ADA OPEN ISSUES: TRANSFERS TO VACANT POSITIONS, LEAVES OF ABSENCE, TELECOMMUTING, AND OTHER ACCOMMODATION ISSUES

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The Americans with Disabilities Act (hereinafter "ADA") was enacted in 1991 and amended in 2008.[1] The ADA prohibits discrimination against persons with *disabilities* and requires employers to provide *reasonable* accommodations so disabled workers can perform the *essential* functions of their jobs.[2] Even twenty-five years after the passage of the ADA, there are several significant open issues under the ADA, and employers' understanding of their duties under the ADA is less than perfect.

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[1] Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012).

[2] *Id.* at §§ 12111(9)(B), 12112(a).

The ADA is different from all other discrimination laws, since the other laws merely level the playing field. The employer need only put on blinders and treat all workers the same, irrespective of race, color, sex, age, etc.[3] In contrast, the ADA creates an affirmative duty for employers by requiring employers to provide reasonable accommodations, which can impose significant costs and burdens on employers.[4]

The first open issue—one that has badly split the United States Courts of Appeals—is whether the ADA has an affirmative action requirement. This issue comes up when a person with a disability can no longer perform his or her regular job duties, even with reasonable accommodations, but can perform the duties of a vacant job. The question is whether the disabled worker, who meets the minimum qualifications for a vacant job, is entitled to the vacant job over a more qualified, non-disabled applicant or co-worker.

The second open issue involves unpaid leaves of absence. The Equal Employment Opportunity Commission (hereinafter "EEOC") believes an indefinite leave of absence is a reasonable accommodation,[5] as well as taking a rather liberal view of the importance, or lack thereof, of regular attendance at work. In contrast, the courts have held that regular attendance at work is an essential function of most jobs, and that there is a limit on how long an ADA-required unpaid leave of absence can last.[6] However, the courts have not given any clear guidance as to when enough is enough with respect to unpaid leaves of absences as a reasonable accommodation under the ADA.[7] In the real world, determining when an employer can fill a job that is left open by a disabled person on unpaid leave is

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[3] *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2012); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a) (2012). *But see* Transworld Airline, Inc. v. Hardison, 432 U.S. 63, 84 (1977) (requiring de minimus accommodations for a worker's religion).

[4] 42 U.S.C. §12112(b)(5)(A); *see also* Cehrs v. Alzheimer's Research Ctr., 155 F.3d 775, 781 (6th Cir. 1998) (explaining that the inquiry into the reasonableness of an accommodation involves a benefit-burden analysis).

[5] See Walsh v. United Parcel Serv., 201 F.3d 718 (6th Cir. 2000), in which the Court rejected the EEOC's view.

[6] *Id.* at 727.

[7] *Id.*; *see also* Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1187 (6th Cir. 1996) (holding that it is not a reasonable accommodation to require employers to keep employees on medical leave indefinitely in the hope that a position that they can perform will become available), *abrogated by* Lewis v. Humboldt Acquisition Corp., 681 F.3d 312 (6th Cir. 2012).

very problematic for employers.[8] The answer lies in employers having more patience and being more inventive in dealing with budgeted personnel slots, such as allowing a department to hire a replacement, and then dealing with the disabled worker if and when the disabled worker is able to return to work.[9]

There are also issues about where workers must perform their job duties.[10] Must an employer accommodate problems with an employee's commute to and from work? Many workers can perform their job duties, but medical issues make the commute to and from work problematic.[11] The courts are split on whether employers must accommodate a disabled worker's commuting problems.[12] The courts have struggled with how and when teleworking must be allowed as a reasonable accommodation.[13] Likewise, rearranging work schedules to change when a worker starts and ends the workday and whether they can rearrange their workdays is often an issue.[14]

A corollary question involves defining the essential functions of a job and whether face-to-face interaction with supervisors, co-workers, and customers, at regular work times, is an essential function of the job.[15] There is also an issue of who, the employer or the employee, has the burden of proof.[16] The employer has the initial burden of producing evidence of what the essential functions of a job are, since the employer presumably controls that evidence.[17] That does not

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[8] *See* Smith v. Midland Brake Inc., 180 F.3d 1154, 1174 (10th Cir. 1999) (discussing reassignment of disabled employee previously on medical leave of absence).

[9] *Id.* (discussing interactive obligations to help secure a reassignment position).

[10] *See* Livingston v. Fred Meyer Stores, Inc., 388 F. App'x 738, 740 (9th Cir. 2010) (discussing how employers should accommodate an employee's limitations in getting to and from work).

[11] *See id.* at 739 (discussing visual impairment as affecting plaintiff's ability to drive safely and walk outside after dark).

[12] *Compare id.*, *with* Pagonakis v. Express, LLC, 534 F. Supp. 2d 453, 463 n.11 (D. Del. 2008) ("Employers are not required to grant accommodations to allow an employee to commute to work because the ADA solely addresses discrimination with respect to any 'terms, condition or privilege of employment.'") (quoting Americans with Disabilities Act of 1990, 42 U.S.C. § 12112 (2012)).

[13] *See* Dahlman v. Tenenbaum, No. DKC 10-2993, 2011 WL 3511062, at *14 (D. Md. Aug. 9, 2011) (discussing whether providing teleworking accommodations is an undue burden).

[14] *See id.* at *13.

[15] *See* EEOC v. AT&T Corp., No. 1:12-CV-00402-TWP, 2013 WL 6154563, at *4 (S.D. Ind. Nov. 20, 2013) (discussing whether regular attendance is an essential function of employment).

[16] *See* Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1187 (6th Cir. 1996).

[17] *See Dahlman*, No. DKC 10-2993, 2011 WL 3511062, at *10.

change the fact that on all issues, including determining the essential functions of the job, the worker has the ultimate burden of persuasion.[18]

One bright spot is that the courts do not follow the adage that "no good deed goes unpunished."[19] Thus, if a sympathetic employer allows a disabled worker to not perform certain job functions for a short period of time while the disabled worker recovers from an illness or injury, the courts recognized that it does not mean those functions are not essential to the job.[20] The courts understand that forcing other workers to pick up the slack for a disabled worker may work in the short-term, but that does not mean that solution can be forced on the employer and co-workers in the long-term.[21] The kind act of allowing a disabled worker to not perform certain, essential functions of the job for a short time is beyond what the ADA requires,[22] and thus, that situation cannot be forced on the employer as a reasonable accommodation.[23] A worker must be able to perform the essential functions of the job, and excusing the worker from doing so for a short period of time does not mean the essential functions of the job have changed.[24]

The issue of the safety of the employee and others, the "direct threat" defense, continues to be a difficult issue because it is so fact specific and deals with medical issues for which there are not always easy and clear answers.[25] Certainly courts are not as quick to say a disabled employee can perform the essential duties of his or her job

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[18] *See Monette*, 90 F.3d at 1180.

[19] *See* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1160–64, 1170–78 (10th Cir. 1999) (defining reasonable accommodations and discussing how employers can accommodate disabled employees); *see also* McBride v. BIC Consumer Prods. Mfg. Co., 583 F.3d 92, 99 (2d Cir. 2009) (finding that an employer's failure to engage in an interactive process intended to develop an accommodation suitable to both parties is immaterial).

[20] *See, e.g.*, Benson v. Nw. Airlines, Inc., 62 F.3d 1108, 1114 (8th Cir. 1995) (discussing the requirements of an essential function as it relates to employees); Basith v. Cook Cty., 241 F.3d 919, 929 (7th Cir. 2001) ("[A]n essential function need not encompass the majority of an employee's time, or even a significant quantity of time, to be essential.").

[21] *E.g.*, Bratten v. SSI Servs., Inc., 185 F.3d 625, 632 (6th Cir. 1999); Cochrum v. Old Ben Coal Co., 102 F.3d 908, 912 (7th Cir.1996).

