

**Selected Recent Case Illustrations:
EEOC Litigation Under Title I of the Americans with
Disabilities Act and Title II of the
Genetic Information Nondiscrimination Act**

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SELECTED RESOURCES

Employer-Provided Leave and the ADA

<https://www.eeoc.gov/eeoc/publications/ada-leave.cfm>

The ADA: Applying Performance and Conduct Standards to Employees with Disabilities

<https://www.eeoc.gov/facts/performance-conduct.html>

EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA

<https://www.eeoc.gov/policy/docs/accommodation.html>

Service Animals and the ADA:

Employment:

Job Accommodation Network (www.askjan.org) publication:

<https://askjan.org/topics/servanim.cfm>

Non-Employment (Members of the Public Accessing Government Programs/Services and Public Accommodations):

U.S. Dep't of Justice publications:

Service Animals: https://www.ada.gov/service_animals_2010.htm

Frequently Asked Questions About Service Animals and the ADA:

https://www.ada.gov/regs2010/service_animal_qa.html

~ QUALIFIED ~

- **“100% Healed” and Other Policies Requiring Leave or Discharge Instead of Return to Work Even if Qualified**

Pre-litigation EEOC Settlement with The Cato Corporation (Dec. 2018), <https://www.eeoc.gov/eeoc/newsroom/release/12-10-18.cfm>. Systemic EEOC investigation conducted by Chicago and Philadelphia offices found denial of accommodations to certain pregnant employees or those with disabilities, requiring certain employees take unpaid leaves of absence or terminating them rather than allowing return to work with restrictions that could be accommodated. Settlement agreement provided for a claims process to distribute the \$3.5 million to Cato employees who were terminated due to their pregnancy or disabilities, as well as revised policies for considering whether medical restrictions of its pregnant employees or those with disabilities can be reasonably accommodated, training, and periodically reporting to EEOC for three years on responses to requests for reasonable accommodation.

EEOC v. Wilmington Trust Corp., Civil Action No. 17-cv-05077 (S.D.N.Y. consent decree entered Dec. 19, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/12-19-18a.cfm>. EEOC alleged that company had a long-standing inflexible policy and practice of placing employees with impairments or disabilities on involuntary leave unless or until it received their medical provider's clearance to return to work with no restrictions. This practice resulted in denying qualified individuals with disabilities reasonable accommodations, as well as placing qualified individuals with disabilities on involuntary leave and/or discharging them because of disability. Consent decree provided for payment of \$700,000, policy changes, training, and other relief.

EEOC v. Absolut Facilities Management, L.L.C., Civil Action No. 1:18-cv-0102 (W.D.N.Y. consent decree entered Oct. 2018), <https://www.eeoc.gov/eeoc/newsroom/release/10-22-18a.cfm>. EEOC alleged company's nursing and health care facilities failed to accommodate workers with disabilities; denied leave as a reasonable accommodation to individuals with disabilities; refused to allow disabled employees to return to work unless they could do so without medical restrictions; and subjected employees to impermissible disability-related inquiries and medical examinations. Consent decree provided for payment of \$465,000, policy changes, training, and other relief.

Pre-litigation EEOC Settlement of Charges with Associated Fresh Market (July 2018), <https://www.eeoc.gov/eeoc/newsroom/release/7-2-18b.cfm>. Investigation of a group of charges revealed a company practice of denying reasonable accommodations under the ADA, including leave and reassignment, and requiring employees to have no restrictions or be able to return to work without accommodation. EEOC found the practices resulted in the termination or resignation of a group of individuals with disabilities who would have been qualified with accommodation. Settlement agreement provided for payment of \$832,500 distributed to various former employees, policy changes, training, and other relief.

EEOC v. Nevada Restaurant Services, Case No. 2:18-cv-00954-JCM-CWH) (D. Nev. Consent decree entered June 2018), <https://www.eeoc.gov/eeoc/newsroom/release/6-6-18c.cfm>. EEOC alleged a gaming company that operates slot machines, taverns and casinos maintained company-wide practice of requiring that employees with disabilities or medical conditions be 100% healed

before returning to work, and not allowing for any interactive process or reasonable accommodation. This resulted in termination or constructive discharge (forced resignation) of individuals with disabilities. Consent decree provided for payment of \$3.5 million, policy changes, training, and other relief.

EEOC v. American Airlines, Inc. and Envoy Airlines, Inc., No. 2:17-cv-04059 (D. Ariz. consent decree entered Nov. 6, 2017). EEOC alleged airline and its regional carrier denied reasonable accommodations, terminated, denied rehire to individuals because of their actual or perceived disabilities. The 12 Charging Parties and other claimants had various impairments, including lupus, cancer, asthma, stroke, and knee and back injuries. Defendants maintained a 100% healed policy that did not permit employees on medical leave to return to work with restrictions, and also refused to provide intermittent leave and reassignment to a vacant position as reasonable accommodations and did not allow employees with permanent restrictions to apply for promotions. The 2-year consent decree provided \$9 million, with 1500 eligible claims to be evaluated by a settlement administrator, as well appointment of an ADA coordinator and other policy changes, training, and relief.

- **Employer/Doctor Makes Faulty Assumptions Instead of Considering Individualized Information About Limitations, Work History, or Current Ability to Perform Functions with Accommodation**

EEOC v. Asurion, Civil Action No. 3:17-cv-336-CWR-FKB (S.D. Miss. consent decree entered March 2019), <https://www.eeoc.gov/eeoc/newsroom/release/3-11-19.cfm>. The Charging Party applied for a customer care representative position online and was qualified for the position. After reviewing her application, the company telephoned her to discuss her interest and availability for the position. During her telephone interview, the interviewer learned that the Charging Party is paralyzed from the waist down, and abruptly ended the interview without inquiring into her skills or relevant work experience. She applied three more times for the same position, but the company rejected all of her applications. Settled for \$50,000 and other relief.

