EMPLOYMENT

Brief No. 19
September 2012

Legal Briefings

Prepared by:

Barry C. Taylor, Vice President for Civil Rights and Systemic Litigation, Alan M. Goldstein, Senior Attorney, and Legal Interns Rebecca Wylie and Nikki Ashmore with Equip for Equality

Update on Emerging ADA Issues: Disability Harassment, Retaliation and Constructive Discharge [1]

Disability harassment, retaliation and constructive discharge are emerging workplace issues affecting employees with disabilities and presenting unique challenges to employers. This brief will review how these issues are covered by the ADA and review the most recent case law decisions on all three issues.[2]

I. Disability Harassment Under the ADA

Disability harassment under Title I of the ADA (also referred to as "hostile work environment") is a developing area of law, and this cause of action is being explicitly or implicitly recognized by a growing number of courts. The U.S. Supreme Court and the lower federal courts have previously recognized a cause of action for workplace harassment under Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. *See* 42 U.S.C. §2000e-2(a)(1)

A review of Title VII harassment cases reveals that there is no exact science to determine what type of conduct rises to the level of actionable harassment. The courts, however, have set a high bar for what conduct constitutes harassment under Title VII. Courts that have recognized a disability harassment claim under Title I of the ADA have analogized such a claim to a Title VII harassment claim. As more and more individuals with disabilities enter the workforce, the more important this issue will become for employers. Training and anti-harassment policies that address other forms of harassment, based on race and sex, for example, should be modified to include disability.

Title I of the ADA prohibits discrimination in employment, and provides employees with disabilities with broad protections in the workplace. The statute states: "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)

Courts that have recognized a cause of action for disability harassment have focused on the similarities between this provision of the ADA and Title VII. Although harassment is not expressly prohibited in Title VII, the U.S. Supreme Court has recognized that harassment based on a protected status is implicitly prohibited by Title VII. Both Title I of the ADA and Title VII use the language "terms, conditions, and privileges of employment." Courts have interpreted this to be the relevant portion of the statutes from which to draw a harassment claim.

The U.S. Supreme Court has yet to address the parameters of what conduct amounts to harassment under the ADA. However lower courts recognize that there is a cause of action for a harassment claim based on a person's disability and have held that certain factors are more indicative of harassment than others. The courts rely on the Title VII sexual harassment framework to determine whether the person with a disability was subjected a hostile work environment. Under the ADA, a plaintiff must establish the following five factors to successfully assert a harassment claim:

1. plaintiff has a disability under the ADA;
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. the employer knew or should have known of the harassment and failed to take prompt, remedial action.[3]

The biggest challenge plaintiff face when establishing a harassment claim is proving that the harassment was sufficiently severe or pervasive to alter a term or condition of their employment. To prove this element, plaintiffs typically have to present evidence that the harassment has prevented them from performing an essential aspect of their job.[4] Courts have established varying standards for the level discriminatory conduct that creates a hostile work environment. Physically threatening or humiliating comments are more indicative of harassment than offensive utterances, even if the "offensive utterances" are directly focused on the person's disability. Furthermore, courts are clear that anti-discrimination laws are not designed to enforce a civility code in the workplace.

Therefore, teasing, offhand comments and isolated incidents will not be considered to alter the conditions of employment.

A. Recent Harassment Cases in Favor of the Person with a Disability

In *Davis v. Vermont, Dept. of Corrections,* 2012 WL 1269123 (D. Vt. Apr. 16, 2012), a prison guard injured his groin and testicles from a work related injury. During his recovery leave, his supervisors sent two staff-wide offensive emails containing pictures that referenced the guard's injury. He later had to take a four week medical leave. During this leave, he complained to his union about the e-mails and an investigation was started. When he returned, a note was left in his mailbox stating, "how's your nuts/kill yourself/your done." The guard was also ridiculed by prisoners who repeatedly grabbed their testicles and made comments like "good luck making kids with that package." He then received another offensive email that contained a picture stating "kill yourself" and a cartoon with a gun pointing to a person's head. The conduct escalated when the plaintiff was injured during a training session. He was injured because one of the supervisors responsible for the offensive e-mails failed to supervise the training. The guard subsequently took a year of medical leave. During that year, he was followed by a private investigator that he believed was working for the defendant.

The court held that this conduct amounted to disability harassment as 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 on 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.

In *Schwarzkopf v. Brunswick Corp.*, 833 F.Supp.2d 1106 (D. MN., 2011), a fitness equipment fabricator who had depression and an anxiety disorder was continuously subjected to derogatory comments about his mental health. He worked for the defendant company for three years and before he disclosed 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 also stated that people receiving Social Security disability benefits were "worthless pieces of shit" and told the plaintiff several times that he wanted to put a shock collar on him because he was so forgetful. The plaintiff was subjected to degrading names, was yelled at in front of his co-workers, and on one occasion, his supervisor made a slashing motion across his neck. The negative environment forced the plaintiff to take medical leave so he could recover from the anxiety.

The court allowed his hostile work environment claim to proceed as 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.)

In *Lowenstein v. Catholic Health E.*, 820 F. Supp. 2d 639 (E.D. Pa. 2011), the plaintiff, a pharmacist, notified her supervisor that she had an autoimmune disorder and that she would need a reasonable accommodation for medically related absences. Her supervisor told her that "she would take care of it" and that the plaintiff would need to provide a doctor's note for absences. However, another supervisor decided that hospitalization was not an excuse for missing work, and her doctor's notes were rejected. Ultimately the plaintiff was fired for violating the company's attendance policy. During one month alone the plaintiff's supervisor rejected five different doctor's notes. The court held that the disciplinary proceedings against the plaintiff, who was attempting in good faith to comply with company policy, were sufficiently severe to be considered harassment.