[22] *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(9)(b) (2012).

[23] *See Bratten*, 185 F.3d at 632.

[24] *See* Holbrook v. City of Alpharetta, 112 F.3d 1522, 1527–28 (11th Cir. 1997).

[25] *See* Echazabal v. Chevron USA, Inc., 336 F.3d 1023, 1028 (9th Cir. 2003) (discussing many of the issues that make up the "direct threat" defense).

when it exposes the worker or others to a risk of significant injury.[26] But the courts cannot agree as to what medical evidence is required to determine if there is a safety risk and who bears the burden of proof.[27]

Employees also sometimes forget that they have an obligation to cooperate with their employer in determining whether they have a covered disability and what reasonable accommodations are necessary.[28] An employee cannot ignore an employer's request for medical documentation or an examination by an employer-selected physician.[29] At the end of the day, a disabled worker must be able to demonstrate that he or she can perform the essential functions of his or her job in a reasonably safe manner.[30] Disabled employees also must remember that they are entitled to *an* effective accommodation that allows them to perform their jobs,[31] not necessarily *the* accommodation they prefer, nor are they each entitled to a perfect solution.

While, to some people, these issues may seem abstract, for those in the human resources profession, they are every day real questions and very difficult ones at that.[32] Nevertheless, one can frame the questions, review the arguments on both sides of the employment fence, and

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[26] *See* Jarvis v. Potter, 500 F.3d 1113, 1123 (10th Cir. 2013) (holding that an employee was not a "qualified individual" under the Rehabilitation Act because he posed a threat to the safety of others); Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1248 (9th Cir. 1999) (discussing that safety of other employees is required).

[27] *See* Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996) (finding that the employee retains the burden of persuading the jury that he or she is not a threat to safety). *But see* Branham v. Snow, 392 F.3d 896, 906 (7th Cir. 2004) (addressing the objective standard for medical evidence and employer's burden to show the safety risk).

[28] *See* Felix v. N.Y.C. Transit Auth., 154 F. Supp. 2d 640, 657 (S.D.N.Y. 2001) (discussing the process by which employers and employees find reasonable accommodations); Stola v. Joint Indus. Bd., 889 F. Supp. 133, 135 (S.D.N.Y. 1995) (addressing that it is the employer's obligation to reasonably accommodate the employee for disabilities that are obvious or called to the employer's attention).

[29] *See generally* Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(d)(4)(A) (2012).

[30] *See, e.g.*, Mathews v. Denver Post, 263 F.3d 1164, 1166 (10th Cir. 2001); Phelps v. Optima Health, Inc., 251 F.3d 21, 25 (1st. Cir. 2001).

[31] *See, e.g.*, Brunker v. Schwan's Home Serv., Inc., 583 F.3d 1004, 1009 (7th Cir. 2009) (finding that the employee's "ideal" accommodation is not always necessary if there is a reasonable one); Gile v. United Airlines, Inc., 95 F.3d 492, 499 (7th Cir. 1996) (explaining that employer is not obligated to provide employee's request or preference accommodation).

[32] *See generally* U.S. Comm'n on Civil Rights., Sharing the Dream: Is the ADA Accommodating All? (2000), http://www.usccr.gov/pubs/ada/ch2.htm.

provide some practical guidance on how to handle these problematic situations.

Overview

The issue concerning whether there is a preference for the disabled to be given vacant jobs is the type of question law school moot courts love because there are strong arguments on both sides. The United States Supreme Court will ultimately have to decide the reassignment to a vacant position issue because the courts of appeals are split on the issue.[33] It may come down to whether the court activists prevail and the Supreme Court fills in the uncertainty in the statute, or whether the conservatives prevail—refusing to mandate an outcome which Congress itself did not clearly direct.

On the one hand, it seems hard to believe Congress meant the reassignment to a vacant position accommodation to be a preference right since it did not explicitly so state, and indeed, Congress excluded "bumping rights" with respect to union seniority systems.[34] Congress clearly noted that the ADA was not meant to override seniority systems.[35] On the other hand, if the reasonable accommodation of reassignment is not a preference, then what is it, since, even without the reassignment accommodation right, a disabled employee can always apply for a vacant job?

With respect to leaves of absence, three things seem fairly clear. First, if, after a reasonable healing period, the worker's doctor cannot give a definite, or at least approximate, date for the worker to return to work, then it is a request for an indefinite leave of absence. As a matter of law, such a request is unreasonable. Second, a leave of absence over a year is probably always going to be held unreasonable. A leave of absence over six months is also probably going to be held unreasonable, particularly for smaller employers. Conversely, the employers who believe their obligation to provide a leave of absence ends with the twelve weeks of Family Medical Leave Act (hereinafter "FMLA")[36]

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[33] *Compare* Benson v. Nw. Airlines, Inc., 62 F.3d 1108, 1112 (8th Cir. 1995) (holding that the employer met his burden of providing reassignment or transfer to a position other than a mechanic's position), *with* Barnett v. U.S. Air, Inc., 196 F.3d 979, 990 (9th Cir. 1999) (interpreting the ADA as requiring no more than equality among disabled and nondisabled employees in hiring and reassignment decisions).

[34] U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 405 (2002).

[35] *Id.*

[36] Age Discrimination in Employment Act of 1967, 29 U.S.C. § 2601 (2012).

leave are sadly mistaken. That is when the ADA analysis for unpaid leave as a reasonable accommodation must begin.

While the fashionable trend seems to favor telecommuting, i.e., working at home, some courts in the past have been hesitant to consider telecommuting as a reasonable accommodation, noting that it is the exception rather than the rule.[37] Moreover, almost all courts seem to recognize that few jobs will allow unlimited telecommuting.[38] Thus, if the employer puts forth evidence that face-to-face interaction with supervisors, co-workers, or clients is needed, then the courts will likely consider such in-person duties an essential function of the job and will not require the employer to allow telecommuting or will certainly allow a limit on the amount of telecommuting.

However, as more and more employers voluntarily allow telecommuting, employers must take care when faced with a request for telecommuting. Many courts now are very willing to consider limited telecommuting as a reasonable accommodation.[39] Thus, it will be the rare employer that can justify excluding some amount of telecommuting as a reasonable accommodation. If an employer wants to do so, it better explain in its job description why face-to-face interaction is required. However, courts do recognize that when an employer allows a small amount of telecommuting, it does not mean that a large amount of telecommuting is feasible.[40] Likewise, the courts recognize that not requiring an essential function be performed for a short time period is an act of kindness for an ill or injured employee who is recovering from his or her injury or illness at home, and that this does not mean

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[37] *See, e.g.*, EEOC v. Ford Motor Co., 782 F.3d 753, 761 (6th Cir. 2015); Doak v. Johnson, No. 14-5053, 2015 WL 4910067, at *1 (D.C. Cir. Aug. 18, 2015).

[38] *See, e.g.*, *Ford Motor Co.*, 782 F.3d at 763; Vande Zande v. Wis. Dept. of Admin., 44 F.3d 538, 545 (7th Cir. 1995) ("[A]n employer is not required to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced.").

[39] *See, e.g.*, Humphrey v. Memorial Hosps. Ass'n, 239 F.3d 1128, 1136 (9th Cir. 2001) ("[W]orking at home is a reasonable accommodation when the essential functions of the position can be performed at home and a work-at-home arrangement would not cause undue hardship for the employer."); Bisker v. GGS Info. Servs., Inc., No. 1:CV-07-1465, 2010 WL 2265979, at *3 (M.D. Pa. June 2, 2010) (noting that the plaintiff had "met her burden demonstrating an accommodation that is not facially unreasonable").

