"Invisible" Disabilities and the ADA

Presented by Equip for Equality
Barry C. Taylor, VP for Civil Rights and Systemic Litigation
Rachel M. Weisberg, Managing Attorney
Paul W. Mollica, Senior Attorney

July 12, 2023

1

Continuing Legal Education Credit for Illinois Attorneys

- This session is eligible for 1.5 hours of continuing legal education credit for **Illinois** attorneys.
- **We will post a link in the chat at the end of the presentation.**

2

2

Topics for Today's Webinar

- Definition of Disability
- Medical Exams, Inquiries and Disclosure
- Confidentiality
- Direct Threat
- Knowledge of Disability
- Harassment
- Resources
- Questions

ada National Network
Information, Guidance and Training on the Americans with Disabilities Act

3

3

Definition of Disability after the ADA Amendments Act

- Definition of disability "shall be construed in favor of broad coverage … to the maximum extent permitted by the terms of this Act."
- Episodic conditions are examined when active.
- Mitigating measures are not included when assessing substantial limitation.
- **Note:** Often, non-apparent disabilities such as diabetes, epilepsy, cancer, and mental illness, are episodic in nature and/or involve issues relating to mitigating measures. So ADAAA made coverage for these non-apparent conditions easier.

ada National Network
Information, Guidance and Training on the Americans with Disabilities Act

4

4

ADAAA and Major Bodily Functions

ADAAA		EEOC Regs
immune system	neurological	special sense organs & skin
normal cell growth	brain	genitourinary
digestive	respiratory	cardiovascular
bowel	circulatory	hemic
bladder	endocrine	lymphatic
reproductive functions		musculoskeletal

Lists are not exhaustive - no negative implication by omission

National Network
Information, Guidance and Training on the Americans with Disabilities Act

5

5

Application of Major Bodily Functions to Non-Apparent Disabilities

- **immune system:** HIV/AIDS, auto-immune disorders, lupus
- **normal cell growth:** cancer
- **digestive:** Crohn's disease, celiac disease
- **bowel:** ulcerative colitis
- **bladder:** kidney disease
- **reproductive functions:** infertility
- **neurological:** multiple sclerosis, epilepsy
- **brain:** schizophrenia, intellectual disabilities, mental illness
- **respiratory:** asthma
- **circulatory:** heart disease, high blood pressure
- **endocrine:** diabetes

National Network
Information, Guidance and Training on the Americans with Disabilities Act

6
(

6

EEOC Regulations
List of Consistently Limiting Impairments

(A) Autism

(B) Cancer

(C) Cerebral palsy

(D) Diabetes

(E) Epilepsy

(F) HIV or AIDS

(G) Multiple sclerosis and muscular dystrophy

(H) Major depression, bipolar disorder, PTSD, OCD, or schizophrenia

Note: Many on list relate to non-apparent disabilities.

ADA National Network
Information, Guidance and Training on the Americans with Disabilities Act

7

(877) 232 – 1990

7

ADAAA Coverage of Non-Apparent Disability - Case Example

Oncale v. CASA of Terrebonne Parish
2020 WL 3469838 (E.D. La. June 25, 2020)

Facts: Employee with breast cancer took FMLA leave. Employer concerned about future attendance because of upcoming treatments and fired her. She sued for wrongful termination under Rehab Act.

Employer: Cancer not a covered disability.

Court: Cancer substantially limits major bodily function of normal cell growth.

ADAAA confirmed episodic conditions are covered if substantially limiting when active, and thus, irrelevant that employee’s cancer was in remission when fired.

ADA National Network
Information, Guidance and Training on the Americans with Disabilities Act

8

8

Medical Exams, Inquiries, Disclosure

9

9

Pre-Employment Inquiries and Medical Exams - Background

- **Rule:** ADA bars employers from questioning about the existence, nature or severity of a disability and prohibits medical examinations until after a conditional offer of employment has been made
- **Benefit to Applicants with Non-Apparent Disabilities:**
  - ensures applicant's disability is not considered prior to the assessment of the applicant's qualifications
  - prevents discrimination and allows applicant to keep disability confidential if that's applicant's preference
- **Drug Tests:** Not considered medical exam so generally permissible at pre-employment stage

10

10

Pre-Employment Inquiries and Medical Exams - Case Example

Hurd v. Cardinal Logistics Mgt Corp
2018 WL 4604558 (W.D. Va. Sept. 25, 2018)

Facts: Hurd applied to be truck driver. Employer required pre-offer blood test that revealed hypoglycemia and that Hurd took anti-seizure medication. Employer contacted Hurd's doctor who confirmed Hurd's epilepsy but said he could still do driver job.

Hurd not hired and sued under ADA for improper medical exam and inquiries, and for failure to hire.

Court: Pre-offer medical exam and inquiries were *per se* violations of the ADA.

