than in other types of workplaces because employees are ‘in positions where they can do tremendous harm if they act irrationally,’ and thus pose a greater threat to themselves and others.”⁹⁷ Nevertheless, the court noted that a few isolated incidents of abnormal behavior do not amount to a direct threat, even in a public safety workplace.⁹⁸ Defendant cited no objective evidence to support its belief that plaintiff’s behavior threatened either any business necessity or patient safety.⁹⁹ Indeed, the court noted that defendant’s actions appeared to have been driven more by its moral convictions than by any objective concerns regarding safety.¹⁰⁰ Therefore, the Sixth Circuit reversed the lower court’s summary judgment ruling in favor of defendant.

Elsewhere, the U.S. Department of Justice (“DOJ”) recently finalized a settlement agreement with an Indiana municipality in the wake of inappropriate disclosures of a police officer’s medical information made during public proceedings.¹⁰¹ In that case, the municipality’s police chief had requested medical information from the officer in question, who was at that time on medical leave from his job. The chief then recommended charges to the municipality’s Merit Commission, forwarding the officer’s medical information to the Commission in the process. In the ensuing public hearing, the Commission voted to permit the officer to keep his employment, but the officer’s medical privacy was violated in the course of the proceedings. Both the police chief and the municipality’s attorney publicly disclosed private information regarding the officer’s disability, as well as their concerns regarding the officer’s fitness for work. Additionally, the Commission attorney provided the media with the charging documents, which contained information regarding the officer’s prescription medications, medical treatment, and psychological evaluations. In the agreement with DOJ, the municipality agreed to a financial settlement with the officer, as well as to revise its policies, practices and procedures regarding confidentiality, and to provide training to employees regarding confidentiality requirements

2. Wellness plans

Another developing issue presenting questions of medical privacy is that of employee wellness plans. These plans often require employees to submit to medical examinations and inquiries in order to participate. Some of these plans are tied to employer-sponsored health insurance, while others are not. Employers often provide strong “incentives” for employees to participate in their wellness plans, including greatly reduced healthcare costs. And while the ADA imposes restrictions on certain medical examinations and inquiries, employers find limited exceptions to these restrictions by way of the ADA’s safe harbor provision and the “voluntary” nature of employee participation.¹⁰²

The EEOC recently litigated cases regarding wellness programs. In one such case, *EEOC v. Orion Energy Systems*, the EEOC settled with an employer after an employee whom it had terminated accused the employer of retaliating against her for complaining that the employer’s

wellness program violated the ADA. Employees who opted out of this wellness plan were required to pay their entire monthly health insurance premium. After investigating the claim, the EEOC filed suit in a Wisconsin district court. The court dismissed cross-motions for summary judgment, and set the case for trial. In its ruling, the court found that the ADA safe harbor provision was inapplicable in these circumstances, but that the employer could still avail itself of the “voluntariness” exception in spite of the very strong financial incentives for its employees to join in the wellness program.¹⁰³ The parties settled prior to trial, with the consent decree providing for a financial settlement for the employee in question, and with the employer agreeing to ensure that its wellness plans going forward would comply with the ADA’s voluntariness provisions, and that it would not retaliate against any employees raising concerns of this nature in the future.¹⁰⁴

The EEOC filed suit in a different Wisconsin federal district court in order to challenge another employer’s wellness program on ADA grounds. In *EEOC v. Flambeau*, the central issue was whether a wellness plan falls within the ADA’s safe harbor provision if it is part of the employer’s health insurance plan. The Seventh Circuit ultimately upheld the lower court’s ruling that this is so, dismissing the EEOC’s appeal on the narrow grounds that the claim was moot due to the complaining employee having since resigned his position.¹⁰⁵

