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Legal Issues Webinar Series**

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**Update on Emerging ADA Issues –
Disability Harassment, Retaliation, and
Constructive Discharge**

Presented by:
Barry Taylor, Legal Advocacy Director, Equip for Equality
Alan Goldstein, Senior Attorney, Equip for Equality

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Today's Webinar



Query: How many participants today are -

- A. Advocates for people with disabilities
- B. Represent employers or other covered entities
- C. Innocent, unbiased bystanders

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Topics to Be Discussed – Disability Harassment



Disability Harassment

- Disability Harassment Claims Under Title I of the ADA
- Legal Standard for Harassment
- The First Two Major Cases Recognizing Disability Harassment
- Cases Allowing Disability Harassment Cases to Proceed
- Cases Dismissing Disability Harassment Claims
- Potential Claim For Disability Harassment Under Title V of the ADA

See Great Lakes ADA Center Legal Brief, *Disability Harassment, Retaliation and Discipline: Three Emerging ADA Issues*, at: <http://www.adagreatlakes.org/Publications/#legalBrief>

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Topics to Be Discussed – Constructive Discharge



Constructive Discharge

- What is a Hostile Work Environment?
- What types of working conditions can constitute constructive discharge?
- Can the denial of reasonable accommodation requests lead to a constructive discharge claim?
- How does the concept of reasonableness factor into constructive discharge claims?

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Topics to Be Discussed - Retaliation



Retaliation

- Who Can Bring Suit?
- Are Retaliation Claims Limited to Current Employers?
- Was the Employee Engaged in a Protected Activity?
- What Constitutes an Adverse Employment Action?
- Causal Connection Between the Employee's Exercise of Protected Activity and the Employer's Adverse Action?
- Was There a Non-Retaliation Cause for the Adverse Action?
- Are Damages Available in ADA Retaliation Cases?

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Disability Harassment – Terms, Conditions, and Privileges of Employment



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Disability Harassment Claims Under Title I of the ADA

• **ADA Language:** No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other **terms, conditions, and privileges of employment.**” See 42 U.S.C. §12112 (a)

• **Analogy from Title VII:** Supreme Court has recognized harassment under Title VII relying on “terms, conditions, and privileges of employment” language that is also found in the ADA.



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The Legal Standard for Disability Harassment

5 Factors in Disability Harassment Claims:

1. Plaintiff is a qualified individual with a disability
2. Plaintiff was subjected to unwelcome harassment
3. The harassment was based on plaintiff's disability
4. The harassment was sufficiently severe or pervasive to alter a term, condition, or privilege of employment, and
5. Some factual basis exists to impute liability for the harassment to the employer (i.e. the employer knew or should have known of the harassment and failed to take prompt, remedial action)



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Disability Harassment – Court Decisions



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First Two Major Cases Recognizing a Claim for Disability Harassment

- In 2001, two circuit courts of appeals recognized a cause of action of disability harassment:
 - ❖ *Fox v. General Motors Corp.*, 247 F.3d 169 (4th Cir. 2001).
 - ❖ *Flowers v. Southern Regional Physician Services, Inc.*, 247 F.3d 229 (5th Cir. 2001).
- These two cases, which ended up providing very different results to the plaintiffs, formed the basis for the development of ADA disability harassment case law.



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Fox v. General Motors Corp., 247 F.3d 169 (4th Cir. 2001)



Facts:

- Fox sustained a back injury and had light-duty work restrictions.
- Foreman and other employees verbally abused Fox.
- Foreman instructed employees not to speak to Fox, ostracize him, and not bring him supplies.
- Foreman made Fox work at a table that was too low, which re-aggravated Fox's back injury.
- Foreman refused to allow Fox to apply for a truck driver position, which met Fox's medical restrictions and for which he was otherwise qualified.



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Fox v. General Motors Corp., 247 F.3d 169 (4th Cir. 2001)

Damages:

- Harassment caused Fox both physical and emotional injuries.
- Fox filed ADA lawsuit alleging that GM subjected him to a hostile work environment.
- The jury awarded Fox \$200,000 in compensatory damages, \$3,000 for medical expenses, and \$4,000 for lost overtime.
- The Fourth Circuit affirmed the jury's verdict.