[40] *See Vande Zande*, 44 F.3d at 545 (recognizing the employer allowing some work to be done at home in conjunction with medical leave, but adding that the employer "must not be punished for its generosity by being deemed to have conceded the reasonableness of so far-reaching an accommodation").

that face-to-face interaction is no longer an essential function of the job.[41]

An important fact to remember in the interactive process of evaluating requests for reasonable accommodations is that a worker and the worker's doctor must cooperate with the employer's request for information, e.g., for copies of medical records or for the worker to submit to an examination by a physician chosen by the employer.[42] If the employee fails to provide necessary information to the employer for the evaluation of whether the employee is disabled and needs a reasonable accommodation, then the worker will not be entitled to the requested accommodation.[43] Likewise, the disabled employee must show that, even with accommodations, he or she can safely perform the essential functions of the job.[44]

The key to finding practical solutions to reasonable accommodation requests should focus on two main tenets of the ADA: (1) the employee must be able to perform the essential duties of the job; and (2) the employer need only provide an effective accommodation which works, not necessarily the one the worker requests.[45] Thus, employers should focus on determining the true *essential* functions of a job and what effective accommodation will work best for the employer, not necessarily the employee. Of course, the ADA interactive process requires all this be discussed with the employee,[46] and it is a good practice to document all key communications with the employee.

Finally, as for safety issues, the courts have been very understanding regarding an employer's duty to protect the safety of customers, the public, and even the worker himself or herself.[47] Nevertheless, the employer must document the medical information as to the risk of

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[41] *See, e.g.*, Fierce v. Burwell, No. RWT 13-3549, 2015 WL 1505651, at *5 (D. Md. Mar. 31, 2015) (denying plaintiff's claim involving her request to telework because attendance at work was an essential function of her job description); Davis v. Lockheed Martin Operations Support, Inc., 84 F. Supp. 2d 707, 714–15 (D. Md. 2000).

[42] Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(d)(4)(B) (2012).

[43] Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1137 (7th Cir. 1996).

[44] Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1255–56 (11th Cir. 2001).

[45] 42 U.S.C. § 12111(8), (9)(B); *see also* Hardenburg v. Dunham's Athleisure Corp., 963 F. Supp. 2d 693, 700 (E.D. Mich. 2013) (noting that the plaintiff must show that she is "otherwise qualified" and that the employer bears the burden of determining whether a proposed accommodation will impose an undue hardship).

[46] 29 C.F.R. § 1630.2(o)(3) (2015).

[47] 42 U.S.C. § 12113(b); *see also* Rizzo v. Children's World Learning Ctrs., Inc., 84 F.3d 758, 764 (5th Cir. 1996) ("An employee who is a direct threat is not a qualified individual with a disability."); Davis v. Meese, 692 F. Supp. 505, 517 (E.D. Pa. 1988)

injury and not rely on mere conjecture or assumptions.[48] The courts are also split on whether the burden of proof on a safety issue is on the employer or the employee.[49] The key may be whether safety is a key component of the job, e.g., a policeman or fireman, in which case the burden of proof may well be on the employee to prove he or she can safely perform the job.[50]

These issues underlying the ADA are coming more into focus because the coverage of the ADA was greatly expanded with the passage of its 2008 amendments.[51] Now, employees with any chronic condition are covered by the ADA, even if mitigating measures, such as medicine, limit the adverse effects of the condition.[52] Indeed, even a temporary condition can be a protected disability.[53]

Congress passed the 2008 amendments, changing the focus of employers and the courts from deciding whether a condition is a disability to determining what reasonable accommodations are needed to allow disabled workers to perform the essential duties of the job.[54] Congress explicitly stated that the ADA should be liberally interpreted to expand its coverage.[55] As such, plaintiffs' attorneys will be more attracted to ADA claims, and they can be expected to push to resolve these open issues.

Reassignment to a Vacant Job

The courts are divided as to whether the ADA gives a preference to "disabled workers who are no longer able to perform their regular job, even with reasonable accommodations, but who meet the mini-

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(defining a "qualified handicapped person" as someone who does not endanger the safety of others), *aff'd*, 865 F.2d 592 (3d Cir. 1989).

[48] Bragdon v. Abbott, 524 U.S. 624, 649 (1998).

[49] *Compare Rizzo*, 84 F.3d at 259 (holding that "the burden of proof is on the [employee] to prove that, as a qualified individual, she is not a direct threat to herself or others"), *with* Branham v. Snow, 392 F.3d 896, 906 (7th Cir. 2004) (holding that the employer "must prove as a defense that [the employee] is a direct threat").

[50] Coffman v. Indianapolis Fire Dep't, 578 F.3d 559, 566 (7th Cir. 2009) (holding that "this special work environment convinces us that the [Indianapolis Fire] Department's decision to refer [the employee] for fitness for duty evaluations was job-related and consistent with business necessity").

[51] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

[52] *Id.* at 3556.

[53] Summers v. Altarum Inst. Corp., 740 F.3d 325, 327 (4th Cir. 2014).

[54] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

[55] Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(4)(A) (2012).

mum qualifications for a vacant job."[56] The question is simple—who gets a vacant job, the most qualified person or a disabled worker who meets the minimum qualifications for the job and who cannot perform his or her regular job even with reasonable accommodations? The answer, however, is not at all clear, badly dividing the United States Courts of Appeals, and indeed, several of the courts of appeals have reversed themselves on the issue either in en banc decisions, or in one case, one panel declining to follow another panel's earlier decision.[57]

Moreover, "[t]he Courts of Appeals for the District of Columbia, Seventh and Tenth Circuits have held that the minimally qualified disabled worker gets the job, reasoning that otherwise the reasonable accommodation of 'reassignment to a vacant position' is meaningless,"[58] since even without the ADA, a disabled person could always apply for a vacant job.[59]

However, there is disagreement from United States Court of Appeals for the Fifth, Eighth, and Ninth Circuits.[60] They have held that the ADA is not an affirmative action statute, and thus disabled workers are not to be given a preference over other workers.[61] Rather, they are only to be assured a level playing field—to be considered equally with others—no better, no worse.[62]

The problem is that each side has a compelling argument. On the one hand, if the employer need only "consider" a disabled employee for a vacant position and not give a preference, then why even include the reassignment accommodation in the list of reasonable accommodations? Even without explicitly listing it as a reasonable accommodation, employers have to consider all applicants for an open job, even a currently disabled employee.[63] On the other hand, giving a preference over other applicants is different from everything else in the ADA. It

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[56] Camille A. Olson et al., Am. Bar Ass'n, Recent Developments in Reasonable Accommodations Issues 11 (2013), http://www.americanbar.org/content/dam/aba/events/labor_law/2013/04/nat-conf-equal-empl-opp-law/28_olson.authcheckdam.pdf.

[57] *Id.*

[58] *Id.* (quoting 42 U.S.C. § 12111(9)(B)).

[59] See Duvall v. Ga.-Pac. Corp., 607 F.3d 1255, 1263 (10th Cir. 2010) for a Tenth Circuit decision exploring a vacant position without ADA requirements.

[60] *See e.g.*, Huber v. Wal-Mart, 486 F.3d 480, 483 (8th Cir. 2007), *reh'g en banc denied*, 493 F.3d 1002, 1002 (8th Cir. 2007); Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995); Sharpe v. AT&T, 66 F.3d 1045, 1051 (9th Cir. 1995).

[61] Olson et al., *supra* note 56, at 11; *see also Huber*, 486 F.3d at 483.

[62] Olson et al., *supra* note 56, at 11.

[63] *Id.*

seems very odd that Congress would do so without saying that was its intent and providing a discussion in the legislative history.

In resolving this conflict, it would seem three arguments turn the balance of this debate against a preference. First and foremost, the ADA limits the reasonable accommodation of transfer to a vacant position to current employees, and it is not available to disabled applicants.[64] Why would Congress give a preference to a disabled employee over a more qualified person, but not give the same preference to a disabled applicant?