ADA National Network
Information, Guidance and Training on the Americans with Disabilities Act

11

11

Pre-Employment Inquiries and Medical Exams - Case Example

Connolly v. First Personal Bank
623 F. Supp. 2d 928 (N.D. Ill. 2008)

Facts: Applicant denied job after positive drug test based on a prescription drug. Sued under ADA.

Employer: Drug tests not a med exam under ADA. Also, plaintiff did not have disability, so can't bring ADA claim.

Court: Plaintiff's case can proceed. Drug test went beyond test for illegal drug use. No evidence that prescribed medication would impair plaintiff's ability to effectively perform job. Also, ADA does not require plaintiff to have a disability to challenge test. (Uses term "applicant")

ADA National Network
Information, Guidance and Training on the Americans with Disabilities Act

12

12

Post-Offer Inquiries and Medical Exams - Background

- Once conditional offer made, employers may require med exams and ask disability-related inquiries, but ADA imposes restrictions and safeguards
  - must do so for all entering employees in that job category
  - if exam or inquiry screens out because of disability, exclusionary criterion must be job-related and consistent with business necessity
  - employer must show that criterion cannot be satisfied, and essential functions cannot be performed, with a reasonable accommodation
  - conditional offer is "real" if employer evaluated all relevant non-medical information *prior* to giving the offer

ADA National Network Information, Guidance and Training on the Americans with Disabilities Act

13

13

Post-Offer Inquiries and Medical Exams - Case Example

Sorber v. Security Walls

2020 WL 2850227 (N.D. Tex. June 1, 2020)

Facts: All prospective employees required to undergo pre-employment medical exam

Employer: Exam OK because only given after conditional offer

Court: Applicants had not received a "real" conditional offer prior to medical exam – too many contingencies

Defendant had not evaluated all other hiring information and had not completed all non-medical portions of the application process before requiring medical exam

ADA National Network Information, Guidance and Training on the Americans with Disabilities Act

14

14

Inquiries and Medical Exams of Employees - Background

- Once employed, employer may make disability-related inquiries and require medical examinations *only* if they are job-related and consistent with business necessity.
- Employer must have a reasonable basis to believe that an employee is not qualified, poses a direct threat, or needs a reasonable accommodation.
- In response to reasonable accommodation request, employers may request "reasonable documentation" about employee's "disability and its functional limitations that require reasonable accommodation" in situations "when the disability or the need for the accommodation is not known or obvious."

ADA National Network
Information, Guidance and Training on the Americans with Disabilities Act

15

15

Inquiries and Medical Exams of Employees – Case Example

LaCroix v. Boston Police Dep't.

2022 WL 876885 (D. Mass. March 24, 2022)

Facts: BPD policy required physical exam after 3-month leave and psych exam after 6-month leave - 2 officers filed suit alleging policy violated ADA

BPD: Police face unique stressors – exams needed to ensure officers physically and mentally can do the job

Court: Exam unwarranted if no specific concerns about officer's ability to perform job. No evidence that leave posed increased risk for physical or psych conditions that could negatively impact officer's job performance.

ADA National Network
Information, Guidance and Training on the Americans with Disabilities Act

16

16

Inquiries and Medical Exams of Employees – Case Example

EEOC v. Blue Sky Vision, LLC
2021 WL 5535848 (W.D. Mich. Nov. 1, 2021)

Facts: Employer learned of employee's eye condition and required him to undergo medical exam and release broad range of records including for mental health, alcohol and substance use, and HIV. Employee terminated for failing to comply with request.

Court: Ruled for employee. "Defendant would be hard pressed to identify a medical record that would not be covered by the release. The release was overly broad and not justified as job-related and consistent with business necessity."

17

17

Inquiries and Medical Exams of Employees – Case Example

Flanary v. Baltimore Cty., Md.
2017 WL 1953870 (D. Md. May 11, 2017)

Facts: Police officer involved in traumatic shooting diagnosed with PTSD. Police Dept. required officer to undergo therapy. She alleged improper medical exam.

Court: Ruled for employer. Police Dept. had legitimate basis to doubt officer would respond adequately in emergency situations. She continued to experience PTSD symptoms related to traumatic event years later.

Court also found police departments have greater leeway under ADA considering police officers' unique job responsibilities and duty to safeguard the public.

18

18

Wellness Programs - Background

- Employee wellness plans often require employees to submit to medical exams and inquiries to participate.
- Some plans tied to employer-sponsored health insurance.
- Employers often provide strong “incentives” for employees to participate in their wellness plans, including greatly reduced healthcare costs.
- Despite ADA restrictions on medical exams and inquiries, employers find exceptions under ADA’s “safe harbor” provision and “voluntary” nature.
- EEOC wellness plan regulation currently on hold

ada National Network Information, Guidance and Training on the Americans with Disabilities Act

19

19

Wellness Programs – Case Example

Williams v. City of Chicago
616 F. Supp. 3d 808 (N.D. Ill. 2022)

