Overview of Recent ADA Employment Cases

Pacific ADA Center
ADA Update Conference

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Equip for Equality

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Outline of Today’s Presentation

• Definition of Disability
• Title I - Employment
  ❖ Definition of Employee
  ❖ Reasonable Accommodation Issues: Reassignment, Leave, Full-time Interpreter, Medical Marijuana
  ❖ Constructive Discharge
  ❖ Qualified
  ❖ Supported Employment
  ❖ Pre-Offer Medical Inquiries
  ❖ Wellness Plans
• Questions
Definition of Disability
Reassessing “Substantially Limits” under the ADAAA

_Cannon v. Jacobs Field Services_

813 F.3d 586 (5th Cir. 2016)

- Employee with torn rotator cuff
  - Cannot raise right arm above shoulder; limited ability to push/pull
- Received conditional job offer and had pre-employment exam
- Doctor cleared employee with restrictions (no lifting/pulling over 10 lbs, no working with hands above shoulder level)
- Job offer was revoked
- **Dist. ct.:** Found for ER (granted summary judgment) – not disabled
  - Limitations did not substantially limit daily functioning
- **5th Cir:** Found for EE (reversed/remanded)
  - Decision “at odds” with ADA Amendments Act
Reassessing “Substantially Limits” under the ADA Amendments Act

Court discussed important ADAAA principles

• Substantially limits no longer demands extensive analysis
• Must compare employee with general population
• Here, undisputed evidence that employee’s shoulder impairment is substantially limiting
  ❖ Employee and doctor said he cannot lift his right arm above shoulder level
  ❖ Employee and doctor said he has considerable difficulty lifting, pushing, or pulling objects with right arm
• Also evidence that employee was regarded as disabled
  ❖ Report from employee’s physical demonstrates that his shoulder injury was perceived to be an impairment
“Regarded As” Under the ADAAA

**Alexander v. Wash. Metro. Area Transit Authority**
826 F.3d 544 (D.C. Cir. 2016)

- Employee with alcoholism
- Used alcohol at work; suspended; referred to EAP
- Returned subject to periodic alcohol tests but failed and was fired
- Told he could reapply in one year if he completed an intensive alcohol dependency treatment program
- Employee completed program, but was not rehired
- Alleges it was because he failed EAP, violated alcohol policy
- **Dist. ct.**: Found for ER (granted summary judgment)
  - Alcoholism did not substantially limit 1+ major life activity
- **D.C. Cir.**: Found for EE (reversed and remanded)
Definition of Disability: Three Prongs

- Important language about the *regarded as* prong under the ADAAA
  - The “regarded-as-prong has become the primary avenue for bringing the type of discrimination claim that Alexander asserts.”
  - Now unnecessary in most cases to proceed under the “actual disability” or “record of” prong
  - Only need to show ER took prohibited action against EE because of an actual or perceived *impairment* - substantial limitation not required for regard as prong
  - No dispute that alcoholism is an impairment – meets standard
- Court also concluded that the EE met the definition of disability under “actual disability” and “record of”
  - Alcoholism substantially limited sleep, daily care activities, caring for himself, walking, concentrating and communicating
Is Obesity a Disability?

**Morriss v. BNSF Railway Co.**  
817 F.3d 1104 (8th Cir. 2016)

- Plaintiff given a conditional job offer for machinist position
- BNSF = Applicants for safety sensitive jobs must have BMI under 40
- Plaintiff’s BMI was 40.9 at 5’10” and 270lbs (no medical condition)
- Plaintiff’s job offer was revoked
- **Question on appeal:** Is obesity a disability under the ADA?
- **8th Cir.**: Obesity must be due to underlying physiological disorder
  - ADA statute = Does not define “physical impairment”
  - EEOC regs = Defines impairment
    - “any physiological disorder or condition . . . affecting one or more body systems”
Obesity as a Disability

• *But see* EEOC interpretive guidance: “‘impairment’ does not include physical characteristics such as . . . weight . . . that are within “normal” range and are not the result of a physiological disorder.”
  ❖ 8th Cir.: Interprets this to require physiological disorder
• *But see* EEOC Compliance Manual: “severe obesity” or “body weight more than 100% over the norm” is a disability
  ❖ 8th Cir.: Manual contradicts plain language of Act and regs
• BNSF cited pre-ADAAA cases finding obesity not to be a disability
  ❖ 8th Cir.: Pre-ADAAA case law relevant for this holding
    ➢ EEOC revised regulatory definitions of “substantially limit” and “major life activity” but no changes to “impairment”
• Regarded as? No based on the same reasoning (no impairment)
Circuit Split?

