

Welcome to the 2010 Legal Issues Webinar Series



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Employer Defenses Under the ADA

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Employer Defenses – Overview & Terms



- **Some defenses rebut an employee's *prima facie* case.**
- ***Prima facie* case:** Evidence that is sufficient to establish the claim raised, if not contradicted. Black's Law Dictionary.
 - ❖ Individual or employer are not covered by the ADA
 - Employer Coverage . < 15 employees
 - Independent Contractors and Volunteers
 - Employee is not a qualified individual with a disability.+
 - Unable to perform essential job functions with or without a reasonable accommodation
 - Made statements in another forum demonstrating an inability to perform the job.

More Explanations of Terms



- **Other defenses are “Affirmative Defenses”** – A defense to a charge that employers must raise & prove by a preponderance of evidence.
 - ❖ Undue Hardship (Failure to accommodate claims)
 - ❖ Direct Threat (Applies to all ADA claims)
 - ❖ Employee missed the timeline for filing (statute of limitations)
- **Burden of Proof:** A party's burden to prove the elements of their case. Employees have the initial burden of proof in Title I cases and must prove their case by a preponderance of the evidence.
 - ❖ **Preponderance of the Evidence:** Evidence demonstrating an asserted fact is more probable than not (of greater weight or more convincing).
- **Resources Will Also Be Provided, Including ...**
 - ❖ DBTAC: Great Lakes ADA Center Webinars and Briefs, http://www.onlineconferencingsystems.com/sedbtac_1/2008_webinar_archives.htm.

Who is Covered Under the ADA?

Employer and Employee Coverage



Employers Covered by the ADA



Possible Defense:

Employer is not covered by the ADA which covers:

- Employers with 15 or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. +
 - ❖ All state and local government employees are covered
 - ❖ State and local laws may cover employers with 1+ employees
- Federal agencies are covered by the Rehabilitation Act.
 - ❖ Organizations that receive federal financial assistance may be covered under both the ADA and the Rehab Act.

Counting Issues – *Clackamas*



Clackamas Gastroenterology Assoc., P.C. v. Wells, 538 U.S. 440 (2003)

Issue: Are the 4 physician/shareholders who own a professional corp. also counted as employees in determining the # of employees?

Holding: Maybe. A designation as %partner+does not end the analysis. Look at common law criteria for master-servant relationships:

- 1) Degree of control . hiring, firing, supervision
- 2) Extent of the organization's supervision of the individual's work
- 3) Does the individual report to someone higher in the organization?
- 4) Is the individual able to influence the organization?
- 5) Intent of the parties as expressed in written agreements or contracts
- 6) Does the individual share in the profits, losses, and liabilities?

See also, Nationwide Mutual Ins. Co. v. Darden, 302 U.S. 318 (1992);
EEOC Compliance Manual § 605:0009

Counting Issues – *Clackamas*



- Other factors may include:
 - ❖ Whether the work requires a high level of skill or expertise
 - ❖ Whether the employer furnishes the tools, materials, and equipment
 - ❖ Whether the employer has the right to control when, where, and how the worker performs the job. EEOC Compliance Manual § 605:0008.
- Some facts indicate the physician/shareholder/directors are not employees:
 - ❖ They control the operation of their clinic
 - ❖ Share the profits
 - ❖ Are personally liable for malpractice claims.

Counting Issues – *Clackamas*



- On the other hand, the physician/shareholder/directors ã
 - ❖ Receive salaries
 - ❖ Must comply with the clinic standards & report to personnel manager
 - ❖ Admit are %employees+under ERISA (prime reason for being a P.C.) and state workers\$ compensation laws.
 - ❖ Have employment contracts (and can be terminated)
- Justice Ginsburg\$ Dissent:
 - ❖ Would affirm Cir. Ct. holding that Drs. are employees
 - ❖ %see no reason to allow the doctors to escape from their choice of corporate form when the question becomes whether they are employees for purposes of federal antidiscrimination statutes.+

Counting Issues – *Walters*



EEOC & Walters v. Metropolitan Educational Enterprises., Inc., 519 U.S. 202, 117 S. Ct. 660 (1997)

- **Issue:** How are employees counted?
- **Court:** An employer has an employee if he maintains an employment relationship with that individual on the day in question, regardless of whether employee worked or was compensated on given day.
 - ❖ Employment relationship is the touchstone. Was there an employment relationship with 15 or more individuals for each working day in 20 or more weeks during the year?
 - ❖ Use payroll method: # individuals on employer's payroll per week
 - ❖ For example, an employee who works irregular hours, only a few days a month, will be counted for every week in the month.

See also, EEOC Enforcement Guidance on EEOC & Walters v. Metropolitan Educational Enterprises, Inc.

