

REASONABLE ACCOMMODATION: THE NEW FOCUS IN DISABILITY BIAS SUITS

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I. OVERVIEW

The Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”) amended the ADA, the landmark disability statute that President George H.W. Bush signed into law in 1990. The new statute took effect on January 1, 2009. The ADAAA was enacted to “restore the intent and protections” of the ADA by making it easier for plaintiffs to establish that they are disabled. The law made a number of significant changes to broaden the number of individuals protected by the statute. It also directed the EEOC to amend its ADA regulation to reflect the changes. The final regulations were published in the *Federal Register* on March 25, 2011, and are codified at 29 C.F.R. Part 1630.

Prior to the enactment of the ADAAA, most of the focus in ADA litigation concerned the definition of “disability.” For this reason, the courts very often never reached the issue of whether an employer was obligated to make a “reasonable accommodation” to enable the plaintiff to perform the “essential functions” of his or her position. Now that the definition of disability has been expanded, pundits are predicting that reasonable accommodation issues will dominate courts’ attention in the near future. Included within these questions is to what extent a plaintiff must have requested an accommodation, whether the requested accommodation would change the essential functions of a position and, if not, whether providing the accommodation would impose an “undue hardship” upon the employer’s business. There has been and will be considerable uncertainty as to how to answer those questions, as can be demonstrated by the current move by the EEOC to address the ADA’s impact of leave policies.

Herein, we will review the current state of the ADA after the ADAAA. Next, we will discuss the general parameters of the duty to make reasonable accommodation. We will then address recent developments at the EEOC, the OFCCP and in court regarding the affirmative obligation to offer an individual with a disability a “reasonable accommodation.” In the conclusion, we will provide you with some guidance in considering your firm’s obligation to make such reasonable accommodations.

II. BASIC REQUIREMENTS AFTER THE 2008 AMENDMENTS

A. Under the ADAAA, more individuals with impairments will meet the disability threshold.

The ADAAA retained the ADA’s definition of “disability,” which is: “An impairment that substantially limits one or more major life activities; a record of such impairment; or being regarded as having such an impairment.” *Pub. L. No. 110-325, Sec. 4, § 3, 122 Stat. 3553*. However, although the definition of “disability” remained the same, the ADAAA expanded its protection to a broader class of individuals. Congress found that persons with many types of impairments – including epilepsy, diabetes, multiple sclerosis, major depression, and bipolar

disorder – had been unable to bring ADA claims because they could not meet the ADA definition of “disability.” The ADAAA explicitly rejected certain Supreme Court decisions and a portion of the EEOC regulations that it found had improperly narrowed the definition of disability. Congress set the tone in favor of employees when it said, “the question of whether an individual’s impairment is a disability under the ADA should not demand an extensive analysis.” *Id.* So how has the ADAAA broadened the scope of the ADA?

1. It is now easier to prove that a disability “substantially limits” a major life activity.

Some courts had determined that in order to be “substantially limiting,” an impairment needs to significantly restrict an individual in performing a major life function. However, the ADAAA clarifies that, “A person is considered an individual with a disability for the purposes of the first prong of the definition when [one or more of] the individual’s important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people.” *Id.* The EEOC’s final regulations published on March 25, 2011, developed several “rules of construction” to determine whether the impairment “substantially limits” performance of a major life activity. Those rules of construction require the term “substantially limits” to be construed broadly in favor of coverage “to the maximum extent permitted by the ADA.” Moreover, an impairment need not prevent or severely or significantly limit a major life activity to be considered “substantially limiting.” The regulations state that the condition, manner and duration of the person’s performance of the activity should be closely examined. For example, can the person perform the activity for only a brief period? Is it painful or otherwise difficult to perform the activity? The EEOC’s focus will be on whether the employer reasonably accommodated or discriminated against the employee, not whether the individual’s impairment substantially limits the performance of a major life activity.

Given this approach, a prudent employer will not focus on how to defeat an employee’s request for an accommodation by arguing the employee’s impairment is not “substantially limiting.” Rather, the prudent employer will assume the employee’s impairment will be considered substantially limiting and proceed to the next step - namely, what reasonable accommodation, if any, should be considered?

2. “Major life activities” now include “major bodily functions.”

The ADAAA provides that “major life activities” now include, but are not limited to, “caring for oneself, performing manual tasks, seeing, hearing, eating, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” *Id.* Thus, the ADAAA considers even the most basic functions to be “major life activities.” It is also important to note that because “concentrating” and “thinking” are now “major life activities that can be substantially limited by an impairment under the ADA, individuals with conditions such as Attention Deficit Disorder (ADD) and Attention Deficit Hyperactivity Disorder (ADHD) will have a much easier time of meeting their burden of proving disability.

3. A “disability” includes any impairment that is episodic or in remission if it would substantially limit a major life activity when active.

An impairment that is episodic or in remission will be nevertheless considered a disability *if* it would substantially limit a major life activity *when active*. Thus, even in a dormant state, the impairment may be a “disability” under the new statute. The final regulations include epilepsy, hypertension, asthma, diabetes, major depression, bipolar disorder, schizophrenia, and cancer as examples of impairments that would substantially limit a major life activity when active. However, employers should note that an individual might not need an accommodation during periods when his or her condition is in remission.

In *Hoffman v. Carefirst of Fort Wayne, Inc.*, 737 F. Supp. 2d 976 (N.D. Ind. 2010), the court held that an employee with cancer in remission was considered disabled under the ADA. The court reasoned that “because [the employee] had cancer in remission (and that cancer would have substantially limited a major life activity when it was active), [the employee] does not need to show that he was substantially limited in a major life activity at the actual time of the adverse employment action.” *Id.* at 985.

4. The ameliorative effects of mitigating measures cannot be taken into account when assessing whether an impairment substantially limits a person’s major life activities.

Employers and courts are now prohibited from taking into account mitigating measures, such as prescription drugs, medical supplies and equipment, hearing aids, and prosthetic limbs when deciding whether an individual has a covered disability. Thus, when applied to the ADD or ADHD examples mentioned above, an employer would not be able to consider the benefits the employee may reap from prescribed medications. However, employers may still consider vision impairment in its corrected state with contacts or eyeglasses.

5. “Regarded as” coverage is broader than ever.

An individual can be protected by the ADA because the individual has an actual disability, a record of a disability, or because the employer incorrectly regards the individual as having a disability. The good news is that the ADAAA clarified that a “regarded as” plaintiff is not entitled to a reasonable accommodation. The bad news is that the statute also states that the employee need not prove that the employer regarded him or her as having a disability *as defined by the ADA* – i.e. an impairment that *substantially impairs a major life activity*. Many “regarded as” claims were previously dismissed because the employee could not meet this standard. Those decisions are no longer good law.