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*Fox v. General Motors Corp.,
247 F.3d 169 (4th Cir. 2001)*

Analysis:

- 4th Circuit recognized disability harassment as a cause of action under the ADA.
- Adopted Title VII's 5 factor test
- Relied on EEOC regulations reference to harassment
- Found harassment was severe and pervasive
- Testimony of experts about physical and emotional injuries critical to plaintiff's success



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

Facts:

- Flowers worked as a medical assistant
- Supervisor stopped socializing with Flowers and refused to shake her hand after her HIV status was revealed
- Work evaluations changed dramatically
- Flowers required to submit to multiple drug tests
- Derogatory language from company president
- Ultimately Flowers was discharged



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*Flowers v. Southern Regional
Physician Services*



Analysis:

- 5th Circuit recognized disability harassment as a cause of action under the ADA
- Adopted Title VII's 5 factor test
- Found harassment was severe and pervasive, but physical impact of harassment only arose after termination
- Must prove "actual injury" resulting from the harassment – can't presume emotional harm from discrimination
- Appellate court vacated jury's award of damages



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Examples of Cases Allowing Disability Harassment Cases to Proceed

- **EEOC v. BobRich Enterprises:** \$165,000 to a hard of hearing employee finding that she had been harassed and forced to resign because of her disability
- **Arrieta-Colon v. Wal-Mart Stores:** \$230,000 jury verdict for employee harassed about penile implant
- **EEOC v. Luby's, Inc.:** Employee with mental impairment stated harassment claim after being subjected to repeated name-calling, barking, and threats of violence
- **Quiles-Quiles v. Henderson:** Court rejected argument that harassment is acceptable in "blue collar" workplaces.



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Examples of Cases Dismissing Disability Harassment Claims

- **Shaver v. Independent Slave Co.:** Despite being subjected to constant name calling ("platehead"), no harassment claim for person who had brain surgery
- **Meszes v. Potter:** Derogatory comments about employee with AIDS did not meet harassment standard
- **Rozier-Thompson v. Burlington Coat Factory Warehouse:** Comments were not "physically threatening" nor "deeply repugnant" enough to be harassment
- **Mason v. Wyeth, Inc.:** Actions against employee who was hard of hearing were simply pranks not harassment.
- **Suarez v. Pueblo Int'l, Inc.:** "The workplace is not a cocoon, and those who labor in it are expected to have reasonably thick skins ... to survive the ordinary slings and arrows that workers routinely encounter in a hard, cold world."



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Recent Case: *Davis v. Vermont DOC*

- Davis v. Vermont, Dept. of Corrections**, 2012 WL 1269123 (D. Vt. Apr. 16, 2012)
- A prison guard injured his groin and testicles at work.
 - During his recovery leave, his supervisors sent two, staff-wide offensive emails containing pictures that referenced the guard's injury.
 - ◊ One of the emails contained a picture of an individual with his testicles showing, with Davis's face superimposed on the individual.
 - ◊ Staff and inmates saw copies of these emails.
 - ◊ He complained to his union and an investigation was started.
 - When he returned from leave, a note was left in his mailbox stating, "how's your nuts/kill yourself/your done."
 - ◊ He also he received an email with a cartoon of a person with a gun to his head, captioned "kill yourself."
 - ◊ Ridiculed by prisoners who grabbed their testicles and made comments like "good luck making kids with that package."



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Recent Case: *Davis v. Vermont DOC*

- **Court:** Incidents were sporadic but severe.
- Conduct could constitute disability harassment - it was perpetuated by his supervisors and it interfered with an essential function of his job.
- Prison guards must rely on their co-workers to stay safe and this was compromised when the plaintiff was ostracized.
- Furthermore, courts have generally held that prison officials are not responsible for the conduct of inmates.
 - ◊ However, in this case the inmates would not have known about the guard's disability if it had not been for his supervisors disclosing the injury.
 - ◊ The court compared the situation to an employer tolerating sexual harassment.