EEOC v. Otto Candies, LLC, Civil Action No. 17-9584 (E.D. La. consent decree entered Aug. 2018), <https://www.eeoc.gov/eeoc/newsroom/release/8-23-18a.cfm>. EEOC alleged employer violated the ADA when it terminated ship deckhand, citing his recurrent pancreatitis as the reason. The employer contended the condition rendered him unqualified, but EEOC contended his infrequent and brief bouts of severe abdominal pain, nausea and vomiting had not impeded his work over the prior ten years, and both his own doctor and the U.S. Coast Guard had both determined that the condition would not impede his work in the future. Settled for \$165,000 and other relief.

Pre-litigation EEOC Settlement of Charge with Cumbres & Toltec Scenic Railroad (Aug. 2018), <https://www.eeoc.gov/eeoc/newsroom/release/8-21-18.cfm>. Charge alleged employer denied employment to qualified applicant for brakeman position based on his disability without conducting an individualized assessment of whether he could perform the essential functions. Settlement included financial relief, policy changes, and training.

EEOC v. Zachry Industrial, Inc., 1:18-cv-58-HSO-JCG (S.D. Miss. consent decree entered July 2018), <https://www.eeoc.gov/eeoc/newsroom/release/7-26-18a.cfm>. EEOC alleged a construction and industrial contractor violated the ADA by terminating four employees because an occupational

health exam revealed they had disabilities, without conducting an individualized assessment and despite their adequate work performance. Settlement of \$135,000 and other relief.

EEOC v. Jones Lang LaSalle Americas, Inc., Civil Action No. 1:17-cv-04017-ELR-JSA (N.D. Ga. consent decree entered July 2018), <https://www.eeoc.gov/eeoc/newsroom/release/7-3-18a.cfm>.

EEOC v. The Hertz Corporation, Case No. 1:17-cv-02298-KMT (D. Colo. consent decree entered April 2018), <https://www.eeoc.gov/eeoc/newsroom/release/4-18-18b.cfm>. EEOC alleged the company refused to hire an applicant with 10 years of car sales experience because he used a cane due to a physical impairment. The employer had actively recruited the applicant for its car sales division based on his online resume, but at the interview the sales manager expressed reservations about his mobility because he used a cane. Settlement of \$45,000 and other relief pursuant to 2-year consent decree.

EEOC v. Kaiser Aluminum Washington, LLC, No. 2:16-cv-00343 (E.D. Wash. consent decree entered Oct. 18, 2017). EEOC alleged aluminum manufacturing company denied charging party a production worker position in violation of ADA because of his record of or perceived disability. During post-offer exam by a third-party medical provider, charging party disclosed he had broken his left heel 10 years previously, was off work for a year, and had undergone vocational training, but said he had no current problems related to his injury. Medical provider's nurse recommended employer revoke his job offer because records from 2004-06 indicated the disability was permanent. Charging Party contacted the employer directly and explained, describing jobs he had had since the injury, that he could perform all the physical duties of the production worker position. Employer told him it does not override the medical provider's recommendations. Three-year consent decree provides \$125,000 in backpay and \$50,000 in compensatory damages, and, subject to an examination and test described in the decree, reinstatement of the job offer, with retroactive seniority, as well as ADA training for human resources staff and medical and nurse contractors as specified in the decree, and annual reporting to EEOC.

EEOC v. Flying Star Transport, Civil Action No.2:17-cv-00070-J (N.D. Tex. consent decree entered April 2017), <https://www.eeoc.gov/eeoc/newsroom/release/4-26-17.cfm>. EEOC alleged employer violated ADA by denying hire to truck driver because he had had his arm amputated during his teenage years. Driver had more than 20 years of experience driving trucks when he applied to work for Flying Star. Company made assessment, without evidence or proof, that there was no accommodation that would allow him to do job safely, and failed to engage in an interactive process of exploring that with him. Settlement: Payment of \$65,000, required company ADA training of managers, and reporting of disability discrimination complaints to EEOC.

- **Discrimination Based on Employee's High Medical Expenses/Insurance Costs**

EEOC v. Signature Industrial Services, LLC Civil Action No. 1:18cv70 (E.D. Tex. consent decree entered July 2018), <https://www.eeoc.gov/eeoc/newsroom/release/7-26-18.cfm>. EEOC alleged the employer violated the ADA when it fired three laborers, all brothers, because it learned that their Hemophilia A could increase insurance costs if they were to require treatment. The company contended the brothers were laid off pursuant to a RIF, but no other workers were laid off at the same time. EEOC's suit alleged top management instructed lower-level managers to fire the brothers once they learned how the insurance costs could be affected, but because the brothers had an excellent

work history, the project manager initially refused to fire them; after he stopped working at the plant, the brothers' direct supervisor was ordered to fire them. Settlement of \$135,000 and other relief pursuant to a 2-year consent decree.

- **Discrimination Based on Association with an Individual with a Disability**

EEOC v. Camber Corporation, Case No. 1:17-cv-01084-AJT JFA (E.D. Va. consent decree entered July 2018), <https://www.eeoc.gov/eeoc/newsroom/release/7-2-18a.cfm>. EEOC alleged the defendant defense contractor immediately classified an employee as "resigned" and then terminated him on pretextual grounds because he sought a transfer to a different location in order to be closer to his disabled son, as well as leave to participate in his care. While employees are not entitled to ADA accommodation based on the needs of a child or parent with a disability, they are protected from disparate treatment based on their association with an individual with a disability. Settlement of \$100,000 and other relief pursuant to a 2-year consent decree.