Under the final regulations, an individual who is claiming discrimination, as opposed to failure to reasonably accommodate, need not prove he or she has a disability. An employer “regards” a person as having a disability if it takes an action prohibited by the ADA (e.g. failure to hire, termination, or demotion) based on an individual’s impairment or an impairment the employer believes the individual has. Two exceptions apply to “regarded as” claims: (1) employers do *not* have to provide any accommodation to an employee “regarded as disabled”

and (2) individuals with temporary and minor impairments (e.g., conditions lasting six months or less) are not permitted to bring a “regarded as” claim.

B. In a broad sense, how will the ADAAA affect employers?

1. More disability discrimination claims.

It seems to go without saying that with an increase in the number of individuals now covered under the ADA, employers can only expect an increase in the number of discrimination cases they will face. Take, for example, a case where a federal district court concluded that under the ADAAA an employee was disabled because she was obese. *EEOC v. Resources for Human Development*, No. 10-3322, 2011 U.S. Dist. LEXIS 140678 (E.D. La. Dec. 7, 2011). Prior to the enactment of the ADAAA, it would have been highly unlikely that this plaintiff would have qualified as disabled under the statute. However, now the obese, as well as most anyone else with an impairment, fall under the protection of the ADA. This will only increase the number of claims employers will be forced to handle.

The EEOC already has seen a “significant increase” in ADA charges since the amendments took effect on Jan. 1, 2009, as more than 25,000 ADA charges were filed with EEOC in fiscal year 2010, up about 7,000 from FY 2008.¹

2. Pre-taliation.

The concept of pre-taliation involves an inadequate employee requesting disability accommodation before his employer has the opportunity to discipline or terminate him. By filing an accommodation request before management can impose discipline, an employee becomes “protected” against employer retaliation. With more employees being considered “disabled” due to the ADAAA, the new statute may serve as a preemptive move for subpar employees against employer discipline.

However, the Sixth Circuit may have limited the effect of pre-taliation in *Whitfield v. Tennessee*, 639 F.3d 253 (6th Cir. 2011). There, the Court upheld the poor performance-based firing of a disabled employee. The employee had cerebral palsy, but as the court noted, she “routinely made serious errors that were unrelated to her disability or to a lack of accommodation.” This case provides that although employers must still make reasonable accommodations, the employer may lawfully terminate a disabled employee for poor performance even after an accommodation request.

3. Fewer Summary Judgments in Favor of Employers.

Prior to the enactment of the ADAAA, most plaintiffs’ claims did not survive the summary judgment stage because they could not establish that their impairment qualified as a “disability” under the ADA. Indeed, according to the Education and Labor Committee of the U.S. House of Representatives, in 2004, plaintiffs lost 97 percent of ADA employment

¹ U.S. Equal Employment Opportunity Commission, *FY 2012 Congressional Budget Justification*, at 18, reprinted at <http://www.eeoc.gov/eeoc/plan/upload/2012budget.pdf>.

discrimination claims. Now, with more individuals covered by the law, and a relaxed standard for proving that an individual is “disabled,” more cases will survive summary judgment and proceed to trial.

III. “REASONABLE ACCOMMODATION” REQUIREMENTS

Title I of the ADA requires an employer to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, except when such accommodation would cause an undue hardship. Although the ADAAA did not alter the definition of “reasonable accommodation,” the range of individuals entitled to a reasonable accommodation has increased due to the changes discussed above. Thus, employers should brace themselves for an increase in accommodation requests in light of the enactment of the ADAAA. No longer will ADA cases turn on whether the employee’s impairment meets the definition of “disability” – instead, the focus of ADA litigation has now become whether the employer reasonably accommodated the disability, or otherwise discriminated against the employee.

This section will focus on policies and procedures that may be helpful in addressing reasonable accommodation issues, how to recognize and handle accommodation requests, what types of accommodation might be considered reasonable and what types may not. For a more detailed refresher, the *EEOC’s Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* can be found at <http://eeoc.gov/policy/docs/accommodation.html>.

A. Defining reasonable accommodation.

Under the ADA, reasonable accommodations include “[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position.” Such accommodations must be both reasonable and effective. A modification is “reasonable” if it appears reasonable on its face, which means that the accommodation seems feasible or plausible. An accommodation is “effective” if it meets the needs of the disabled individual to remove a workplace barrier and provides the individual with an equal opportunity to perform the essential functions of a position. It is important to note, however, that once an employer provides an accommodation that is reasonable, the employee cannot reject it and demand the employer provide a preferred accommodation.

B. Consider adopting policies and procedures for addressing reasonable accommodation requests.

The ADAAA does not require employers to adopt reasonable accommodation policies and procedures. There are, however, a number of reasons to consider adopting a formal policy. First, it will help guide managers and HR professionals when they are faced with a request for a reasonable accommodation or a situation where an accommodation, although not requested, should be considered. This will help ensure that reasonable accommodations are considered in a uniform way consistent with the statute. Second, a policy will help employees know what to expect if they request an accommodation. Third, following the policy and documenting the

employer's efforts to provide a reasonable accommodation will create evidence supporting the employer's defense of an ADA claim.

The Job Accommodation Network ("JAN") is a free service of the U.S. Department of Labor's Office of Disability Employment Policy. JAN has a sample of accommodation policies on its website at <http://askj.jan.org/links/adapolicies.html>.

C. Identifying a reasonable accommodation request.

Given the complicated statutory definition, especially now under the new ADA, an employee's disability may not be obvious to his or her employer. As a general rule, the employee who has the most knowledge about the need for reasonable accommodation must inform the employer that an accommodation is needed. However, the employer should initiate the reasonable accommodation interactive process without being asked if the employee's known disability appears to limit his or her performance of essential job functions.

The EEOC makes it clear that an employee need not mention the ADA or use the magic phrase "reasonable accommodation." Thus, when an employee indicates he or she is having a work-related problem related to a medical condition, a prudent employer should consider whether the employee is making a request for a reasonable accommodation under the ADA. The EEOC gives examples. Example A: An employee tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of medical treatments I'm undergoing." This is a request for a reasonable accommodation. Example B: An employee tells his supervisor, "I need six weeks off to get treatment for a back problem." This is a request for a reasonable accommodation. Example C: An employee who uses a wheelchair, informs the employer that her wheelchair cannot fit under the desk. This is a request for reasonable accommodation.