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**Recent Case:
*Schwarzkopf v. Brunswick***



Schwarzkopf v. Brunswick Corp., 833 F.Supp.2d 1106 (D. MN., 2011)

- Fitness equipment fabricator with depression and an anxiety disorder worked for the defendant company for three years.
 - ◊ Before disclosing, his disability he got along well with the other employees.
- After disclosing his disability, his supervisor started calling him "stupid," "idiot," "mental case," "dumb," and "incompetent" on a daily basis.
- His supervisor called people receiving Social Security disability benefits, "worthless pieces of shit."
 - ◊ Told plaintiff several times that he wanted to put a shock collar on him because he was so forgetful
 - ◊ During a shouting match, the he made a slashing motion across his neck.


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**Recent Case:
*Schwarzkopf v. Brunswick***



- Plaintiff had to take medical leave to recover from the anxiety caused by the workplace conduct and was eventually told that he "voluntarily resigned" his position.
- He claimed harassment, retaliation, and constructive discharge.
- **Court:** Denied summary judgment on his hostile work environment
 - ◊ The comments were routinely made by supervisors and there was a clear connection between the adverse conduct and his increased anxiety and depression.
 - ◊ He was unable to proceed with the constructive discharge claim because he was not able to prove that his supervisor was trying to force him to quit, *i.e.*, that the discriminatory conduct was initiated with the intent to force him to quit.


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Recent Case: *Trevino v. UPS*



Trevino v. United Parcel Serv., 2009 WL 3423039 (N.D. Tex. Oct. 23, 2009)

- Driver for UPS had depression, a panic disorder, anxiety, and PTSD.
- Co-workers would ask her if she's taken her medication.
- She felt she was wrongly accused of not following procedures on occasion.
- When told that she was, "noticeably distressed, disoriented, and gasping for air," her manager took her off the road and had her tested at a hospital.
 - ◊ Asked why she wasn't on an FMLA day since she took them all the time.


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Recent Case: *Trevino v. UPS*



- The company decided to terminate her based upon this incident, but this was later reduced to a written warning when the employee filed a grievance.
- During this period, she was also demoted.
- **Court:** "These instances are not sufficiently severe and pervasive to rise to constitute actionable harassment."
 - ◊ No allegation that actionable comments occurred regularly.
 - ◊ Regarding the examination, the court said, "While the return-to-work requirements could have been completed more efficiently or communicated more clearly, Trevino has not produced evidence that they were sufficiently severe to support a claim of harassment."


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Recent Case: *Colon-Fontanez v. San Juan*

Colon-Fontanez v. Municipality of San Juan, 660 F.3d 17 (1st Cir. 2011)

- A municipality employee with fibromyalgia earned excellent performance reports despite suffering intense pain throughout the work day.
 - ◊ Swelling was evident to co-workers
- She disclosed her disability due to her absences – as a result, her supervisor:
 - ◊ Refused to meet with her or allow other employees to meet ahead of plaintiff
 - ◊ Refused to greet her in the office
 - ◊ Yelled at her and threw her out of her office in front of other staff
 - ◊ Refused to address the fact that co-workers repeatedly accused plaintiff of "faking it," called her a hypochondriac, frequently suggested that she should apply for disability , and would isolate her from conversations.
 - ◊ Had her followed when taking bathroom breaks.


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Recent Case: Colon-Fontanez v. San Juan



- **Court:** The supervisor's behavior, despite being unprofessional and occurring on a routine basis, was not severe and pervasive enough to constitute harassment.
- "[T]he evidence does not support a hostile work environment claim. The incidents described are episodic, but not frequent, in nature; upsetting, but not severe; mildly humiliating, but not physically threatening."
- "Lastly, such acts do not appear to have affected her overall work performance; in fact Colón, both below and on appeal, repeatedly has asserted to the contrary."