- **Paying Less Than Those Who Cannot Perform Function for Non-Disability Reasons**

EEOC v. UPS Ground Freight, Inc., 344 F. Supp. 3d 1256 (D. Kan. Nov. 1, 2018). The court refused to vacate its injunction ordered enjoining UPS from continuing its policy of paying drivers who sought non-driving work due to a disability less than those it assigned to non-driving work for non-disability reasons, such as convictions for driving while intoxicated. <https://www.eeoc.gov/eeoc/newsroom/release/11-2-18.cfm>.

EEOC v. Work Services, Inc., No. 3:16-cv-03257 (D.S.C. consent decree entered Nov. 2018). EEOC alleged the defendant employment agency, which provided unskilled laborers for turkey-processing work, discriminated against 6 employees wages due to their intellectual and developmental disabilities, or because defendant regarded them as disabled. During their 30-year tenure, the employees were paid much less than nondisabled employees doing similar work, those performing janitorial work were not paid at all, and the disabled workers were charged \$600/month more out of their pay for their room and board than the nondisabled workers, in addition to other restrictions and harassment. Settled pursuant to a 5-year consent decree providing for \$342,000 in backpay and damages, as well as other relief.

~ DIRECT THREAT TO HEALTH OR SAFETY ~

EEOC v. McLeod Health, Inc., 2019 WL 385654 (4th Cir. Jan. 31, 2019). Plaintiff, the company's newsletter editor whose medical condition had resulted in non-injurious falls and other symptoms, was required to submit to a functional-capacity exam by an occupational therapist. The OT recommended restrictions such as not traveling more than 10 miles from the main office, using a motorized scooter, and being provided an accessible parking space. The company told her that these restrictions would prevent her from returning to her job, and that she could apply for other positions within the company. She was then terminated after 6 months on involuntary medical leave. Denying

summary judgment to the employer, the court held a reasonable jury could find the employer lacked the requisite basis for sending her to the exam (a reasonable belief based on objective evidence that employee's medical condition, which had resulted in falls and other symptoms, rendered her unable to navigate safely the campuses of the company's hospitals and health care facilities) or ultimately removing her from her position. The court held it would reach the same result regardless of whether navigating the campuses was an essential function of the job. A reasonable jury could also conclude it was not reasonable to believe she posed a direct threat simply because she had fallen multiple times recently and her manager thought she looked groggy and out of breath.

EEOC v. Huntington Ingalls, Inc., 2018 WL 6272891 (E.D. Va. Nov. 29, 2018), appeal docketed (4th Cir. Mar. 4, 2019). EEOC alleged that applicant with severe hearing impairment who wore hearing aids in both ears was discriminated against by employer, a shipbuilder, when it denied requested accommodations and rescinded a conditional offer of employment for a pipefitter position for which he had been referred by a third-party leased laborer. The applicant asked to take the hearing test wearing his hearing aids, but the test provider refused, telling him the test was to evaluate his unaided hearing. Defendant determined from applicant's test results that his hearing was too poor to be hired as a leased laborer pipefitter. EEOC argued that hearing was not an essential function or qualification standard for the pipefitter position, noting that neither the job announcement nor job description contained a hearing requirement, an industrial hygienist testified he had never seen the minimum audiometric requirement for which the test measured, and defendant had ceased verifying the audiograms of leased laborer employees. The court found the shipyard was "a very fluid environment that is constantly undergoing construction," and found that the "ability to hear alarms, announcements and communicate effectively with coworkers [wa]s essential to performing work as a pipefitter." Regarding the job announcement, the court said that the leased laborer provider was required to provide medical clearances for candidates, and dismissed as irrelevant the different test processes used for different types of hires. The court also ruled the applicant was not entitled to take the test with his hearing aids because defendant had shown that evaluating the unaided hearing of candidates was essential to determining whether they could work safely at the shipyard, allowing the applicant to use his hearing aids would undermine the purpose of the test.

EEOC v. Amsted Rail Co., 2017 WL 5499384 (S.D. Ill. Nov. 16, 2017). Employer regarded qualified applicants as individuals with disabilities by taking them out of applicant pool due to abnormal nerve conduction test (NCT) results, and employer could not establish direct threat defense to justify the disparate treatment. Employer was not reasonable in relying on doctor's medical judgment that applicants posed current significant risk of substantial harm because of test results or prior surgery for carpal tunnel syndrome.

~ PERFORMANCE AND CONDUCT ~

- **The general rule is that an employer never has to lower production or performance standards as an accommodation, or excuse violations of uniformly applied conduct rules that are job-related and consistent with business necessity, even if a disability caused the performance or conduct issue. However, a different result obtains where an employer's improper denial of accommodation caused the performance or conduct issue.**

EEOC v. Dolgencorp, LLC, 899 F.3d 428 (6th Cir. 2018). Cashier with diabetes was denied request to keep juice at register; subsequently, terminated for violating pay-first policy during hypoglycemic symptoms. EEOC argued employer violated ADA by not making exception to register policy or offering alternative accommodation; jury awarded approx. \$278,000 to employee. Upholding the jury verdict on appeal, the Sixth Circuit held: “[A] company may not illegitimately deny an employee a reasonable accommodation to a general policy and use that same policy as a neutral basis for firing him. Imagine a school that lacked an elevator to accommodate a teacher with mobility problems. It could not refuse to assign him to classrooms on the first floor, then turn around and fire him for being late to class after he took too long to climb the stairs between periods. In the same way, Atkins never would have had a reason to buy the store’s orange juice during a medical emergency if Dollar General had allowed her to keep her own orange juice at the register or worked with her to find another solution.”