D. What the employer should do after receiving an accommodation request.

According to the EEOC, the employer and the individual with the disability should engage in an "interactive process" which is an informal process to clarify what the individual needs and identify an appropriate reasonable accommodation that will allow the individual to perform the essential functions of the job. During the interactive process, the employer may ask the employee relevant questions to enable it to make an informed decision about the request. This includes what type of reasonable accommodation is being sought. In many instances both the disability and the type of accommodation required will be obvious, so there may be no need for extensive discussion. In other cases, the employer may have to ask questions about the nature of the disability and the individual's functional limitations in order to identify an effective accommodation.

Under the ADA, the employer may request medical information in response to an accommodation request. The medical inquiry must be limited in scope to address the request. The employer may require the employee to provide medical documentation to: (1) establish the disability; (2) show that the employee needs the requested accommodation; and (3) to help determine effective accommodation options.

The interactive process is a “problem solving approach” used to identify tasks or job functions that limit performance and to identify accommodation(s) that remove barriers to job performance. Engaging in a good faith interactive process is important for employers because it may serve as an affirmative defense to a disability claim.

The interactive process should include several steps. First, the employer should analyze the particular job involved to determine its purpose and essential functions. Second, the employer and the individual with the disability should work together to identify what barriers exist to that individual’s performance of a particular job function. Third, the employer, working with the individual with a disability, should identify a range of possible accommodations that have the potential to remove the difficulties, either in the work environment or job tasks, and which would allow the individual to perform the essential functions of the job. Fourth, having identified various possible accommodations, the employer should assess the effectiveness of each accommodation to determine whether the various accommodations would pose an undue hardship upon the employer. The employer is then free to select the accommodation it prefers, provided it is effective in addressing the barriers preventing the employee from performing the job.

E. Interactive process ≠ reasonable accommodation.

The Seventh Circuit stressed the importance of reasonable accommodation in its opinion in *Ekstrand v. School District of Somerset*, 583 F.3d 972 (7th Cir. 2009). Ms. Ekstrand taught first grade and kindergarten (successfully for 5 years) until she was assigned a classroom with no windows. Ms. Ekstrand has “seasonal affective disorder” (a form of depression) and natural light helps alleviate the symptoms; artificial light, in turn, causes her difficulty. Before the 2005-06 school year, Ekstrand asked (repeatedly) for a “natural light” room. There were two rooms available (one teacher was willing to move and the other vacant one was being held anticipating that the school might add another third grade class). The School District worked with Ekstrand a good bit, but did not move her to an outside room.

Ekstrand’s symptoms (fatigue, anxiety, hypervigilance, tearfulness, racing thoughts, and trouble organizing tasks) increased after the school year began. She sought medical attention, and continued to press for an outside room. After going on medical leave, she presented the school with a note from her physician which explained that it was important for individuals who had seasonal affective disorder to have natural light and that the current episode of depression was likely caused by being in the windowless room. Ms. Ekstrand was never moved into a room with natural light and she eventually quit.

At argument (the lower court had dismissed the case), the Seventh Circuit wanted to know why the school did not move Ms. Ekstrand to the classroom with natural light. The judges pressed the School District to explain what it would have cost them to move her. The School District's counsel didn't (and wouldn't) say, preferring instead to focus on what the School District had done for her instead. The court, however, viewed the School District as arguing that the "interactive process" means the "when we get around to it" process. The move, it turns out, would have cost nothing, and the disruption would have been minimal (recall that at least one

teacher was willing to trade classrooms). So why, the court wanted to know, did the School District not agree to it?

The bottom line message this decision sends is that it is a mistake to equate the "interactive process" with a "reasonable accommodation." The interactive process is not an end result; it is a means to an end. The interactive process would have allowed the school to have proposed other "less expensive" accommodation "so long as it is sufficient to meet the job-related needs of the individual being accommodated."

The School District thought its initial efforts met this requirement but it turns out their "good faith" steps (as even the court described them) fell short of the ultimate mandate. They were not, after all, effective in alleviating Ekstrand's condition and, when she presented the medical explanation, the School District backed itself into the corner of trying to explain how some other effective accommodation would be "less expensive" than an accommodation that doesn't cost anything to begin with.

One other important point concerns the court's holding about *when* the accommodation should have been made. The court didn't hold that the School District should have immediately moved the teacher upon her initial (before the school year) request. Instead, because the accommodation she requested wasn't "so widely known as a necessary treatment for seasonal affective disorder that it should have been obvious to the school district," the court held the School District acted reasonably in not moving her until she submitted the physician's note. The EEOC's Appendix to § 1630.9 permits the employer to require documentation "when the need for an accommodation is not obvious" and the court held "an employer may not be obligated to provide a specifically requested modest accommodation unless the employer is made aware of its medical necessity to the employee."

But, once Ekstrand submitted the physician's note, "the school district was obligated to provide Ekstrand's specifically requested, medically necessary accommodation unless it 'would impose an undue hardship' on the school district." Similarly, the EEOC emphasizes that when a request is made the employer should act promptly to provide the reasonable accommodation" or at least engage in the interactive process "as quickly as possible." The simpler the requested accommodation the quicker the employer will be required to provide it.

F. Essential job requirements.

In order to effectively identify reasonable accommodations, it is important that employers revisit employee job descriptions to ensure that the stated essential functions are consistent with actual practice. It is important to ensure that, in practice, the job actually requires the employee to perform up to the standards listed in the requirements. This can be done by communicating with supervisors who are familiar with the day-to-day responsibilities of the job.

If an individual cannot perform an essential job requirement with or without reasonable accommodation, then he or she would not be considered a qualified individual with a disability pursuant to the ADA. For instance, in *Alexander v. Northland Inn*, 321 F.3d 723 (8th Cir. 2003), a housekeeping supervisor who could not perform the essential function of vacuuming was held

not to be a qualified individual with a disability under the ADA. In this case, prior to beginning her employment, the plaintiff was involved in a car accident that exacerbated prior neck and back injuries and caused her chronic pain. After initially performing her vacuuming duties, the plaintiff presented her manager with a physician's note listing permanent work restrictions, including restrictions on repetitive lifting, pushing, pulling, and bending. The employer then provided the physician with a written job description and requested that the physician confirm whether the employee could perform the essential functions of the job, including vacuuming. When the physician responded that the employee could not do any vacuuming, the employer terminated her employment. In upholding summary judgment for the employer, the Eighth Circuit noted that testimony of other housekeeping supervisors supported the employer's position that vacuuming was an essential function of the job. Accordingly, because the employee was permanently restricted in performing her vacuuming duties, and because the employer was under no obligation to reallocate the essential functions of the job, the employee could not establish the existence of a reasonable accommodation.