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Recent Cases: You Be the Judge and Jury



Murphy v. BeavEx, Inc., 544 F. Supp. 2d 139 (D. Conn. 2008)

- Dispatcher had progressive multiple sclerosis.
 - Used a cane, experienced numbness and weak limbs, had coordination issues, memory loss, cognitive impairments and difficulty controlling his bowels and bladder.
- Due to bowel accidents at work, his co-workers called him names, such as "Mr. Shitty" and left a children's book about feces on his desk ("The Book of Poop").
- Co-workers hid his cane and drew caricatures that were put up in the dispatch area.
 - One depicted him as a Special Olympian with a cane and another that listed him as "Stupid Employee of the Month."
- **Query:** Disability Harassment? A: Yes B: No


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Recent Cases: You Be the Judge and Jury



Lowenstein v. Catholic Health E., 820 F. Supp. 2d 639 (E.D. Pa. 2011)

- A pharmacist notified her supervisor that she had an autoimmune disorder and that would need a reasonable accommodation for medically related absences.
- One supervisor said that would be fine with a doctor's note.
- Another supervisor decided that hospitalization was not an excuse for missing work and her doctor's notes were rejected.
 - During one month alone the plaintiff's supervisor rejected five different doctor's notes.
- Ultimately the plaintiff was fired for violating the attendance policy.
- **Query:** Disability Harassment? A: Yes B: No


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Recent Cases: You Be the Judge and Jury

EEOC
U.S. Equal Employment Opportunity Commission

EEOC v. Rite Aid Corp., 750 F. Supp. 2d 564 (D. Md. 2010)

- An employee with epilepsy had recurring seizures including grand mal and complex partial seizures
- He was restrained by co-workers during one seizure and photographed in his boxer shorts during another seizure.
- When his seizures increased, his supervisor questioned him about whether he had been drinking alcohol, if he was taking his medication and his co-workers allegedly ridiculed him.
- He was also placed on restricted work duty despite documentation from his neurologist that this was not necessary.
- **Query:** Disability Harassment? A: Yes B: No

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Potential Claim For Disability Harassment Under Title V of the ADA

Disability Harassment

- **Title V:** "unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of . . . any right granted or protected by this chapter."
- **Standard of Proof:** Title V would require a lower standard of proof that the current "severe or pervasive" standard
- **Proof of Disability:** Title V would *not* require proof of disability
- **Case Law:** Limited case law under this provision of Title V
See the book, *Disability Harassment*, by Mark C. Weber

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Constructive Discharge

Rock Hard Place

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The Legal Standard for Constructive Discharge

- **Constructive Discharge:** Working conditions that are "so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign."
 - **Examples:** Forced resignation, employer harassment, repeated denials of reasonable accommodation requests, and a materially adverse change in job duties.
- Highly factual analysis requiring the following two elements:
 1. A reasonable person in their position would have felt compelled to quit under the intolerable working conditions, and
 2. The employer acted with intent for the employee to quit or that he could have reasonable foreseen that the employee would quit as a result of his actions.
- See *Talley v. Family Dollar Stores of Ohio, Inc.*, 542 F.3d 1099, 1107 (6th Cir. 2008).



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Recent Constructive Discharge Cases



Chavez v. Waterford School District, 720 F.Supp.2d 845 (E.D. Mich. 2010)

- A middle school teacher's vocal cords were paralyzed due to a brain tumor.
- She claimed constructive discharged after resigning due to:
 - being reassigned to substitute status
 - failing to receive an effective microphone
 - failing to receive computer equipment
 - being subject to random observations, and
 - being told to "tape a cushion" to a headset that irritated her brain surgery scar.
- **Court:** This "one-sided harassment" constituted constructive discharge.
- **Query:** Is there such a thing as two-sided harassment? (not including reality TV)



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Recent Constructive Discharge Cases

Gingold v. Bon Secours Charity Health Sys., 768 F. Supp. 2d 537 (S.D.N.Y. 2011)

- A computer technician with an anxiety and panic condition had "panic attacks... triggered by traveling outside of his local area."
- Employer initiated a new rotating schedule that required technicians to travel and plaintiff expressed his concern to managers.
- His manager requested clarification on where the plaintiff was able to travel without anxiety and submitted him for a position at a different location that did not have a rotating schedule.
- Before these actions were finalized, the plaintiff resigned.
- **Court:** Granted summary judgment to the defendant because the plaintiff ended the interactive process and resigned before any adverse employment action occurred.
- A reasonable person in his position would not have felt compelled to resign as the defendant was being cooperative and attempting accommodation.