Counting Issues – *Walters*



- **Court:** All one needs to know about a given employee for a given year is whether the employee started or ended employment during the year and, if so, when. He is counted as an employee for each working day after arrival and before departure. +
- **Queries:** Does *Walters* negate, or give meaning to, the phrase 'each working day'?
- *Walters* has been applied to ADA Cases. See, e.g., *Fichman v. Media Center*, 512 F.3d 1157 (9th Cir. 2008); *Hosler v. Greene*, 173 F.3d 844 (2d Cir. 1999) (unpublished).

Protected Individuals



Possible Defense:

Employee does not meet the ADA definition of disability:

- A physical or mental impairment that causes a substantial limitation of one or more major life activities.
- Also covered are individuals with a record of a disability or who are regarded as having a disability.

42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g).

Note: As the ADAAA broadened the definition of disability, it is anticipated that this defense will be less effective for cases arising after 1/1/09 than it was previously.

Independent Contractors Under Title I



Possible Defense:

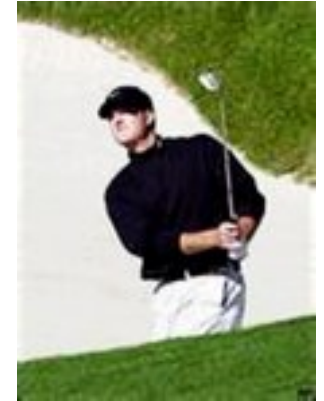
The individual was an independent contractor and not an employee.+

- Courts generally find independent contractors are not covered by Title I of the ADA.
 - ❖ Look at common law factors of master/servant relationship.
 - ❖ **Note:** ADA Retaliation cases arise under Title V.

Aberman v. J. Abouchar & Sons, Inc., 160 F.3d 1148 (7th Cir. 1998)

- Sales worker was "independent contractor" rather than "employee" of manufacturer, thus not protected by ADA
 - ❖ Made sales calls for other companies; incurred significant costs, tax returns listed earnings as business income, not wages; no evidence position was permanent.

Independent Contractors Under Title III - Say it Ain't so Jack and Arnie



Note: Title III (or the Rehab Act) may provide coverage for denial of the full and equal enjoyment of the goods, services, [or] privileges, of any place of public accommodation.+

PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001)

- Golfer sought to use a golf cart in PGA tournaments.
- **Issue:** Does Title III cover golf tournament participation?
- **Holding:** Participating in golf tournaments is a benefit & privilege under Title III - reasonable modifications of policies may be required.
 - ❖ Title III is not limited to customers but even if it were, Casey Martin is a customer+of the competition.+
- Definition of public accommodations should be liberally construed
- A golf cart does not fundamentally alter the nature of tournament golf.
- **Scalia Dissent:** Title III applies only to customers, not contractors.

Independent Contractors Under Title III



Menkowitz v. Pottstown Mem'l Med. Ctr., 154 F. 3d 113 (3rd Cir. 1998)

- A medical doctor with staff privileges may assert a cause of action under Title III +

Haas v. WY Valley Health Care, 553 F.Supp.2d 390 (MD PA 2008)

- A physician with privileges had standing under Title III and the Rehab although he posed a direct threat and was not qualified.+

But See,

Wojewski v. Rapid City R'gn'l Hosp., 2005 WL 1397000 (D.S.D. 2005)

- Rejected *Menkowitz* in finding that Title III should only apply to customers+and not to a Dr. who was an independent contractor.
- Cited Scalia's dissent in *PGA v. Martin* for this position.

Independent Contractors Under the Rehab Act – Very Recent Decision



Fleming v. Yuma Regional Medical Center, 2009 WL 3856926
(9th Cir. November 19, 2009)

- Anesthesiologist's employment contract was terminated after the practice learned he had sickle cell anemia.
 - ❖ Obviously discrimination, but was it unlawful?
- **Court:** § 504 covers independent contractors
 - ❖ Incorporates only substantive standards of Title I regarding conduct
 - ❖ Not limitations on covered employers, a jurisdictional requirement.
- Agrees with 10th Circuit; Conflicts with 6th and 8th Circuits.
- Rejects position in Scalia dissent in *PGA v. Martin*.

See also, EEOC Enforcement Guidance on EEOC & Walters v. Metropolitan Educational Enterprises, Inc.



Volunteers – Thanks, but No Thanks

Possible Defense:

The individual was a volunteer and not an employee.

From EEOC Policy Guidance Manual

- Volunteers usually are not protected employees unless
- %s/he receives benefits, - pension, life insurance, workersq compensation, or access to professional certification.+
- Benefits must be a %significant remuneration,+not %a consequential incidents of an otherwise gratuitous relationship.+
- Volunteers may also be covered if volunteer work is required for, or regularly leads to, regular employment with the entity.

Volunteers



Haavistola v. Cm'ty Fire Co. of Rising Sun, 6 F.3d 211 (4th Cir. 1993)

- A volunteer firefighter may be covered under Title VII of the Civil Rights Act if s/he received sufficient other benefits such as a disability pension, survivors' benefits, and tuition reimbursement.

