

Welcome to the 2008 Legal Issues Webinar Series



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ADA Qualified Issues as Related to Reasonable Accommodations Such as Leave, Reassignment and Job Modifications



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Topics To Be Discussed

- ADA Qualified Issues In General
- Leave Issues and Cases
- Reassignment Issues and Cases
- Job Modification Issues and Cases
- Bonus Cases on Qualified Issues

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Qualified Issues

Overview



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Definition of Qualified

- An employee must be "qualified" for his/her position.
- An employee is "qualified" for a position if s/he:
 - (1) satisfies the requisite skill, experience, education, and other job-related requirements of the position and
 - (2) can perform the essential functions of the position, with or without reasonable accommodation.

29 C.F.R. pt. 1630 app. § 1630.2(o); *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship.*

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Essential Job Functions

“Essential Functions” of the job are:

- Fundamental Job Duties
- Employers are not required to reallocate essential functions but may chose to do so anyway.
- Job descriptions may be used as evidence but are not necessarily determinative

29 C.F.R. § 1630.2(n);
EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship.

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What are Reasonable Accommodations?



EEOC Regulations define reasonable accommodations as:

- Modifications or adjustments to the work environment, or
- to the manner or circumstances under which the position ... is customarily performed,
- that enable a qualified individual with a disability to perform the essential functions of that position ... or ...
- enjoy equal benefits and privileges of employment.

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29 C.F.R. § 1630.2(o)(1)

Reasonable Accommodation Limitations



An Accommodation does not have to be provided if:

- It is unreasonable
 - ❖ Requires reallocation of essential job functions
 - ❖ Will not enable the employee to be qualified
- It results in an undue hardship to the employer involving significant difficulty or expense; or
- Results in a direct threat to the health or safety of the employee or others.

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29 C.F.R. §1630.2(o)

Qualified Issues

Leave Cases



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Leave – In General



- Medical leave may be required due to a need for treatment or limited stamina
- Leave may be for a period of time
- Intermittent leave may also be necessary.
- Leave may involve the ADA and Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et. seq.* (1993).

EEOC Fact Sheet: The FMLA, the ADA, and Title VII of the Civil Rights Act

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FMLA and ADA Leave – In General

- FMLA provides up to twelve weeks of leave per year
- ADA provides for reasonable amount of leave
- If both ADA & FMLA apply, the law providing the “broadest protection to the employee” applies.
- Under the ADA, it is best to specify a needed period of leave as requests for indefinite leave are sometimes deemed to be unreasonable (though still requiring an “interactive process.”)

EEOC Fact Sheet: The FMLA, the ADA, and Title VII of the Civil Rights Act

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ADA Leave

- Leave is generally unpaid leave although vacation and/or sick time may run concurrently under ADA or FMLA.
- ADA leave allows employer to offer other options, (e.g., temporary reassignment to a part-time position, flexible scheduling, or telework).
- Related Issues:
 - ❖ Extra break time
 - ❖ Modifying shifts
 - ❖ Flexible work schedules

42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o); See also, JAN's Searchable Online Accommodation Resource on Psychiatric Impairments.

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Leave Case – *Byrne*

Byrne v. Avon Products, Inc., 328 F.3d 379 (7th Cir. 2003)

- Employee with depression was discharged for failing to show up for work and sleeping on the job.
- Time off may be an apt accommodation for intermittent conditions but only proposed accommodation was not working for an extended time, making him unqualified.
- Employee could not show leave would enable him to become qualified to perform the essential job functions.
 - ❖ However, employee may have been entitled to FMLA leave.

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Leave Case – *Brannon*

Brannon v. Luco Mop Co., 521 F.3d 843 (8th Cir 2008)

- An employee had diabetes and neuropathy.
- Because of her diabetes, she had partial toe and foot removal.
 - ❖ Employer accommodated the employee following these surgeries.
- Employee needed additional surgery and time off from work which the employer denied.
- Eventually, the employee was terminated because of extended absences and deficient work quality.

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Leave Case – *Brannon*



Brannon v. Luco Mop Co., 521 F.3d 843 (8th Cir 2008)

- Employee failed to demonstrate that her requested accommodation of additional time off to recuperate would have enabled her to have consistent attendance at work. (essential job function).
- While allowing medical leave of absence might be a reasonable accommodation, an employer was not required to provide an unlimited absence policy.
- Therefore, employee failed to demonstrate that she was a qualified individual with a disability.