Second, Congress probably put the transfer to a vacant position in the list of reasonable accommodations to not only make sure a disabled employee was at least considered for the job, but to also make sure the disabled employee obtained the job if he was the most qualified applicant or the only applicant.

Finally, Congress explicitly indicated in the legislative history that a disabled employee cannot "bump" someone out of a job, a position even the EEOC has followed.[65] Putting a less qualified disabled employee in a job over a more qualified applicant no doubt has the same feeling of being bumped for the more qualified applicant.

Indeed, Congress also directed that an employer need not violate its collective bargaining agreement in order to accommodate a person with a disability.[66] Thus, in the union setting of a seniority clause, if the choice in deciding who gets a light duty job is between the disabled worker and the employee with more seniority, the senior employee gets the job.

A preference would also be beyond any of the other reasonable accommodations. While all the other accommodations cost the employer money or inconvenience, none of them adversely affect other

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[64] *Id.*

[65] S. REP. NO. 101-116, at 29 (1989); H.R. REP. NO. 101-485, pt. 2, at 63 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 345 ("Reassignment as a reasonable accommodation is not available to applicants for employment . . . . The Committee also wishes to make clear the reassignment need only be to a vacant position—"bumping" another employee out of a position to create a vacancy is not required."); *see also* White v. York Int'l Corp., 45 F.3d 357, 362 (10th Cir. 1995); EEOC Notice, Enforcement Guidance: Workers' Compensation And The ADA, Question 23 (July 6, 2000), http://www.eeoc.gov/policy/docs/workcomp.html.

[66] Laurie M. Johnston, *The ADA and Collective Bargaining Issues*, SW. ADA CTR., http://www.southwestada.org/html/publications/employment/otherlaws/collective_bargaining.html (last visited Sept. 24, 2015).

workers to any significant degree.[67] At most, a modified work schedule or transfer of non-essential duties may slightly inconvenience other workers. However, the real cost of the accommodation in most cases is borne by the employer—e.g., the cost of special equipment, or machines to aid the disabled worker.[68]

In contrast, giving the disabled worker a preference for a vacant job is going to cost someone else that job. When Congress explicitly noted that the ADA does not trump union seniority systems, Congress made it clear that such a burden on other workers was not the intent of the ADA, and the ADA does not allow a disabled worker to bump another worker out of a job.[69] Giving a disabled worker a vacant job over a more qualified worker is essentially the same as bumping the more qualified job applicant from the job.

It is surprising that the United States Supreme Court has not yet taken up this issue, and a resolution by the Supreme Court is long overdue. The courts of appeals have nicely set forth the arguments for each side,[70] and it is now time for the Supreme Court to decide the issue.

Attendance at Work and Leaves of Absence

Many disabilities make attendance at work on a regular schedule a challenge at best. It is often unpredictable when disabilities will flare up and cause absences. In addition, it is sad to say, but some workers will abuse leave policies by saying they are sick when they are not, e.g., a pattern of illness on Fridays and Mondays and the day right before or after a holiday.

The courts have put some limits on such abuse by holding that regular attendance at work is an essential function of most jobs, and "the ADA does not protect persons who have erratic, unexplained absences, even when those absences are a result of a disability."[71] The

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[67] *Id.*

[68] *See id.*

[69] S. REP. NO. 101-116, at 29–30 (1989); H.R. REP. NO. 101-485, pt. 2, at 63 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 345.

[70] *See, e.g.*, Hammel v. Eau Galle Cheese Factory, 407 F.3d 852, 867 (7th Cir. 2005); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1167 (10th Cir. 1999); Sieberns v. Wal-Mart Stores, 125 F.3d 1019, 1023 (7th Cir. 1997); Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995).

[71] EEOC v. Yellow Freight Sys., Inc., 253 F.3d 943, 948 (7th Cir. 2001) (quoting Waggoner v. Olin Corp., 169 F.3d 481, 484, 486 (7th Cir. 1999)); *see also* Brannon v. Luco

courts have noted that "a regular and reliable level of attendance is a necessary element of most jobs."[72] An accommodation of an open-ended schedule with the privilege to miss workdays frequently and without notice is "unreasonable."[73]

The courts have held that regular attendance is a basic requirement of most jobs,[74] observing that "[a]n employee who cannot meet the attendance requirements of the job at issue cannot be considered a 'qualified' individual protected by the ADA."[75] Likewise, multiple courts have held that an indefinite leave of absence is not a reasonable accommodation.[76]

Even the usually liberal United States Court of Appeals for the Ninth Circuit has recognized that regular attendance can be an essential function of the job.[77] The courts have also recognized that rotating shifts may be an essential function of the job, not only for cross-training, but also for employee morale.[78] The ability to engage in job rotation may be an essential function of a job, such as at a prison[79] or in a warehouse.[80] The courts have held that the ability to work overtime may be an essential job function if it is required for all employees in a

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Mop Co., 521 F.3d 843, 846 (8th Cir. 2008); Rios-Jimenez v. Sec'y of Veterans Affairs, 520 F.3d 31, 42 (1st Cir. 2008); Hypes v. First Commerce Corp., 134 F.3d 721, 727 (5th Cir. 1998).

[72] Tyndall v. Nat'l Educ. Ctrs., Inc. of Cal., 31 F.3d 209, 213 (4th Cir. 1994).

[73] *See* Mobley v. Allstate Ins. Co., 531 F.3d 539, 547–48 (7th Cir. 2008); Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co., 201 F.3d 894, 899 n.9 (7th Cir. 2000); *Waggoner*, 169 F.3d at 485.

[74] Brenneman v. MedCentral Health Sys., 366 F.3d 412, 420 (6th Cir. 2004) (holding the plaintiff pharmacy technician was unqualified for the position because of his excessive absenteeism).

[75] *Tyndall*, 31 F.3d at 213 (4th Cir. 1994); *see also Waggoner*, 169 F.3d at 485 (holding that the employer was not obligated to "tolerate erratic, unreliable attendance") (quoting Haschmann v. Time Warner Entm't Co., 151 F.3d 591, 601 (7th Cir. 1998)).

[76] *E.g.*, Walsh v. United Parcel Serv, 201 F.3d 718, 727 (6th Cir. 2000) (rejecting EEOC's position); Rogers v. Int'l Marine Terminals, Inc., 87 F.3d 755, 759 (5th Cir. 1996). *But see* Romanello v. Intesa Sanpaolo, S.p.A., 998 N.E.2d 1050, 1053 (N.Y. 2013) (holding an indefinite leave of absence may be a reasonable accommodation under a New York City ordinance).

[77] Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233, 1238 (9th Cir. 2012).

[78] Kallail v. Alliant Energy Corp. Servs., Inc., 691 F.3d 925, 932 (8th Cir. 2012); *see also* Laurin v. Providence Hosp., 150 F.3d 52, 59 (1st Cir. 1998) (finding that a twenty-four hour shift for maternity ward nurses was an essential job duty).

[79] Dargis v. Sheahan, 526 F.3d 981, 987 (7th Cir. 2008).