- **Facts:** Employees sued under ADA and GINA that wellness program was involuntary due to $50 monthly charge for employees and spouses who don’t participate
- **City:** Financial incentive doesn’t make program involuntary. (Relying upon EEOC regulation)
- **Court:** Plaintiffs’ ADA and GINA claims can proceed (denied MTD) - whether a wellness program is voluntary is a question of fact.
- EEOC regs relied on by City were withdrawn by EEOC

ada National Network Information, Guidance and Training on the Americans with Disabilities Act

20

20

COVID-19 Testing and Vaccinations

Sharikov v Philips Med. Sys. MR Inc.
2023 WL 2390360 (N.D.N.Y. Mar. 7, 2023)

Facts: Employee alleged ADA violation due to disability-related inquiries asking his vaccination status and whether he had contact with "infectious people" and subjecting him to non-job-related med exams requiring COVID testing and daily temperature screenings.
Court: Found for employer. No allegation inquiries would result in disability disclosure. And even if he did, employer's inquiries would be considered job-related and consistent with business necessity.
Current Status: Appeal pending.

ada National Network
Information, Guidance and Training on the Americans with Disabilities Act

21

21

Confidentiality

ada National Network
Information, Guidance and Training on the Americans with Disabilities Act

22

22

Confidentiality - Background

42 U.S.C. §12112(d)(3)(B): Information about an applicant's medical condition or history must be collected and maintained on "separate forms and in separate medical files and treated as a confidential medical record"

29 C.F.R. § 1630.14: Confidentiality requirements apply to: entrance exams; exams/info for employees; and info for "voluntary" health programs

EEOC guidance: Confidentiality requirements apply to all medical information

National Network
Information, Guidance and Training on the Americans with Disabilities Act

23

23

What Information is Protected?

Byrd v. Outokumpu Stainless

2022 WL 2134993 (S.D. Ala. June 14, 2022)

- **Facts:** Plaintiff took prescribed hydrocodone for a knee injury; alleged that employer violated ADA's confidentiality requirements by disclosing results of drug test - rumors that he had "too much medication" and references him as a "druggie"
- **Court:** Allowed claim to move forward (denied MSJ)

***See also Lisby v. Tarkett Ala.*, 2020 WL 1536386 (N.D. Ala. Mar. 31, 2020)** (plaintiff's use of amphetamines and methadone discovered during drug tests)

National Network
Information, Guidance and Training on the Americans with Disabilities Act

24

24

What Information is Protected? (2)

- Information from fitness for duty for employee with autism
  - ***McCarthy v. Brennan*, 230 F. Supp. 3d 1049 (N.D. Cal. 2017)**
- Fitness for duty for plaintiff with a benign brain tumor
  - ***Dedrick v. Abilene Motor Exp., Inc.*, 2021 WL 5236817 (W.D. Wash. Nov. 8, 2021)**
- Information about an employee's chronic health condition shared when seeking reassignment through employee's union contract rather than as a formal request for a reasonable accommodation
  - ***Brown v. Wilkie*, 2022 WL 1658802 (S.D. Ind. May 24, 2022)**
- Explanation for absence for employee with HIV
  - ***Hoffman v. Family Dollar Stores, Inc.*, 99 F. Supp. 3d 631 (W.D.N.C. 2015)**

ada National Network
Information, Guidance and Training on the Americans with Disabilities Act

25

25

Confidentiality – Background Exceptions and Permitted Disclosures

Exceptions and permitted disclosures

- Supervisors and managers may be informed regarding necessary restrictions on the work or duties… and necessary accommodation
- First aid and safety personnel.. when appropriate
- Government officials investigating compliance…

ada National Network
Information, Guidance and Training on the Americans with Disabilities Act

26

26

Exceptions & Permitted Disclosures

Rivera v. City of North Chicago

2021 WL 323794 (N.D. Ill. Feb. 1, 2021)

- Employer disclosed plaintiff's medical information to plaintiff's ex-wife in response to a litigation subpoena
- Employer argued no ADA violation because information was disclosed outside of the employment context and after his employment ended
- **Court:** Confidentiality claims move forward (denied MSJ)
  - ADA has no time limits on an employer's confidentiality obligations – they survive an employee's termination
  - Exceptions do not include litigation requests/subpoenas
  - When deciding whether confidentiality prevails over liberal discovery, courts generally consider the purpose behind the ADA's confidentiality provisions. Here, no argument that plaintiff's confidential medical record furthers the ADA's purpose

ADA National Network Information, Guidance and Training on the Americans with Disabilities Act

27

Exceptions & Permitted Disclosures (2)

Brown v. Wilkie

2022 WL 1658802 (S.D. Ind. May 24, 2022)

- Plaintiff with chronic health conditions asked to be reassigned under her union agreement – VA sent letter to three managers
- VA argued that disclosure was permitted as it was made to managerial employees related to "necessary restrictions on the work or duties of the employee and necessary accommodations"
- **Court:** Confidentiality claims move forward (denied MSJ)
  - Reassignment request was denied; while there might be a need to share the "outcome", there was no need to share information to discuss a "necessary restriction" or "accommodation"
  - Confidentiality applies even though requested reassignment was outside the formal accommodation process