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Leave Case: *Epps v. City of Pine Lawn*



Epps v. City of Pine Lawn, 353 F.3d 588 (8th Cir. 2003)

- Six-month leave of absence was not a reasonable accommodation for a policeman in a small city.
- The municipality could not reasonably reallocate his job duties among its small staff of 15-22 police officers.
- “An employer is not required to hire additional people or assign tasks to other employees to reallocate essential functions that an employee must perform.”
- Employee was seen as unable to perform one job and was not “regarded as” being disabled under the ADA.
- Excessive absenteeism made employee unqualified.

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Leave Case - *Garcia-Ayala*

Garcia-Ayala v. Lederle Parenterals, Inc.,
212 F.3d 638, (1st Cir. 2000)

- An employee with breast cancer was on medical leave and short-term disability benefits for 1 year while undergoing surgeries, chemotherapy, & other treatment.
- The employer used temporary employees at no extra cost.
- On June 10, 1996, company told Ms. Garcia that the 1 year leave period expired in March and she was terminated under a blanket policy limiting leave to 1 year.
- Employee requested an extension to July 30 based on her Dr.'s expectations for her RTW. (4+ months).

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Leave Decision – *Garcia-Ayala*

- Request Denied! Confirmation letter sent June 13th.
- Released to RTW August 22nd. Did not tell employer.
- Court: Prolonged disability leave situations are “tricky.”
- ADA “does not require employers to retain disabled employees who cannot perform the essential functions of their jobs [with or] without reasonable accommodation.”
- If the employer can “get temporary help or find some other alternative that will enable it to proceed satisfactorily with its business uninterrupted ..., retaining the ailing employee's slot while granting unsalaried leave may be a reasonable accommodation required by the ADA.”

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Leave Language – *Garcia-Ayala*

- “If, however, allowing the sick employee to retain his or her job places the employer in a hardship situation where it cannot secure in some reasonable alternative way the services for which it hired the ailing employee, ... the ADA does not require ... retention...”
- “Hence, where it is unrealistic to expect to obtain someone to perform those essential functions temporarily until the sick employee returns, the employer may be entitled to discharge the ill employee and hire someone else.”
- Exception: “[I]f the requested disability leave was so brief that no undue business harm could reasonably be expected to occur from not filling the vacancy. “

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Leave - *Garcia-Ayala*

- “Undue hardships are not limited to financial impacts; the term includes accommodations that are unduly extensive, substantially disruptive, or that would fundamentally alter the nature or operation of the business.”
- Decision: Summary Judgment for Plaintiff/Employee
- “We add that our analysis, while applicable to these facts, may not be applicable in other cases.”
- These are difficult, fact intensive, case-by-case analyses, ill-served by per se rules or stereotypes.

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Leave - *Garcia-Ayala*

- Per the U.S. Supreme Court, individualized assessments are “essential” in ADA cases.
School Board of Nassau County v. Arline, 480 U.S. 273 (1987).
- Factors in leave situations:
 - ❖ Is the request for indefinite leave with "no indication as to when [the employee] might be able to RTW"?
 - ❖ Are absences “erratic” and “unexplained”?
 - ❖ Will the employee be “qualified” at end of leave?
 - ❖ Company policies regarding temporary employees
 - ❖ Company resources

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Leave Case – *Rascon*



Rascon v. U.S. West Communications, Inc.,
143 F.3d 1324 (10th Cir. 1998)

- Medical leave of four to five months for treatment for an employee with PTSD was deemed reasonable.
- Employer had policies permitting up to one year of medical leave.
- However, the court stated, “[A]n indefinite unpaid leave is not a reasonable accommodation where the plaintiff fails to present evidence of the expected duration of her impairment.”

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Qualified Issues

Reassignment



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Reassignment – In General

- Reassignment to a vacant (equivalent) position for which the employee is qualified may be an appropriate accommodation under the ADA.
- Reassignment may be useful for an employee who has limitations in handling a heavy workload, workplace stress, or who needs periodic leave.
- Reassignment is generally not reasonable where it is sought to obtain a new supervisor or to escape certain co-workers.

EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship; See, U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002); Gile v. Untied Airlines, 213 F. 3d 365 (7th Cir. 2000).

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Reassignment Issue: Competing for Position

EEOC Position:

- The employee does not need to be the best qualified individual for the position.
- “Reassignment means that the employee gets the vacant position if s/he is qualified for it.”
- Otherwise, “reassignment would be of little value and would not be implemented as Congress intended.”
- Some Courts follow the EEOC’s position (10th and D.C.) and others do not (7th and 8th).

EEOC Enforcement Guidance on Reasonable Accommodation...;
See, Huber v. Wal-Mart Stores, Inc., 486 F.3d 480 (8th Cir. 2007).

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Barnett – Reassignment and Seniority Policies



U.S. Airways v. Barnett, 122 S. Ct. 1516 (2002)

- **Holding:**
 - ❖ Reassignment may be available to a worker despite a policy granting vacant positions by seniority.
 - However, a person must show the seniority provision was not strictly followed in other cases in order to prevail.
- **Implication:**
 - ❖ Refers to reasonable accommodations as “special” and “preferential.”

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Reassignment & Seniority Policies – *Dilley*

Dilley v. Supervalu, Inc., 296 F.3d 958 (10th Cir. 2002)

- A truck driver who had a lifting restriction requested a reassignment to a route that did not require heavy lifting.
- The employer argued that the reassignment would violate its seniority system because a more senior employee could later bid for the new position.
- The court disagreed, stating that there was only a “potential violation of the seniority system.”
- As the employee had the requisite seniority, and the employer could remove him later if a more senior employee requested the position, reassignment should have been available.

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Reassignment – *Chapple*



Chapple v. Waste Management, Inc.,

2007 U.S. Dist. LEXIS 14151 (D. Minn. Feb. 28, 2007)

- Employee’s request for reassignment to a different position after a medical leave of absence was denied.
- Employer had a consistently applied “most qualified applicant policy,” a “legitimate, nondiscriminatory policy”
- The court warns against employers “always referring to a policy of hiring the most qualified person for a job,” especially when the qualifications are subjective.
- In this case the employee had objectively lower qualifications for the position.

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Lucent Technologies
Bell Labs Innovations

Reassignment – Cases

Gaul v. Lucent Technologies, Inc.,
134 F.3d 576 (3rd Cir. 1998)

- The court denied reassignment requested due to “prolonged and inordinate stress” caused by co-workers.
- Employer would only be able to obtain temporary compliance as compliance depended on the employee’s “stress level at any given moment.”
- Accommodation was also administratively burdensome due to the # of factors beyond the employer’s control.
 - ❖ See also, *Ozlek v. Potter*, 2007 WL 4440051 (3rd Cir. 2007), where reassignment was denied to a postal employees who stated he would have taken any transfer as long as it was “away from the supervisors and managers I had been working for.”

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Reassignment – Cases

Williams v. Philadelphia Housing Authority Police Department, 380 F.3d 751 (3rd Cir. 2004)

- Reassignment was a possible reasonable accommodation for a police officer with depression who could not carry a gun.
- He sought a position in the radio room or a training room assignment where he would not have to carry a weapon.
- See also, *Mustafa v. Clark County School District*, 157 F.3d 1169 (9th Cir. 1998).
 - ❖ A teacher with PTSD, depression, and panic attacks could be accommodated by being assigned to a non-classroom setting.

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Reassignment – Cases

Williams v. Philadelphia Housing Authority Police Department, 380 F.3d 751 (3rd Cir. 2004)

- The *Williams* case is interesting as the court noted that reasonable accommodations may be required for employees who are “regarded as” being disabled.
- Other courts have held that employees who are “regarded as being disabled are not entitled to reasonable accommodations. See, e.g., *Kaplan v. City of North Las Vegas*, 323 F.3d 1226, 1231-33 (9th Cir. 2003); *Weber v. Strippit, Inc.*, 186 F.3d 907, 916-17 (8th Cir. 1999).