[80] Rehrs v. Iams Co., 486 F.3d 353, 359 (8th Cir. 2007).

job category.[81] The courts have also held that punctuality can be an essential duty.[82]

While employers should take care before rejecting a request for a minor scheduling accommodation, the courts have recognized that some flexibility demands go beyond what the ADA requires. For example, in *Haynes v. Community Hospital of Brazosport*,[83] the court granted the employer's motion for summary judgment, denying a nurse's ADA claim.[84] The nurse wanted her employer hospital to accommodate her three-hour commute to work, which adversely affected her diabetes, by allowing her to work a four-day week and not work weekends or on-call as was required of other nurses.[85] Instead, the hospital offered the nurse a part-time position, which the nurse rejected.[86] The court held that the nurse was not qualified for the essential duties of the full-time nursing job, which required working weekends and being on-call.[87]

Courts are also reluctant to second guess the employer's determination of a job's essential functions, as one court aptly observed:

> The ADA requires us to consider "the employer's judgment as to what functions of a job are essential[.]" The employer describes the job and functions required to perform that job. We will not second guess the employer's judgment when its description is job-related, uniformly enforced, and consistent with business necessity. In short, the essential function inquiry is not intended to second guess the employer or to require the employer to lower company standards.[88]

Conversely, the employer's job description must be accurate, meaning that it must include what current employees actually do in their job. For example, a job description for a policeman might say policemen must run a hundred-yard dash in ten seconds, but if the desk sergeant is sixty-years-old and fifty pounds overweight and runs the hundred-yard dash in ten minutes, then the police department's own workforce has shown that running a hundred-yard dash in ten seconds is not an essential function of the job. Likewise, employers and unions cannot say a longshoreman must be able to lift one hun-

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[81] Tjernagel v. Gates Corp., 533 F.3d 666, 673 (8th Cir. 2008).
[82] Earl v. Mervyns Inc., 207 F.3d 1361, 1366 (11th Cir. 2000).
[83] No. G-09-271, 2011 WL 43315 (S.D. Tex. Jan. 5, 2011).
[84] *Id.* at *4.
[85] *Id.* at *5.
[86] *Id.* at *6.
[87] *Id.*
[88] Mason v. Avaya Commc'n., Inc., 357 F.3d 1114, 1119 (10th Cir. 2004) (citations and internal quotations omitted).

dred pounds when there are seventy-year-old longshoremen who simply drive trucks and forklifts, essentially a sedentary job.

Similarly, all employees take vacation and occasionally get sick unexpectedly. Thus, drawing the line as to what is reasonable and acceptable is often difficult to say. Of particular importance is the question of whether the judge will decide the issue as a matter of law, or whether the court will determine that the issue is one of fact for the jury. Employers must look carefully at what they say, or fail to say, in their written job description, as well as what their workforce actually does. If an employer wants to argue that regular, predictable attendance is a required essential job function, the employer should say so in its written job description and follow that requirement even for its best job performers.

Of course, while regular attendance can be required and an indefinite leave of absence need not be allowed, employers must remember, "part-time or modified work reschedules" can be a reasonable accommodation.[89] For example, in one case, the United States Court of Appeals for the Eleventh Circuit held that whether coming to work on time was an essential function of the job was a jury question because the job was not time sensitive.[90] Again, the failure to state requirements in a written job description and being lax in what the employer tolerates from other employees can be problematic. If the employer allows varied attendance by a valued employee, then, when faced with a disabled worker's claim for a modified scheduled, the employer will face the axiom that "no good deed goes unpunished."

Employers must also recognize that short, unpaid leaves of absence are a required reasonable accommodation under the ADA.[91] Many employers believe that once an employee runs out of their twelve weeks of FMLA leave,[92] they can be fired if they remain out of work. However, once the twelve weeks of FMLA leave runs out, the employer

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[89] Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(9)(B) (2012). *But see* Treanoss v. MCI Telecomm's Corp., 200 F.3d 570, 575 (8th Cir. 2000) (finding that an employer is not required "to create a part-time position where none previously existed").

[90] Holly v. Clairson Indus., LLC, 492 F.3d 1247, 1261 (11th Cir. 2007).

[91] *See generally* U.S. Equal Emp't Opportunity Comm'n, Notice No. 915.002, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, (Oct. 17, 2002), http://www.eeoc.gov/policy/docs/accommodation.html. *See, e.g.*, *Holly*, 492 F.3d at 1263; Taylor v. Rice, 451 F.3d 898, 910 (D.C. Cir. 2006).

[92] Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 2601–2654 (2012).

must make an ADA analysis since unpaid leave is one of the explicit reasonable accommodations under the ADA.[93] If the medical condition is a covered disability,[94] then the employer must engage in the ADA interactive process.[95] The employer needs to inquire as to when the employee can be expected to return to work. Only once the employee is at maximum medical improvement[96] and his or her medical provider cannot give a return to work date, can the employer consider terminating the disabled worker's employment.[97] For some conditions, this can take six months to a year.[98]

Temporarily Filling Job Slots when an Employee is on Leave

There is no "one size fits all" solution to leave of absence requests. Rather, they will always be fact specific and require patience by the employer. Managers will be anxious to fill the job slot, and human resources personnel need to counsel the managers not to rush to judgment. If needed, the employer should hire a temporary employee to fill the slot, but the employer cannot terminate the disabled employee while there is a reasonable chance the disabled employee normally

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[93] *See* 42 U.S.C. § 12111(9)(B).

[94] After the 2008 Amendments to the ADA, essentially any condition that significantly limits a bodily function is a covered disability. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3555 (2008). *See* Regulations To Implement The Equal Employment Provision Of The Americans With Disabilities Act, *as amended*, 76 Fed. Reg. 16977 (Mar. 25, 2011) (codified at 29 C.F.R. § 1630).

[95] Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, 951 (8th Cir. 1999); 29 C.F.R. § 1630.2(o)(3). But the failure to engage in the interactive process may not create an independent cause of action. Noll v. IBM, 787 F.3d 89, 98 (2d Cir. 2015); Basden v. Prof'l Transp., Inc., 714 F.3d 1034, 1039 (7th Cir. 2013); McKane v. UBS Fin. Servs., Inc., 363 F. App'x 679, 682 (11th Cir. 2010); Hohider v. United Parcel Serv., 574 F.3d 169, 196 (3d Cir. 2009); Rehling v. City of Chi., 207 F.3d 1009, 1016 (7th Cir. 2000).

[96] Maximum medical improvement ("MMI") refers to when a patient is unlikely to get any better. It is a term frequently seen in workers' compensation cases. *See e.g.*, Minn. Stat. § 176.011(13)(a) (2013); Willingham v. Town of Stonington, 847 F. Supp. 2d 164, 188 (D. Me. 2012) (finding that a leave request while the employee's condition and status is being determined is not a request for indefinite leave).

[97] Robert v. Bd. of Cty. Comm'rs of Brown Cty., 691 F.3d 1211, 1218 (10th Cir. 2012) (citing Cisneros v. Wilson, 226 F.3d 1113, 1130 (10th Cir. 2000)); Rascon v. U.S. West Commc'ns, Inc. v. Maine, 143 F.3d 1324, 1334 (10th Cir. 1998); *see also* Peyton v. Fred's Stores of Ark., Inc., 561 F.3d 900, 903 (8th Cir. 2009) (upholding a job termination and a replacement as soon as cancer was diagnosed).

[98] *E.g.*, *What to Expect From Spine Surgery for Low Back Pain*, Spine-health, http://www.spine-health.com/treatment/spine-specialists/what-expect-spine-surgery-low-back-pain (last visited Oct. 24, 2015) (noting that back fusion surgery requires up to twelve months for a full recovery). *But see, e.g.*, Epps v. City of Pine Lawn, 353 F.3d 588, 593 n.4 (8th Cir. 2003) (holding that a six-month leave of absence was unreasonable).

might recover and be able to return to work.[99] The employer can even hire a "permanent" replacement, provided it is understood that the replacement may later need to move to another job if the disabled worker recovers and can return to work.[100] The interactive process must be used to determine what possibilities exist for the disabled worker's return to work. Indeed, if the employer, in good faith, engages in the interactive process, the employer cannot be liable for compensatory or punitive damages, even if it is found that the employer should have provided a reasonable accommodation.[101]

The employer will need to communicate with the disabled worker's physician or medical provider about the worker's medical status and possible return to work date.[102] If the medical provider is not forthcoming or does not seem to be giving candid responses, the employer can obtain an independent medical examination (hereinafter "IME") by a medical provider the employer chooses.[103]

All too often employers become frustrated because they deal with artificial budget slot limitations and feel they must terminate the disabled worker before they can hire someone else to fill the job. Human resources and the finance departments need to be more flexible in order for the managers to make the right legal decision. To do less might "follow the budget process," but it can lead to hundreds of thousands of dollars in liability.