B. Recent Cases Dismissing Claims for Disability Harassment

In *Colon-Fontanez v. Municipality of San Juan*, 660 F.3d 17 (1st Cir. 2011), a municipality employee with fibromyalgia earned excellent performance reports despite experiencing intense pain throughout the work day. As a result of her medical condition, she incurred more absences than other employees. After disclosing her disability, her supervisor refused to meet with the plaintiff, make her wait if a meeting was scheduled, refused to greet her in the office, and would allow other employees to meet with her ahead of the plaintiff. She also presented evidence that her supervisor would yell at her in front of other employees and refused to discipline other employees that made derogatory comments related to her disability. Her supervisor refused to address the fact that co-workers repeatedly accused her of "faking it," called her a hypochondriac, frequently suggested that she should apply for disability and would isolate her from conversations. Her movements were restricted throughout the office, and she was followed when she took bathroom breaks. The negative treatment that she received from her supervisors and her co-workers formed the basis of her harassment claim. The court held that her supervisor's behavior, despite occurring on a routine basis, was not severe and pervasive enough to be considered harassment. The court acknowledged that her supervisor's conduct was unprofessional and that it had created an uncomfortable work environment, but ultimately ruled that it was only mildly humiliating. The fact that the plaintiff was able to maintain positive performance evaluations, despite the aforementioned discrimination, undercut her claim.

In *Trevino v. United Parcel Serv.*, 2009 WL 3423039 (N.D. Tex. Oct. 23, 2009), plaintiff, a feeder driver for United Parcel Service, had depression, a panic

disorder, anxiety and post-traumatic stress disorder. As a result of her disabilities, she took medical leave, which resulted in negative, derogatory comments from her co-workers and her supervisors. Her co-workers would ask her if she's taken her medication and on one occasion a supervisor stopped her while she was working and asked why she was not on an FMLA day since she took them all the time. The employee's co-worker testified that her manager forced plaintiff to take a fitness test at the hospital. Her co-worker stated that she was distressed and gasping for air, but plaintiff stated that she was only a little out of breath and was fine to drive. At the hospital, she was sedated, examined, and forced to take a breathalyzer test. The company decided to terminate her based upon this exam, but this was later reduced to a written warning when the employee filed a grievance. During this period, she was also demoted. She eventually filed suit for disability harassment. Despite the comments, forced medical exam, and demotion, the court held that she lacked sufficient evidence to support a claim of harassment.

In *Murphy v. BeavEx, Inc.*, 544 F. Supp. 2d 139 (D. Conn. 2008), the plaintiff, a dispatcher had progressive multiple sclerosis. He had to use a cane, experienced numbness and weak limbs, had coordination issues, memory loss, cognitive impairments and difficulty controlling his bowels and bladder. The plaintiff experienced significant name calling and ridicule by his co-workers. On several occasions the plaintiff had bowel accidents at work. This prompted the other employees to call him derogatory names, such as "Mr. Shitty" and leave a children's book about feces on his desk. There was also an incident where someone hid his cane in the warehouse stacks and he had to wait until someone could retrieve it for him. The plaintiff was also the subject of two caricatures that were put up in the dispatch area. They depicted him as a Special Olympian with a cane and another that listed him as "Stupid Employee of the Month." Despite filing a complaint, these pictures remained in the dispatch area throughout his employment. His supervisor stated that the drawings were supposed to reflect the employee's personalities. The court granted summary judgment to the employer finding that the name calling and ridicule plaintiff experienced was not considered severe and pervasive enough to alter the terms of his employment. The court held that the name calling and caricatures cannot form the basis for his hostile work environment claim because they did not adversely affect his ability to do his job. Furthermore, the incident where his cane was stolen and hidden was not indicative of a hostile work environment because it was an isolated incident.

In *EEOC v. Rite Aid Corp.,* 750 F. Supp. 2d 564 (D. Md. 2010), an employee in the defendant's distribution center had epilepsy. He filed a harassment suit after co-workers restrained him and a supervisor took pictures of him during a seizure. He had taken his pants off during the seizure and he was photographed in his underwear. 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. The court held that even though this conduct could be considered offensive and humiliating, it was not tantamount to a hostile work environment because he could not prove that the other employees intended to ridicule him on account of his disability.

In *Skinner v. City of Amsterdam*, 824 F. Supp. 2d 317 (N.D.N.Y. 2010), the plaintiff, a foreman for the Department of Public Works for the City of Amsterdam, had become addicted to pain killers after experiencing a back injury. His co-workers called him names related to his drug use, attempted to sell him prescription pills, and offered him drug-like substances on a daily basis. They also taped pills to his time card and left something that looked like marijuana on his desk. His disability harassment claim stemmed from incidents that occurred on a daily basis over a five month period, although plaintiff testified that the incidents did not affect his ability to do his job. Summary judgment was granted to the employer because five months was not considered a long enough period of time. When the allegations were viewed in totality, the court held that because they did not affect his ability to perform his job, they did not rise to the level of harassment. The court stated that hostile work environment claims are meant to protect employees from abuse and are not intended to enforce a code of civility.

C. Potential Claim for Disability Harassment Under Title V of the ADA

Mark C. Weber, Professor of Law at DePaul University, among other authors, has argued that a claim for disability harassment could be based on provisions found in Title V of the ADA.[5] Under 42 U.S.C. § 12203(b) in Title V, it is "unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of . . . any right granted or protected by this chapter." Professor Weber argues that this unique and separate provision that focuses on coercion, interference and intimidation under Title V of the ADA, is a separate cause of action from a harassment claim, and therefore does not require the strict and difficult burdens of proof as those in a traditional harassment claim.