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Qualified Issues

Job Modifications



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Job Modifications – In General

Job modifications may include:

- Reasonable modifications of policies and/or procedures
 - ❖ Attendance / Leave
 - ❖ Working from home
 - ❖ Training
 - ❖ Service animals
 - ❖ Personal assistants
 - ❖ Job coaches

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42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630 app. §§ 1630.2(o), 1630.9;
EEOC Guidance on Reasonable Accommodation & Undue Hardship



Job Modifications – In General

Job modifications may include:

- Altering the time or manner in which a job function is performed
 - ❖ Extra break time
 - ❖ Modifying shifts
 - ❖ Flexible work schedules

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42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630 app. §§ 1630.2(o), 1630.9;
EEOC Guidance on Reasonable Accommodation & Undue Hardship

Job Modifications – In General

Job modifications may include:

- Reassigning non-essential functions
 - ❖ Reallocating essential job functions is not required, although employers may chose to do so.
- Work at home / Telework
- Interpersonal interaction changes among employees or between an employee and a supervisor.

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42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630 app. §§ 1630.2(o), 1630.9;
EEOC Guidance on Reasonable Accommodation & Undue Hardship

Job Modifications – Work at Home / Telework



- The ADA does not require that employers create a teleworking policy if none exists.
- If a telework program does exist, people with disabilities should be able to participate.
- If there is no teleworking policy, employers must still consider it as a possible reasonable accommodation.
- Some courts have found working at home is a reasonable accommodation
- Other courts have strictly interpreted these types of reasonable accommodation requests.

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EEOC Fact Sheet: Work At Home/Telework as a Reasonable Accommodation.



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Job Modifications – Work at Home / Telework Cases

- Work at home not reasonable where physical attendance at the administration center was an essential function of the service coordinator position, a low-level position requiring supervision and teamwork.

Mason v. Avaya Communications, Inc., 357 F.3d 1114 (10th Cir. 2004)

- Working from home was not reasonable as presence at the workplace was necessary for meetings & mediations.
 - ❖ Accommodation of a distraction free environment was effective.

Mobley v Allstate Insurance Company,
2006 WL 2735906 (S.D. Ill. Sept. 22, 2006)

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Telework Case – *Humphrey*

Humphrey v. Memorial Hospitals Association,
239 F.3d 1128, (9th Cir. 2001)

- Working at home, (or leave), might be a reasonable accommodation for a medical transcriptionist with OCD.
- Telework was allowed for others in the same position.
 - ❖ Employee had previously been provided a flexible start time as an accommodation but it proved ineffective.

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Telework Case – Woodruff

Woodruff v. Department of Transportation,
482 F.3d 521 (D.C. Cir. 2007)

- Team Leader was injured in a fall at work.
- Later, his manager signed a telecommuting agreement, permitting him to work from home up to 2 days per week.
- FAA encouraged such agreements in order to reduce the FAA's environmental impact (commuting time).
 - ❖ FAA Telecommuting Handbook required that the agreements identify in advance the days when the employee would work from home.
 - ❖ This agreement did not do so, listing the telecommuting days as “variable.”

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Telework Case – Woodruff

Woodruff v. Department of Transportation,
482 F.3d 521 (D.C. Cir. 2007)

- FAA Telecommuting Handbook says: “[E]mployees may telecommute ... as frequently as 5 days a week.”
- FAA allowed another employee in Woodruff's division to lead a team in Washington, D.C., while working in Florida.
- Woodruff's team was “mostly ... self-directed.”
- Employee was allowed to work with the proposed accommodations for months with no problems before employer sought to terminate telework.
- Therefore, telework was a reasonable accommodation.

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Part-Time or Modified Work Schedules Cases - *Rask*

Rask v. Fresenius Medical Care North America,
2007 WL 4258620 (8th Cir. December 6, 2007)

- A kidney dialysis technician with clinical depression was terminated for irregular attendance resulting from adverse side effects of medication.
- She claimed she should have been given a reasonable accommodation allowing sudden, unscheduled absences prior to terminating her employment
- Court denied her claim - While the technician might personally benefit were the accommodation granted, it would not assist her in performing her job.

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Part-Time or Modified Work Schedules Cases - *Rask*

Rask v. Fresenius Medical Care North America,
2007 WL 4258620 (8th Cir. December 6, 2007)

- Employee never sufficiently requested a reasonable accommodation.
 - ❖ She had only let her employer know that she was “having problems” with her medication and that she might “miss a day here and there because of it.”
- The court held that even if her statements suggested “what a reasonable accommodation might be,” no reasonable person could find that Ms. Rask “specifically identified” her “resulting limitation.”