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Recent Cases – You be the Judge and Jury



Lara v. Unified Sch. Dist. #501, 2009 WL 3382612
(10th Cir. Oct. 22, 2009)

- A school district custodian took several periods of leave after having a ruptured aneurysm, a heart attack, and an abdominal hernia.
- HR told him plaintiff he was “too old,” was “getting on in age,” and “brought up the idea that [he] maybe should take an earlier retirement” because he was missing too much work, having too many medical problems, and costing the school district money.
- Plaintiff stated these statements caused him to retire.

• **Query:** Constructive Discharge? A: Yes B: No



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Recent Case – You be the Judge and Jury



Sensing v. Outback Steakhouse, 575 F.3d 145 (1st Cir. 2009)

- Hostess and take-away waitress had diabetes and multiple sclerosis (MS).
 - When her MS would flare up, it was so debilitating that she would be bedridden and unable to walk or feed herself.
- The plaintiff disclosed to the scheduling manager that she had been experiencing numbness in her legs.
- Despite being able to work, the manager sent her home and covered her next few shifts against the plaintiff's wishes.
- The plaintiff presented a note from her doctor confirming that she was able to work, but the scheduling manager refused to put her back on the schedule.
 - Manager claimed he wanted a fitness for duty, but ne never scheduled it after plaintiff agreed.

• **Query:** Constructive Discharge? A: Yes B: No



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Recent Cases – You be the Judge and Jury



Talley v. Family Dollar Stores of Ohio, 524 F.3d 1099 (6th Cir. 2008)

- Cashier had degenerative osteoarthritis of her spine causing intense pain in her legs and back and limiting her ability to stand for long periods of time.
- Some managers, but not all, allowed her to sit on a stool due to her pain.
 - One manager prohibited her from using a stool because other employees had complained that she was receiving unfair treatment.
 - She attempted to work without a stool, but after two hours she had to go home as the pain was so severe.
- She returned to work with a doctor's note seeking the use of a stool.
- Her manager refused to even read the note and said he would schedule a meeting to discuss her accommodation request.
 - Manager never returned calls to schedule the meeting.
- She did not return after handing her manager the doctor's note and was terminated five months later for abandoning her position.

• **Query:** Constructive Discharge? A: Yes B: No



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Retaliation - Engaging in Protected Activities



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Overview of Retaliation under the ADA 

- **Title V:** "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act."
- **Rationale:** provides protection for employees who exercise their civil rights and promotes full and fair enforcement of the ADA.


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Who Can Bring Retaliation Claims? 

- **Not limited to people with disabilities:** the majority of courts have found that proving disability is not required in retaliation cases because the retaliation section of the ADA refers to "person" instead of "qualified individual with a disability."
- **Shellenberger v. Summit Bancorp, Inc.** 318 F.3d 183, 185 (3rd Cir. 2003): Employee with allergies claimed she was terminated for filing an ADA charge with the EEOC.
 - **Court:** Language of Title V does not require proof of ADA disability to bring retaliation case.


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Are Retaliation Claims Limited to Current Employers?

- **Background:** In almost all retaliation claims, the alleged retaliation occurs while plaintiff is still an employee. Can a retaliation claim be brought by a former employee?
- **Carr v. Morgan County School Dist., 2007 WL 2022055 (D. Colo. Jul. 9, 2007):** Teacher settled ADA claim after filing with the EEOC. School administrator revealed problem with employee during reference check. The court refused to dismiss the claim finding that an adverse action for retaliation purposes would include harm to a former employee's future employment prospects.



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What if the Retaliation is Based on the Actions of a Third Party?

- **Fogleman v. Mercy Hospital, Inc., 283 F.3d 561, 564 (3rd Cir, 2002)**
- A son worked at a hospital where his father had previously worked.
- Brought a retaliation claim alleging that he was fired because his father had previously filed an ADA discrimination case.
- **Issue:** Does the ADA prohibit "an... adverse employment action against a third party in retaliation for another's protected activity."
- **Third Circuit:** Reversed the district court's decision to grant the hospital summary judgment.
 - Cited 42 U.S.C. § 12203(b), the second anti-retaliation provision in the ADA which protects people who have "aided or encouraged any other individual in the exercise or enjoyment of any right granted or protected by this chapter." See also, *EEOC v. Cognis Corp.*, 2012 WL 1893725 (C.D. Ill. May 23, 2012),



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Was the Employee Engaged in a Protected Activity?