Bauer v. MDA, 268 F. Supp 2d. 1281 (D. Kan. 2003)

- MDA policy: All volunteers must be able to lift and care for a camper.
- Volunteers with muscular dystrophy could not meet the requirement
- **Court:** The right of equal access under Title III ~~is~~ most reasonably construed to mean the goods, services and facilities offered to customers or patrons, not to paid employees, independent contractors, or unpaid volunteers.+
- Relied on Scalia's dissent in *PGA v. Martin*.



Employees Must Be Qualified

Possible Defense:

The employee is not a qualified individual with a disability +

- Title I only protects a qualified individual with a disability, + meaning a person has a disability and:
 - (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*.

Qualified
Candidates
Get
Huge Benefits...

Qualified Issues

- Generally, employees must show that they are qualified.
- However, the issue is sometimes blurred
 - ❖ Qualified issues may be combined with undue hardship in situations involving leave or modified job duties.
 - Does the need for an accommodation render the employee unqualified or is it an administrative undue hardship?
 - ❖ Qualified issues may be combined with direct threat issues, e.g., when performing the job safely is an essential function.
 - Generally, the ability to perform a job safely is only a qualified issue for positions of public safety. *See, e.g., Jarvis v. Potter, 500 F.3d 1113 (10th Cir. 2007).*
 - Otherwise, it is a direct threat defense issue.
 - Distinction is important for assessing the burden of proof.



Essential Job Functions

- Fundamental Job Duties (Not marginal duties)
 - ❖ Employers are not required to reallocate essential functions but may choose to do so anyway.
- A job function may be considered essential for any of several reasons, including:
 - (i) the position exists to perform that function;
 - (ii) limited number of employees available; and/or
 - (iii) the function may be highly specialized and the individual is/was hired for his/her expertise.

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



Essential Job Functions

- (3) Evidence ã includes, but is not limited to:
- (i) The employer's judgmentã ;
 - (ii) Written job descriptions prepared beforeã interviewing;
 - (iii) The amount of time spentã performing the function;
 - (iv) The consequences of notã performing the function;
 - (v) The terms of a collective bargaining agreement;
 - (vi) The work experience of past incumbentsã ; and/or
 - (vii) Theã work experience of people in similar jobs.

29 C.F.R. § 1630.2(n)



Essential Functions May Include

- ” Regular and Predictable Attendance: *Miller v. University of Pittsburgh Medical Center*, 2009 WL 3471301 (3d Cir. Oct. 29, 2009).
- ” Staying Awake: *Cannon v. Monsanto, Co.*, 2008 WL 236922 (E.D. La. 2008)
- ” Patient %Take-Down+ Training: *Hennagir v. Utah DOC*, 2009 WL 2883037 (10th Cir. 2009) (was essential for a physician& assistant at a prison even though training not required 1st 8 yrs. on the job.)
 - ❖ *But see, Johnston v. Morton Plant Mease Healthcare, Inc.*, 2008 WL 191026 (M.D. Fla. 2008) (Question of fact whether this is an essential function for a nurse in a psych unit).
- ” Licensing: *Fiumara v. President and Fellows of Harvard College*, 2009 WL 1163851 (1st Cir. 2009) (Class B Driver& License); *Levine v. Shore Service Co., Inc.*, 2008 WL 5264008 (D.N.J. 2008) (CDL).



Essential Functions – Mandatory Overtime

Rehrs v. Iams Co., 486 F.3d 353 (8th Cir. 2007)

- ” Rotating shifts was essential function for a warehouse tech. with diabetes . two 12 hour shifts, then 2 days off .
- ❖ Providing an exception to plaintiff would create more work for other employees, causing an undue hardship.
 - ❖ Temporarily providing the accommodation does not constitute an admission that a function is non-essential.
 - ❖ Essential job functions are not limited to % core job requirements+but may include flexible scheduling. *See also*,
 - *Tjernagel v. Gates Corp.*, 533 F.3d 666 (8th Cir. 2008) - Working OT is essential where noted in job description & required of all in same position.
 - *Gorney v. Siemens Med. Sol'ns* , 2009 WL 1543660 (S.D. IN 2009) Being on-call was essential for engineer returning from FMLA leave.



Evidence of Essential Functions - Mandatory Overtime, Rotating Shifts & Licensing

Rohr v. Salt River Project..., 555 F.3d 850 (9th Cir. 2009)

- Technical support specialist w/ Type I diabetes had restrictions of no:
 - ❖ Rotating shifts; working > 9 hrs./day; heavy exertion; unprotected heights and climbing; also thermal stress limitations, ability to carry sugar sources.
 - ❖ Restrictions prevented him from obtaining respirator certification.
- Co. Dr. said he could perform job with restrictions (mostly office work).
- Some functions (overtime) only occurred 12X over 23 yrs. and others, (out-of-town field work), had not occurred for several years.
- **Court:** If evidence conflicts regarding essential functions, the factual dispute precludes Summary Judgment.
 - ❖ Employer must show requirements are job-related & a business necessity.
 - ❖ Test tended to screen out individuals with diabetes and high B/P
 - ❖ Case also discussed ADAAA, but did not decide about retroactivity.