ADA National Network Information, Guidance and Training on the Americans with Disabilities Act

28

“Voluntary” Disclosure

Courts generally say confidentiality requirements do not protect medical information that is “voluntarily disclosed”

- ***Perez v. Denver Fire Dep’t*, 724 F. App’x 646 (10th Cir. 2018)** (holding firefighter voluntarily disclosed his PTSD after an emotional reaction at work such that ADA confidentiality requirements did not apply)
- ***Chandler v. Louisiana-Pacific Corp.*, 2022 WL 15570702 (S. D. Ala. Oct. 28, 2022)** (finding employee’s disclosure voluntary as plaintiff told HR about his mental health diagnoses and that he knew his rights)

Caution: Employers with dual roles

- ***Derin v. Stavros Ctr. for Ind’t Living, Inc.*, 581 F. Supp. 3d 351 (D. Mass. 2022)** (denying motion to dismiss where plaintiff both worked and received services from defendant; dual nature of the relationship is important as voluntary disclosure was outside of employment context)

But see EEOC Guidance (confidentiality includes voluntary info)

Interplay with Employee Assistance Programs

Hannah P. v. Coats

916 F.3rd 327 (4th Cir. 2019)

- Plaintiff alleged two violations:
  - Supervisors wrongfully sought and disclosed confidential medical information when referring her to the EAP
  - EAP psychologists wrongfully disclosed confidential medical information back to her supervisors
- **Court:** Finding for employer on confidentiality claims (affirmed MSJ)
  - Plaintiff voluntarily disclosed her depression to her supervisors (multiple disclosures; one was in response to a supervisor’s question about her absences – court found not disability related)
  - No evidence that EAP psychologist shared *medical* information with plaintiff’s supervisors

Damages from Breach

Plaintiffs need to have suffered an "injury" from the breach; emotional distress can be an injury

Lisby v. Tarkett Alabama, Inc.
2020 WL 1536386 (N.D. Ala. Mar. 31, 2020)

- **Facts:** Plaintiff has ADHD, anxiety and chronic lower back pain; took amphetamines and methadone. Employer shared, in front of others, that he failed drug test based on these medications
- **Employer:** No injury
- **Court:** As a result of the disclosure, plaintiff's neighbor asked him if he used drugs; several neighbors now know about his medication use; he feels stigmatized for using methadone; the stigma and anxiety prevent him from using the medication

ada National Network Information, Guidance and Training on the Americans with Disabilities Act

31

31

Direct Threat

ada National Network Information, Guidance and Training on the Americans with Disabilities Act

32

32

Direct Threat Basics

Employer may avoid liability by establishing its employee posed "a direct threat to the health or safety of other individuals in the workplace." 42 USC § 12111(3)

- **Definition = Statute**
  - "A significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 USC § 12111(3)
- **Definition = EEOC Regulations**
  - "A significant risk **of substantial harm** to the health or safety **of the individual** or others that cannot be eliminated **or reduced** by reasonable accommodation." 29 C.F.R. §1630.2(r).
  - **Note:** Words in bold were added to the statutory definition, via the regulation
- **Note:** DOJ Regulations apply to "others" only

ADA National Network
Information, Guidance and Training on the Americans with Disabilities Act

33

33

Direct Threat Basics (2)

Factors to consider:

- duration of the risk
- nature and severity of the potential harm
- likelihood that the potential harm will occur
- imminence of the potential harm

Analysis requires:

- An "individualized assessment of the individual's present ability to safely perform" essential job functions
- A decision "based on a reasonable medical judgment that
  - relies on the most current medical knowledge, and/or
  - the best available objective evidence"

29 C.F.R. §1630.2(r)

ADA National Network
Information, Guidance and Training on the Americans with Disabilities Act

34

34

Factors – Cases for Employer

***Anderson v. Norfolk S. Ry. Co.*, 2021 WL 1214622 (W.D. Pa. Mar. 31, 2021)** - finding train engineer with condition that causes disruption to the heart's normal rhythm that can result in the sudden loss of consciousness posed a direct threat, noting the duration of the risk was lifetime, the nature and severity of harm included the catastrophic loss that might occur of a train derailed with hazardous materials or in a densely populated area, and the likelihood of an occurrence was significant and imminent.

***Goode v. BNSF Ry., Inc.*, 2020 WL 1527864 (N.D. Tex. Mar. 20, 2020)** (concluding that while probability and duration of the risk caused by an employee's implantable cardioverter-defibrillator's firing might be low, the nature and severity of the risk caused when he collapses as a result is potentially catastrophic if he worked as a conductor)

ada National Network
Information, Guidance and Training on the Americans with Disabilities Act

35

35

Individualized Assessment

Brasier v. Union Pac. R.R. Co.