EEOC v. The Home Depot/Home Depot, U.S.A, Inc., Civil Action No. 17-cv-06990 (N.D. Ill. consent decree entered Aug. 2018), <https://www.eeoc.gov/eeoc/newsroom/release/8-17-18.cfm>.

~ DRUGS ~

- **No Federal ADA protection exists for employees where employer acts based on employee’s current marijuana use, which remains illegal under the federal Controlled Substances Act as cited in the ADA.¹ However, to preclude ADA liability, an employer must have acted on basis of current illegal drug use, not cite it as pretext for disability discrimination.**

EEOC v. Pines of Clarkston, No. 13-CV-1407, 2015 WL 1951945 (E.D. Mich. Apr. 29, 2015) (reasonable jury could conclude employee was fired because of her epilepsy rather than her medical marijuana use).

¹ **NOTE:** Some state laws provide explicit employment protections for medical or recreational marijuana use to the extent use is permitted under state law, or have been interpreted to find an implied right against employment discrimination. These state laws would still allow employers to terminate employees who use or are under the influence in the workplace but may bar discipline where that is not established. For example, in Whitmire v. Wal-Mart Stores, Inc., ___ F. Supp. 3d ___, 2019 WL 479842 (D. Ariz. Feb. 7, 2019). Fired employee who had a state medical marijuana card had a valid discrimination claim under Arizona Medical Marijuana Act for wrongful

suspension without pay and termination after post-accident drug screen came back positive. She had advised clinic personnel prior to the test that she was a medical marijuana user for arthritis and chronic shoulder pain. While the state law does not require an employer to allow any employee to work while impaired or under the influence of marijuana, here the employee was found not at fault in the accident (dropping a bag of ice) and there was no evidence she used, possessed, or was impaired by marijuana on the job. See also Barbuto v. Advantage Sales Marketing, LLC, 477 Mass. 456, 78 N.E.3d 37 (2017); Noffsinger v. SSC Niantic Operating Co., 273 F. Supp. 3d 326 (D. Conn. 2017); Callaghan v. Darlington Fabrics Corp., 2017 WL 2321181 (R.I. Super. May 23, 2017).

- **Prescribed Opioids, Drugs to Treat Opioid Addiction, or Other Legal Use Under Federal Law¹**

EEOC v. M.G. Oil d/b/a Happy Jack's Casino, 4:16-cv-04131-KES (D.S.D. consent decree entered May 2018), <https://www.eeoc.gov/eeoc/newsroom/release/5-18-18.cfm>. EEOC alleged that job offer to cashier was withdrawn in violation of ADA based on drug test showing lawful presence of prescribed medication, and that company had unlawful policy of requiring all employees to report prescription and non-prescription medications they are taking. Settlement of \$45,000 and other relief.

EEOC v. Foothills Child Development Ctr., Inc., Civil Action No. 6:18-cv-012555-AMQ-KFM (D.S.C. consent decree entered May 2018), <https://www.eeoc.gov/eeoc/newsroom/release/5-15-18.cfm>. EEOC alleged that employee was terminated in violation of ADA after employer learned he takes Suboxone as part of supervised medication-assisted treatment program, with no individualized assessment of whether he could safely perform essential functions. Settlement of \$5,000 and other relief pursuant to 5-year consent decree.

EEOC v. Hester Foods, Inc., Civil Action No. 3:17-cv-000340-DHB-BKE (S.D. Ga. consent decree entered Feb. 2018), <https://www.eeoc.gov/eeoc/newsroom/release/2-1-18.cfm>. EEOC alleged Kentucky Fried Chicken franchise owner violated the ADA by firing the restaurant manager when he found out that she was taking medications prescribed by her doctor for her bipolar disorder. Settlement of \$30,000 and other relief.

EEOC v. Volvo Group North America, LLC, Civil Action No. 1:17-cv-02889 (D. Md. consent decree entered Jan. 2018), <https://www.eeoc.gov/eeoc/newsroom/release/1-19-18a.cfm>. EEOC alleged laborer's conditional job offer was unlawfully revoked in violation of the ADA based on his use of

¹ Employers may engage in an appropriate process to determine if legal drug use renders an individual unqualified or poses a direct threat to health or safety. See, e.g., Voss v. Housing Authority of the City of Magnolia, Arkansas, ___ F.3d ___, 2019 WL 910557 (8th Cir. Feb. 25, 2019) (employer did not violate the ADA when it placed employee on paid suspension following positive drug test for opiates/morphine in order to obtain letter from his treating physician to determine that he did not pose a direct threat to safety due to his prescribed hydrocodone); Breaux v. Bollinger Shipyards, LLC, 2018 WL 3329059 (E.D. La. July 5, 2018) (employer may have violated ADA by terminating employee, a welder, due to his taking Suboxone prescribed to aid in withdrawing from dependency on prescribed opioid painkillers; question of fact for jury whether he posed a direct threat to safety).

suboxone for treatment of opioid addiction. During his post-offer physical examination, the applicant explained that he was taking medically prescribed suboxone. However, Volvo failed to conduct an individualized assessment to determine what effect, if any, the suboxone had on his ability to perform the job. Settlement of \$70,000 and other relief.

~ REASONABLE ACCOMMODATION ~

- **Sign Language Interpreters and VRI²**

EEOC v. USA Parking, Civil Action No. 18-23984 (S.D. Fla. consent decree entered Feb. 2019), <https://www.eeoc.gov/eeoc/newsroom/release/2-27-19.cfm>. EEOC alleged the employer, a parking valet service, refused to hire an applicant for valet attendant because of his hearing impairment. As part of the \$150,000 settlement, which included workforce training and affirmative recruitment of applicants who are deaf or hearing-impaired, the employer agreed to revise its written qualifications for the position to make clear that the requirement of communicating effectively with customers could be verbal or written.