Rotating Shifts - Locations

Turner v. Hershey Chocolate USA, 440 F.3d 604 (3rd Cir. 2006)

” Table inspectors+required to rotate through 3 assembly line positions.

- ❖ Two seated positions and one requiring standing, bending, and twisting

” Employee with fused cervical discs requested sitting duties only.

” Request denied . employee went on LT disability.

” **Issue:** Was working on all shifts an essential job function?+

” **Court:** Question of Fact

- ❖ Rotation scheme had no effect on the number of required employees
- ❖ Was not a highly specialized function
- ❖ Plaintiff was not hired for her ability to rotate positions.

See also, Kiphart v. Saturn Corp., 251 F.3d 573 (6th Cir. 2001) (Upholding a jury finding - rotating shift positions was not essential as was not listed in some job announcements & scheme was not consistently followed)



Lifting as an Essential Function

Fuzy v. S&B Engineers & Constr's, Ltd., 332 F.3d 301 (5th Cir. 2003)

” **Facts:** Applicant for a pipefitting position failed to meet a 100 pound weight lifting test and was not hired.

” **Court:** Case dismissed as the weight lifting requirement was job-related (based on DOL publications) and therefore, was permissible.

” **Query:** Was there an individualized assessment?

Puckett v. Park Place Ent., Corp., 2006 WL 696180 (D.Nev. 2006)

” Using a cart was a reasonable accommodation for a waitress with MS who could not carry with her left arm.

” Job description said: “Provide beverage service in a friendly manner +

” **Court:** Co. did not research feasibility of using a tray . whether there is an undue hardship is a question of fact.

” Carrying tray itself not listed, only handling up to 30# of items on a tray.

Job Modifications & Essential Functions – Lifting



Calef v. FedEx Ground Packaging..., Inc., 2009 WL 2632147 (4th Cir. 2009)

- Package & delivery service mgr. had a temporary 20# lifting restriction
 - ❖ Could not deliver but package delivery was not in job description
 - ❖ Job was overseeing independent contractors who did deliveries.
- After injury, supervisors had her do deliveries instead of %ide-alongs.+
 - ❖ FedEx offered a severanc e package & then forced her on medical leave.
 - ❖ She missed no work due to injury.
- **Court:** Affirmed jury verdict (\$1.2M) for employee
 - ❖ Delivering packages was not essential despite testimony from the prior manager that he regul arly did deliveries (contradicting a prior statement).
 - ❖ Client testified passionately about her experience.

See also, Calvo v. Walgreens Corporation, 2009 WL 2435700 (11th Cir. 2009) (Lifting over 5# might not be essential for an asst. mgr. as only one of 23 listed job duties involved this and she previously worked 4 yrs. with a similar restriction and %was working fine+according to her manager.)



ADA Supreme Court Case: Qualified Issue – Receipt of SS

Possible Defense: Employee statements demonstrate they are not a qualified individual with a disability, but
Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999)

- An SS Beneficiary asserted an ADA Claim
- **Holding:** People who are disabled under SS rules may pursue ADA claims but have the burden of explaining any apparent inconsistency.
- **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

Cleveland in the Lower Courts



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

- Employee applied for SS benefits at suggestion of HR.
- Stated - could have worked part-time if MS accommodated
 - ❖ Dr. suggested modified job duties, modified schedule, & OT consult.
- Jury verdict for employee was upheld on appeal

Butler v. ...Round Lake Police Dep't, 2009 WL 3429100 (7th Cir. 2009)

- Former police officer with chronic obstructive pulmonary disease (COPD) told Pension Board he could barely walk a few blocks or climb stairs & was not reinstated.
- **Court:** Plaintiff estopped from claiming he was qualified.

What Are Un-Reasonable Accommodations?

Undue Hardship

paul leberg

BE
unreasonable

THE
UNCONVENTIONAL
WAY TO
EXTRAORDINARY
BUSINESS
RESULTS

Undue Hardship Defined

Possible Defense: Accommodation poses an undue hardship: %Significant difficulty or expense.. in light of:

- The nature and net cost of the accommodati onõ
- The overall financial resources of the covered entity;
- The impact õ upon the operation of the facility -
 - ❖ The ability of other employees to perform their duties and
 - ❖ The impact on the facility's ability to conduct business.+
- Includes accommodations that are:
 - ❖ %unduly extensive, substantial, or disruptive, orõ that would fundamentally alter the nature or operation of the businessõ +

42 U.S.C. § § 12111; 29 C.F.R. §1630.2(p) Appendix; *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship*



Undue Hardship and Reasonable Accommodation

- An accommodation does not have to be provided if:
- It is significantly expensive or otherwise
 - It is administratively burdensome or disruptive
 - ❖ Requires reallocation of essential job functions
 - ❖ Requires creating a new position
 - ❖ Requires personal services or devices
 - ❖ Will not enable the employee to be qualified
 - Also applies to failure-to-hire and termination cases.
 - Results in a direct threat to the health or safety of the employee or others
 - ❖ Also applies to failure-to-hire and termination cases.