When dealing with a disabled worker, the finance department would be well advised to allow workers on unpaid leave to not count against headcount limitations. The disabled worker on an unpaid leave does not cost the company any money, so why count them as a headcount? Yet, if they are counted against a headcount limitation, the manager may prematurely deny continued unpaid leave in order to fill the position. This can lead to an ADA failure to accommodate a

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[99] *See generally* Smith v. Chrysler Corp., 155 F.3d 799, 806 (6th Cir. 1998).

[100] *See generally* Ramit Mizrahi, *Leave as a Reasonable Accommodation Under the Americans with Disabilities Act*, 3 LABOR & EMPLOYMENT LAW FORUM (2013), http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1055&context=lelb.

[101] 42 U.S.C. § 1981a(a)(3) (2012).

[102] 29 C.F.R. § 1630.14(c) (2011); *see also* Kennedy v. Superior Printing Co., 215 F.3d 650, 656 (6th Cir. 2000).

[103] 29 C.F.R. § 1630.14(c).

claim, whereas, filing the position with a temporary employee might well be a viable solution.[104]

Medical Issues and Mental Disabilities

One of the fundamental problems in this process is that doctors who treat the employees will normally say whatever the patients wants them to say. So, if the disabled worker says they are in too much pain to work, the doctor will write an out-of-work slip without really evaluating the issue. While, of course, pain is subjective and thus cannot be verified, medical professionals can do more than just take the patient's word for it. Physicians can, and should, first ask whether the pain complaint makes sense. If the x-ray and MRI are normal, does disabling pain, months after a back strain, make sense?

Moreover, while physicians do not like to challenge their patients, there are ways to do so. Does the patient give pain complaints that make no anatomical sense? For example, pushing on the top of one's head cannot cause back pain, yet some patients who are malingering will say that it causes them back pain.[105] Does the patient give inconsistent results? For example, a straight leg test for a herniated disc can be done lying down or sitting up, and both methods should produce the same result. Does the patient say he cannot move his neck more than ten degrees, but when a pretty nurse walks by he fully rotates his neck? Some doctors will even look at the patients as they leave the building and see how they act walking to their cars in the parking lot, or even view them when they wait in the waiting room.

Employers also have tools in their arsenal to avoid abuse.[106] The IME can be a very effective tool.[107] Oftentimes, a treating doctor knows

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[104] Walters v. Metro. Educ. Enters., 519 U.S. 202, 209–11 (1997); *see also Employment Laws: Medical and Disability-Related Leave*, U.S. Dep't of Lab. Office of Disability Emp. Pol'y,, http://www.dol.gov/odep/pubs/fact/employ.htm (last visited Sept. 25, 2015).

[105] This is one of the Waddell tests, which anatomically cannot cause back pain, and if the patient says it causes pain, then the physician should doubt the accuracy of his or her pain complaints. *See* Gordon Waddell, et al., *Nonorganic Physical Signs in Low-Back Pain*, 5 Spine 117–125 (Mar./Apr. 1980). *But see* American College of Occupational and Environmental Medicine, *Low Back Disorders*, *in* Occupational Med. Prac. Guidelines 43–44 (Kurt Hegmann, ed. 2007).

[106] Sam Nasiri, *FMLA Abuse: 4 Ways to Fight Back and Not Get Sued*, Hum. Resources News & Insights (Oct. 7, 2008), http://www.hrmorning.com/fmla-abuse-4-ways-to-fight-back-and-not-get-sued/; *see also FMLA: What Steps Can an Employer Take to Limit the Abuse of Intermittent FMLA Leave?* Soc'y for Hum. Resource Mgmt., http://www.shrm.org/templatestools/hrqa/pages/fmlaabuse.aspx (last visited Oct. 24, 2015).

[107] Dalpiaz v. Carbon Cty., 760 F.3d 1126, 1134 (10th Cir. 2014).

the patient is not being honest, but does not want to confront the patient. If, however, an IME doctor says the patient can work, the treating physician may well feel more comfortable agreeing with that opinion. The treating physician can then focus the employee's displeasure on the IME doctor and avoid having the patient place all the blame on the treating doctor and running to another physician more willing to give the worker the requested out-of-work disability slip.

Employers have also been known to have supervisors call the worker at home, or even do a home visit. Some employers will even hire surveillance companies to see what the employee is doing while out sick. While this may sound unseemly, there are unfortunately some employees who work very hard at not working.

Many employers mistakenly forget that the ADA protects not only physical disabilities, but also mental disabilities.[108] Unfortunately, since mental disabilities are less obvious, employers are often times less tolerant of them. We can confirm a diagnosis of cancer or see a limp from a bad knee, but the person who is bipolar looks all too healthy to us. However, his or her disability is no less real, and the ADA analysis and obligations for mental disabilities are no different than for physical disabilities.[109]

Employers must address mental disabilities with the same caution they do physical disabilities.[110] Of course, this requires proof of a mental disability, and the courts do have limitations on what they will consider as a mental disability.[111] In *Weaving v. City of Hillsboro*,[112] an employee who had attention deficit hyperactivity disorder (hereinafter "ADHD") argued he was disabled because his ADHD made it difficult for him to get along with others.[113] While the court recognized that the ability to "interact" with others may be a major life activity, the

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[108] *Americans with Disabilities Act Questions and Answers*, U.S. Equal Emp. Opportunity Commission & U.S. Dep't of Just. C.R. Division, http://www.ada.gov/qandaeng.htm (last visited Oct. 24, 2015).

[109] *Id.*

[110] Norman L. Tolle, *Circuit Courts Divided Over Policies' 'Mental Illness' Limitation*, Rivkin Radler Att'ys at L., (Feb. 2007), http://www.rivkinradler.com/publications.cfm?id=579.

[111] U.S. Commission on C.R., Sharing the Dream: Is the ADA Accommodating All? (2000), http://www.usccr.gov/pubs/ada/ch5.htm.

[112] 763 F.3d 1106, 1107 (9th Cir. 2014).

[113] *Id.*

court refused to hold that the inability to "get along with others" was a major life activity.[114] As the court concluded, albeit with a dissent:

> One who is able to communicate with others, though his communications may at times be offensive, inappropriate, ineffective, or unsuccessful, is not substantially limited in his ability to interact with others within the meaning of the ADA. To hold otherwise would be to expose to potential ADA liability employers who take adverse employment actions against ill-tempered employees who create a hostile workplace environment for their colleagues.[115]

Conversely, in *Jacobs v. Administrative Office of the Courts*,[116] the United States Court of Appeals for the Fourth Circuit held that whether social anxiety disorder is a disability is a fact issue for a jury.[117] The court adopted the EEOC's position that the ability to interact with others is a major life activity.[118]

There are some employees who cannot get along with their supervisors. It may be that the supervisor gave the employee a negative performance review, or it may be that the supervisor is a lousy manager. This naturally can cause stress and anxiety for the employee. If the employee goes to a psychiatrist or psychologist, they may be given a diagnosis of adjustment disorder or depression, and a note that they should be transferred to a different supervisor. Most courts, when faced with this situation, have held that the person does not have a protected disability under the ADA, and thus is not entitled to the requested transfer.[119] While working is a major life function, in most cases, a person must be disqualified from a class of jobs to be found to be disabled, not just a single job.[120] And, even those courts that are willing to consider a single job as a major life function will not go so far as to extend the activity of working to include merely being unable to work with a particular supervisor.[121]

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[114] *Id.* at 1113–14.