2023 WL 2754007 (D. Ariz. Mar. 31, 2023)

- Employer concerned about the post-surgery seizure risk for a railroad conductor who had brain surgery
- **Court:** No proof of individualized inquiry
  - No physicians with expertise in neurology or brain surgery participated in the fitness for duty assessment because the evaluating doctors considered the case to be "straightforward"
  - Evaluating doctors "relied exclusively" on handbook with generalized guidelines intended for commercial vehicle drivers and not train conductors
  - No analysis of plaintiff's specific risk of seizure or the potential harm that could occur if he experienced a seizure while on duty
  - Dispute about role of conductor, which impacts "likelihood" of harm

ada National Network
Information, Guidance and Training on the Americans with Disabilities Act

36

36

Individualized Assessment (2)

EEOC v. Outokumpu Stainless USA, LLC

2022 WL 4004769 (S.D. Ala. Sept. 1, 2022)

- Plaintiff took Xanax to treat anxiety disorder and ADHD
- Conditional offer as an entry operator at a steel mill was withdrawn because of his prescription drug use
- **Court:** Reasonable jury could conclude he was not a direct threat
  - Plaintiff only took Xanax to sleep and never took it fewer than five hours before working
  - Never experienced side effects and no evidence to the contrary
  - Track record of safety at work in similar hazardous environments
  - Employer's medical professional relied almost entirely on the patient insert for Xanax, which describes fatigue as a possible side-effect, instead of plaintiff's individualized experience

ada National Network Information, Guidance and Training on the Americans with Disabilities Act

37

37

Individualized Assessment (3)

Similar cases where employers do not consider individual's own experience with medications or assumptions about disability

- ***Byrd v. Outokumpu Stainless USA, LLC*, 2022 WL 2134993 (S.D. Ala. June 14, 2022)** – Denying summary judgment to defendant in case where nurse practitioner excluded plaintiff from safety sensitive position given use of hydrocodone based only on a product packet identifying drowsiness as a potential side effect - failed to ask plaintiff about actual experience including side effects.
- ***Bailey v. Metal-Fab, Inc.*, 2020 WL 6077315 (D. Kan. Oct. 15, 2020)** – Denying summary judgment to employer who fired fabricator in a metal shop after concluding that a seizure in the shop would be dangerous, despite the fact that the plaintiff had *petit mal* seizures that usually involved a short lapse in concentration and had never resulted in a fall

ada National Network Information, Guidance and Training on the Americans with Disabilities Act

38

38

Individualized Assessment – Case for Employer

Pontinen v. United States Steel Corp

26 F.4th 401 (7th Cir. 2022)

- **Facts:** Steel plant rescinded conditional employment offer to a utility person after discovering he had an uncontrolled seizure disorder as the job required working around heavy machinery and tools
- **Court:** Affirmed summary judgment for employer on direct threat
  - Referenced plaintiff's statements about his medication, notes from fitness-for-duty exam, notes from his treating doctor; fact that when plaintiff had seizures he tends to lose consciousness
  - Four factors: Duration of risk was indefinite; the nature and severity of potential harm was unreliable and possibly life-threatening, the likelihood of reoccurrence was significant, and "It is possible that he could have a seizure at any moment."

ADA National Network — Information, Guidance and Training on the Americans with Disabilities Act

Conflicting Medical Information

Munoz v. Union Pac. R.R. Co.

2022 WL 4348605 (D. Or. Aug. 9, 2022)

- Track laborer with alleged cognitive and vision disabilities but without a definitive diagnosis - wide array of medical information
  - One doctor found plaintiff's vision to be "excellent" and released him to return to work without restrictions; other doctors said plaintiff had "cognitive limitations" but no definitive diagnosis
  - One doctor suggested an on-the-job assessment; employer did not do; other doctor said plaintiff lacked depth perception, while another acknowledged that it is possible for an individual who lacks depth perception to safely operate a machine
- **Court:** Conflicting medical evidence – employer has not met its burden of showing direct threat

ADA National Network — Information, Guidance and Training on the Americans with Disabilities Act

Knowledge of Disability

41

41

Knowledge of Disability Background

General Rule: Employees do not have to disclose disability.

Exception: Must disclose if seeking reasonable accommodation – employers only responsible for accommodating known disabilities.

What's Required: People with non-apparent disabilities seeking accommodation should let employer know of existence of disability, identify limitations that result from disability, and try to identify possible accommodations.

EEOC: Disclosure and accommodation request doesn't need to be written or expressed formally, as long as employer informed that change at work is needed because of a medical condition.

42

42

Knowledge of Disability – Employee Notice Sufficient for Accommodation

Kumagah v. Aldersgate United Methodist Ret. Cmty.
2022 WL 17970566 (W.D.N.C. Dec. 27, 2022)

Facts: Nurse requested to not work with COVID patients because of "high-risk medical condition." Despite repeated requests for information about her underlying condition, the nurse submitted letters that only spoke about "pre-existing health conditions." She was fired and sued under ADA.