EEOC v. Jacksons Food Stores, Inc., Case No. 2:17-CV-01285 (W.D. Wash. consent decree entered Sept. 2018), <https://www.eeoc.gov/eeoc/newsroom/release/9-7-18a.cfm>. EEOC alleged that a chain convenience store manager refused to interview an applicant once he explained he was deaf and would need a sign language interpreter for the interview, even though his online application had resulted in his being selected for an interview based on his qualifications and experience working in similar jobs. Settlement of \$88,000 and other relief pursuant to a 5-year consent decree.

EEOC v. AT&T Pacific Bell Telephone Company, Case No. 1:17-cv-01059-LJO-EPG (E.D. Cal. consent decree entered July 2018), <https://www.eeoc.gov/eeoc/newsroom/release/7-12-18a.cfm>. EEOC alleged that despite the employee's numerous requests for a sign language interpreter, managers chose to provide inadequate accommodations instead, such as standing close to him during meetings so he could read their lips, or by jotting down notes explaining the contents of the meeting after the fact. Settlement of \$15,000 and other relief pursuant to a 2-year consent decree.

EEOC v. Capstone Logistics, LLC, Civil Action No. 1:17-cv-01980 (D. Md. consent decree entered April 2018), <https://www.eeoc.gov/eeoc/newsroom/release/4-6-18.cfm>. EEOC alleged that after a deaf applicant applied for a warehouse position, the site manager e-mailed him to schedule an

² Note: recent court decision re: materials in accessible format: Stokes v. Nielsen, 2018 WL 4859088 (5th Cir. Oct. 4, 2018). Employee with vision impairment brought denial of accommodation claim against the Department of Homeland Security under the Rehabilitation Act for failing to provide her with meeting materials either in large font she could read at the meeting, or electronically in advance so that she could review them before the meeting using her assistive technology. Rejecting DHS's argument that it was only required to provide reasonable accommodations needed for plaintiff to perform the essential functions of her job, the court cited EEOC regulations explaining that accommodations must also be provided to enable employees with disabilities to enjoy equal benefits and privileges of employment. Receiving materials after the meeting was not effective, and she did not waive her right to an effective accommodation for on-site meetings simply because she accepted inferior accommodations for offsite meetings when advance materials may not have been feasible.

interview, but when the applicant arrived, the site manager canceled it and said they would reschedule so that human resources and an interpreter could be present. However, the company never rescheduled the interview. EEOC alleged the site manager instead sent the applicant a text message saying, "...we have determined that there is no job that we can offer that would be safe for you...." EEOC asserted that the applicant was never asked the applicant about his ability to perform any of the essential functions of a warehouse position, with or without reasonable accommodation. Settlement of \$50,000 and other relief pursuant to a 3-year consent decree.

EEOC v. The Cheesecake Factory, Inc. and The Cheesecake Factory Restaurants, Inc., 2:16-CV-1942-JLR (W.D. Wash. consent decree entered February 2018), <https://www.eeoc.gov/eeoc/newsroom/release/2-1-18b.cfm>. EEOC alleged restaurant fired newly hired dishwasher who is deaf for issues associated with his disability. Settlement of \$15,000 and other relief, including a commitment to provide closed captioning for the training and orientation videos that are required viewing for new hires, ensuring accessible training on how to clock in for his shifts and how to use the online scheduling system.³

- **Accessible Parking**

EEOC v. Cloverland Dairy Limited Partnership, t/a Cloverland Farms Dairy, Civil Action No. 1:18-cv-02759 (D. Md. consent decree entered Sept. 2018) (EEOC alleged employer required 3 employees with disabilities to cease using reserved accessible parking spaces; settlement of \$75,000 and other relief pursuant to 2-year consent decree), <https://www.eeoc.gov/eeoc/newsroom/release/9-19-18.cfm>.

Lloyd E. v. Dep't of Transp., EEOC Appeal No. 0120150325 (Aug. 17, 2017). Employee requested change to later shift or to be allowed to report one hour later. Employer instead allowed him to use one hour of leave. Commission held employer did not meet reasonable accommodation obligation. Forcing an employee to take leave when another accommodation would permit an employee to continue working a full day is not an effective accommodation. Employer did not show it would have posed significant difficulty or expense to allow him to report for work one hour later and work a full day. No evidence that this proposed schedule change would have been unduly disruptive to other employees. Employer's assertion that allowing reporting to work one hour later would be unfair to other employees did not establish undue hardship.

³ See also Cadoret v. Sikorsky Aircraft Corp., 2018 WL 806548 (D. Conn. Feb. 9, 2018). Plaintiff, a native ASL signer who reads and writes English and at fourth-to-sixth grade level, worked as an electrical installer. His employer failed for many years to provide a sign language interpreter for staff meetings and trainings, notwithstanding plaintiff's repeated requests to supervisors and managers. He could communicate by lip reading depending on the context (one-on-one, well-lit, and quiet settings), but could not rely on it his noisy workplace for encounters with peers and the people he supervised. During the pendency of the lawsuit raising his ADA denial of accommodation claim, the employer began providing some sign language interpretation for company-wide meetings and at least one training, and then began providing VRI services, but the court ruled the claim could proceed as to the prior period when the employer believed an interpreter was not required and instead provided ineffective solutions such as text-to-speech software, written materials, or a one-on-one meeting after the larger meeting.