The employer in this case was able to prevail because it had a detailed written job description and was able to provide testimony that supported the essential functions set forth in that description. The employer could, thus, reject any proposed accommodation that relieved the employee of one of the essential functions of her position. As the Fourth Circuit has noted, "[t]he ADA . . . does not require an employer to hire an additional person to perform an essential function of a disabled employees position." *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683, 687 (4th Cir. 1997).

G. Reasonable accommodation options.

The following are among the reasonable accommodation options the EEOC requires employers to consider:

1. Making existing facilities readily accessible;
2. Acquiring new equipment or modifying existing equipment;
3. Job restructuring;
4. Changing the work schedule;
5. Reassigning a disabled employee to a vacant position because he or she can no longer perform the essential functions of their current position.
6. Changing tests and training materials;
7. Changing company policies or creating an exception to company policies;
8. Permitting use of accrued paid leave or providing additional unpaid leave;
9. Providing reserve parking spaces.

H. The employer may choose an effective accommodation from many various options.

According to the EEOC, employers may choose among the effective reasonable accommodation options. If more than one accommodation would be effective, the employer may select one of the options and is not bound to provide the employee with the employee's preferred option.

I. Accommodations that are unreasonable

The ADA does have a limit on what an employer must do to reasonably accommodate an individual's disability – it need not provide any reasonable accommodation that causes **undue hardship**, meaning significant difficulty or expense. Undue hardship refers not only to financial difficulty, but also to reasonable accommodations that are unduly extensive or disruptive, or those that would fundamentally alter the nature or operation of the business.

Every request for reasonable accommodation should be evaluated separately to determine if it would impose an undue hardship, taking into account:

- The nature and cost of the accommodation needed,
- The overall financial resources of the business; the number of persons employed by the business; and the effect on expenses and resources of the business;
- The impact of the accommodation on the business.

If cost is an issue, an employer should determine whether funding is available from an outside source, such as a state rehabilitation agency, to pay for all or part of the accommodation. In addition, the employer should determine whether it is eligible for certain tax credits or deductions to offset the cost of the accommodation. Also, to the extent that a portion of the cost of an accommodation causes undue hardship, the employer should ask the individual with a disability if s/he will pay the difference.

Keep in mind that an employer cannot claim undue hardship based on employees' (or customers') fears or prejudices, or because providing a reasonable accommodation might have a negative impact on employee morale. Employers, however, may claim undue hardship where a reasonable accommodation would be unduly disruptive to other employees' ability to work.

Reasonable accommodation also does not include providing personal need items such as eyeglasses, hearing aids or mobility aids. Providing these type of accommodations is not prohibited – they are just not required.

J. Job restructuring.

Job restructuring is one of the primary forms of reasonable accommodation required by the EEOC. This includes modifications such as: reallocating or redistributing marginal job functions, altering when and/or how an essential or marginal function is performed. Employers do not have to reallocate or remove essential job functions.

If an employer eliminates marginal functions as part of the job restructuring, the employer may add other marginal functions that the employee can perform.

K. Leave

Permitting the use of accrued paid leave or unpaid leave is another significant form of reasonable accommodation. An employee with a disability may need leave for a number of reasons including obtaining medical treatment, rehabilitation services, physical or occupational therapy, recuperating from an illness or episodic manifestation of the disability, and so forth. An employer has a duty to hold open the employee's job as a reasonable accommodation unless the employer can demonstrate that it is an undue hardship.

Under the ADA, an employee who needs leave related to his/her disability is entitled to such leave if there is no other effective accommodation and the leave will not cause an undue hardship. The employer must require the employee to use available paid leave first, but, if that is insufficient to cover the entire period, then the employer should grant unpaid leave. When the employee is ready to return to work, the employer must allow the individual to return to the same position (assuming there was not undue hardship in holding it open) if the employee is still qualified (i.e. the employee can perform the essential functions of the position with or without reasonable accommodation).

L. Reassignment to vacant position.

The ADA specifically lists "reassignment to a vacant position" as a form of reasonable accommodation. This type of accommodation must be provided to employees who, because of a disability, can no longer perform the essential functions of his/her current position, with or without reasonable accommodation unless the employer can show it is an undue hardship. Note that the position must be *vacant*. An employer has *no duty* to create a new position. Also the employee must be qualified for the position, although the employee need not be the best qualified. There is also no duty on the employer to train the employee to acquire the necessary skills to become qualified. However, the employer must give the disabled individual any training that is normally given to anyone hired into the position.

IV. RECENT DEVELOPMENTS.

A. At the EEOC – Leave Wars.

As discussed above, the Commission issued regulations last March that implemented the revised definition of disability adopted by Congress in the ADAAA. The final rule did not

contain any changes to old regulations regarding “reasonable accommodation” except a note specifying that accommodations may be required for persons with a “record of disability” but are not available to those claiming they were “regarded as” disabled. As a result, EEOC suggests that ADA claimants not seeking reasonable accommodation proceed under the “regarded as” prong.

More newsworthy, however, was the Commission’s meeting held last June 8 where it heard varied views on the Americans with Disabilities Act’s requirements for leave as a reasonable accommodation. In a public meeting, the Commission heard testimony from EEOC staff attorneys, lawyers representing employers, and advocates for persons with disabilities. The private practitioners urged EEOC to consolidate and update its existing written guidances regarding leave, reasonable accommodation and undue hardship under the ADA, and the ADA’s interplay with the Family and Medical Leave Act.

The meeting particularly focused on employer leave policies that require individuals with disabilities to return to work once their leave is exhausted, or else lose their jobs. Within the past two years, EEOC has settled ADA class actions against Sears for \$6.2 million, the SuperValu supermarket chain for \$3.2 million and Verizon for \$20 million, resolving claims that the employers violated the ADA by allegedly requiring automatic termination of disabled workers who were not ready to return when their approved leaves expired. The consent decrees also required those employers to notify employees on disability leaves that their leave is about to expire and inform those workers about their options to request a leave extension or transfers to jobs consistent with their medical restrictions.

The EEOC’s position has been and remains that under the ADA, employers may need to provide leave in excess of that required by the FMLA. When an employee is entitled to leave under both laws, EEOC says the statute granting greater protection should apply. EEOC’s technical assistance documents under the ADA state that an employer may have to provide leave as an accommodation even when there is no fixed date of return, but those documents do not require an employer to provide leave when there is “no possibility” the disabled employee can return to work. Further, an “inflexible period” of disability leave is insufficient to satisfy the ADA ; “appropriate leave” under the ADA requires an individualized assessment even when the employer appears to provide generous leave; separating an employer’s leave administration function (sometimes outsourced to a third-party administrator) from its ADA decision maker is “very risky” for employers; “clear lines of communication” between employers and employees regarding reasonable accommodation are critical; and EEOC has a “major role” in litigating these ADA systemic cases because of the resources required.