Undue Hardship – EEOC Guidance

- If an accommodation poses an undue hardship, employers must explore effective accommodations that do not pose an undue hardship.
- An employer cannot claim undue hardship based on employees' (or customers') fears or prejudices toward the individual's disability.
- The only statutory limitation on an employer's obligation to provide a reasonable accommodation is that no such change or modification is required if it would cause an undue hardship to the employer.
- **Query:** Is this an accurate statement?

EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship; 29 C.F.R. pt. 1630 app. § 1630.15



Cost as an Undue Hardship

- ” Generally, cost alone will rarely be an undue hardship.
- ” Compare cost of accommodation to employer’s resources
 - ❖ Cost is not compared to the employee’s salary, position, or status.
- ” When cost is raised as a defense, it brings all of the employer’s financial information into issue.
- ” VR may help defray costs of accommodations.
- ” A few cases have looked at a cost/benefit analysis but --
 - ❖ This contradicts EEOC Guidance saying: look at net cost, including tax credits & deductions.
 - ❖ **JAN Info:** \$10 benefit for every \$1 spent on accommodations

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

Undue Hardship – Cost of ASL Interpreters



Friends v. Astrue, 2007 WL 1954420 (D.D.C. Jul. 5, 2007)

- “ An employee who is deaf was provided an interpreter at her job except when interviewing clients (SSA policy).
- “ SSA prohibited using interpreters for business with public.
 - ❖ Claimed cost at providing and training 2 FT interpreters is too high
 - ❖ Would lengthen time of interviews.
- “ **Court:** Employer’s burden to prove undue hardship
 - ❖ Not demonstrated here
 - ❖ Looked at SSA’s financial resources
 - ❖ Full-time interpreter not necessarily required.
- “ **Practical Tip:** ADA requires reasonable policy modifications.



Administrative Hardship

Possible Defense: The Requested Accommodation Would Cause an Administrative Hardship*

- “ Often found in reasonable accommodation requests that:
 - ❖ Require elimination of essential job functions
 - ❖ Significantly disrupt business operations or the work of co-workers
 - ❖ Seek indefinite leave
 - In leave situations, an employee must demonstrate an ability to perform essential functions after returning from leave
- “ May be undue hardships or that employee is unqualified.
- “ *Employers must still explore other accommodations:
 - ❖ e.g., limited leave, working from home, reassigning marginal job duties, a temporary part-time position, using temporary workers, ò

Job Modifications and Undue Hardship



Possible Undue Hardship Defense:

Requested Accommodation Requires Elimination of an Essential Function

E.E.O.C. v. Amego, Inc., 110 F.3d 135 (1st Cir, 1997)

- When a nurse at a medical facility could not fulfill the essential job function of administering drugs to patients due to depression
❖ It was not a reasonable accommodation to have another employee perform this essential function.
❖ *But See, Borkowski v. Valley Central School District*, 63 F.3d 131 (2nd Cir. 1995) (Providing a teacher's aide to assist a school librarian with classroom control may be a reasonable accommodation.)



Job Modifications & Undue Hardship – Working at Home

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

- Work at home not reasonable where physical attendance was an essential function for service coordinators, a low-level position requiring supervision and teamwork.

Mobley v Allstate Insurance Co., 2006 WL 2735906 (S.D. IL 2006)

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

But See, Humphrey v. Mem. Hosp. Assn., 239 F.3d 1128 (9th Cir. 2001)

- Working at home, (or leave), might be a reasonable accommodation for a medical transcriptionist with OCD as it was allowed for other transcriptionists.

***Barnett* – Reassignment and Seniority Policies**



Possible Defense:

Requested Accommodation Poses an Undue Hardship due to a Consistently Enforced Seniority Policy

U.S. Airways v. Barnett, 535 U.S. 391 (2002)

- Reassignment may be a reasonable accommodation, but not if it violates a seniority policy regarding reassignment.
 - ❖ Requiring employer to violate a consistently enforced seniority policy would be an undue hardship.
 - ❖ Policy trumps the ADA unless it can be shown seniority provision was not strictly followed in other cases.