A cause of action crafted under this provision of Title V would require a lower standard of proof for plaintiffs because coercion and intimidation could include verbal harassment, insults and threats that might not rise to the level of severe or pervasive currently required by the courts. And, a cause of action under this section of the ADA would not require plaintiff to be a qualified individual with a disability since this section says "any individual" instead of "a qualified individual with a disability." Therefore, if courts did recognize a cause of action for disability harassment under Title V, plaintiffs would have a higher likelihood of

success on those claims, and would not be intimidated or coerced out of a job without recourse.

There is very little case law under this section of the Title V of the ADA, so it is unclear whether this theory will be a way for people with disabilities to obtain redress for the harassment they experience. There is one case that provides some guidance. In *Brown v. City of Tucson*, 336 F.3d 1181 (9th Cir. 2003), the court stated that "the ADA's anti-interference provision appears to protect a broader class of persons against less clearly defined wrongs, compared to the anti-discrimination provisions from which the hostile environment standard is derived.") It will be interesting to see if cases under Title V develop to provide broader protections against harassment o employees with disabilities.

D. Tips for Employees with Disabilities

As noted previously, the employee must show that the alleged harassment was sufficiently severe or pervasive to alter a condition of employment. Thus far, the case law indicates that courts are less likely to find that name-calling alone meets the standard for disability harassment. Although courts say that actual physical harm is not necessary, courts seem more sympathetic to disability harassment claims when the employee actually experienced physical or emotional harm on the job as a direct result of the harassment. If employees suffer these types of injuries, they should make sure to plead them in their claims, and if possible, utilize experts to support their claims.

Since they may face a difficult burden in court, employees should consider addressing the situation directly with their employer before pursuing legal action. This can include informing the harasser that the conduct is unwelcome, informing supervisors about the unwelcome behavior, and utilizing the employer's internal procedures for reporting and investigating harassment**.** If an amicable approach is not successful, the employee should keep a record of the unwelcome behavior including the date, time, place, witnesses, and any attempts that were made to remedy the situation with the employer and the employer's responses to those attempts.

Finally, employees should educate themselves about their rights, remedies and statutes of limitations, should they decide to file a disability discrimination charge. Statutes of limitations will differ depending on the local, state or federal jurisdiction in which an employee intends to file a charge, the size and type of entity the employer is, and the type of claim the employee is bringing. Generally, if the employee is seeking relief by filing a charge of discrimination under Title I of the ADA, she should contact the Equal Employment Opportunity Commission (EEOC). Claims for disability discrimination in employment based on prohibited discrimination defined in Title I

must be filed within 180 days of the alleged discriminatory act of the employer, unless the EEOC has a work share agreement with the state human rights commission, and in those cases, charges must be filed within 300 days. Claims based on hostile work environment require a careful analysis of events in order to determine when the statute of limitations begins to run because these claims can be characterized as an ongoing violation and thus, not tied to an incident on a particular date. It is recommended that potential plaintiffs seek legal counsel in order to understand and protect their rights.

E. Tips for Employers

Employers should be aware that, as with harassment and hostile work environment claims based on sex, race, religion, ethnicity, age or other protected status under Title VII of the Civil Rights Act, and other employment rights laws, employers can be subject to liability for disability harassment claims under the ADA. To avoid such liability and to promote a positive workplace environment, employers should modify any anti-discrimination or anti-harassment training to include training about disabilities. Additionally, employers should put in place disability harassment policies and appropriate grievance procedures for persons with disabilities to report workplace harassment. Employers should also train supervisors to respond promptly to an employee's internal complaint of harassment. The employer will need to show that it took the claim seriously, investigated the complaint, maintained employee confidentiality to the extent practicable, and took appropriate disciplinary action against any employee or supervisor who was found to be harassing another employee, or who knew the work environment was abusive and did nothing to prevent or stop the harassment.

While plaintiffs typically carry a heavy burden, disability harassment is still an emerging area of law, and as the cases above demonstrate, plaintiffs can prevail in disability harassment cases. Accordingly, employers should put systems in place that will prevent workers with disabilities from facing disability harassment and provide avenues to promptly address harassment if it occurs. Preventing harassment will ensure a better working environment and also avoid the expense and workplace disruption of any potential litigation.

II. Constructive Discharge under the ADA

In order to assert a claim of employment discrimination under the ADA, the plaintiff must be able to prove that he suffered an adverse employment action by reason of his disability. This can be established if an employee was terminated because of his or her disability, or if there has been an adverse change in the terms of employment that forced the employee to quit. If the employer has created a hostile work environment that is so difficult or unpleasant that the person

with a disability resigns, the resignation could be deemed to be a constructive discharge and serve as the basis for the adverse employment element of a discrimination claim. A constructive discharge claim is based on the concept that the employee did not voluntarily leave his or her position.

A constructive discharge claim is a highly factual analysis in which the plaintiff must establish the following two elements:

1. that a reasonable person in their position would have felt compelled to quit under the intolerable working conditions, and

2. that the employer acted with intent for the employee to quit or that he could have reasonably foreseen that the employee would quit as a result of his actions.[6]

Constructive discharge claims can be based on a wide variety of conduct. Courts have recognized a cause of action arising out of forced resignation, harassment by their employer, repeated denial of a reasonable accommodation request, and a materially adverse change in duties.

A. Recent Constructive Discharge Cases in Favor of the Person with a Disability

In *Sensing v. Outback Steakhouse*, 575 F.3d 145 (1st Cir. 2009), the plaintiff, a 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. The hostess contacted the restaurant several times to request that she be put back on the schedule. Finally, the restaurant manager agreed that she could be scheduled to work contingent on the results of an independent medical examination. The plaintiff was willing to submit to an examination, but was never provided with the information to set it up and ultimately left the job. She filed suit under the ADA alleging constructive discharge. The court denied summary judgment to the defendant and held that the manager had made it impossible for the plaintiff to work as they refused to schedule her or provide the requisite information for her to be examined. Factors that weighed heavily in her favor were the multiple requests that she made to try and return to work, and that the manager failed to provide the exam information. By refusing to connect her with the condition they had implemented, the restaurant effectively terminated the plaintiff.