- **Telework**

EEOC v. Advanced Home Care, Inc., 305 F. Supp. 3d 672 (M.D.N.C. 2018). EEOC alleged that employee, a patient accounts representative with COPD, sought telework as an accommodation due to difficulty talking for extended periods of time, and aggravation of condition by scents and odors encountered from working in a cubicle with hundreds of people. EEOC alleged that the essential function of the job was serving as a case manager for patients requiring home services, and that she could have performed the job remotely. She was told repeatedly by direct supervisor that if he could not return without restrictions at the end of FMLA leave she would be terminated. Denying employer's motion to dismiss, the court held that allegations stated an ADA claim for failure to accommodate.

- **Making Exceptions to a Policy**

EEOC v. Zale Delaware, Inc., Civil Action No. 4:15-cv-00149-D (E.D.N.C. consent decree entered April 2017), <https://www.eeoc.gov/eeoc/newsroom/release/4-4-17.cfm>. Kiosk manager with degenerative disc disease and fibromyalgia sought to return to work after medical leave with doctor's restriction to sit for 15 minutes of each hour as reasonable accommodation for disability, as an exception to the employer's rule to remain standing at all times. Employer refused request and fired her, insisting that job required standing for entirety of work shift. Two-year consent decree requiring, among other things, that employer conduct annual ADA training for its HR personnel, regional managers, and district managers, post employee notice about the lawsuit at kiosk locations, and make periodic reports to EEOC on accommodation requests.

- **Workplace Modifications**

EEOC v. Merritt Hospitality, LLC, and HEI Hotels and Resorts, LLC, Civ. Action No. 18cv654 (S.D. Cal. consent decree entered Nov. 2018), <https://www.eeoc.gov/eeoc/newsroom/release/11-29-18.cfm>. Employee, a hotel conference services/catering sales manager with asthma and other respiratory impairments, was assigned to a windowless room with inadequate ventilation and a broken air conditioner, aggravating her conditions. At the end of her first day, she told her supervisor she had a chronic health issue and the lack of ventilation was making her sick. The next day, her supervisor told her she did not know if the air conditioner, which had been broken for nearly a year, would be fixed and questioned why the employee had a problem when no one else did. The employee explained that her severe allergies, sinusitis, and asthma were triggered by lack of ventilation and air circulation, and as her condition worsened, she continued to seek an accommodation, and provided a doctor's note supporting her request. Defendants said they could not accommodate her and asked that she email a letter of resignation. Settlement of \$125,000 and other relief pursuant to 5-year consent decree.

EEOC v. InsideUp, Inc., Case No.: 3:17-cv-01961-CAB-JMA (S.D. Cal. consent decree entered Feb. 2018), <https://www.eeoc.gov/eeoc/newsroom/release/2-20-18.cfm>. EEOC alleged employer violated ADA by refusing to accommodate an employee with COPD who requested to transfer to an office

on the first floor of the non-elevator building because of his difficulty with the stairs. Settlement of \$10,500 and other relief.

Fawn G. v. U.S. Postal Serv., EEOC Appeal No. 0120162032 (Dec. 25, 2017). Employee, with severe allergic reaction to chemical scents, including perfume, ink and diesel exhaust, was provided accommodations that included: moving to workstation away from employees and customers and close to window for ventilation; allowing use of fans and a mask; employer statement to employees (which they all signed) concerning use of fragrances in the workplace; prohibiting staff from spraying perfumes or hair sprays in work area; changing all cleaning solutions used in facility. Held: no violation for denial of accommodation; no evidence co-workers were using fragrances around her, and an entirely fragrance-free environment is not reasonable.

- **Leave**

- **Reasonable Accommodation of Individuals with Disabilities May Require an Exception to “No Fault” Maximum Leave Policies if the Additional Leave Needed is Disability-Related and Does Not Pose an Undue Hardship**

EEOC v. Stanley Black & Decker, Inc., Civil Action No. 1:18-cv-02525 (D. Md. consent decree entered March 2019), <https://www.eeoc.gov/eeoc/newsroom/release/03-05-19a.cfm>. EEOC alleged the company violated the ADA when it terminated a sales representative, who had exceeded her sales goals and quotas, for poor attendance. She had requested but was denied unpaid leave for medical appointments and treatment related to her cancer. The company’s attendance policy on its face and/or as applied did not provide exceptions for disability accommodation subject to undue hardship. Settlement of \$140,000 and other relief pursuant to 3-year consent decree.

Pre-litigation EEOC Settlement of Charge with Metropolitan Jewish Health System (Dec. 2018), <https://www.eeoc.gov/eeoc/newsroom/release/12-21-18c.cfm>. Settlement of \$132,500 and other relief.

EEOC v. Senior Care Properties, Inc. d/b/a Harborview Rehabilitation and Healthcare; Civil Action No. 4:17-cv-00136-FL (E.D.N.C. consent decree entered Dec. 2018), <https://www.eeoc.gov/eeoc/newsroom/release/12-17-18.cfm>. Settlement of \$21,000 and other relief.

EEOC v. Family Healthcare Network, Case No. 1:18-cv-00893-DAD-BAM (E.D. Cal. consent decree entered Dec. 2018), <https://www.eeoc.gov/eeoc/newsroom/release/12-06-18.cfm>. Systemic challenge under both ADA and Pregnancy Discrimination Act to application of no-fault maximum leave policy. Settlement of \$1.75 million for affected class and other relief pursuant to 3-year consent decree.

EEOC v. Whole Foods Market Group, Inc., No. 5:17-cv-00494 (E.D.N.C. consent decree entered Nov. 2018), <https://www.eeoc.gov/eeoc/newsroom/release/11-5-18.cfm>. Employer aware that two of cashier’s three absences within a 30-day period that triggered automatic termination under no-fault absence policy were disability-related. EEOC alleged employer violated the ADA by applying the absence policy automatically instead of allowing exceptions as an accommodation absent undue hardship. Settlement of \$65,000, revised policies, and other relief pursuant to 2-year consent decree.