Obesity without a physiological condition is not an impairment

  (“consistent with the EEOC’s own definition, . . . to constitute an ADA impairment, a person’s obesity, even morbid obesity, must be the result of a physiological condition.”)

- **Francis v. City of Meriden, 129 F.3d 281 (2d Cir. 1997)**
  Can be impairment (outside “normal” range or “morbid obesity”)

  (a physiological cause for obesity is required only when an individual’s weight is within normal range)

  (emphasizing ADAAA)

Oct. 3, 2016: Supreme Court denied request for review in **Morriss**
Is Gender Identity Disorder a Disability?

**Blatt v. Cabela’s Retail, Inc.**

- Plaintiff identifies as transgender and was denied requests to wear female nametag and uniform and denied use of female restroom
- Sued under ADA based on diagnosis of gender identity disorder
- Employer argues gender identity disorder is explicitly excluded under Sect 12211 of the ADA
- **Court:** ADA exclusion of gender identity disorder can be limited to condition of identifying with a different gender – doesn’t exclude ADA coverage for disabling conditions that persons who identify with a different gender may have, such as gender dysphoria.
- Plaintiff sufficiently alleged she was substantially limited in numerous major life activities (e.g. interacting with others, reproducing, and social and occupational functioning).
Title I: Employment
“Employee” Under the ADA and Section 504

*Flynn v. Distinctive Home Care, Inc.*
812 F.3d 422 (5th Cir. 2016)

• Plaintiff is an independent contractor, not employee
• ADA Title I = Protects rights of “employees”
• 504 = “disabled persons in federally assisted programs or activities”
  ❖ Incorporates certain Title I protections
• Dist. ct.: Found for ER - contractors cannot sue under Sec. 504
• 5th Cir.: Reversed - contractors can sue under Section 504
  ❖ Rehab Act is broad - covers all programs and activities
  ❖ Rehab Act does not incorporate Title I’s definition of employer
    ➢ Adopts the *substantive standards* for determining *what* conduct violates the law, not who is covered
Circuit Split

Independent contractors **can** sue under Section 504

- **Schrader v. Fred A. Ray, M.D., P.C., 296 F.3d 968 (10th Cir. 2002)** (holding that Section 504 does not incorporate the ADA's requirement that the employer have “fifteen or more employees”)
- **Fleming v. Yuma Reg'l Med. Ctr., 587 F.3d 938 (9th Cir. 2009)** (“[T]he Rehabilitation Act covers discrimination claims by an independent contractor.”)
  - Supreme Court denied cert. **561 U.S. 1006 (2010)**

Independent contractors **cannot** sue under Section 504

- **Wojewski v. Rapid City Reg'l Hosp., 450 F.3d 338 (8th Cir. 2006)** (“[W]e affirm … summary judgment to the defendants because [plaintiff] was not an employee of the hospital.”)
Reassignment as a Reasonable Accommodation

**Legal question:** Does reassignment require employers to place an employee in a vacant position OR permit employees to compete?