In *Talley v. Family Dollar Stores of Ohio*, 524 F.3d 1099 (6th Cir. 2008), the plaintiff, a cashier, had degenerative osteoarthritis of her spine. Her disability

caused intense pain in her legs and back and prevented her from sitting or standing for long periods of time. Throughout her employment, some managers, but not all, had allowed her to sit on a stool to alleviate the pain. At some point during her employment, a 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 stating that she could not stand for more than 60 minutes and that sitting for five to fifteen minutes every hour would be beneficial. Her manager refused to even read the note, but said he would schedule a meeting to discuss her accommodation request. She contacted her manager several times to schedule this meeting, but he never responded. Five months later, she received notice that she had abandoned her position. The court held that the employer's refusal to read the doctor's note, grant her accommodation, or schedule a meeting to discuss alternative accommodations, could be viewed by a reasonable person as an intentional action to force the plaintiff to quit. Summary judgment was denied because it was foreseeable that the plaintiff would quit when her accommodation was rejected as the alternative would be to continue to suffer extreme pain.

In *Chavez v. Waterford School District*, 720 F.Supp.2d 845 (E.D. Mich. 2010), the plaintiff, a middle school teacher, was diagnosed with a brain tumor. During treatment, one of her vocal cords was paralyzed which made it difficult for her to teach a full day of class in a normal volume. After her year-long medical leave, she received notification that she would return to her previous position. However, when the school year began, she was told all full-time positions were filled, and she would be assigned to a substitute position. The issues with her employer escalated when she requested a microphone. The microphone was not delivered until the end of the semester and it was not effective because it was so outdated. She was then switched to a new classroom, but the microphone system was not transferred. As the microphone did not work, she requested a computer program to amplify her voice. At this point, her supervisor started making regular, unannounced visits that were so prevalent, she disrupted the students. When her request for computerized assistance was denied, she purchased her own computer program. She attempted to contact the school to ensure it was compatible with their software, but she was never provided an answer. Once the school year started, her supervisor ordered her to remove the software she had purchased because she should have contacted the school first; which she had done. The school then issued her a headset. When she told her supervisor that the headset pushed on her brain surgery scar, the response was to "tape a cushion to it." She eventually resigned, applied for long-term disability benefits and brought a constructive discharge suit against the school. The court denied the

defendant's motion for summary judgment because her supervisor should have reasonably believed that the plaintiff would quit since she was unable to effectively teach without the requested accommodations.

In *Willinghan v. Town of Stonington*, 2012 WL 759621 (D. Me. Mar. 7, 2012), the plaintiff, a Town Manager, experienced a series of back injuries that caused him serious, continuous pain. He was hired to be a town manager by a Board of Selectmen on a three year contract. The employment agreement stated that the board could fire the plaintiff for cause during his contract. During his first seven months, he received excellent performance reviews and communicated frequently with the Board about his back and his need for surgery. When his pain increased, he requested that he be able to work from home part-time and have reduced hours in the office or be granted medical leave. The Board never responded to his request despite the plaintiff attempting to contact them several times. Finally, during an executive meeting, the Board requested the plaintiff's resignation because they claimed that he admitted that he was unable to perform the essential functions of his position. He agreed to resign because he knew that it would be very difficult to perform when the board had the discretion to terminate his position. The court held that even though the plaintiff's case does not indicate a typical hostile work environment, the position of town manager and the relationship with the Board is unique. As his position was required to work closely with the Board and the timing of the resignation request was directly linked to the plaintiff's disability, the court held that summary judgment on the constructive discharge claim was not appropriate.

B. Recent Cases Dismissing Claims for Constructive Discharge

In *Gingold v. Bon Secours Charity Health Sys.,* 768 F. Supp. 2d 537 (S.D.N.Y. 2011), the plaintiff, a computer technician, was diagnosed with an anxiety and panic disorder which caused him to have panic attacks when he traveled outside of his local area. The defendant initiated a new rotating schedule that required technicians to travel. The plaintiff contacted several members of upper management to express concern that the new schedule might cause him to have a panic attack. The plaintiff's 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. However, before these actions were finalized, the plaintiff resigned. The court granted summary judgment to the defendant because the plaintiff ended the interactive process before an agreement was reached. Furthermore, when he resigned, the adverse employment action had not yet occurred and the defendant was attempting to accommodate his request. The court held that a reasonable person in his position would not have felt compelled

to resign as the defendant was being cooperative.

In *Buboltz v. Residential Advantages, Inc.,* 523 F.3d 864 (8th Cir. April 18, 2008), a direct services provider who was legally blind resigned after her employer began scheduling her on weekends, removed job duties, and prohibited her from working without supervision with residents. The Eighth Circuit affirmed summary judgment for the employer, holding that the employee had not suffered an adverse employment action or constructive discharge. The court found the changes in job duties were in response to complaints about the employee, affected only a small part of the employee's job, and did not reduce her potential for promotions, nor did the change in schedule amount to an adverse employment action. Other employees in the same position had to work weekends, and the employer changed the employee's schedule after the employer became short-staffed. In addition, the change in schedule was not related to the employee's disability.