- The first element that a plaintiff needs to prove in an ADA retaliation case is that s/he engaged in a protected activity, such as:
 - Filing a lawsuit or charge of discrimination with a federal, state, or local agency.
 - **Note:** Many cases involve the filing an EEOC Charge.
 - Requesting or receiving reasonable accommodations.
 - Assisting, testifying or otherwise participating in an investigation of discrimination.
- See Butler v. Exxon Mobil Corp., 838 F.Supp.2d 473 (M.D. La. January 20, 2012).*



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Does the Retaliation Claim Relate to a Protected Activity?

- The retaliation claim must relate to a protected activity. Therefore, an employee terminated for confronting and complaining to his employer was not engaging in a protected activity. *Kirkeberg v. Canadian Pac. Ry.*, 619 F.3d 898 (Cir. 8th 2010).
- *Bloch v. Rockwell Lime Company*: Employee who was fired after opposing employer's request for health info was not engaged in protected activity.
- *Mosley v. Potter*: Court found that filing for workers' compensation is not a protected activity (May be protected under State Law).
- *Sanchez v. City of Chicago*: Employee who was terminated after requesting reasonable accommodation was engaged in protected activity for retaliation claim.



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What Constitutes an Adverse Employment Action?



- **Termination Required?** Courts were split whether termination was required to bring retaliation case.
- **Supreme Court Establishes Standard:** In *Burlington Northern & Santa Fe Railway Co.*, Supreme Court resolved lower court split by finding that any action that materially injures or harms an employee who has complained of discrimination and would dissuade a reasonable worker from making a charge of discrimination could be the basis for a retaliation claim.



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What Constitutes an Adverse Employment Action?

- *Norden v. Samper*: Employee was required to waive right to file EEO complaints in order to return to work. This was an adverse employment action.
- *Gilmore v. Potter*: After filing EEO complaint, employee was isolated in small room, threatened with termination, called "worthless", and told not to talk to her coworkers. The court said this was not an adverse action.
- *Serino v. U.S. Postal Service*: Transfer was not an adverse action, but an effort to accommodate the employee.
- *Williams v. Brunswick County Bd. of Educ.*, 725 F.Supp.2d 538 (E.D.N.C. July 2, 2010): There was no adverse employment action because the employee did not lose any benefits or pay.
- Retaliation may also relate to actions of a labor organization. See *Infantolino v. Joint Industry Bd. Of Elec. Indus.*, 582 F.Supp.2d 351, 354 (E.D. N.Y. 2008): Union engaged in retaliation when it cut off an electrician's health care benefits and refused to provide job referrals after he filed an EEOC Charge.



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What Constitutes an Adverse Employment Action?

Larkin v. Methacton Sch. Dist., 773 F.Supp.2d 508 (E.D. Pa. February 23, 2011)

- The following actions were not "materially adverse" as they would not dissuade a reasonable person from engaging in a protected activity. Here, a HS teacher with alcoholism requested a transfer to an elementary school:
 - (1) failing to engage in the interactive process required by the ADA;
 - (2) failing to transfer her to positions for which she was qualified;
 - (3) forcing her "to endure a sham interview process";
 - (4) giving her an unsatisfactory rating;
 - (5) accusing her of failing to provide the results of her blood-alcohol test;
 - (6) initially refusing to grant her FMLA leave;
 - (7) insisting that she return to the HS against "medical advice"; and
 - (8) accusing her of not engaging in the interactive process."



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Causal Connection Between the Protected Activity and the Employer's Adverse Action?

- Background:** In order to prove a retaliation claim, plaintiffs must demonstrate a causal connection between their exercise of a protected activity (e.g. filing an EEOC claim) and the employer's adverse action (e.g. termination).
- Temporal Proximity:** In many of these cases, the court will look at the "temporal proximity" of the two events to determine if there was a causal connection.