More recently and significantly, the District Court for the District of Columbia vacated EEOC rules pertaining to wellness plans, in *AARP v. United States Equal Employment Opportunity Commission*, finding that the agency was moving too slowly in revising these rules per the earlier instruction of the court. In 2016, AARP filed suit seeking an injunction against a recently-adopted EEOC rule that permitted employers to impose penalties of up to 30% of the cost of coverage to encourage employees to disclose information that was protected under the ADA and the Genetic Information Nondiscrimination Act (“GINA”), without rendering such disclosures involuntary. In August 2017, the court agreed that the EEOC’s rulemaking process had been arbitrary, and sent the rule back to the agency for further revision. Finding the EEOC’s projected timeline for completing its revisions to be unacceptably slow, the court responded to AARP’s motion to alter or amend its earlier judgment by vacating the rule altogether, effective January 1, 2019.¹⁰⁶ As of the time this brief was written, it remained unknown whether the EEOC would complete its new rule prior to that date.

F. Doctors as Independent Contractors

As a final point regarding Title I, it may be noted that doctors are frequently not able to position themselves of Title I protections. This is because doctors seldom work as direct employees of hospitals and healthcare facilities, and more commonly serve as independent contractors who provide medical services in and use the facilities of privately-owned hospitals and clinics. As such, a common issue in the healthcare context is whether doctors who work as independent contractors can bring claims for disability discrimination under Section 504 of the Rehabilitation Act. A recent case on this issue is *Flynn v. Distinctive Home Care, Inc.*, where the Fifth Circuit concluded that independent contractors can sue under Section 504 for employment discrimination.¹⁰⁷ The court reasoned that Section 504 is broad and applies to all of a covered entity’s programs and activities. It also found that while the Rehabilitation Act incorporates the ADA’s substantive non-discrimination provisions, it does not incorporate the ADA’s definition

of employer. This is the majority position, although other courts have found that independent contractors cannot sue under the Rehabilitation Act.¹⁰⁸

IV. Conclusion

The ADA plays an indispensable role in ensuring the rights and opportunities healthcare workers with disabilities. Many of the regulatory and litigation trends herein are still very much evolving, and interested parties will continue to monitor them for future developments. Those developments may carry ramifications with regard to healthcare that may resonate within the disability community long into the future.

¹ This legal brief was updated in 2018 by Andrew Webb, Staff Attorney and Equal Justice Works Fellow and Aima Mori, Legal Intern, Equip for Equality. This legal brief was initially written in 2012 by Barry C. Taylor, Alan M. Goldstein, Senior Attorney, and Volunteer Attorneys Matthew Teaman and Aaron Lawee. Equip for Equality is the protection and advocacy system for the State of Illinois, and is providing this information under a subcontract with Great Lakes ADA Center.

² 42 U.S.C. § 12111.

³ 42 U.S.C. §12112(b)(5)(A).

⁴ 29 C.F.R. § 1630.2(o)(1)(ii).

⁵ 42 U.S.C. §12111(10)(A).

⁶ 29 C.F.R. § 1630.2(m).

⁷ 29 C.F.R. § 1630.2(o)(3).

⁸ *Leme v. Southern Baptist Hospital of Florida, Inc.*, 248 F.Supp.3d 1319 (M.D.Fla. 2017).

⁹ *Id.* at 1328.

¹⁰ *Id.* at 1333.

¹¹ *Id.* at 1327-28.

¹² *Id.* at 1340, 1341-42.

¹³ *Dickerson v. Secretary, Dept. of Veterans Affairs Agency*, 489 Fed.Appx. 358, 2012 WL 3892196 (11th Cir. Sept. 7, 2012) (Note that this case involves the Rehabilitation Act rather than the ADA. This is because the employer in question was a federally-funded agency, thus subject to the Rehabilitation Act. As the Rehabilitation Act was the legislative predecessor and basis for the later-enacted ADA, and applies essentially the same requirements to employers as those described above in ADA Title I, this case is included here largely as an illustrative example).

¹⁴ *Id.* at 361.

¹⁵ *Wulff v. Sentara Healthcare, Inc.*, 513 Fed.Appx. 267, 2013 WL 781958 (4th Cir. March 4, 2013).

¹⁶ *Id.* at 267-68.