In *Lara v. Unified School District #501,* 2009 WL 3382612 (10th Cir. Oct. 22, 2009), plaintiff worked for the defendant school district as a custodian. Plaintiff had to take several periods of leave after experiencing a ruptured aneurysm, a heart attack, and an abdominal hernia. Following his leave, plaintiff retired, and filed suit against his employer under Title I of the ADA, alleging that he was constructively discharged, and thereby discriminated against on account of his disabilities. Affirming summary judgment for the employer, the Tenth Circuit reasoned that in order for plaintiff to base his discrimination claim on constructive discharge, he had to show that his employer deliberately made working conditions so intolerable that he had no choice but to quit. Plaintiff was unable to make such a showing. The court found that his employer had merely suggested taking an early retirement, and told plaintiff that he was costing the school district a lot of money. The court held that because his working conditions were not intolerable, plaintiff did not suffer an adverse action, and he did not have a claim for constructive discharge under the ADA.

III. Retaliation and the ADA

Under the ADA, it is unlawful for an employer to retaliate against an employee based upon the employee's efforts to exercise his or her civil rights. Specifically, in Title V, the ADA provides: "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."[7] The rationale behind this anti-retaliation provision is to provide protection for employees who exercise their civil rights and to promote the full and fair enforcement of the ADA.

A. The Elements of Retaliation

To be successful in a retaliation case, the plaintiffs must prove they: 1) engaged in a protected activity; 2) suffered an adverse employment action; 3) the defendant was aware of the protected activity; and 4) there is a causal link between the protected activity and the adverse employment action.[8]

B. Who Can Sue and Be Sued

Proving disability is not necessarily required in an ADA retaliation claim because the retaliation provision states that covered entities cannot discriminate against "any individual" from exercising his or her rights under the Act.[9] By not specifying that a person bringing a retaliation claim under the ADA must "qualify as an individual substantially limited in a major life activity," as is the case in typical ADA discrimination cases, Congress has lowered the standard and made it easier for employees to bring retaliation claims against their employers.[10] The provision also addresses who can be sued under the Act.

One of the most frequently cited cases is *Shellenberger v. Summit Bancorp, Inc.,* 318 F.3d 183 (3rd Cir. 2003), where an employee with allergies that were aggravated by perfumes sued her employer for retaliation. The employer fired the employee shortly after she complained to the EEOC regarding various fragrances worn by colleagues and she filed a claim of retaliation against the employer. Citing *Krouse v. Am. Sterilizing Co.*, an earlier ADA retaliation case, the 3rd Circuit held that the "any individual" language meant that the employee was not required to show she was a qualified individual with a disability.

In *Kirkeberg v. Canadian Pac. Ry.*, 619 F.3d 898 (Cir. 8th 2010), an employee with monocular vision and hepatitis C requested an accommodation from his employer for a large screen computer and to work from home. The employer only granted the request for the computer. The computer was stolen from the office and the employee told the employer this would not have happened if the employer granted the employee's request to work at home. Shortly after the confrontation, the employer fired the employee. The employee brought ADA discrimination and retaliation claims against the employer. The 8th Circuit dismissed the ADA discrimination claim because the employee did not prove he was *substantially* limited in a major life activity. In contrast, the 8th Circuit found that *any* person could bring a claim of retaliation under the ADA as long as the accommodations requested were reasonably made in good faith. Unfortunately for the employee, the court found he did not prove all the elements of his retaliation claim, mainly, his confrontation with his employer was not a request for accommodation and therefore, the employee was not engaged in a protected activity.

Most retaliation claims involve a direct employee-employer relationship. However, some cases have emerged against other employment entities such as, employment agency, labor organization or a joint labor-management committee.[11] A recent case has considered ADA retaliation claims to apply to labor/management organizations, not just employers.[12] In *Infantolino v. Joint Bd. Of Elec. Indus.*, a Union electrician received health insurance and job referrals from a labor organization created by his union. The electrician filed a disability discrimination charge with the EEOC. The organization then cut off his health benefits and removed him from the job referral list. Subsequently, the electrician sued the organization for retaliation. The organization argued that only an employer could be held liable for violating the anti-retaliation provision of the ADA.. However, 42 U.S.C. §12112(a) states, "no *person* shall discriminate against any individual," and the court held that the provision does not require an employee-employer relationship, such as existing case law suggested. The court also found that the organization was a covered entity under the ADA.

C. The 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. Examples of protected activities include: requesting an accommodation, filing an EEOC charge, and assisting, testifying or otherwise participating in a discrimination investigation.[13]

In *Butler v. Exxon Mobil Corp.*, 838 F.Supp.2d 473 (M.D. La. Jan. 20, 2012), the plaintiff had allergies and worked at a chemical plant where he could come in contact with substances that aggravated his condition. The plaintiff asked to be transferred to a facility where he would less likely to be exposed to irritants. The court found that the plaintiff was engaged in a protected activity when he requested this accommodation even though the court did not find the plaintiff was disabled. It is well established in the 5th Circuit that requesting accommodations is a protected activity as long as the plaintiff reasonably believes he or she is covered under the ADA.

In *Fogleman v. Mercy Hospital, Inc.*, 283 F.3d 561 (3rd Cir. March 18, 2002), a son worked at a hospital where his father had previously worked. The father had sued the hospital for terminating him based on age and disability discrimination. In the case at bar, the son brought a retaliation claim alleging that he was fired because his father had previously filed an ADA discrimination case against the hospital. The court had to consider if the ADA "prohibits an employer from taking adverse employment action against a third party in retaliation for another's protected activity."[14] The

3rd Circuit reversed the district court's decision to grant the hospital summary judgment on this issue. In their reasoning, the 3rd Circuit cited language from 42 U.S.C. § 12203(b), the second anti-retaliation provision in the ADA.

> "It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter."[15]

Under this provision, it is not necessary to prove that the plaintiff was "such an individual" engaged in a protected activity and therefore, could succeed in a retaliation claim without engaging in a protected activity.