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Causal Connection – Case Law

- Satchel v. School Bd. of Hillsborough Co.:** No retaliation when plaintiff was terminated two years after requesting an accommodation
- Erbel v. Dept. of Agriculture:** Claim for retaliation allowed to proceed when supervisor's behavior changed after plaintiff filed with EEOC.
- Travis v. U.S.P.S.:** Employee was disciplined for attendance problems and altercations with co-workers. No causal connection because discipline occurred before filing with EEOC.



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The Causal Connection



Ryan v. Pace Suburban Bus Div. of Reg'l Transp. Auth.,
837 F.Supp.2d 834 (N.D. Ill. August 8, 2011)

- There was a causal connection when an inspection technician, who had been with Pace for 25 years, was terminated three days after complaining about a functional capacity evaluation.
- The employer required the FCE due to reasonable accommodations needed after a work-related accident.
- The employee had complained that he had to perform tasks at the FCE that he did not do on the job.

Colon-Fontanez v. Municipality of San Juan, 660 F.3d 17 (1st Cir. Oct. 12, 2011)

- No retaliation when an employer removed an employee's computer for repair and cleaning, and not in retaliation for the reasonable accommodation request of a reserved parking space.


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The Causal Connection



Williams v. Recover Sch. Dist., 2012 WL 893421 (E.D. La. 2012)

- No retaliation when an employer fired an employee for taking leave sixteen months after he filed an EEOC charge of discrimination.

Bliss v. Morrow Enterprises, Inc., 2011 WL 2555365 (D. Minn. Jun. 28, 2011)

- An assistant manager of a retail clothing store wore a cast on her arm for an extended period but did not require accommodations.
- Her relationship with her supervisor deteriorated and she filed a charge with the EEOC alleging harassment and discrimination.
- Less than a month later, plaintiff was fired for allegedly violating the employee discount policy by permitting her friend to purchase a tie using her discount.
- **Court:** Granted summary judgment on the discrimination and harassment claims, but denied it on plaintiff's retaliation claim due to the temporal proximity between the filing and termination (less than a month).


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Was There A Non-Retaliation Cause for the Adverse Action?

- An employer can defeat a retaliation claim by showing it had a legitimate business reason for taking the adverse employment action.
- The burden then shifts back to the employee to show that the employer's asserted non-retaliatory reason is not legitimate and was actually pretext for discrimination.
- **Ozlek v. Potter:** Employer provided non-retaliatory reason for termination to defeat retaliation claim – need to resolve inconsistency between plaintiff's medical status and his inappropriate behavior.
- **Hughes v. City of Bethlehem:** Retaliation claim failed when employer had legitimate reason for termination (employee called in sick when in Las Vegas).
- **Mitchell v. GE Healthcare:** Employer had valid reason for referral to EAP for employee who was disruptive and intimidating.


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Was the Alleged Non-Retaliatory Reason Actually Pretext?



Monterroso v. Sullivan & Cromwell, LLP, 591 F.Supp.2d (S.D. N.Y. 2008)

- An employee with chemical and environmental sensitivities filed a charge with the EEOC after her employer refused to accommodate her request for a "propellant-free" workplace.
- Less than three months later, she was placed on unpaid administrative leave and fired a few months later.
- **Court:** This established a *prima facie* retaliation case against the employer.
- The employer then claimed the termination was due to chronic absences.
- The employee did not rebut this, hence the court ruled there was no pretext and the ADA retaliation claim was dismissed.



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Pretext



Dickerson v. Bd. Of Tr. of Cmty. Coll. Dist. No. 522, 657 F.3d 595 (7th Cir. 2011)

- A custodian received an unsatisfactory performance evaluation told he needed to improve his relationships with people and the quantity of work.
 - ◊ He refused to sign the evaluation as he disagreed.
 - ◊ Filed a grievance stating the evaluation was discriminatory and unjust discipline for his union activities.
 - ◊ Also filed an EEOC charge after he was not promoted to a FT position.
- Six months later he received another poor evaluation and was then fired.
- **Court:** Affirmed summary judgment for the employer. Although the employee engaged in a protected activity and there was a connection between that activity and the adverse employment action he suffered, the employer had a legitimate reason in terminating the janitor as he did not meet the required expectations of his job, an ADA requirement.