[115] *Id.* at 1114 (citation and internal quotations omitted).

[116] 780 F.3d 562 (4th Cir. 2015).

[117] *Id.* at 574.

[118] 29 C.F.R. § 1630.2(i)(l)(i).

[119] Weiler v. Household Fin. Corp., 101 F.3d 519, 527 (7th Cir. 1996); Higgins-Williams v. Sutter Med. Found., 237 Cal. App. 4th 78, 86 (2015).

[120] 29 C.F.R. § 1630 Appendix (Guidance), 1630.2(j)(5)(6) (2015) (stating that "the individual can do so by showing that the impairment substantially limits his or her ability to perform a class of jobs or broad range of jobs in various classes as compared to most people having comparable training, skills, and abilities").

[121] *See Higgins-Williams*, 237 Cal. App. 4th at 84.

What are the Essential Functions of the Job?

In deciding whether a disabled employee can return to work and whether reasonable accommodations will allow the employee to do so, a critical question in virtually every ADA case is determining what the essential functions of a job are.[122] A disabled worker need only perform the essential duties of a job, and it takes more than listing a function on a job description to make the duty essential.[123] Many employers do not regularly consider which job duties are essential and which are marginal. Yet, it is critical because at the end of the day, the disabled employee need only be able to perform the essential functions of the job, and non-essential duties may have to be transferred to others as part of the job restructuring reasonable accommodation.

Most courts will start their analysis of the essential functions issue with the EEOC regulations.[124] The EEOC, in its regulations, defines essential functions as the "fundamental" duties as opposed to "marginal" tasks, and provides factors to consider:

> The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.
>
> (2) A job function may be considered essential for any of several reasons, including but not limited to the following:
>
> (i) The function may be essential because the reason the position exists is to perform that function;
> (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
> (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.
>
> (3) Evidence of whether a particular function is essential includes, but is not limited to:
>
> (i) The employer's judgment as to which functions are essential;
> (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
> (iii) The amount of time spent on the job performing the function;

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[122] *See, e.g.*, Minnihan v. Mediacom Commc'ns Corp., 987 F. Supp. 2d 918, 931 (S.D. Iowa 2013) (citing EEOC v. Wal-Mart Stores, Inc., 477 F.3d 561, 568 (8th Cir. 2007)). *See generally* 29 C.F.R. § 1630.2(n) (defining the essential functions of an employment position).

[123] *See Minnihan*, 987 F. Supp. 2d at 931 (citing Knutson v. Schwan's Home Serv., 711 F.3d 911, 913–14 (8th Cir. 2013)).

[124] *See, e.g.*, *id.* at 930–31.

> (iv) The consequences of not requiring the incumbent to perform the function;
> (v) The terms of a collective bargaining agreement;
> (vi) The work experience of past incumbents in the job; and/or
> (vii) The current work experience of incumbents in similar jobs.[125]

The United States Court of Appeals for the Tenth Circuit, in *Robert v. Board of County Commissioners of Brown Count.*,[126] provided an excellent analysis of the essential duties issue and a helpful discussion of the realities of the workplace.[127] The Tenth Circuit noted that in determining whether a duty is an essential function, the court will *not* hold an employer to what the employer allows temporarily while the worker is recovering from his or her illness.[128] The court recognized that employers often allow temporary changes to job duties when someone is recovering from an illness (e.g., in *Robert*, not requiring site visits), which an employer cannot allow on a permanent basis.[129] The reality is that co-workers asked to cover certain job duties for an ill employee on a short-term basis does not change the fact those job duties are essential functions of the job.

The court's ruling is a very helpful decision because it recognizes that an employer should not be punished for doing more in the short-term and going beyond what the ADA requires.[130] It is one thing to ask other workers to take up the tasks of a sick worker in the short-term, essentially making them perform some of the disabled worker's duties for free, while paying the disabled worker full pay even though he or she is unable to perform all the essential functions of the job. Many employees are kind enough to do this in the short-run, but cannot be expected to accept such an arrangement on a permanent basis. The other workers will usually not tolerate such an arrangement for long, and the employer is essentially giving a gift to the disabled worker,

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[125] 29 C.F.R. § 1630.2(n).

[126] 691 F.3d 1211 (10th Cir. 2012).

[127] *Id.* at 1217–19.

[128] *Id.* at 1217 ("[A] plaintiff cannot use her employer's tolerance of her impairment-based, ostensibly temporary nonperformance of essential duties as evidence that those duties are nonessential.").

[129] *See id.*; *see also* Basith v. Cook Cty., 241 F.3d 919, 929 (7th Cir. 2001) ("[A]n employer need not reallocate the essential functions of a job, which a qualified individual must perform.") (citing Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112–13 (8th Cir.1995)).

[130] *See* Robert, 691 F.3d at 1217.

paying them full pay for working only part of the job, something even the ADA does not require.[131]

The decision of the Tenth Circuit, moreover, hardly stands alone. The United States Courts of Appeals have repeatedly held that an employer going beyond what the ADA requires on a temporary basis does not change the limits of what the ADA mandates.[132] Thus, reassigning some of a disabled worker's essential duties to others on a temporary basis does not change the fact that these are still essential duties, and thus the ADA does not require their reassignment to an employee other than the disabled worker.[133] Additionally, giving an extended leave to an employee on a voluntary basis does not change what is a reasonable leave of absence.[134] Likewise, allowing a disabled employee to work part-time on a short-term basis does not establish that the job can be performed on a part-time basis if there are no permanent part-time positions.[135]

While the courts will often cite to, and go through, the EEOC's regulatory checklist,[136] a more practical and definitive test would be to look at how frequently a task is performed and if there are others who

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[131] *See id.* at 1216 ("Robert's absence caused strain in her small office.").

[132] *See Basith*, 241 F.3d at 929 ("[A]n employer need not reallocate the essential functions of a job, which a qualified individual must perform.") (citing Benson v. Nw. Airlines, 62 F.3d 1108, 1112–13 (8th Cir. 1995)); *see also* Gile v. United Airlines, Inc., 95 F.3d 492, 499 (7th Cir. 1996) ("The ADA may only require an employer to reassign a disabled employee to a position for which the employee is otherwise qualified.").

[133] *See Basith*, 241 F.3d at 929–30 (explaining that an employer is not required to rearrange the essential functions of a job because these functions must be performed regardless of the employee's ability to fulfill them, or the employee's request that another absorb them).

[134] Wood v. Green, 323 F.3d 1309, 1314 (11th Cir. 2003); Amadio v. Ford Motor Co., 238 F.3d 919, 929 (7th Cir. 2001) (addressing "the fact that Ford generously granted extended leaves to its employees in rare cases, up to two years, does not necessarily bind Ford to repeatedly grant successive leaves to [plaintiff,]" where plaintiff is unable to perform the essential functions of his job and does not qualify for protection under the ADA); Phelps v. Optima Health, Inc., 251 F.3d 21, 28 (1st Cir. 2001) (ending a restructured alternative job); Walton v. Mental Health Ass'n. of Se. Pa., 168 F.3d 661, 671 (3d Cir. 1999) (finding termination of unpaid leave); Holbrook v. City of Alpharetta, 112 F.3d 1522, 1528 (11th Cir. 1997) (discontinuing accommodation which eliminated an essential function of the job); Myers v. Hose, 50 F.3d 278, 284 (4th Cir. 1995).

[135] Minnihan v. Mediacom Commc'ns, 779 F.3d 803, 814 (8th Cir. 2015); Rabb v. Sch. Bd. of Orange Cty., No. 6:12-CV-1562-ORL-28, 2014 WL 726560, at *6 (M.D. Fla. Feb. 25, 2014).