¹⁷ *Id.* at 269.

¹⁸ *Id.* at 271.

¹⁹ *Id.*

²⁰ *Id.* at 271-72.

²¹ *Anderson v. E. Conn. Health Network, Inc.*, 2015 WL 4393552 at *1 (D. Conn. July 16, 2015).

²² *Id.*

²³ *Id.* at *3.

²⁴ *Id.* at *8.

²⁵ *Osborne v. Baxter Healthcare Corp.*, 798 F.3d 1260, 1264-65 (10th Cir. 2015).

²⁶ *Id.*

²⁷ *Id.* at 1272, 1274.

²⁸ *Id.* at 1269, citing *School Board of Nassau County v. Arline*, 480 U.S. 273, 287-88 (1987).

²⁹ *Id.* at 1275.

³⁰ *Id.* at 1277-78.

³¹ *Id.* at 1278.

³² *Stern v. St. Anthony's Health Ctr.*, 788 F.3d 276, 279 (7th^h Cir. 2015).

³³ *Id.* at 295.

³⁴ *Id.* at 295.

³⁵ *Olsen v. Capital Region Med. Ctr.*, 713 F.3d 1149, 1150-51 (8th Cir. 2013).

³⁶ *Id.* at 1153.

³⁷ *Id.* at 1154.

³⁸ *EEOC v. St. Joseph's Hospital, Inc.*, 842 F.3d 1333 (11th Cir. 2016).

³⁹ *Id.* at 1338.

⁴⁰ *Id.* at 1340.

⁴¹ *Id.* at 1345.

⁴² *Stevens v. Rite Aid Corp.*, 851 F.3d 224 (2d Cir. 2017).

⁴³ *Id.* at 227.

⁴⁴ *Id.* at 230-31.

⁴⁵ *Id.*

⁴⁶ *Searls v. Johns Hopkins Hosp.*, 158 F.Supp.3d 427, 430 (D. Md. 2016).

⁴⁷ *Id.*

⁴⁸ *Id.* at 437.

⁴⁹ *Id.* at 438.

⁵⁰ *Id.* at 439.

⁵¹ *Id.* at 439-40.

⁵² *Id.* at 438-39.

⁵³ *Id.* at 438.

⁵⁴ *Id.* at 439.

⁵⁵ *Id.* at 439-40.

⁵⁶ See “Dialysis Clinic To Pay \$190,000 To Settle EEOC Disability Discrimination Suit” (September 14,2015), available online at www.eeoc.gov/eeoc/newsroom/release/9-14-15.cfm, last visited on March 16, 2018.

⁵⁷ See “Pactive to Pay \$1.7 Million to Settle EEOC Disability Discrimination Class Investigation” (November 5, 2015), available online at www.eeoc.gov/eeoc/newsroom/release/11-5-15a.cfm, last visited on March 16, 2018.

⁵⁸ 21 U.S.C. § 801 *et seq.*

⁵⁹ 42 U.S.C. § 12114 (a). For examples of past state court rulings in favor of employers in this context, see *Coats v. Dish Network, LLC*, 350 P.3d 849 (Co. 2015), in which the Colorado Supreme Court found for an employer which had been sued for violating a state “lawful activity” statute, after the employer cited its own drug policy in terminating an employee with quadriplegia who used medical marijuana in the evening to reduce muscle spasms; *Ross v. RagingWire Telecommunications, Inc.*, 174 P.3d 200 (Cal. 2008); *Johnson v. Columbia Falls Aluminum Co., LLC*, 213 P.3d 789 (Mont. 2009); *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010); *Roe v. TeleTech Customer Care Mgmt.*, 257 P.3d 586 (Wash. 2011).

⁶⁰ *Callaghan v. Darlington Fabrics Corp.*, 2017 WL 2321181 (R.I.Super. May 23, 2017).

⁶¹ *Id.* at *9, *11.

⁶² *Id.* at *13.

⁶³ *Id.* at *13-14.