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Part-Time or Modified Work Schedules – Case – *Earl*

Earl v. Mervyns, Inc.,

207 F.3d 1361 (11th Cir. 2000)

- A store area coordinator with OCD was denied the accommodation of clocking in whenever she arrived
- Sought a modification to the employer's tardiness policies
- Employee's psychiatrist: No reasonable accommodation would enable the employee to arrive at work on time.
 - ❖ Employees should ensure that submitted documentation supports their accommodation request
- Maintaining regular attendance at the workplace is often an essential job function.

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Part-Time or Modified Work Schedules – Cases – *Holly* (Compare with *Earl*)

Holly v. Clairson Industries, L.L.C.,

492 F.3d 1247 (11th Cir. 2007).

- Mold polisher who used a wheelchair frequently arrived late to work due to his disability.
- Court found that punctuality was not an essential function because employee was able to start late and stay late to finish duties without holding up production.
- Therefore, court held that employer must modify its tardiness policy as a reasonable accommodation for employee.

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Modified Work Schedules Cases – *Convergys* (Compare with *Holly and Earl*)

EEOC v. Convergys Customer Management Group, Inc.,
491 F.3d 790 (8th Cir. 2007)

- Employee used a wheelchair and was often late arriving at work and returning from lunch due to a lack of accessible parking and difficulty locating a workstation.
- Employee requested an accommodation of being allowed extra time to return from lunch.
- Allowing the employee an extra 15 minutes to return from his lunch break did not require the employer to eliminate the essential job function of punctuality. It merely created a different time for returning from lunch.
- Court held that it is the employer's responsibility to identify potential accommodations. (not done here).

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Job Modifications – Interpersonal Interactions



Reasonable modifications in interpersonal interactions may include:

- Providing for regular or informal meetings
- Modifying the manner in which expectations are communicated, (using written means instead of oral communication or vice versa)
- Utilizing checklists, and
- Redirecting activity when necessary

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JAN's Searchable Online Accommodation Resource on Psychiatric Impairments, www.jan.wvu.edu/soar/psych.html.



Case on Job Restructuring: Interpersonal Interactions

Taylor v. Phoenixville School District,
84 F.3d 296 (3rd Cir. 1999)

- **Facts:** Teacher who had worked at school for 20 years was hospitalized for bipolar disorder. She sought accommodations, which were denied. Instead, her work was closely scrutinized and she was disciplined routinely, even though she had never been disciplined in the previous 20 years. She was subsequently terminated.
- **Court:** Employer's actions in disciplining and terminating plaintiff while denying her any reasonable accommodations may constitute ADA discrimination.

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Case on Job Restructuring: Interpersonal Interactions

Taylor v. Phoenixville School District,
84 F.3d 296 (3rd Cir. 1999)

Quoting *EEOC Compliance Manual*, Enforcement Guidance for
Psychiatric Disabilities

“Supervisors play a central role in achieving effective reasonable accommodations for their employees. In some circumstances, supervisors may be able to adjust their methods as a reasonable accommodation by, for example, communicating assignments, instructions, or training by the medium that is most effective for a particular individual (e.g., in writing, in conversation, or by electronic mail).”

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Additional Qualified Issues

Bonus Cases



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ADA Supreme Court Case: Qualified Issue – Receipt of SS



Cleveland v. Policy Management Systems Corp.,
526 U.S. 795 (1999)

- An SS Beneficiary asserted an ADA Claim
- **Holding:** People who are disabled under Social Security rules may pursue ADA claims.
- **Basis of the Decision:**
 - ❖ ADA considers Reasonable Accommodations
 - ❖ Differing Analyses (e.g. SSA has listed disabilities)
 - ❖ SSA work incentive rules anticipate working
 - ❖ People's condition changes over time
 - ❖ Alternative pleading is allowable

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Cleveland Language

- “[P]ursuit, and receipt, of SSDI benefits does not automatically estop the recipient from pursuing an ADA claim. Nor does the law erect a strong presumption against the recipient's success under the ADA.”
- ”...[D]espite the appearance of conflict ..., the two claims do not inherently conflict ... [T]here are too many situations in which an SSDI claim and an ADA claim can comfortably exist side by side.”
- “An SSA representation of total disability differs from a purely factual statement in that it often implies a context-related legal conclusion, namely, ‘I am disabled for purposes of the Social Security Act.’”