**Majority Rule:** Reassignment to a vacant position w/o competition is reasonable absent undue hardship or seniority system

- 7th Cir.: *EEOC v. United Airlines*, 693 F.3d 760 (7th Cir. 2012)
- 10th Cir. *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999)

**Minority Rule:** Employers can make reassignment competitive

- 8th Cir.: *Huber v. Wal-Mart*, 486 F.3d 480 (8th Cir. 2007)
  - **Note:** Adopted reasoning in a now-reversed (pre-*United Airlines*) case “wholesale” and “without analysis”
  - Supreme Court agreed to review *Huber*, but dismissed the case before ruling after the parties settled
Update on Reassignment as a Reasonable Accommodation

_EEOC v. St. Joseph’s Hospital, Inc._
842 F.3d 1333 (11th Cir. 2016)

- Plaintiff worked as a nurse in a psychiatric ward
- Developed spinal stenosis, arthritis and started using a cane
- Hospital said cane could be used as a weapon – gave her 30 days to try to find alternate position but she had to compete for new job
- **EEOC:** ER violated ADA b/c required competition for vacant position
- **Hosp./Dist. Ct.:** ADA doesn’t mandate reassignment w/o competition
- **11th Cir:** Found for ER: ADA does not require reassignment w/o competition – “preferential treatment”
  - Relied on ADA statutory language: reasonable accommodation _may_ include reassignment to vacant position
  - Cited 8th Circuit’s decision in _Huber v. Wal-Mart_
11th Circuit Decision re: Reassignment as a Reasonable Accommodation

- Cited Supreme Court case, *Barnett v. U.S. Airways*
  - Held that it is not reasonable to violate a best-qualified hiring policy or a transfer policy “in the run of cases”
  - Noted this was especially true in hospitals – need best personnel

- However:
  - Court emphasizes that there could be cases where reassignment would supersede a best-qualified hiring policy, if there are special circumstances that warrant it
  - Court affirmed jury’s pro-employee holdings (not relevant to ultimate legal conclusion re reassignment)
    - Disability, qualified for vacant positions, not accommodated

**QUERY:** Impact of this decision?
DOJ Position Consistent with EEOC

United States v. City of Philadelphia

- **Complaint:** City fired employee w/ heart condition who could no longer do job instead of reassigning him to vacant position

- **Consent Decree:** Revise policies consistent with EEOC guidance
  - Reassign employee who can no longer perform job due to disability to vacant position for which he is qualified that is equivalent in terms of pay, status or other relevant factors
  - If no vacant equivalent position, reassign to vacant lower level position for which the employee is qualified
  - If 2+ vacancies, reassign to position closest to equivalent

Reassignment & Undue Hardship

Reyazuddin v. Montgomery County, Maryland
789 F.3d 407 (4th Cir. 2015)

- Plaintiff who is blind worked as an information and referral aide
- County opened a consolidated call center with inaccessible software
- Plaintiff was not transferred to new center
- Instead, she kept same salary, grade and benefits, but supervisors struggled to find work for her
- **4th Cir.**: Q of fact whether county accommodated Plaintiff
  - County cobbled together “make-work” tasks w/ same salary
  - An employer may provide an alternate accommodation, but accommodation must be “meaningful employment opportunity”
- Case remanded for trial
Reassignment & Undue Hardship

- Two-week trial; five-days of jury deliberations
- Jury found for Plaintiff
  - Country discriminated by refusing to transfer Plaintiff to a call center because of the inaccessible software
  - County could have provided a reasonable accommodation to make the call center software accessible
  - Not an undue hardship to make the software accessible
- Post-trial ruling:
  - Since Plaintiff was subsequently transferred with accommodations and given full-time meaningful work, court denied request for further injunctive relief (i.e. placing her into the position she had originally sought)
Reasonable Accommodation: Leave

**EEOC v. United Postal Service**
Case No. 09-cv-5291 (N.D. Ill. Agreement Reach Aug. 8, 2017)

- EEOC sued UPS for its inflexible leave policy
- **UPS Policy**: Employees with disabilities automatically fired when they reached 12 months of leave
- **EEOC**: Violation of ADA – failure to engage in interactive process.
- **Settlement reached**:
  - $2 million to nearly 90 current and former UPS employees.
  - Update policies on reasonable accommodation and improve implementation of those policies
  - Conduct training for those who administer the company’s disability accommodation processes
  - Periodic status reports filed with EEOC
Reasonable Accommodation: Full-time ASL Interpreter