⁶⁴ *Barbuto v. Advantage Sales and Marketing, LLC*, 477 Mass. 456 (July 17, 2017).

⁶⁵ *Id.* at *466-67.

⁶⁶ *Id.* at *465-66.

⁶⁷ *Noffsinger v. SSC Niantic Operating Co. LLC*, 2017 WL 3401260 (D. Conn. Aug. 8, 2017).

⁶⁸ *Id.* at *336-38.

⁶⁹ *Port Authority Police Benevolent Association, Inc. v. Port Authority of New York and New Jersey*, 2017 WL 4838320 (S.D.N.Y. Oct. 24, 2017).

⁷⁰ *Id.* at *3.

⁷¹ *Id.* at *5.

⁷² *Id.* at *5-6.

⁷³ *Id.* at *6.

⁷⁴ *Id.* at *8.

⁷⁵ *Id.*

⁷⁶ *Id.* at *9.

⁷⁷ *Id.* at *9-10.

⁷⁸ *Wright v. Illinois Dep’t of Children & Family Svcs.*, 798 F.3d 513 (7th Cir. 2015).

⁷⁹ *Id.* at 517-18.

⁸⁰ *Id.* at 518.

⁸¹ *Id.* at 518-19.

⁸² *Id.* at 519-20.

⁸³ *Id.* at 522.

⁸⁴ *Id.* at 522-23.

⁸⁵ *Id.* at 515.

⁸⁶ *Id.* at 524-25.

⁸⁷ *Id.* at 525.

⁸⁸ *Id.*

⁸⁹ *Id.* at 525-26.

⁹⁰ *Kroll v. White Lake Ambulance Authority*, 763 F.3d 619, 620 (6th Cir. 2014).

⁹¹ *Id.* at 620-21.

⁹² *Id.* at 622.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 626.

⁹⁸ *Id.* at 626.

⁹⁹ *Id.* at 626-27.

¹⁰⁰ *Id.* at 627

¹⁰¹ Settlement Agreement Between the United States and the City of New Albany, Indiana (17-cv-185 (S.D. Ind. Agreement reached Oct 4, 2017)), available online at www.ada.gov/new_albany/new_albany_sa.html, last visited on March 17, 2018.

¹⁰² In 2016, the EEOC released final rules regarding wellness programs addressing both the safe harbor and voluntariness exceptions. These regulations, along with an accompanying “Q&A,” are available online at www.eeoc.gov/laws/regulations/qanda-ada-wellness-final-rule.cfm (last visited on March 17, 2018).

¹⁰³ *EEOC v. Orion Energy Systems, Inc.*, 2016 WL 5107019 (E.D. Wis. Sept. 19, 2016).

¹⁰⁴ See “Wisconsin Employer Resolves EEOC Case Involving Wellness Program and Retaliation,” available online at www.eeoc.gov/eeoc/newsroom/release/4-5-17a.cfm, last visited on March 17, 2018.

¹⁰⁵ *Equal Employment Opportunity Commission v. Flambeau, Inc.*, 846 F.3d 941, 946 (7th Cir. 2017).

¹⁰⁶ *AARP v. United States Equal Employment Opportunity Commission*, 2017 WL 6542014 (D.D.C. Dec. 20, 2017).

¹⁰⁷ *Flynn v. Distinctive Home Care, Inc.*, 812 F.3d 422 (5th Cir. 2016).

¹⁰⁸ See also *Schrader v. Fred A. Ray, M.D., P.C.*, 296 F.3d 968 (10th Cir. 2002) (holding that Section 504 does not incorporate the ADA's requirement that the employer have “fifteen or more employees”); *Fleming v. Yuma Reg'l Med. Ctr.*, 587 F.3d 938 (9th Cir. 2009) (“[T]he Rehabilitation Act covers discrimination claims by an independent contractor.”). But see *Wojewski v. Rapid City Reg'l Hosp.*, 450 F.3d 338 (8th Cir. 2006) (“[W]e affirm ... summary judgment to the defendants because [plaintiff] was not an employee of the hospital.”).