Direct Threat Issues



ADA Limitations – Direct Threat



Possible Defense:

The Individual Poses a Direct Threat to the Health or Safety of the Individual or Others

- 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. +
- Requires an an individualized assessment +
 - ❖ based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. +

29 C.F.R. §1630.2(r).



Direct Threat Regulations

- In determining whether an individual would pose a direct threat, the factors to be considered include:
 - (1) The duration of the risk;
 - (2) The nature and severity of the potential harm;
 - (3) The likelihood that the potential harm will occur; and
 - (4) The imminence of the potential harm.

29 C.F.R. §1630.2(r); *See also, School Board of Nassau County v. Arline*, 480 U.S. 273 (1987).

EEOC Interpretive Guidance of Direct Threat Regulations

EEOC Guidance to Employers on Implementing Factors from *Arline*:

- Employers should identify the *specific risk* posed by the individual.
 - ❖ For individuals with mental or emotional disabilities, employers must identify the *specific behavior* on the part of the individual that would pose the direct threat.
 - ❖ For individuals with physical disabilities, employers must identify the *aspect of the disability* that would pose the direct threat.

School Board of Nassau County v. Arline, 480 U.S. 273, 284 (1987); EEOC's Interpretative Guidance to 29 C.F.R. § 1630.2(r)

Direct Threat in the Operating Room



Jakubowski v. Christ Hospital, 2009 WL 2407766 (S.D. Ohio 2009)

- Resident with Asperger's Syndrome alleged wrongful termination and failure to accommodate.
- Previously, resident repeatedly received negative reviews from other doctors relating to his communication skills.
- **Court:** Summary judgment for hospital . no ADA violation
 - ❖ In performing medical work, plaintiff's disability and lack of communication skills posed a direct threat to the health and safety of patients.
 - ❖ Plaintiff requested accommodation, but knowledge and understanding by the hospital's staff, did not adequately address legitimate safety concerns.

The Dangerous Greeter – Posing a Direct Threat?



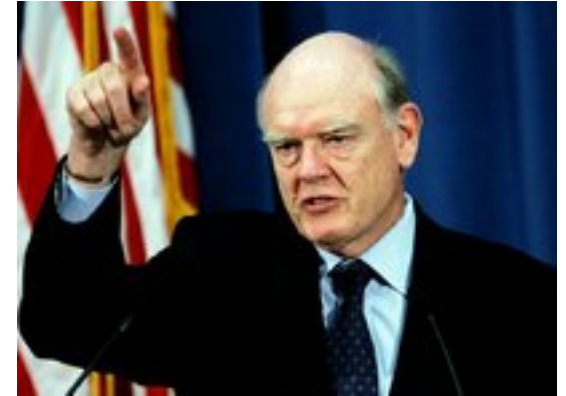
EEOC v. Wal-Mart Stores, 477 F.3d 561 (8th Cir. 2007)

- Wal-Mart claimed an applicant with cerebral palsy would pose a direct threat if hired as a greeter or cashier.
- Wal-Mart's Dr. cited many safety risks.+
 - ❖ Biggest risk is the fact that [Bradley's] legs are not capable of holding him without arm support+as employee often falls on floors that have impediments.
 - ❖ Bradley is very wide when he uses his crutches ... twice the width of a normal person depending on the area where he is,+posing an obstacle+to customers.
 - ❖ Standing for an entire shift would place [Bradley] at great risk+for current back and knee pain+that would make it difficult to tolerate these tasks+over time.

EEOC v. Wal-Mart - Individualized Assessment

- Wal-Mart's Dr. admitted his opinion assumes that Bradley would be using crutches, not a wheelchair.
- Wal-Mart's Dr. admitted applicant was "very ... stable in a wheelchair + and would be "much less of a threat to himself and to coworkers + when he is not on crutches.
- **Court:** Wal-Mart did not explain how he poses more of a threat than Wal-Mart customers who use mobility aids.
- **Holding:** Wal-Mart has failed to prove that Bradley, using a wheelchair or other reasonable accommodation, would pose a direct threat to the safety of himself or others. +

Branham v. Snow – Assessing the Risk



Branham v. Snow, 392 F.3d 896 (7th Cir. 2005)

- Employee with diabetes applied for job as IRS criminal investigator.
- **Issue:** Was he qualified or did he pose a direct threat?
- **Duration of the risk**
 - ❖ **IRS:** Mr. Branham had experienced significant changes in his blood glucose levels that could affect his performance.
 - ❖ **Mr. Branham & Physician:** Diabetes cannot be cured but he can control the condition so effectively there is no real ... duration of risk.+
 - ❖ **Court:** Duration of Risk Not Significant
- **Nature and Severity of the Risk**
 - ❖ **IRS:** Drastic changes in blood sugar level could "significantly degrade his abilities to function as a special agent, potentially endangering Mr. Branham, his colleagues and the public."