**Searls v. Johns Hopkins Hospital**
158 F.Supp.3d 427 (D. Md. 2016)

- Recent nursing graduate is deaf
  - Had two clinical rotations at JHH with ASL interpreters
- Voices for herself and reads lip, but understands better with ASL
- Applied for nursing position at JHH that required “highly effective verbal communication and interpersonal skills”
- Given offer contingent on health screening
- Requested full-time ASL interpreter and offer was rescinded
- Undue hardship? Nurse made $40k-$60k; interpreter cost $120k
- Nurse found other job and works successfully with interpreter
- **Court:** Found for EE (granted summary judgment to nurse)
Reasonable Accommodation: Full-time ASL Interpreter

- **Court:** Interpreter request was reasonable
  - Current/prior use of terp; ADA lists terp as accommodation
  - Current experience and clinical experience at JHH
- **Court:** Interpreter did not reallocate essential functions
  - EE could still communicate with patients, family and personnel and monitoring alarms – terp could not act independently
  - Note: Nurse would retain “substantial portion” of duties
- **Court:** No undue hardship
  - Examine overall budget—not nurse’s salary or dept. resources
  - Terp might be 2x nurse’s salary but 0.007% of overall budget
- **Court:** No direct threat due to auditory alarms
  - Post-hoc rationalization w/o an individualized assessment
Modifying Drug Policies to Accommodate Medical Marijuana Users

**Question**
Now that states are legalizing the use of marijuana (both medically and recreationally), will the ADA protect employees who use marijuana?

**Statutory language**
ADA excludes “any employee or applicant who is currently engag[ed] in the illegal use of drugs, when the covered entity acts on the basis of such use.”

42 U.S.C. § 12114 (a)
Modifying Drug Policies to Accommodate Medical Marijuana Users

*Coats v. Dish Network, LLC*

350 P.3d 849 (Co. 2015)

- Employee with quadriplegia used medical marijuana in the evening to reduce muscle spasms
- Violated employer’s drug policy
- **Lawsuit:** Employee alleged violation of state “lawful activity” statute
- **Colorado Supreme Court:** Found for employer
  - Marijuana is not lawful under federal law
  - Controlled Substance Act lists marijuana as a Schedule I substance and makes no exceptions for medicinal use or use in accordance with state law
  - Supremacy clause = conflicts resolved in favor of federal law
Modifying Drug Policies to Accommodate Medical Marijuana Users

Colorado decision consistent with most other states:

- **California**: *Ross v. RagingWire Telecommunications, Inc.*, 174 P.3d 200 (Cal. 2008) (employers not required to accommodate employee with disability who used medical marijuana legally)

- **Montana**: *Johnson v. Columbia Falls Aluminum Co., LLC*, 213 P.3d 789 (Mont. 2009) (ADA does not require employers to accommodate employees who use medical marijuana)

- **Oregon**: *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010)

Medical Marijuana - One court takes different approach


- Massachusetts passed medical marijuana law
- Plaintiff with Crohn’s Disease had doctor’s certification to use marijuana for medicinal purposes.
- She was denied employment when she failed the mandatory drug test.
- Plaintiff filed suit under state disability law
- **Supreme Judicial Court of Massachusetts:** Plaintiff has viable claim under state disability law. Fact that employee’s possession of medical marijuana violates federal law does not make it *per se* unreasonable as an accommodation.
Constructive Discharge

Van Rossum v. Baltimore County
14-CV-00115 (D. Md. filed 2014)

- Employee worked as a Sanitarian for the Department of Environmental Protection and Resource Management
- Employed for 29 years and 9 months
- July 2009: Dep’t moved to a newly renovated office with new furniture, paint, carpeting that “off-gassed” chemicals
  - Experienced severe reaction – headaches, loss of balance, severe burning in her eyes and extremities, tightness in chest
  - Unable to work while on this floor
  - Diagnosed with severe allergic and irritant rhinitis
  - Requested to move to another floor as a reasonable accommodation – request initially granted
Constructive Discharge

• 2010: County withdrew accommodation
  ❖ Ordered her to return to the fourth floor or resign
• April 2010: Employee forced to retire
• **ADA lawsuit:** Alleged constructive discharge
• **Jury verdict:**
  ❖ Found County failed to provide employee with reasonable accommodation; discriminated and retaliated against her
  ❖ Pain/suffering = $250,000
  ❖ Economic damages = $530,053