In *EEOC v. Cognis Corp.,* 2012 WL 1893725 (C.D. Ill. May 23, 2012), the court also recognized that a protected activity need not be presented to bring a claim of retaliation. The court cited two decisions (*Sauers v. Salt Lake County*, 11 F.3d 1122, 1128 (10th Cir. 1993) and *Beckel v. Wal-Mart Assoc., Inc.*, 301 F.3d 621, 624 (7th Cir. 2002)) where it was found that employees suffered an adverse employment action by an employer in anticipation of the employee engaging in a protected activity. In this case, the plaintiff brought a retaliation claim against his employer for forcing him to sign a Last Chance Agreement (LCA) after he did not meet performance expectations and being terminated for not agreeing to the terms. The company would keep him employed if the plaintiff agreed to comply with all job requirements, agreed not to violate company rules, receive discipline, miss work or file any grievances or lawsuits under a variety of laws, including the ADA.[16]

The plaintiff moved for summary judgment in a unique procedural motion for a Title VII retaliation case because plaintiffs do not often have direct evidence of retaliation. The LCA served as the plaintiff's direct evidence. The court held that the plaintiff had engaged in a protected activity by refusing to agree to the LCA because it restrained his civil rights. The court also held that the employer preemptively retaliated against poorly performing employees by offering them LCAs as the only way they could keep their jobs. Under this theory, it was not necessary for employees to engage in a protected activity prior to receiving the LCA. Although this was a Title VII case, it could be applied to ADA cases as well.

D. The Adverse Employment Action

There are many actions that could constitute an adverse employment action. In the past, some courts had decided that the only adverse employment action that an employee could file a retaliation claim for was termination. However, since the

Supreme Court's 2006 ruling of *Burlington Northern & Santa Fe Ry. Co.,* 126 S. Ct. 2405 (2006) it is clear that other adverse employment actions can be a basis for retaliation cases.

In *Burlington Northern*, the only female forklift operator was demoted to a laborer position after complaining of gender discrimination. She filed a charge with the EEOC and shortly after that, her employer accused her of insubordinate behavior and suspended her without pay. Over a month later, it was found that she was not insubordinate and the employer reinstated her with back pay. She then filed a lawsuit against her employer claiming retaliation for suspending her and transferring her to a lower position. The Supreme Court held that any action that materially injures or harms an employee who has complained of discrimination and would dissuade a reasonable worker from making or supporting a charge of discrimination, could be the basis for a retaliation claim.

In *Heaphy v. Webster Cent. Sch. Dist.*, 761 F.Supp.2d 89 (W.D.N.Y. January 28, 2011), the plaintiff, a pregnant tenured teacher, claimed retaliation under the Pregnancy Discrimination Act (PDA) which is an amendment to Title VII. The plaintiff's supervisor found out the plaintiff was pregnant and subsequently put the plaintiff on a performance improvement plan. The plaintiff then filed a charge with the EEOC. The plaintiff also complained of unnecessary close monitoring and negative evaluations. The court held that scrutiny of the plaintiff's performance was not an adverse employment action because classroom observations were part of her collective bargaining agreement. The court held that the negative evaluations could be considered an adverse employment action even though she did not suffer monetary losses, but that was a question for a jury. Finally, the court granted summary judgment for the employer because the employer proved that there were legitimate reasons for taking the actions they did against the plaintiff.

In *Larkin v. Methacton Sch. Dist.*, 773 F.Supp.2d 508 (E.D. Pa. February 23, 2011) an employee with alcoholism claimed she was disabled under the ADA and experienced eight different adverse employment actions after her employer denied her request to be transferred from her high school PE position to an elementary school position. The adverse actions against the employer were: "(1) failing to engage in the interactive process required by the ADA; (2) failing to transfer her to one of the two open elementary-school positions for which she was qualified; (3) forcing her "to endure a sham interview process"; (4) giving her an unsatisfactory rating; (5) harassing her and 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 her teaching position at the high school "despite medical advice to the contrary"; and (8) accusing her of not engaging in the interactive process." The court held that these actions were not "materially adverse," meaning that they were not so

bad as to dissuade a reasonable person from engaging in a protected activity. Thus the court used an objective standard in evaluating injury and harm in rejecting her retaliation claim.

In *Williams v. Brunswick County Bd. of Educ.*, 725 F.Supp.2d 538 (E.D.N.C. July 2, 2010), a school administrator with diabetes claimed to have suffered an adverse employment action when her employer transferred her from Director of Pre-K to Dean of Students at a middle school. The administrator filed a retaliation claim, but the court granted summary judgment for the employer. The court held that the administrator failed to prove she suffered an adverse employment action because she did not lose any benefits or pay.

E. The Causal Connection

There must be a causal connection between the plaintiff's activity and the employer's adverse employment action in order for a retaliation claim to succeed. Temporal proximity, or time between the protected activity and the adverse employment action, is a significant factor in courts' decisions.

In *Ryan v. Pace Suburban Bus Div. of Reg'l Transp. Auth.*, 837 F.Supp.2d 834 (N.D. Ill. August 8, 2011), the plaintiff worked as an inspection technician for over twenty-five years. Around year twenty, the plaintiff was in a car accident and had to take a few months of medical leave. Upon his return, the plaintiff's supervisor said he would never get a mid-level salary because of his injury's restrictions. A few years later, the plaintiff experienced a back injury on the job and took FMLA leave and short-term disability benefits. Upon his return, the plaintiff required light-duty, occasional leave and a modified schedule. The employer initially agreed, but after six months, began disciplining the employee for taking days off and arriving late. The plaintiff reminded the supervisor that he needed those accommodations, but the supervisor said he was not protected. Shortly after taking another leave of absence, the supervisor said the plaintiff could not return to work and needed to undergo a functional capacity evaluation. During the evaluation the plaintiff complained that he was being discriminated against when he was asked to perform tasks that he did not do as an inspection technician. Three days later, the plaintiff was terminated. The plaintiff filed suit and the employer moved to dismiss the retaliation claim. The court denied the motion finding that the plaintiff's termination followed only three days after the plaintiff complained of discrimination. In this case, it could be reasonable to find a connection between the plaintiff's protected activity (complaining of discrimination) and the employer's adverse employment action (the termination).