Court: Although plaintiff's communications were vague and she provided no specific information about her diabetes and other conditions, employer had notice of her having *a* disability and a need for accommodation, so ADA claim can proceed.

43

43

Knowledge of Disability – Employee Notice Sufficient for Accommodation

King v. Steward Trumbull Memorial Hosp., Inc.
30 F.4th 551(6th Cir. 2022)

Facts: Employee sought leave to address flare up of her asthma and ultimately terminated. Sued under ADA.

Employer: Knowledge of health issue isn't the same as knowledge of a disability.

Court: Employee's case can proceed. Employer knew of employee's asthma, and even though she didn't use term "disability" or "accommodation," jury could find employer knew asthma was severe enough to constitute a disability needing accommodations. "Magic words" not necessary to put employer on notice.

44

44

Knowledge of Disability – Employee Notice Not Sufficient for Accommodation

Abler v. Mayor and City Council of Baltimore,
2022 WL 824850 (D. Md. Mar. 18, 2022), appeal filed (June 9, 2022)

Facts: Paramedic with PTSD, depression and anxiety sought reassignment to previous position. Request denied and he sued under Rehab Act.

Court: Ruling for employer. 1) Initial reassignment request didn't mention disability; 2) No evidence that employer ever received letter from employee's doctor; and 3) Employee only made a vague reference to his "medical condition" which wasn't sufficient to put the employer on notice that request for change in job was disability-related.

ada National Network
Information, Guidance and Training on the Americans with Disabilities Act

45

45

Knowledge of Disability – Employee Notice Not Sufficient for Accommodation

Powley v. Railcrew Xpress, LLC,
2020 WL 7481737 (D. Neb. Dec 18, 2020)

Facts: Employee with back impairment requested an ergonomic chair, as current chair caused her back pain and migraines. Request denied and she sued under ADA

Court: Ruling for employer. No evidence that employee requested employer provide an ergonomic chair as an accommodation for an alleged disability (back impairment or migraines) and therefore employer was not on notice request was disability-related. Court also referenced that employee did not use the accepted procedures for a reasonable accommodation.

ada National Network
Information, Guidance and Training on the Americans with Disabilities Act

46

46

Knowledge of Disability – Employee Notice Sufficient for Failure to Hire

EEOC v. McLane/Eastern, Inc.,
2023 WL 1102600 (N.D.N.Y. Jan. 30, 2023)

Facts: Deaf person applied for job and filed ADA suit under when not hired.

Employer: No knowledge of applicant's disability and other people hired were more qualified (non-disability reason)

Court: Applicant's case can proceed. Employer's HR department spoke to applicant via telecommunication relay service (TRS). Although applicant did not specifically identify herself as deaf during the call, most people who use TRS are deaf, so this raised a question of fact.

National Network
Information, Guidance and Training on the Americans with Disabilities Act

47

47

Knowledge of Disability – Employee Notice Insufficient to Challenge Termination

Edmonds-Radford v. Southwest Airlines Co.,
17 F.4th 975 (10th Cir. 2021)

Facts: Employee with learning disability terminated. She sued claiming termination due to her disability.

Employer: No knowledge of applicant's disability – termination based on poor performance (non-disability reason)

Court: Summary judgment for employer. Although employee asked for additional training – she did not link that request to her disability. And while she disclosed learning disability to co-workers, no evidence supervisor, manager or other decisionmaker had knowledge of her disability.

National Network
Information, Guidance and Training on the Americans with Disabilities Act

48

48

Knowledge of Record of Disability

Trafton v. Sunbury Primary Care, P.A.,
689 F. Supp. 2d 180 (D. Me. 2010)

Facts: Employee claimed she was terminated based on her record of disability (major depression and PTSD).

Court: Plaintiff's case can proceed. Plaintiff's records of a hospitalizations for attempted suicides, combined with scars on her arms, her supervisor's negative comments (including calling her "unstable"), and subsequent termination provided sufficient evidence to raise a triable question as to whether her supervisor was aware of her record of a disability and if he terminated her for that reason.

ada National Network
Information, Guidance and Training on the Americans with Disabilities Act

49

49

Disability Harassment

ada National Network
Information, Guidance and Training on the Americans with Disabilities Act

50

50

Harassment Basics

ADA: Discrimination prohibited in all "terms, conditions, and privileges of employment." ***See* 42 U.S.C. § 12112 (a)**

Title VII: Same language prohibiting discrimination in all "terms, conditions, and privileges of employment"

- U.S. Supreme Court has recognized that harassment based on a protected status is implicitly prohibited by Title VII.