EEOC v. Triton, Inc., Case No.: 3:17-cv-02004-BAS-KSC (S.D. Cal. consent decree entered Oct. 2018), <https://www.eeoc.gov/eeoc/newsroom/release/10-10-18.cfm>. Settlement of \$110,000, revised policies, training, and other relief pursuant to a 3-year consent decree.

EEOC v. Mueller Industries, Inc., Case No. 2:18-cv-05729-FW-GJS (S.D. Cal. consent decree entered July 2018), <https://www.eeoc.gov/eeoc/newsroom/release/7-17-18a.cfm>. EEOC alleged company failed to make exceptions as required under ADA to 180-day maximum leave policy. Settlement of \$1 million, revised policies, training, and other relief pursuant to a 2 ½ -year consent decree.

EEOC v. Kessinger Hunter Management Co., Inc., Case No. 4:17-cv-809-HFS (W.D. Mo. Aug. 2018). <https://www.eeoc.gov/eeoc/newsroom/release/8-31-18.cfm>. EEOC alleged company applied 30-day maximum leave policy to terminate employee who sought one-week extension for post-surgical recuperation that would not have posed an undue hardship. Settlement of \$50,000, revised policies, training, and other relief pursuant to consent decree.

Additional recent ADA settlements involving alleged denial of disability-related leave absent undue hardship:

EEOC v. Greektown Casino LLC, Case No. 2:16-cv-13540 (E.D. Mich. consent decree entered Jan. 2018), <https://www.eeoc.gov/eeoc/newsroom/release/1-24-18a.cfm>.

EEOC v. Regional International Corp., Civil Action No. 17-cv-06505 (W.D.N.Y. consent decree entered June 2018), <https://www.eeoc.gov/eeoc/newsroom/release/6-7-18a.cfm>.

EEOC v. Heritage Home Group, LLC, Civil Action No. 5:18-CV-00018 (W.D.N.C. consent decree entered May 2018), <https://www.eeoc.gov/eeoc/newsroom/release/5-22-18.cfm>.

EEOC v. Macy's, Inc/Macy's Retail Holdings, Inc.; Civil Action No. 17-cv-05959 (N.D. Ill. consent decree entered April 2018), <https://www.eeoc.gov/eeoc/newsroom/release/4-18-18a.cfm>.

EEOC v. Pioneer Health Services, Inc., Civil Action No. 1:17-cv-00016-GHD-DAS (N.D. Miss. consent decree entered Jan. 2018), <https://www.eeoc.gov/eeoc/newsroom/release/1-10-18a.cfm>.

Conciliation agreement with G4S Secure Solutions, <https://www.eeoc.gov/eeoc/newsroom/release/9-4-18.cfm>.

Settlement with Coca-Cola Refreshments USA, Inc., <https://www.eeoc.gov/eeoc/newsroom/release/8-23-18.cfm>.

○ **No Fixed Date of Return vs. Indefinite Leave**

EEOC v. B.F. Saul Company, B.F. Saul Hospitality Group, and B.F. Saul Property Co., Civil Action No. 8:17-cv-2879-RWT (D. Md. consent decree entered Sept. 2018), <https://www.eeoc.gov/eeoc/newsroom/release/9-14-18b.cfm>. EEOC alleged an area sales manager for two Marriott hotels, who had been employed for less than a year (and to whom FMLA therefore

did not apply), advised the company a month in advance that she was scheduled to undergo surgery for breast cancer, and her physician identified accommodations she may need after the surgery. EEOC asserted that a week before the scheduled surgery, she was terminated, escorted out of the building, and told not to return. The vice president of human resources told her it would take too long for her to get better, even though it was too early to predict the outcome of the surgery and subsequent cancer treatment. EEOC alleged the denial of leave as an accommodation absent a determination of undue hardship violated the ADA. In announcing the settlement, which provided for \$210,000, revised policies, training, and other relief, the EEOC emphasized that although many types of cancer can be successfully treated, and often cured, the treatment and severity of side effects often are unpredictable and do not permit exact timetables, and emphasizes that an employer may not automatically deny a request for leave where the employee cannot specify an exact date of return; the Commission's position is that granting leave to an employee who is unable to provide a fixed date of return may be a reasonable accommodation if it does not pose an undue hardship. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship (question 44), <https://www.eeoc.gov/policy/docs/accommodation.html>, question 44; Q & A About Cancer in the Workplace and the ADA, <https://www.eeoc.gov/laws/types/cancer.cfm>, question 15. See also Employer-Provided Leave and the ADA, <https://www.eeoc.gov/eeoc/publications/ada-leave.cfm>.

EEOC v. AccenCare, Inc., No. 3:15-CV-3157-D, 2017 WL 2691240 (N.D. Tex. June 21, 2017). Court denied defendant's motion for summary judgment on EEOC's failure-to-accommodate claim, where employer cut off interactive process rather than responding to employee's request for a few additional days of leave after which she would be able to let defendant know if and when she could come back to work based on forthcoming doctor's assessment.

- **Service Animals⁴**

EEOC v. CRST International Inc. and CRST Expedited Inc., Case No. 1:17-cv-00129, (N.D. Iowa consent decree entered March 2019), <https://www.eeoc.gov/eeoc/newsroom/release/3-6-19.cfm>. EEOC alleged company refused to hire and then retaliated against a truck driver applicant, a Navy veteran, because he used a service dog to assist with his disabilities. During the CRST application process, the veteran disclosed his disabilities and use of a service dog to help with post-traumatic stress disorder (PTSD). The applicant successfully completed the required commercial drivers' licensing course with CRST's partner training company yet was denied hire due to CRST's "no pet" policy. Settlement of \$47,500, revised policies, training, and other relief pursuant to consent decree.