***Branham v. Snow* – Nature and Severity of the Risk**



- **Nature and Severity of the Risk (cont.)**
 - ❖ **Mr. Branham:** Although the risks of severe hypoglycemia can include incapacitation, confusion, coma and death, he never has lost consciousness and he never has experienced physical or mental incapacitation as a result of mild hypoglycemia.
 - ❖ **Court:** A reasonable trier of fact could conclude that any hypoglycemia experienced will not impair Mr. Branham in the performance of his duties.
- **Likelihood of Potential Harm**
 - ❖ **IRS Endocrinologist:** Employee's job duties and program of intensive treatment were "associated with increased risk" of severe hypoglycemia.
 - ❖ **Employee's Dr.:** The risk of Mr. Branham suffering a severe hypoglycemic reaction was 0.2% per year.
 - ❖ **Court:** IRS has not presented any statistical evidence of the likelihood that the harm it fears will occur. [A] reasonable jury could conclude that the likelihood of the harm that the IRS fears is quite low.

Branham v. Snow – Likelihood of Potential Harm



- **Imminence of Potential Harm**
 - ❖ **Mr. Branham:** He "has never suffered any period of incapacitation or other hypoglycemic episode & there is no medical evidence that he will do so in the future."
 - ❖ **IRS:** "Such an assertion is not supported by logic."
 - ❖ **Court:** A reasonable trier of fact could conclude that Mr. Branham can prevent severe hypoglycemia and eliminate imminence of harm.
- **Court:** Genuine issue of material fact as to whether Mr. B. can perform the essential functions of the position of without becoming a threat to the safety of himself or others.



Direct Threat Case – *Darnell* - Uncontrolled Diabetes

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

- Summary judgment affirmed for employer who did not rehire employee with insulin -dependent, Type I diabetes
- Pre-employment physical - diabetes not under control.
- **Court:** Uncontrolled diabetes in a manufacturing plant with dangerous machinery could cause serious injury.
 - ❖ An employee is not qualified for a position if his disability poses a direct threat to his safety or the safety of others.

But See, Rodriguez v. ConAgra Grocery Product Co., 436 F.3d 468 (5th Cir. 2006), (Employer must conduct an independent, individualized assessment, not base decisions on generalizations and false beliefs)

Direct Threat Case - Medical Information

Possible Defense:

Employee refused to provide required medical information

Ward v. Merck & Co., 2007 WL 760391 (3d Cir. 2007)

- Employee with anxiety & panic disorders was under stress & experiencing problems at work.
 - ❖ Problems continued with a reduced work schedule.
- Co-workers & supervisors were concerned about performance and strange behavior.
 - ❖ Claims he walked around like a zombie and had temper tantrums.
 - ❖ After an unexplained episode in Merck's cafeteria resulting from a brief psychotic disorder, the employee was taken to the hospital, treated, and released.



Medical Information – *Merck*

- As a result, his employer requested that he undergo a fitness-for-work evaluation with the company's physician.
- The employee refused, was suspended without pay, and terminated when he did not respond to a follow-up letter.
 - ❖ **ADA:** Employers can only require medical examinations or make medical inquiries when job-related and consistent with business necessity. (42 USC § 12112(d)(4))
- **Court:** Merck has the burden of showing a %direct threat.+
 - ❖ Here, employer met the burden as possible %breaths to employee safetyõ were sufficient to meet the business necessity elementõ +
- **Note:** In some situations, employee medical information may be required to support accommodation requests.



The Best Available Objective Medical Evidence

EEOC v. Burlington Northern & Santa Fe Railway Co.,
621 F.Supp.2d 587 (W.D. Tenn. 2009)

- Employee's doctor gave unrestricted release to RTW after amputation.
- Employer consulted with drs. & terminated employment citing direct threat.
- Co.-paid doctors never examined employee (relied on general knowledge)
- **Court:** A jury could reasonably find that the employer's determination was not based on an individualized assessment.

See also, Haynes v. City of Montgomery, 2008 WL 4495711 (M.D. Ala. 2008) (Facts supported jury conclusion that plaintiff was qualified and not a direct threat as the city-hired dr. never examined the employee).

Direct Threat Cases - Rx Medication



Dvorak v. Clean Water Services, 2009 WL 631247 (9th Cir. 2009)

- Employee took narcotic painkillers for neck pain and migraines.
- Employer placed employee on leave pending a medical evaluation.
 - ❖ Dr. concluded employee dependent on painkillers and wouldn't allow him to RTW in any position due to a direct threat. (Supervisor: %Wouldn't even put him %behind a computer, +much less in the field.)
- **Court:** Whether these medications freed Dvorak of substantial limitations or imposed such limitations is a factual question for the jury.
 - ❖ Was medication a mitigating measure allowing employee to perform job?
 - ❖ Or, was medication a dangerous limitation on his ability to work safely?
 - ❖ Employer must balance its responsibilities to reasonably accommodate employees with its duty to maintain a safe work environment.
 - ❖ There were also issues of %regarded as+and %record of+having a disability.