In *Colon-Fontanez v. Municipality of San Juan*, 660 F.3d 17 (1st Cir. October

12, 2011), the plaintiff appealed the district court's decision to grant summary judgment to her employer. The plaintiff filed a discrimination claim and a retaliation claim after the employer removed her essential working tools (*i.e.* her computer) after requesting a reserved parking space as a reasonable accommodation. The court found that the plaintiff could not show a causal connection. Rather, the employer provided sufficient evidence that the removal of her computer was for a legitimate reason (routine repair/cleaning) and not in response to her request for a reasonable accommodation. Because plaintiff could not establish a causal connection, her retaliation claim could not proceed.

In *Williams v. Recover Sch. Dist.*, 2012 WL 893421 (E.D. La. March 15, 2012) the plaintiff claimed the employer acted in a discriminatory and retaliatory way after the plaintiff filed a charge with the EEOC. Plaintiff had filed with the EEOC when the employer refused to rehire the plaintiff after taking leave for a back condition. That charge was eventually dropped and the employer rehired the plaintiff. However, the plaintiff suffered a relapse of his back condition and needed leave again. The employee granted the leave request, but during the leave period, the plaintiff received a letter from his employer stating he was fired for excessive sick days and job abandonment. The plaintiff then filed this lawsuit alleging discrimination and retaliation under the ADA. The plaintiff claimed that his employer subjected him to discriminatory and retaliatory acts because of his earlier EEOC charge. The court found there was no causal connection between the plaintiff's filing of the EEOC charge and the employer firing him for taking leave. The court reasoned that the events happened 16 months apart and therefore, did not satisfy the temporal proximity standard that is required.

In *Bliss v. Morrow Enterprises, Inc.*, 2011 WL 2555365 (D. Minn. Jun. 28, 2011), the plaintiff was an assistant manager of a retail clothing store. Throughout her employment, the plaintiff wore a cast for a broken arm. Plaintiff's arm injury was more severe than a normal broken arm, requiring at least six surgeries and limiting plaintiff's "ability to engage in certain types of movements and activities." However, the plaintiff's doctor never imposed medical restrictions on plaintiff's work activities, nor did she request accommodations from the defendant. Plaintiff received a positive review after six months with the store and reported that she was happy with her job, but these sentiments quickly changed. Plaintiff's relationship with her supervisor deteriorated, and plaintiff became unhappy with her job. Plaintiff eventually filed a charge with the EEOC alleging harassment and discrimination based on her broken arm. Shortly thereafter, plaintiff was fired for allegedly violating the employee discount policy by permitting her friend to purchase a tie using her discount. Plaintiff then brought suit alleging wrongful termination and retaliation. The court granted summary judgment on the discrimination and

harassment claims, but denied it on plaintiff's retaliation claim. The court held that the plaintiff could show she was retaliated against when she was fired after filing a charge with the EEOC. The court found that there was a causal connection between the plaintiff's protected activity and the defendant's adverse action as the plaintiff was termination less than a month after filing her charge with the EEOC.

F. Pretext & Non-Retaliatory Reason for Adverse Employment Action

Once a causal connection has been established, an employer has the opportunity to present evidence that the employer had a legitimate reason for taking the adverse employment action against the employee. The burden then is shifted again to the employee to show that the employer's legitimate, non-retaliatory reason is a pretext to the retaliation claim.

In *Monterroso v. Sullivan & Cromwell, LLP*, 591 F.Supp.2d (S.D. N.Y. 2008) an employee with sensitivities to smells and chemical irritants filed a charge with the EEOC after her employer refused to accommodate her request for a "propellant-free" workplace. Shortly after filing with the EEOC, the employer put the employee on unpaid administrative leave and then three months after that, the employer fired the employee. The court determined the plaintiff satisfied the burden of establishing a *prima facie* retaliation case against the employer. The burden then shifted to the employer who offered up several legitimate reasons for deciding to fire the plaintiff, mainly being that the employee's chronic absences. At that point the plaintiff did not offer up any other evidence to rebut the absences, so the court decided there was no pretext and the ADA retaliation claim was dismissed.

In *Dickerson v. Bd. Of Trustees of Community College Dist. No. 522*, 657 F.3d 595 (7th Cir. 2011) a janitor working part-time for the Belleville Community College filed a disability discrimination claim with the EEOC after the employer refused to promote him to a full-time position. The janitor received an unsatisfactory performance evaluation and was told he needed to improve his relationships with people and the quantity of work. The janitor refused to sign the evaluation as he thought his work was "at least good" in every category evaluated. The janitor then filed a grievance stating the evaluation was discriminatory and unjust discipline for his union activities. The janitor also filed an EEOC charge after he was not promoted for a fulltime position. Six months later the janitor received another poor evaluation and was subsequently fired. The court found that the district court was correct in granting the employer summary judgment. While the janitor did engage in a protected activity and there was an established connection between that activity and the adverse employment action he suffered, the court held that the employer had a

legitimate reason in terminating the janitor. The janitor did not meet the required expectations of his job, which are required under the ADA.