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Cleveland Language

- “[A]n individual might qualify for SSDI under the SSA's administrative rules and yet, due to special individual circumstances, remain capable of ‘perform[ing] the essential functions’ of her job.
- To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good-faith belief in, the earlier statement, the plaintiff could nonetheless ‘perform the essential functions’ of her job, with or without ‘reasonable accommodation.’”

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Cleveland in the Lower Courts – Johnson

Johnson v. Exxon Mobil Corporation,
426 F.3d 887 (7th Cir. 2005).

- On his SS application, Johnson stated that he became “unable to work because of [his] disabling condition” on the day he was terminated.
- He claimed that his statements to SSA were a mistake and that his condition worsened after he was fired.
- Court held that claiming a mistake was insufficient and noted that Plaintiff “presented no evidence that he has taken any steps to correct the mistake and relinquish the benefits that he received as a result of it.”
- See also, *Gilmore v. AT&T*, 319 F.3d 1042, 1045, 47 (8th Cir. 2001). Plaintiff’s explanation that he lacked legal training was insufficient.

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Cleveland in the Lower Courts – Voeltz

Voeltz v. Arctic Cat, Inc., 406 F.3d 1047 (8th Cir. 2005)

- Employee claimed that he applied for SS benefits at the suggestion of the company’s HR Dept.
- He stated he would have been able to work “just fine” if the company had not refused to accommodate his MS
 - ❖ His physician suggested modified job duties, including a modified schedule, and consulting with an OT.
- Jury verdict for employee was upheld on appeal
- Court stated: “[A]ny discrepancy in the evidence was for the jury to resolve. [T]he jury heard all the evidence, including Voeltz’s explanation ...; was instructed on the *Cleveland* standard; and found for Voeltz.”

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Another Bonus Case: *Canny v. Dr. Pepper - Facts*



Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.,
439 F.3d 894 (8th Cir. 2006).

- Route supervisor who was legally blind, (20/200 vision), wanted to keep position even though could not drive a car.
- Otherwise, employee sought transfer to merchandiser position or warehouse, claimed he could drive a forklift.
- HR: No positions for reassignment due to hiring freeze & could not create new position. No transfer to warehouse, "You'll either kill someone or you'll lose an arm."
- After 5 minute meeting with HR, Co. placed employee on medical leave. He received disability and SS benefits.

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Bonus Case: *Canny v. Dr. Pepper - Facts*



- VR Counselor tried to contact HR to discuss accommodations, no response.
- HR never returned employee's calls regarding vacant positions – admitted thought unqualified as could not drive though there were no visual acuity standards.
- After employee filed lawsuit, Co. offered merchandiser position in a different city. Employee refused transfer due to family situation. (Co. previously said driving was an essential function of this position).
- After leaving Dr. P, employee found 2 other jobs driving forklifts for other companies.

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Bonus Case: *Canny v. Dr. Pepper - Issues*

- **Qualified Individual with a Disability**

- ❖ Could employee do essential functions of merchandiser or warehouse jobs?
 - Was driving between job sites an essential function?
 - Could he safely work in warehouse & drive forklift



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Bonus Case: *Canny v. Dr. Pepper - Issues*



- **Reasonable Accommodations**

- ❖ Is reassignment to a vacant position a reasonable accommodation?
- ❖ Does Dr. P. have a duty to reassign essential functions or create a new position (i.e. sharing management duties).
- ❖ Did Dr. P. show a good faith effort to engage in the interactive process?

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Bonus Case: *Canny v. Dr. Pepper - Holding*



- **Qualified Individual with a Disability**

- ❖ Could employee do essential functions of merchandiser or warehouse jobs?

Court said Yes.

- ❖ **Essential Functions – Merchandiser Position**

- Was driving between job sites an essential function?

Court said No. Employee could arrange own transportation. Dr. P. seemed to agree as it eventually offered the job to the employee.

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Bonus Case: *Canny v. Dr. Pepper - Holding*

- **Essential Functions – Warehouse job (forklift driving)**

- Co. had no visual acuity standards for forklift drivers.
- Fact that employee safely handled this position elsewhere shows he was qualified.