Another Possible Defense – Time Limits



Possible Defense:

Employee waited too long after the alleged discrimination before filing a Charge

National Railroad Passenger Corp v. Morgan, 536 U.S. 101 (2002)

- In a Civil Rights case (Title VII), a man who is African-American alleged that he was consistently harassed and disciplined more harshly than other employees.
- **Holding:** Discrete discriminatory acts are not actionable if they occurred 180 or 300 days before plaintiff filed a charge with the EEOC, even though the acts are related to acts alleged in a timely filed EEOC Charge.



Morgan: The Implications

- **Implications:**
 - ❖ Each discriminatory act is a separate violation that may be used as evidence but an EEOC Charge must be timely filed.
 - ❖ The doctrine of %continuing violations+is weakened.
- **Exceptions:** A %continuing violation+may be shown by:
 - ❖ A %hostile work environment.+ (*Morgan*)
 - ❖ A failure to make an %individualized assessment+regarding a person's abilities. (*Kapche v. City of San Antonio*, 304 F. 3d 493 (5th Cir. 2002).
 - ❖ A %glass ceiling+on promotions (*Croy v. Cobe Laboratories, Inc.*, 345. F. 3d 1199 (10th Cir. 2003).

Time Limits

E.E.O.C. Filing Deadlines

- ” 180 Days If no FEPA in your area that has jurisdiction
- ” 300 Days if there is a FEPA in your area with jurisdiction.
- ” Federal employees must contact the EEO at the agency within 45 days of the action or event.

Federal Express Corp. v. Holowecki, 552 U.S. ____ (2008)

- ” U.S. Supreme Court upheld EEOC position that, in addition to the form titled "Charge of Discrimination," certain preliminary filings with the agency also can be considered a "charge" of discrimination for timeline purposes (ADEA).

Time Limits and *Lilly Ledbetter*



E.E.O.C. Filing Deadlines

Ledbetter v. Goodyear, 550 U.S. 618 (2007)

- “ **Court:** New violations, (under Title VII), do not occur each time an employer issues a paycheck.
- “ **Overtaken by Fair Pay Act** . In regard to compensation, an unlawful employment practice occurs not only when a discriminatory compensation decision or other practice is adopted, but also when an individual becomes subject to [or is affected by] the application of a discriminatory compensation decision or other practice. +
- “ **Note:** Also applies to compensation claims under the ADA.

Practical Tips for Employers



- Engage in the interactive process. +
- Base decisions on an individualized assessment. +
- Don't rely on outdated job descriptions.
- Get objective medical documentation when necessary.
 - ❖ Avoid obtaining unnecessary medical information.
- Document reasonable accommodation efforts.
 - ❖ It is OK to offer alternative effective accommodations.
- Make sure tests and selection criteria are job -related and consistent with business necessity.
- Offer periodic training to management and other staff.



Practical Tips for Employers

- Base undue hardship decisions on objective criteria
 - ❖ Using cost can open up the company's finances for scrutiny.
- Avoid inflexible or vague policies; e.g., 100% healed RTW, mental & emotional stability as an essential function.
- Make sure there are no available accommodations, including reassignment, before terminating an employee.
- Be consistent on following procedures and making decisions involving accommodation requests.
 - ❖ Centralized decision making has many benefits.

Practical Tips for Employees



- Make sure medical evidence submitted does not inappropriately show an inability to do the job.
- Make sure performance reviews are accurate.
- Make sure job descriptions are accurate.
- Request a reasonable accommodation when needed and do so with appropriate specificity.
- Be wary of disclosing conditions unless a reasonable accommodation is needed.
- Be careful in leave situations . will other accommodations help?, e.g., working at home, temporary part-time, ã



Resources



- **DBTAC: Great Lakes ADA Center**
www.adagreatlakes.org; 800/949 . 4232(V/TTY)
 - ❖ See 2008 Webinars on ADA Direct Threat and Qualified Issues
http://www.onlineconferencingsystems.com/sedbtac_1/2008_webinar_archives.htm.
- **ADA Disability and Business Technical Assistance Center (DBTAC):** www.adata.org/dbtac.html
- **Equip For Equality:** www.equipforequality.org;
800/610-2779 (V); 800/610-2779 (TTY)
- **Job Accommodation Network** - www.jan.wvu.edu
- **Equal Employment Opportunity Commission** - www.eeoc.gov

Thank you for Participating In Today's Session



Please join us for the next session in this series:

February 3, 2010

**Impact of the Supreme Court's ADA
Decisions**

www.ada-audio.org

800-949-4232 (V/TTY)

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Your feedback is important to us. Please fill out the on-line evaluation form at:

http://www.formdesk.com/idealgroupinc/employer_defenses_120209





Employer Defenses Under the ADA

THE END

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Equip for Equality

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