Employers have defended “no-fault” attendance policies on the basis that it is very difficult for even large employers to deal with unplanned employee absences. In many cases, an absent employee’s work either does not get done or is performed in a less productive manner. Several courts have rejected the EEOC’s position that indefinite leave may be a reasonable accommodation in some situations.

At the end of the meeting, the Commission suggested that it might update its ADA guidance regarding leave where it believes there are wide areas of agreement regarding leave as a reasonable accommodation and the requirement for individualized assessments.

B. At the OFCCP – A New Disability Goal for Contractors.

On December 9 of last year, the OFCCP announced its utilization goal proposal in a notice of proposed rulemaking published Dec. 9 in the *Federal Register* (236 DLR AA-1, 12/8/11). The NPRM would revise the agency's regulations at 41 C.F.R. Part 60-741, which implement Section 503 of the Rehabilitation Act. In the NPRM, OFCCP proposed a 7 percent national utilization goal for individuals with disabilities in each job group in a contractor's workforce. Contractors already would have established these job groups under Executive Order 11246's affirmative action and nondiscrimination requirements, which pertain to women and minorities.

The OFCCP has stated that the 7 percent goal is to be aspirational – it is not meant to support a finding of discrimination if it is not met. However, such failure potentially could mean that a contractor should perhaps refine its outreach and recruitment strategies for disabled individuals or examine its hiring processes. The 7 percent goal is based on the percentage of disabled individuals estimated to be in the workforce by the Census Bureau's American Community Survey. Recent Bureau of Labor Statistics data show that approximately 79 percent of individuals with disabilities are outside the labor force, compared to about 30 percent of individuals without disabilities. The OFCCP's proposal also considers the option of establishing, within the 7 percent goal, various “sub-goals” for certain “targeted” disabilities, similar to those in Executive Order 13548 issued by President Obama in July 2010 pertaining to federal hiring of persons with disabilities, including deafness, blindness, and missing extremities.

Additionally, the OFCCP plans to conform the Section 503 rules to the Equal Employment Opportunity Commission's final regulations implementing the ADA Amendments. Some current requirements will be made mandatory. For instance, the NPRM would require contractors to review on at least an annual basis the personnel processes listed in Appendix C of the current Section 503 regulations. The processes include identifying each vacancy, promotion, or training program for which a disabled applicant or employee was considered; preparing statements explaining the reasons for rejecting a disabled individual for a position, promotion or training program; and making a record that describes any accommodations considered. Additionally, the proposed rule would require contractors to annually review all physical and mental job qualification standards to ensure they are job-related and consistent with business necessity in the event that they screen out disabled individuals, she said. Contractors would have to document the results of each of the annual reviews and any actions taken in response to problems or deficiencies uncovered by the reviews.

The NPRM also envisions a requirement for contractors to invite applicants to voluntarily self-identify as disabled at both the pre-offer and post-offer stages of the hiring process. While of course the ADA generally prohibits employers from asking applicants about disabilities prior to making an offer of employment, the OFCCP suggests that the ADA does not prohibit the collection of disability information at the pre-offer stage by a contractor in furtherance of its

Section 503 obligations. Under the same logic, the OFCCP proposal would also require contractors to conduct annual and anonymous disability surveys of its employees.

OFCCP's Section 503 proposal also would introduce mandatory job listing requirements similar to contractor obligations for protected categories of military veterans under the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA). Contractors would be required to list job openings with an appropriate "employment delivery service or one-stop" agency.

The NPRM's proposals would also require contractors to prepare written reasonable accommodation procedures similar to federal sector requirements. These written procedures would be part of a contractor's affirmative action plan. The procedures would include how an employee may request an accommodation, the provision of written confirmation of the request, the time frame for request processing, what medical documentation may be sought, and the basis of accommodation denials in writing. Data collections also would have to be updated annually. For example, the proposed rule would require contractors to submit the total number of applicants, the number of applicants who are individuals with disabilities, and the applicant ratio of known disabled applicants to total applicants. The proposal also would seek the total number of job openings, the number of jobs filled, the number of known individuals with disabilities hired, and the hiring ratio of known disabled individuals to total hires.

C. In the Courts.

As one commentator has observed, because most pre-ADAAA cases centered upon the disability issue, the body of case law delimiting the nature of the duty to accommodate is "chaotic."² While the EEOC has regulations in this area, courts have frequently disagreed with them, so the area is still quite fluid. One thing is clear, as shown below, courts are not granting as many employer motions for summary judgment and, even when granted, some appellate courts are reversing and sending the cases back down for trial.

1. Failure to Engage in Interactive Process.

Stockton v. Northwest Airlines Inc., 804 F.Supp.2d 938 (D. Minn. 2011). Before the reasonableness of a proposed accommodation question is even reached, an employer can lose an ADA case if it does not engage in a good faith interactive dialogue with the disabled employee. Such may have been the case with Northwest Airlines. Plaintiff survived Northwest's motion for summary judgment by presenting evidence that it failed to advise him that the job functions of the position he was offered had changed to the point where he could no longer perform them, its subsequent rejection of his accommodation suggestions, which he developed with the position's prior requirements in mind, and its failure to provide assistance with identifying open positions when he asked for it evinced a lack of good faith on the airline's part in its efforts to help him find accommodations.

Valdez v. McGill, 2012 WL 432635 (10th Cir. 2012). Yet the failure to engage in the interactive process, standing alone, is not a violation of the ADA. In this case, a New Mexico

² Porter, *Martinizing Title I of the Americans with Disabilities Act*, at 1, tentatively published at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2007160. (2012)(cited with permission).

warehouse supervisor with cancer who was terminated after he exhausted available leave under the Family and Medical Leave Act was held not to have an ADA claim based on the employer's failure to extend him additional leave, allow him to work from home, or temporarily assign him to a different job. Among other contentions, Plaintiff, who had exhausted his FMLA leave due to cancer and bronchitis, argued that Defendant could have accommodated him by granting him additional unpaid leave as an accommodation. The court, noting that Plaintiff had been unable to put a definite date on his return to work, rejected this assertion, stating that: "A leave of absence may be a reasonable accommodation as long as the employee's request states the expected duration of the impairment," the court said. "For example, when an employee seeks a leave of absence for treatment and has a good prognosis for recovery, a leave of absence is a reasonable accommodation. Conversely, when the employee seeks leave, but it is uncertain if or when he will be able to return to work, a leave of absence is not a reasonable accommodation." The court also disagreed with the Plaintiff's contention that the Defendant had violated the ADA by not engaging in an interactive process: "[A]n employer is not required to engage an employee in a futile interactive process where, as we have concluded was the case here, no reasonable accommodation was possible."