ADA: Given the similarities in ADA and Title VII, courts have universally concluded that the ADA protects against disability-based harassment

- Idea is that conduct that is severe or pervasive adversely impacts the terms and conditions of employment.

ada National Network
Information, Guidance and Training on the Americans with Disabilities Act

51

51

Elements of a Disability Harassment Claim

Plaintiffs must show:

- Plaintiff is a qualified individual with a disability
- Plaintiff was subjected to unwelcome harassment
- The harassment was based on plaintiff's disability
- The harassment was sufficiently severe or pervasive to alter a term, condition, or privilege of employment

ada National Network
Information, Guidance and Training on the Americans with Disabilities Act

52

52

Elements of a Disability Harassment Claim (2)

- Some factual basis exists to impute liability for the harassment to the employer
  - If co-workers, the employer knew or should have known of the harassment and failed to take prompt, remedial action;
  - If supervisor (person with ability to make ultimate decisions, such as hiring and firing), then employer is liable unless it proves that it has an effective anti-harassment policy that the employee unreasonably failed to use; or
  - If an owner, partner, or president/CEO, liability is strict.

Many cases turn on whether the harassment was sufficiently severe or pervasive to alter a term, condition, or privilege of employment

ada National Network
Information, Guidance and Training on the Americans with Disabilities Act

53

53

What is Severe or Pervasive?

Fox v. Costco Wholesale Corporation

918 F.3d 65 (2nd Cir. 2019)

- Employee with Tourette's and OCD asserted harassment claim
- Would often touch floor before moving and cough when he felt a verbal tic coming on to prevent others from hearing him swear
- Other employees mimicked him ("hut-hut-hike") for "months and months" in front of supervisors and managers who did not act
- **District court:** Found for employer (granted summary judgment) – no evidence about number of times comment made per shift/week month
- **2nd Circuit: Vacated and remanded harassment claims**
  - Recognized hostile environment claims under the ADA
  - Identified specific comments and said it happened for months
  - No opinion on availability of affirmative defense (unreasonably failed to take advantage of preventative opportunities)

ada National Network
Information, Guidance and Training on the Americans with Disabilities Act

54

54

Severe or Pervasive – Case Examples

Nicolini v. Arizona Bd. of Regents

2021 WL 1597898 (D. Ariz. Apr. 23, 2021)

- Plaintiff with PTSD alleged hostile work environment when:
  - Supervisors told colleagues not to talk to her
  - Supervisors called many meetings with the goal of destabilizing her, exploiting her disability, and causing her to make quick, panicked decisions
  - Coercing and bullying plaintiff into working from home permanently to remove her from the workplace
  - Yelling at plaintiff in public in front of colleagues

***See also Turner v. Greyhound Lines*, 2021 WL 1051118 (W.D. Tenn. March 19, 2021)** (denying MTD for hard-of-hearing driver who alleged two incidents of harassment – berated and said need new hearing aids)

ada National Network Information, Guidance and Training on the Americans with Disabilities Act

55

Examples of Severe or Pervasive

- Supervisor made disparaging comments, targeted plaintiff, singled her out, set her up for failure, ignored her in meetings. ***Beasley v. Kendall*, 2023 WL 2824415 (D. Colo. Feb. 6, 2023)**
- Postmaster "incessantly admonished" plaintiff, embarrassed him on teleconferences in front of his peers, issued him warnings with discipline and claimed without basis that he was failing to perform up to standards, opposed accommodations and forced plaintiff to work beyond his restrictions and agreed-upon work schedule. ***Felts v. DeJoy*, 2022 WL 4332712 (D.N.M. Sept. 17, 2022)**
- Plaintiff was yelled at, scrutinized more heavily, treated poorly, nitpicked, forced to explain dictation device to entire residency program, causing other residents to belittle him using one. ***Varvaro v. Univ. of Cent. Fla.*, 2022 WL 9350839 (M.D. Fla. Oct. 14, 2022)**

ada National Network Information, Guidance and Training on the Americans with Disabilities Act

56

Not Severe or Pervasive (1)

***Burns v. Nielsen*, 456 F. Supp. 3d 807 (W.D. Tex. 2020)**

- Field Technology Officer with migraines and back pain alleged he received three letters from his supervisor asking for medical information from his doctor and restricting his ability to perform certain job duties while taking medication
- Not the type of conduct found to be harassment

***Alston v. Holy Cross Health,* 2023 WL 2743332 (D. Md. Mar. 31 2023)**

- Immunosuppressed Plaintiff given different shift assignments, employer issued policy change that conflicted with accommodation (but not enforced as to him), received counseling based on reported misconduct, subjected to increased scrutiny for leaving work early
- Not intimated, ridiculed, insulted or humiliated

National Network
Information, Guidance and Training on the Americans with Disabilities Act

57

57

Not Severe or Pervasive (2)