G. Remedies and Damages

Courts have not reached a consensus about whether compensatory damages can be awarded to someone who succeeds in an ADA retaliation claim against an employer. Originally the ADA offered the same remedies that the Civil Rights Act of 1964 did under sections 42 U.S.C. § 2000e-4 through § 2000e-9.[17] Remedies included were, but not limited to, equitable relief, reinstatements, back pay, injunctions, etc.[18] However, in 1991 Congress amended parts of the Civil Rights Act that provides that compensatory damages may be awarded in cases where defendants engaged in "unlawful intentional discrimination."[19] *Kramer v. Banc of America Securities, LLC* was a case of first impression in the federal courts in addressing if compensatory damages could be awarded in a retaliation case under the ADA and the 1991 version of the Civil Rights Act.[20] The 7th Circuit court held that 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).

In contrast, in *Rumler v. Department of Corrections, Florida*, the court there held that compensatory damages were appropriate based on the context of how the retaliation claim came about.[21] The court reasoned that statutes do not have to be read literally and relied on Edwards from the Eastern District of New York in recognizing that it was unnecessary for Congress to separately mention retaliation remedies.[22]

In *Baker v. Windsor Republic Doors*, the plaintiff argued that retaliation is an intentional discriminatory act.[23] Under the plaintiff's argument, if courts recognized that an intentional discriminatory act included retaliation, then Congress' intentions in expanding remedies for discrimination cases would also apply to retaliation cases.[24] The plaintiff cited three Supreme Court cases that involve other anti-discriminatory acts such as the Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act and Title IX of the Education Amendments of 1972.[25] These cases are important as the Supreme Court grappled with the statutory language in regards to whether retaliation is an intentional discriminatory act under the expanded provision 42 § 1981a(a)(2).[26] The Gomez-Perez case was most helpful for the Western District of Tennessee court in addressing this issue concluding that retaliation was an intentional discriminatory act and therefore 42 § 1981a(a)(2) allowed the plaintiff to recover monetary relief.

A few months later in *Alvarado v. Cajun Operating Co.,* the 9th Circuit rejected the *Baker* decision.[27] The court discussed the ongoing conversation of whether to award monetary damages or not and was critical of decisions that

award these damages.[28] The 9th Circuit ultimately agreed with the 7th Circuit's opinion in Kramer, in that courts should adhere to a close reading and interpretation of the 42 § 1981a(a)(2) and not grant compensatory damages to those who have prevailed only in ADA retaliation claims.[29]

In *Leone v. North Jersey Orthopedic Specialists*, the 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."[30] The court rejected the request because it was unclear if the plaintiff could even establish the discrimination suffered was malicious or reckless.[31]

III. Conclusion

Disability Harassment, Constructive Discharge and Retaliation can be challenging issues for employers and employees to navigate. The case law continues to develop and for many of the issues, there are splits in the lower courts and resolution may need to come from the U.S. Supreme Court. In the meantime, it is critical that employers put in place fair employment policies that are applied consistently and non-discriminatorily, that efforts be made to avoid problems by exploring possible accommodations through the interactive process, and that managers and employees receive the training necessary to ensure that they do not run afoul of the law in these emerging areas.

Notes

1. This legal brief was written by Barry C. Taylor, Vice President for Civil Rights and Systemic Litigation, Alan M. Goldstein, Senior Attorney, and Legal Interns Rebecca Wylie and Nikki Ashmore with Equip for Equality, the Illinois Protection and Advocacy Agency (P&A). Equip for Equality is providing this information under a subcontract with Great Lakes ADA Center.
2. For an earlier brief on these issues, go to: http://www.ada-audio.org/Archives/ADALegal/Materials/FY2008/2008-04-_Disability_Harassment_Retaliation_and_Discipline.pdf
3. *Flowers v. S. Reg'l Physician Services Inc.,* 247 F.3d 229, 235-36 (5th Cir. 2001)
4. *Id*. at 236.
5. Mark C. Weber, Disability Harassment (2007)
6. *Talley v. Family Dollar Stores of Ohio, Inc.,* 542 F.3d 1099, 1107 (6th Cir. 2008).
7. 42 U.S.C. §12203(a)
8. 42 U.S.C. §12203©
9. 42 U.S.C. §12203(a)
10. 42 U.S.C. §12112(a)
11. 42 U.S.C. §12111(2)
12. *Infantolino v. Joint Industry Bd. Of Elec. Indus.*, 582 F.Supp.2d 351, 354 (E.D. N.Y. 2008).

13. *Butler v. Exxon Mobil Corp.*, 838 F.Supp.2d 473, 495 (M.D. La. January 20, 2012).
14. *Fogleman v. Mercy Hospital, Inc.*, 283 F.3d 561, 564 (3rd Cir, 2002).
15. 42 U.S.C. § 12203(b)
16. E.E.O.C. v. Cognis Corp., 2012 WL 1893725 (C.D. Ill. May 23, 2012).
17. 42 § 12117(a)
18. 42 § 2000e-5(g)(1)
19. 42 § 1981a(a)(2)
20. *Kramer v. Banc of America Securities, LLC*, 355 F.3d 961, 966 (7th Cir. 2004).
21. *Rumler v. Depart. Of Corrections, Fla.*, 546 F.Supp.2d 1334, 1342 (M.D. Fla. 2008).
22. *Id.* at 1342.
23. *Baker v. Windsor Rep. Doors*, 635 F.Supp.2d 765 (6th Cir. 2009)
24. *Id. at* 769.
25. *Id.* at 770.
26. *See Gomes-Perez v. Potter*, 553 U.S. 474 (2008); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005).
27. *Alvarado v. Cajun Operating Co.*, 588 F.3d 1261, 1270 (9th Cir. 2009).
28. *Alvarado v. Cajun Operating Co.*, 588 F.3d at 1264 -1268.
29. *Id.* at 1268; *Motoyama v. Hawaii, Dept. of Transp.*, WL 1082385 (9th Cir. March 29, 2012)
30. *Leone v. North Jersey Orthopedic Specialists, P.A.*, 2012 WL 1535198, 8 (D. N.J. 2012).
31. *Id.* at 8.