Wills v. Superior Court of Orange Cnty., 194 Cal.App.4th 312 (Cal. Ct. App. 2011). An employer is not required to accommodate, on a post hoc basis, an employee's violent and threatening behavior caused by her bipolar disorder. The Plaintiff started off badly when after waiting for what she considered an excessive time for her new employee orientation, she angrily told co-employees she would add them to her "Kill Bill" list. Later, she sent threatening e-mail messages and voice mails which concerned co-workers. After the state court/employer terminated her, she appealed her termination by, among other points, asking for a reasonable accommodation for her bipolar disorder. Her claim was rejected both on California's FEHA and the ADA because, as the judge noted: "Wills asked the [OCC] to excuse her misconduct because of her disability, not for an accommodation to enable her to perform her job....The concept of 'reasonable accommodation' does not entail excusing an employee's failure to control a controllable disability or granting an employee a second opportunity to control such a disability in the future."

In a similar vein, *Fahey v. New York*, 2012 WL 413990 (E.D.N.Y. 2012), involved a firefighter who, after testing positive for cocaine, requested re-assignment to a non-safety position, where his post traumatic stress disorder would make him less likely to seek solace through drugs. The court found this unreasonable because what Fahey sought was essentially to receive a penalty for testing positive for cocaine other than his termination.

Gesegnet v. J.B. Hunt Transp. Inc., 2011 WL 2119248 (W.D. Ky. 2011). Timing also defeated a truck driver applicant who left a clinic before his pre-employment drug screen and was thus rejected for employment. Plaintiff, who suffered from bipolar and anxiety disorders, became agitated while waiting in a clinic for his pre-employment drug screen due to his aversion to being in small spaces with others. Potential Hunt tractor trailer drivers must successfully complete orientation, which includes a drug screen. Orientation attendees were informed verbally and in writing that they could not leave the clinic area until they had given a urine sample for the drug screen. Leaving the clinic area prior to completion of the drug screen is considered a refusal and therefore a failure of the drug screen. After Plaintiff left the facility, the

employer called him to advise that his application had been rejected. Plaintiff then advised of his condition, but did not request a specific accommodation. In granting Hunt's motion for summary judgment, the court stated "Reason dictates that a plaintiff must 'have informed his employer of his disability and requested an accommodation prior to the time at which an employer takes adverse actions against a disabled employee.'"

EEOC v. C.R. England Inc., 644 F.3d 1028 (10th Cir. 2011). An employee's request for a reasonable accommodation must mitigate his condition to the request for ADA duties to attach to the employer. In this case, the employee's request for "family time" and then "home time," unrelated to his HIV positive status, did not put the employer on notice that an accommodation was being requested.

Reilly v. Upper Darby Twp., 809 F.Supp.2d 368 (E.D. Pa. 2011). Plaintiff, with a progressive degenerative neurological disease, had worked as a patrolman for ten years before his condition started causing him physical difficulties. After he was placed on a leave, he sent in a written request for a reasonable accommodation, specifying several alternative jobs he might fill. The Township failed to respond to his letter. Instead, it terminated his employment on the basis that his physical condition would not permit him to perform the essential functions of his position. In his ADA claim, the trial court denied the Town's motion for summary judgment because there were disputed issues such as whether the employer had engaged in a good faith interactive dialogue with Reilly and whether granting his requests would pose an undue hardship on the town.

2. Job Re-Assignment.

Haynes v. AT&T Mobility LLC, 2011 WL 532218 (M.D. Pa. 2011). What are the limits of an employer's obligation to offer a new job to a disabled individual whose impairment prevents him from performing the essential functions of his old job? Plaintiff, a call center worker for AT&T, was diagnosed with acute stress. His physician recommended that he be placed in a less stressful position where he would not be exposed to high call volumes and frequent performance reviews. After AT&T management concluded that accommodating those conditions would alter the essential functions of his job, the Company placed him on a paid leave wherein he could seek alternative employment within its workforce. Plaintiff applied for several positions, but received no offers. In his ADA claim, Plaintiff argued that AT&T failed to reasonably accommodate his disability by not assigning him to one of the positions to which he applied. AT&T asserted that requiring it to do that would constitute an "undue hardship" due to its policy of hiring only the "best qualified" applicant. The district court, in granting AT&T's motion for summary judgment, agreed that an accommodation requiring an employer not to hire its best candidates might not be reasonable, but dodged the concept by finding that the Plaintiff had not shown he could perform the essential functions of the jobs he had applied for, with or without accommodation.

Fink v. Richmond, U.S., 131 S.Ct. 2456 (U.S. 2011). Courts continue to hold that an employee need not be provided his or her favored accommodation. Plaintiff, a teacher had her esophagus surgically removed in June 2006 after diagnosis of a disease indicating cancer. After a recovery period lasting several months, Fink asked that she be placed in an art teacher position,

so she would have a “fixed classroom” to accommodate her post-surgery limitations, which included the need to take frequent bathroom breaks and to eat several small meals during working hours. Determining that there were better qualified applicants for the two such teaching jobs available, the school district instead assigned Fink to a substitute teacher's role in which she had no fixed classroom, but were close to bathrooms, allowed her to eat during instructional periods, and excused her from physically intensive duties. After the Fourth Circuit affirmed the district court’s grant of summary judgment, the Supreme Court denied certiorari last May.

Day v. Morgan, 2011 WL 3418521 (D.S.C. 2011). It is nice to know that promotion is not a required job re-assignment under the ADA. Plaintiff was a school custodian who suffered from various injuries that caused him difficulty with lifting, pushing, pulling, bending, stooping, squatting, and walking. While he was eventually terminated for performance issues, he sought several accommodations, including light duty (which the school did not provide), a golf cart, a lawn mower, re-assignment of some of his duties to co-employees and a promotion to head custodian which would be less physically tasking. After termination for poor performance, Plaintiff filed an ADA suit, alleging a failure to reasonably accommodate, among other claims. In granting the motion for summary judgment, the district court, noting that the Plaintiff could not perform his own job, stated: “[A]n employer is not required to promote an employee to satisfy the requirements of the ADA.”