Qualified: Overreliance on Job Descriptions

Camp v. Bi-Lo, LLC
662 Fed.Appx. 357 (6th Cir. 2016)

- Individual with back impairment worked as a stock clerk for 38 yrs
- Job description required “lifting” 20-60 pounds frequently
- Plaintiff’s doctor restricted him from lifting over 35 pounds
- Informal arrangement where co-workers lifted very heavy items
- Dist. ct.: Found for ER (granted MSJ) due to job description
- 6th Cir.: Lifting over 35 pounds was not an essential function (reversed and remanded)
  - Three-man team had been able to shelve product
  - Plaintiff fulfilled duties of the job for years with co-workers
  - Testimony from immediate supervisor and colleagues
**Supported Employment**

**EEOC v. Papa John’s Pizza**


- Individual with Down syndrome worked successfully for over five months with a job coach
- Operating partner visited location, observed individual working with job coach, and directed that he be fired
- **EEOC consent decree**
  - $125,000 to employee
  - Review EEO policies
  - Conduct training for management/HR employees in Utah
  - Establish recruitment program for individuals w/ disabilities

www.eeoc.gov/eeoc/newsroom/release/1-26-17.cfm
Pre-Employment Disability Inquiries

EEOC v. KB Staffing,

• EEOC filed ADA suit against a staffing firm for requiring applicants to provide health-related information prior to a job offer.

• Settlement: KB Staffing agrees to:
  • Establish a $22,500 class fund to compensate applicants forced to disclose disability-related information;
  • Affirmatively recruit people with disabilities;
  • Adopt and distribute a policy prohibiting disability discrimination; and
  • Train management on ADA, including requirements related to pre-employment inquiries and examinations.
Wellness Plans - Overview

Background on Issue
• Employer wellness plans often require medical exams / inquiries
• Some plans are tied to health insurance; others are not
• Some employers provide “incentives” for participation
  ❖ Including greatly reduced healthcare costs
• Issue: ADA restricts certain medical exams and inquiries
  ❖ Two exceptions: Safe harbor & “voluntary” disclosure
• EEOC has recently litigated cases about wellness programs

2016: EEOC released final rules about wellness programs addressing both exceptions
• Q&A: www.eeoc.gov/laws/regulations/qanda-ada-wellness-final-rule.cfm
Wellness Plans
Safe Harbor Provision & Voluntary Nature

**EEOC v. Orion Energy Systems, Inc.**
2016 WL 5107019 (E.D. Wis. Sept. 19, 2016)

- Employees who opted out of wellness plan had to pay entire monthly health insurance premium ($413.43 - $1,130.83 / month)
- Employer argued: Safe Harbor & Voluntary
- **Court:** Agreed partially with employer and partially with EEOC
  - Safe Harbor did not apply – this is a very limited exception
    - New EEOC reg re safe harbor (not applicable to wellness programs) = retroactive
    - Even w/o relying on new reg, plans generally unrelated to basic underwriting, risk classification
  - However, participation in wellness plan was “voluntary”
    - Not mandatory – just a “strong incentive”
    - No claim that reg re: 30% cap was retroactive
Wellness Plans Voluntary Nature

**AARP v. EEOC,**


- AARP filed suit against EEOC regs
  - Argues that EEOC’s regs conflict with ADA and Genetic Information Nondiscrimination Act (GINA)
  - Employers can provide incentives for participation or impose heavy financial penalties on employees who decline to share medical/genetic information (ex: charge up to 30% extra)
Wellness Plans
Voluntary Nature

**AARP v. EEOC,**

- **Court:** grants AARP’s motion for summary judgment
  - 30% penalty or incentive is unreasonable interpretation of “voluntary” disclosure of disability-related information.
  - EEOC’s position not entitled to deference – contrary to most comments that EEOC received when regs were proposed
  - OK to use a percentage to define voluntariness, but the result must be “logical and rational”
QUESTIONS?

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Thank You
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