~ **DISABILITY-BASED HARASSMENT** ~

EEOC v. Mine Rite Technologies, LLC, Case No. 2:17-cv-00063-SWS (D. Wyo. Mar. 2018), <https://www.eeoc.gov/eeoc/newsroom/release/3-23-18.cfm>. EEOC alleged an employee who was a veteran was harassed and constructively discharged because of his PTSD. Allegations included that the supervisor referred to Kaufman as a "psycho" to his coworkers, and also made comments about "Psycho Thursday," because that was the day of the week when the employee attended therapy sessions. The three-year consent decree resolving the case provides for compensation of \$75,000,

⁴ Note recent court decision re: emotional support animals under Title I of the ADA: Maubach v. City of Fairfax, 2018 WL 2018552 (E.D. Va. Apr. 30, 2018).

implementation of new EEO policies and training, and providing a letter of apology and a letter of recommendation.

EEOC v. Jax, LLC d/b/a Golden Corral, No. 3:17-cv-00535 (W.D.N.C. consent decree entered July 2018), <https://www.eeoc.gov/eeoc/newsroom/release/7-13-18.cfm>. Settlement of \$85,000, revised policies, training, and other relief pursuant to 2-year consent decree.

~ RETALIATION AND INTERFERENCE ~

EEOC v. CRST, 2018 WL 6438369 (N.D. Iowa Dec. 7, 2018). Denying summary judgment to employer, the court explained that EEOC could prevail on its ADA interference claim on behalf of truck driver if it proved he was entitled to the accommodation he sought (having service animal ride with him in truck) and employer threatened not to hire him unless he abandoned the accommodation request.

EEOC v. Jewish Board of Family and Children's Services, Civil Action No. 18-cv-7376 (S.D.N.Y. consent decree entered Sept, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/9-17-18b.cfm>. EEOC alleged employee was retaliated against because she requested that the employer remove confidential medical information from the duty log accessible to all staff.

EEOC v. Murphy Oil USA, Inc., Civil Action No. 2:16-CV-00048-AM-CW (W.D. Tex. consent decree entered Aug. 2018), <https://www.eeoc.gov/eeoc/newsroom/release/8-13-18c.cfm>. EEOC alleged employee was fired in retaliation for complaining to management about the denial of his disability accommodation request.

~ DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMS ~

EEOC v. McLeod Health, Inc., 2019 WL 385654 (4th Cir. Jan. 31, 2019). Denying employer's motion for summary judgment on claim that employer lacked basis for requiring employee, the company's newsletter editor, to submit to a fitness for duty exam, the court found that a reasonable jury could conclude the employer lacked the requisite reasonable belief based on objective evidence that employee's medical condition, which had resulted in falls and other symptoms, rendered her unable to navigate safely the campuses of the company's hospitals and health care facilities.

EEOC v. BNSF Railway Co., 902 F.3d 916 (9th Cir. 2018). Requiring applicant to pay for a \$2,500 follow-up MRI as part of the post-offer examination, due to a perceived back impairment, or else lose his job offer, is disparate treatment based on disability in violation of the ADA.

EEOC v. Amsted Rail Co., Inc., Civil Action No. 14-cv-1292-JPG-SCW (S.D. Ill. consent decree entered June 2018), <https://www.eeoc.gov/eeoc/newsroom/release/6-12-18.cfm>. After a court ruling that the company's practice of disqualifying applicants based on a post-offer nerve conduction test for carpal tunnel syndrome did not measure current fitness for duty, and could not be relied on it in lieu of an individualized assessment, 280 F. Supp. 3d 1141 (S.D. Ill. 2017), the case was settled for settled pursuant to a consent decree providing for payment of \$.4.4 million, revised policies, training, and other relief.

~ GENETIC INFORMATION NONDISCRIMINATION ACT ~

Pre-litigation EEOC Settlement of Charge with SMS Group, Inc. (Oct. 2018): <https://www.eeoc.gov/eeoc/newsroom/release/10-18-18.cfm>. During post-offer and fitness for duty medical exams, employer's contract medical provider asked applicants and employees to complete occupational health questionnaires that required the disclosure of family medical history (which is genetic information under GINA), including parents and siblings' history with cancer, diabetes, heart disease and stroke. Three-year conciliation agreement provided for payment of \$62,000, revised policies, training, and other relief.

EEOC v. Dolgencorp, LLC., Case No. 2:17cv-0001649-JHE (N.D. Ala. consent decree entered Sept. 2017), <https://www.eeoc.gov/eeoc/newsroom/release/9-25-17c.cfm>. Family medical history collected during post-offer medical exams, in violation of GINA.

Pre-litigation EEOC Settlement of Charge with Guardsmark: <https://www.eeoc.gov/eeoc/newsroom/release/6-23-16.cfm>. EEOC A D A c h a r g e investigation uncovered 1,000+ Guardsmark applicants or employees asked to disclose their disabilities and/or family medical history, and charge was amended to add GINA claim.

EEOC v. Joy Underground Mining, LLC, Civil Action No. 2:15-cv-01581-CRE (W.D. Pa. consent decree entered Jan. 2016), <https://www.eeoc.gov/eeoc/newsroom/release/1-7-16.cfm>. Post-offer medical exam form requested family medical history, asking applicants if they had any family medical history of TB, cancer, diabetes, epilepsy, or heart disease. Settlement: 2-year consent decree provided for training on GINA for all management and HR personnel with responsibilities relating to hiring, and EEOC monitoring of compliance with terms of decree.