- Comments made over three-year period about "Plaintiff's medical issues and related missed work time" due to pregnancy-related conditions (such as high-blood pressure, nausea/vomiting, and migraines) were "not of the severity contemplated in that the alleged statements, if not pervasive, would not 'contaminate an environment.'" ***Woods v. AstraZeneca Pharma., L.P.*, 2023 WL 2393649 (M.D. Pa. Mar. 7, 2023)**
- Series of six warnings and other disciplinary actions taken against the plaintiff with a history of PTSD, bipolar disorder, and feelings of "increased anxiety" in front of co-workers was not sufficiently severe or pervasive to support a hostile work environment claim. ***Thompson v. Austin,* 2023 WL 3682113 (E.D.N.C. Mar. 31, 2023) *appeal filed* (May 26, 2023)**

National Network
Information, Guidance and Training on the Americans with Disabilities Act

58

58

Not Severe or Pervasive (3)

- Employees joked that plaintiff (who had several disabilities including Macular Corneal Dystrophy and Graves' disease) had been out drinking when "she appeared wobbly because her medication's effects were slow to start." ***Newell v. Carter Bank & Trust*, 2022 WL 801601 (W.D. Va. Mar. 15, 2022)**
- Comments from co-workers suggesting that employee with fibromyalgia, adrenal insufficiency and chronic fatigue was faking her disability and using her health as a crutch. ***Marshall v. McDonough*, 2022 WL 17541038 (N.D. Tex. Nov. 18, 2022)**
- Calling crane operator a "pill popper" approximately 10 times and giving him "disparaging looks" after learning that he used "multiple potential mentation altering medication(s)". ***Garton v. BWXT Tech. Servs. Grp., Inc.*, 2020 WL 86197 (D. Idaho Jan. 7, 2020)**

ADA National Network Information, Guidance and Training on the Americans with Disabilities Act

59

59

Not Severe or Pervasive (4)

- Employer repeatedly contacted employee asking when she would return to work – court said this was the "opposite" of interfering with work performance. ***Shoul v. Select Rehab.*, 2022 WL 2118322 (M.D. Pa. June 13, 2022)**
- Being assigned the "menial" task of washing pots, as plaintiff testified he "kind of" liked the task and presented no evidence that he was assigned this task more frequently than other dishwashers. ***Jaeckels v. Golden Nugget, LLC*, 2022 WL 1721055 (S.D. Miss. May 27, 2022)**
- Single, verbal comment, even though employer taunted employee's fear of COVID-19, which raised extreme and unusual challenges. ***EEOC v. U.S. Drug Mart*, 2022 WL 18539781 (W.D. Tex. Oct. 18, 2022), *appeal filed* (Jan. 31, 2023)**

ADA National Network Information, Guidance and Training on the Americans with Disabilities Act

60

60

On Basis of Disability – Case for Employee

Teegarden v. Gold Crown Mgt., LLC
2020 WL 13682809 (W.D. Mo. Apr. 23, 2020)

- Plaintiff with bipolar disorder and PTSD alleged that the business owners repeatedly criticized, belittled, insulted, cursed at, and called her derogatory names – also asserts one owner threatened and attacked her by shoving a table at her
- **Employer argued:**
  - Not sufficiently severe or pervasive
  - Treatment had no relation to her disability and that she was not treated differently than other employees
- **Court:** Reasonable jury could find comments disability-related and sufficiently severe and pervasive (denied MSJ)
  - Comments show disability-related animus on their face

ada National Network Information, Guidance and Training on the Americans with Disabilities Act

61

61

On Basis of Disability – Cases for Employer

- Supervisor "treated all employees poorly" – thus, any hostile work environment toward employee with shoulder injury was not because of disability.
  - ***Meyer v. Brennan*, 2020 WL 4904228 (D. Ariz. Aug. 20, 2020)**
- Callous remarks about plaintiff with chemical sensitivities' professional performance in the classroom that did not reference her disability
  - ***Anderson v. Sch. Bd. of Gloucester Cnty., Va.*, 2020 WL 2832475 (E.D. Va. May 29, 2020)**

ada National Network Information, Guidance and Training on the Americans with Disabilities Act

62

62

Resources

- EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA
- EEOC: What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws
- EEOC Proposed Wellness Rules – currently on hold
- ADA Legal Brief re: Confidentiality (2018)
- ADA Legal Brief re: Direct Threat (2018)

ada National Network Information, Guidance and Training on the Americans with Disabilities Act

63

63

Continuing Legal Education Credit for Illinois Attorneys

- This session is eligible for 1.5 hours of continuing legal education credit for **Illinois** attorneys.
- Link for Illinois **attorneys** interested in obtaining continuing legal education credit should is in the chat.
- Participants (non-attorneys) looking for continuing education credit should contact the Great Lakes ADA at 877-232-1990 (V/TTY) or webinars@ada-audio.org

ada National Network Information, Guidance and Training on the Americans with Disabilities Act

(877) 232 – 1990 (V/TTY)
http: //www.ada-audio.org

64

64

Questions?

65

Session Evaluation
Your feedback is important to us

You will receive an email following the session with a link to the on-line evaluation

66

Next Session

Topoic To Be Announced

September 20, 2023

Registration will be available at: www.ada-legal.org

67

67