Nixon-Tinkelman v. New York City Dep't of Health & Mental Hygiene, 434 Fed.Appx. 17 (2d Cir. 2011). Here is another case where an appellate court reversed a lower court’s grant of summary judgment. Plaintiff, who is hearing-impaired and has cancer, heart problems, and asthma, had worked for many years in Queens without difficulty, but after her transfer to a Manhattan office, had commuting difficulties. She requested an accommodation but was denied. The trial court granted the employer’s motion for summary judgment on the basis “commuting falls outside the scope of plaintiff's job, and is thereby not within the province of an employer's obligation under the ADA.” But the 2nd Circuit reversed, finding that since the Plaintiff had worked for many years in a more suitable location, the district court should have considered whether defendants could have reasonably accommodated her needs simply by transferring her back to Queens or another closer location, allowing her to work from home, or providing a car or parking permit.”

Jakubowski v. Christ Hosp., 131 S.Ct. 3071 (U.S. 2011). Plaintiff, a resident in family practice, was to be terminated for his inability to communicate and interact with patients just before he was diagnosed with Asperger’s Syndrome. He then sought a reasonable accommodation that would educate his co-workers about his condition, but did not address the underlying communications issue. The hospital responded that it was without the resources to meet his request, but offered to assist him to transfer to another practice area where patient communication was not essential, such as pathology. He refused to consider another practice. After he was terminated, his ADA claim was dismissed via summary judgment on the basis that communication with patients was an essential function of his position. The Sixth Circuit affirmed, holding that Jakubowski failed because his proposed accommodation for “knowledge and understanding” from hospital physicians and staff “did not address how this accommodation would improve his communication and interaction with patients.” The Supreme

Court denied review over Plaintiff's contention that the employer should have engaged more in the interactive process before terminating him.

Miller v. Ill. Dep't of Transp., 643 F.3d 190 (7th Cir. 2011). Whether a particular job function is essential, such that an employer may not be required to modify it as a reasonable accommodation, is a question for a court. Plaintiff, who suffered acrophobia, worked as a highway maintainer on a state bridge crew, who often worked on bridges crossing rivers. Miller requested that he not perform work more than 25 feet in the air, by swapping duties with other co-workers. Upon learning about Miller's formal diagnosis, his employer immediately prevented him from performing any bridge crew duties, including ones that could be conducted from the ground, and placed him on non-occupational disability status. The Seventh Circuit, reversing a grant of summary judgment for the employer, found that a reasonable jury could find that performing work above 25 feet in an exposed position is not an essential function of a bridge crew highway maintainer, and that Miller's denied accommodation request, which involved IDOT substituting him with other team members on tasks requiring work at such heights, was reasonable given that his crew already had a history of swapping tasks among members based on their strengths and limitations. While acknowledging that for the crew to function, some members would have to work at heights over 25 feet, such a conclusion "does not mean that the fact-finder would be required to conclude that *each* member of the bridge crew had to be able to do *every* task required of the entire team." Further, it was shown that it was normal for individual members of the bridge crew to substitute and reassign tasks among themselves according to individual abilities, preferences, and limitations.

EEOC v. AutoZone Inc., C.D. Ill., No. 07 C 1154, *jury verdict* 6/3/11. Losing the argument about whether a job function is essential can be costly. Last June, a jury in Peoria, Ill. returned a \$600,000 verdict for the EEOC against AutoZone Inc. for failing to reasonably accommodate an auto parts sales manager with permanent back and neck impairments. The manager of one of AutoZones' stores had requested that he be excused from mopping floors, which caused his conditions to worsen and forced him to take medical leave. AutoZone kept him on involuntary leave past the time he was able to return to work, and ultimately fired him in February 2005. The EEOC contended and the jury agreed that mopping floors was a nonessential function of the sales manager job that violated Shepherd's medical restrictions and could have been assigned to other employees.

3. Acquiring new or modifying existing equipment.

Soliday v. 7-Eleven Inc., M.D. Fla., No. 2:09-cv-00807, *jury verdict* 6/23/11. Sometimes, the failure to accommodate manifests itself with changes an employer makes that eliminate the disabled employee's ability to perform the essential functions of the job. In this case, a hearing impaired district store manager for 7-11 for twenty-six years had been able to perform his duties with the assistance of equipment, such as a facsimile machine and a text pager, previously provided by the Company. But when a new Marketing Manager came in, he refused to replace old fax machines and eliminated text pagers. He also began conducting frequent management meetings via telephone conference calls. Apparently, Soliday's performance suffered and he was terminated for poor performance. After the trial of his ADA claim, the jury awarded him \$934,000, finding that the company would not reasonably accommodate his disability.

4. Re-Scheduling.

Valle-Arce v. Puerto Rico Ports Auth., 651 F.3d 190 (1st Cir. 2011). This is another case where the “new broom” supervisor may have gotten the employer in trouble. Plaintiff, a former Puerto Rico Ports Authority human resources employee with chronic fatigue syndrome was terminated allegedly for absenteeism by her supervisor who allegedly failed to follow the previous schedule accommodations the employer had allowed in the past. Hired in 1990 to work in the ports authority's human resources department, Valle was diagnosed in 2000 with chronic fatigue syndrome with symptoms including insomnia that usually prevented Valle from sleeping more than four hours a night. For about two years, Valle worked a flexible schedule allowing her to arrive later in the morning as long as she completed 37.5 work hours a week or made up for any shortfall with vacation or sick leave. However, upon the arrival of a new supervisor, Plaintiff was held to a different standard, culminating in her termination. While the trial court granted the employer’s motion for summary judgment on the basis that “attendance is an essential function of the job,” the First Circuit reversed, holding that there were disputed issues of fact that a jury should decide.

Griffin v. United Parcel Serv. Inc., 661 F.3d 216 (5th Cir. 2011). While re-scheduling may be a reasonable accommodation in some instances, it must be shown to be related to the Plaintiff’s ability to perform the essential functions of the job. Herein, Plaintiff, a “Twilight Hub Manger,” was diagnosed with Type II diabetes and then sought a transfer from his night shift back to the day shift. When his request was denied, he brought an ADA claim. The Fifth Circuit affirmed the district court’s entry of summary judgment on the basis, among others, that the Plaintiff had not shown that working at either the day or night shifts would pertain to the control of his diabetes.

EEOC v. AT&T Mobility Servs. LLC, 2011 WL 6309449 (E.D. Mich. 2011). Plaintiff worked as a store manager at an AT&T retail store, averaging 55-60 hours per week. After finding out she had multiple sclerosis, her physician advised her to limit her working to 40 hours per week. Plaintiff tried on two separate periods to meet the Company’s expectation, each time the period ended in a short term disability leave due to the exacerbation of her MS symptoms. Throughout this period, AT&T maintained that working the 55 to 60 hours per week was an essential function of the store manager position. Finally, when Plaintiff’s physician advised again that she was limited to 40 hours, AT&T placed her on a 30-day paid leave, during which time she could look for an open position within AT&T that she might be able to fill. When she was unable to find a suitable position within that period, she was terminated. The EEOC brought suit on her behalf, but the court granted AT&T’s motion for summary judgment on the basis that the law is clear that an accommodation that eliminates an essential function of a job is unreasonable.