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Are Damages Available in ADA Retaliation Cases?

- **Courts Split:** Courts have differed on whether plaintiffs can recover money damages in an ADA retaliation claim.
- **Analysis:** Historically, monetary damages were not recoverable in civil rights cases. However, the Civil Rights Act of 1991 provides for monetary damages when the defendant has engaged in "unlawful intentional discrimination." Some courts have held that this provision is broad enough to encompass retaliation.
- **Additional Implication:** Plaintiffs may also be denied access to a jury trial if there are no claims in which damages can be awarded.



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Damages



Kramer v. Banc of America Securities, LLC, 355 F.3d 961, 966 (7th Cir. 2004)

- A case of first impression in the federal courts addressing whether compensatory damages could be awarded in a retaliation case under the ADA and the 1991 version of the Civil Rights Act.
- Seventh Circuit:** The ADA does not provide a plaintiff with compensatory damages. The court reasoned that the new language was specific to discrimination cases only (as set forth in Title I of the ADA) and did not include retaliation cases (found in Title V of the ADA).

Rumler v. Dep't. Of Corr., Fla., 546 F.Supp.2d 1334, 1342 (M.D. Fla. 2008)
- District Court:** Compensatory damages were appropriate based on the context of the retaliation claim came. Statutes do not have to be read literally and recognized other courts have held that it is unnecessary for Congress to separately mention retaliation remedies.



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Damages



Baker v. Windsor Rep. Doors, 635 F.Supp.2d 765 (6th Cir. 2009)

- Court:** Retaliation is an intentional discriminatory act and therefore a plaintiff can recover monetary damages.
 - The court based its decision on discussions in three Supreme Court cases involving other anti-discrimination laws. (Cites are in the legal brief).
- A few months later, *Baker's* reasoning was rejected by the Ninth Circuit in ***Alvarado v. Cajun Operating Co.***, 588 F.3d 1261, 1270 (9th Cir. 2009), where the court agreed with the Seventh Circuit's holding in *Kramer*.



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Damages



Leone v. N. Jersey Orthopedic Specialists, P.A.,
2012 WL 1535198 (D. N.J. Apr. 27, 2012)

- Plaintiff requested that the court adopt the ADA discrimination standard in ADA retaliation claims, "that compensatory and punitive damages are appropriate where the employer has engaged in intentional discrimination and has done so with malice or reckless indifference to the federally protected rights of the plaintiff."
- Court:** Rejected the request because it was unclear if the plaintiff could even establish the discrimination suffered was malicious or reckless.



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Practical Tips




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Tips for Employees With Disabilities



- Address harassing or retaliatory conduct and complain to your supervisor.
- Keep good documentation of harassment or retaliation.
- Be aware of the statute of limitations.
- Provide proof of any physical injury arising from harassment that was incurred during employment.
- Simply leaving a job does not give rise to a constructive discharge claim unless the work environment was hostile and "intolerable."



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Tips for Employers



- Modify any anti-discrimination or anti-harassment training to include disability-related training, including harassment, retaliation, and reasonable accommodation requirements.
- Put in place disability harassment policies and appropriate grievance procedures to report workplace harassment.
- Train supervisors to respond promptly to an employee's internal complaint of harassment or retaliation.
- Document attempts to address harassing or retaliation.



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General ADA Resources

- **National Network of ADA Centers:** www.adata.org; 800/949-4232(V/TTY)
- **Equal Employment Opportunity Commission:** www.eeoc.gov
- **Equip For Equality:** www.equipforequality.org; 800/537-2632 (Voice); 800/610-2779 (TTY)
- **Job Accommodation Network:** <http://askjan.org>

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- **Illinois attorneys interested in obtaining continuing legal education credit should contact Barry Taylor at:** barryt@equipforequality.org

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Update on Emerging ADA Issues – Disability Harassment, Retaliation, and Constructive Discharge
September 19, 2012

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

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