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Bonus Case: *Canny v. Dr. Pepper* - Holdings

• Reasonable Accommodations

- ❖ Is reassignment to a vacant position a reasonable accommodation?

Court said Yes.

- ❖ Job Restructuring: Is there a duty for a co. to reassign essential functions or create a new position (i.e. sharing management duties).

Court said No.

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Bonus Case: *Canny v. Dr. Pepper* - Holdings

• Reasonable Accommodations

- ❖ Did Dr. P make a good faith effort to engage in the interactive process? **Court said No.**
 - HR refused to discuss further after 5 minute meeting
 - Did not notify employee of vacant positions
 - Did not speak with VR Counselor.
 - Co. admittedly felt employee not qualified due to vision.

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Bonus Case: *Canny v. Dr. Pepper* – Elements of the Case

In order to establish that an employer failed to engage in the interactive process, the employee must show that they:

- (1) Are disabled and the employer knew of the disability;
- (2) Requested accommodations (or the employer had a reasonable basis to think an accommodation was needed);
- (3) The employer did not assist in seeking accommodations;
- (4) Could have been reasonably accommodated but for the employer's lack of good faith.

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Bonus Case: *Canny v. Dr. Pepper* – Lessons Learned

- It may be **dangerous to assume** an employee is unqualified.
- **Individualized Assessments** should be undertaken.
- Engage in the **Interactive Process**
- Decisions should be based on facts, not assumptions or stereotypes
- **Be careful** what is said



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Bonus Case: *Canny v. Dr. Pepper* – Jury Award

How Does the Cost of Accommodations Compare With the Jury Award?

- **Jury Award**
 - ❖ \$53,910 in back pay
 - ❖ \$20,00 for emotional damages
 - ❖ \$100,000 in punitive damages (was not upheld on appeal)
 - ❖ Attorneys Fees and Expenses



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Practice Tips for Employers



- Always fully engage in the “interactive process.”
- Always make an “individualized assessment.”
- Get medical documentation when necessary.
 - ❖ Do not obtain documentation if it is not needed.
- Document efforts at providing reasonable accommodations.

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Practice Tips for Employers

- Feel free to offer alternative “effective” accommodations.
- Inflexible policies for leave can be problematic, (i.e. limited to 3 months or FMLA time or one calendar year).
- Undue hardship should be based on objective criteria. This defense could open up the company's finances for scrutiny
- Offer periodic training for supervisors to respond to accommodation requests (even if magic words aren't used)

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Practice Tips for Employers

- Be consistent employers on procedures and decision involving accommodation requests.
 - ❖ May arise when one manager for an employer accommodates an employee, but another manager rejects a similar request from another employee
 - See, e.g., *Woodruff* - telework, *Rascon* - leave cases.
 - ❖ It can also be important in the reassignment/seniority cases, (*Barnett*, et. al.).
 - ❖ Centralized decision making has many benefits.

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Practice Tips for Employees

- Ensure that accommodation requests are reasonable.
 - ❖ Suggest possible accommodations, if known.
 - ❖ Submit a time frame for a response.
- Submit medical information with your request if it is appropriate, (i.e., the disability or need for the accommodation is not apparent).
- Make sure medical information documents the disability, limitations, and need for a reasonable accommodation.
 - ❖ Information should show how the accommodation enables you to be qualified to perform essential job functions.

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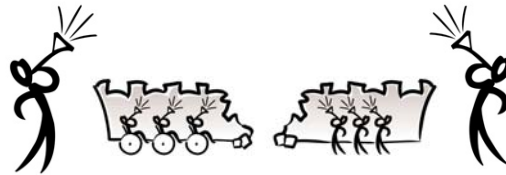
Practice Tips for Employees

- Document all conversations concerning your disability and/or attempts to obtain a reasonable accommodation.
- Promptly respond to proper requests for additional information.
- If more information is needed, obtain it from your doctor.
 - ❖ The employer may request additional information if the information submitted is vague or incomplete.

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**ADA Qualified Issues as Related to
Reasonable Accommodations Such as
Leave, Reassignment and Job Modifications**

THE END



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**Thank you for Participating In
Today's Session**



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