Note: A recent decision of the Fourth Circuit held that the inability to work overtime (more than 40 hours in a week) does not constitute a disability under the ADA, even after the ADAAA. *Boitnott v. Corning Incorporated*, 2012 WL 414662 (4th Cir. 2012).

5. Leave.

Ousley v. New Beginnings C-Star Inc., 2011 WL 4899950 (E.D. Mo. 2011). Despite the EEOC's position on leave, courts continue to rule against employees who request indefinite leave as a reasonable accommodation. In this case, Plaintiff, a substance abuse counselor with knee impairments, sought indefinite leave and a replacement worker to perform his regular job duties. After Plaintiff exhausted his leave rights, he was terminated. In granting the defendant's motion for summary judgment, the district court held that such a request is unreasonable because it would unduly burden the employer to pay both Ousley and a replacement worker for "an indefinite period of time." However, the court did note that had the Plaintiff presented a "more definite and immediate" return date, it would be more likely his request for additional leave might have been reasonable.

6. Job Restructuring.

Braheny v. Commonwealth, 2012 WL 176186 (E.D. Pa. 2012). Plaintiff, a guard in a corrections institution, was diagnosed with a gastrointestinal condition requiring him to be near a bathroom. His employer, the State of Pennsylvania, contended that correctional officers needed to be able to work at any location at any time and denied his requested accommodation. Eventually, due to excessive absenteeism, caused by his condition, Plaintiff was terminated. In response to his ADA suit, Pennsylvania sought summary judgment – arguing that his request for a specific site work location would alter the essential functions of the position. But the court denied the motion on the basis that evidence showed that Pennsylvania had allowed officers to work specific locations when returning from disability leaves and that the ability to work anywhere and anytime really only applied to emergency situations. In a telling manner, the court announced to employers everywhere that an employer's judgment as to which functions are essential is but one piece of evidence to be considered by a trier of fact and alone is not determinative. There was also evidence that the prison had not engaged in a good faith interactive dialogue with the Plaintiff in an effort to reach an accommodation.

Muzyka v. Regions Bank, 2012 WL 243575 (M.D. Fla. 2012). In yet another case where summary judgment was denied, a personal banker with bipolar disorder was terminated after he failed to timely meet the bank's requirements for reporting on his account development activities. The Plaintiff apparently met the bank's sales goals, but had difficulty in timely completing the reporting forms. He attested that his condition's effects included confusion, "racing thoughts," difficulty concentrating at times, and difficulty sleeping. The bank rejected Muzyka's request for flexibility with respect to the deadline for submitting weekly sales activity reports, saying the deadline was "company-wide," and the reports were "very important to forecasting and planning." Citing conflicting evidence as to just what were important performance criteria, the trial judge denied the bank's motion for summary judgment,

Johnson v. Board of Trs. of Boundary Cnty. Sch. Dist. No. 101, 666 F.3d 561 (9th Cir. 2011). While altering marginal functions of a job might be required as a reasonable accommodation, an employer need not change a qualification job standard that the applicant or employee fails to meet as a result of his or her disability. An Idaho special education teacher with a history of depression and bipolar disorder could not show the school district failed to

accommodate her disability by declining to seek provisional state authorization for her to continue teaching without appropriate certification, as she was thus not a “qualified individual” under the ADA.

EEOC v. The Picture People, 684 F.3d 981 (10th Cir. 2012). The Plaintiff was profoundly deaf and communicated largely by pointing, writing notes, and gesturing. During peak periods, the job at issue was split into four separate tasks which were performed by multiple employees. Plaintiff was able to effectively perform one of the tasks, but was not able to effectively perform the others. Following the peak period, all four tasks must be performed by a single employee. Plaintiff was terminated after the peak period because the Company could not rely on the Plaintiff to effectively perform all the tasks. The court held that effective verbal skills were an essential function of the performer position and that the evidence supported that Plaintiff could not effectively perform that essential function. Not only was Plaintiff not qualified to do the job, but there were also a number of other reasons (refusing breaks, coloring while on the clock, etc.) for Plaintiff’s termination.

7. Commute.

Regan v. Faurecia Automotive Seating, Inc., 2012 U.S. Dist. LEXIS 9470 (6th Cir., May 10, 2012). The Plaintiff had narcolepsy and testified that she had an increased risk of falling asleep behind the wheel when she drove in heavier traffic, and her physician sent a note stating that it was best to minimize her drive time and that a work schedule of 6 a.m. to 3 p.m. was best. This was in the wake of the Company’s decision to change the entire department’s work hours to 7 a.m. to 4:00 p.m. for productivity purposes. The 6th Circuit disagreed that it was a reasonable accommodation to allow the Plaintiff to keep the old schedule of 6 a.m. to 3 p.m. since the commute would be easier during that time. “Although an employer is required to make reasonable accommodations to eliminate barriers for a disabled employee in the workplace, the employer is not required to eliminate barriers outside the workplace that make it more difficult for the employee to get to and from work.”

V. TIPS.

1. Consider adopting policies for addressing reasonable accommodation requests.
2. Document all requests for reasonable accommodations.
3. Ask for medical documentation documenting the need for the accommodation.
4. Once an accommodation is made, be very leery of removing or modifying it.
5. Train and notify new supervisors regarding pre-existing reasonable accommodations.
6. Keep all matters regarding the accommodation confidential except for those with a need to know.

7. Consider revising “one size fits all” leave policies - a “red flag” for the EEOC. If you maintain such a policy, be sure to provide notice to employees that their leave is expiring, with information about options. This should include:
 - a. Advice in the policy that the need for further leave to accommodate a disability can be determined on a case-by-case basis upon request by the employee.
 - b. Train those who administer your leave policies to be aware of your ADA obligations.
 - c. Keep communication open with employees out on leave to gather updated medical information, plan for return or need for additional leave and otherwise to build a record that the employer sought to engage in the interactive dialogue.
 - d. Before termination, review alternatives, such as placement on long term disability, additional leave or with a notation that the employee is suitable for re-hire.
8. Create and then periodically review job descriptions setting forth essential functions of your jobs.
9. Always ask for, receive and document suggestions from the disabled employee regarding the appropriate accommodation.
10. Review all disciplinary decisions carefully for those who have requested reasonable accommodation