[136] *See, e.g.*, Holly v. Clairson Indus., 492 F.3d 1247, 1255–57 (11th Cir. 2007); Dahlman v. Tenenbaum, No. DKC 10-2993, 2011 WL 3511062, at *12–13 (D. Md. Aug. 9, 2011).

can perform it besides the disabled worker. If there are multiple persons available to perform a function and the employee does not often perform the task, then it is unlikely to be an essential function.

For example, the legislative history notes that a counselor at a juvenile hall might have to drive an injured juvenile to the hospital.[137] However, since there are several counselors at the facility and all of the counselors do not need to have the ability to drive, driving would not be an essential function of the job.[138] Likewise, in one case, there were multiple welders and only twelve percent of the welding assignments required lifting over twenty-five pounds.[139] The court held that the heavier lifting tasks were not an essential job function, and thus the employer was required to transfer the heavy assignments to other welders as the reasonable accommodation of job restructuring when a disabled worker was unable to lift over twenty-five pounds.[140]

Conversely, if one is a litigator, the ability to speak in court is obviously an essential function of the job. The key fact is that there is normally no one else available to do that task, and it occurs frequently. Indeed, the lack of another available worker to perform the duty is often a key factor.[141] Thus, while pilots spend less than one percent of their time landing a plane, few would doubt that landing the plane is nevertheless clearly an essential function for a pilot. There is no one else who can perform the function although the co-pilot is always held in reserve, and indeed is usually needed to assist in the landing.[142]

One issue that often arises is who has the burden of proof of establishing what the essential duties of a job are. In *Hawkins v. Schwan's Home Services, Inc.*,[143] the court held that while many courts have indicated that the employer has a burden of initial production, the em-

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[137] H.R. Rep. No. 101-485, pt. 3, at 33 (1990).

[138] *Id.*

[139] Ackerman v. W. Elec. Co., 643 F. Supp. 836, 844–45, 851 (N.D. Cal. 1986).

[140] *Id.* at 846 (upholding the reasoning from the Rehabilitation Act). Of course, only non-essential duties must be transferred under the job restructuring accommodations. EEOC v. Convergys Customer Mgmt. Grp., Inc., 491 F.3d 790, 796 (8th Cir. 2007).

[141] Earl v. Mervyns, Inc., 207 F.3d 1361, 1365 (11th Cir. 2000) ("[A] job function may also be essential if there are a limited number of employees among who performance of the job can be distributed.").

[142] *See* Knutson v. Schwan's Home Serv., Inc., 711 F.3d 911, 915 (8th Cir. 2013) (finding that manager had to be DOT qualified even though he has to drive infrequently).

[143] 778 F.3d 877 (10th Cir. 2015).

ployee always has the ultimate burden of persuasion, as the employee does on all issues in proving discrimination.[144]

Employers would do well to review their written job descriptions and make sure they include all duties they view as essential. Conversely, when deciding whether a disabled employee can perform a job, employers must recognize that the written job description may not be accurate. Job duties change over time, and they change much faster than job descriptions are updated, particularly if technology is involved.

Moreover, many job descriptions are written as wish lists and simply do not accurately reflect what the worker actually does. An employer cannot say a secretary must be able to type eighty words per minute when the current secretaries cannot type faster than sixty words per minute. An employer cannot require more from a disabled employee than the employer requires from its worst job performer.[145] In a discrimination lawsuit, the disabled applicant will find that worst job performer, and he or she will be the comparator used at trial to show a discriminatory motive.

Job Restructuring

Deciding which job duties are essential functions of the job is also critical to one of the most straightforward, but least understood reasonable accommodations—job restructuring.[146] Job restructuring is "reallocating or redistributing nonessential marginal job functions[,]" which a disabled employee cannot perform, to other workers.[147] The restructuring accommodation only applies to non-essential duties, meaning that an employer need not transfer essential functions of a job.[148] Job restructuring also assumes that there is some other employee available who can perform the non-essential functions. An employer need not hire a helper to perform job duties if there is no one else available to perform them because in that case, the job duties

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[144] *See id.* at 893–94 (citing Mason v. Avaya Commc'ns, 357 F.3d 1114, 1119 (10th Cir. 2000)).

[145] *See* Keith v. County of Oakland, 703 F.3d 918, 924 (6th Cir. 2013) ("Individuals with disabilities cannot be held to a higher standard of performance than non-disabled individuals.").

[146] Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(9)(B) (2012).

[147] 29 C.F.R. § 1630.2(o) App. (2015) (EEOC Interpretative Guidance).

[148] *See, e.g.*, Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, 950 (8th Cir. 1999); Bratten v. SSI Servs., Inc., 185 F.3d 625, 632–33 (6th Cir. 1999); Barber v. Nabors Drilling USA, Inc., 130 F.3d 702, 709 (5th Cir. 1997).

would be considered essential.[149] Employers should remember that it may be a jury issue as to whether a job function is essential or non-essential, and thus whether the duties must be transferred to other workers may also be a jury question.[150] Juries are likely to be more sympathetic towards the employees and less worried about a corporation's profit levels.[151]

While job restructuring has been included the ADA as a reasonable accommodation since the ADA's inception in 1991,[152] few human resources personnel are even aware that it is a requirement under the ADA. Part of the problem may simply be that employers find it hard to accept that any job function is *not* essential. After all, it is argued that a worker is paid to perform one hundred percent of the job duties. However, if there are several workers who perform the same job, this argument will rarely hold water. It is hard to argue that a part of the job, which is performed infrequently, is "essential" if others are available to perform it. What is the harm of having the other workers handle the infrequent function that the disabled worker cannot perform?

Instructive is the case of *Kauffman v. Petersen Health Care VII, LLC*,[153] in which a hairdresser at a nursing home had surgery and was given a work restriction against pushing wheelchairs.[154] Her job required her to sometimes push nursing home patients in wheelchairs to and from her hairdresser station.[155] She testified that this took up six to twelve percent of her time.[156] The trial court held that pushing the patients in wheelchairs was an essential job duty and granted the employer summary judgment, dismissing her ADA claim.[157] The court of

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[149] Majors v. Gen. Elec. Co., 714 F.3d 527, 534 (7th Cir. 2013).

[150] *See, e.g.*, Supinski v. UPS, 413 F. App'x 536, 543 (3d Cir. 2011).

[151] *See generally* Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327, 329 (1998) ("A common belief is that jurors are so prone to favor individual plaintiffs over corporate defendants that they pick the 'deep pockets' of rich business corporations and deliver extremely high awards that are not merited by the company's actions or the plaintiff's injuries."); Henry J. Lischer, Jr., *Domestic Asset Protection Trusts: Pallbearers to Liability?*, 35 REAL PROP. PROB & TR. J. 479, 499 n.75 (2000) ("Once you get to court, you will find that the system is heavily weighted toward the sympathetic plaintiff, as judges and juries play Robin Hood with your money.").

[152] *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 101(9)(B), 104 Stat. 327, 331 (1990) (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)).

[153] 769 F.3d 958 (7th Cir. 2014).

[154] *Id.* at 960.

[155] *Id.* at 959–60.

[156] *Id.* at 961.

[157] *Id.*

appeals vacated that judgment and held it was a fact issue for the jury. The court of appeals noted that the nursing home had many orderlies who pushed wheelchairs and that a job duty should not be considered essential if it is "so small a part that it could be reassigned to other employees at a negligible cost to the employer."[158]

It should be noted, however, that while job restructuring may sound great in theory, it can easily cause resentment in the real world. For example, assume you have five welders and only ten percent of the welding jobs involve lifting material over twenty-five pounds. First, one welder gets a doctor's note saying he has a bad back and cannot lift over twenty-five pounds. Then, a second, and later a third welder, see this as a way to make their lives easier, and they do the same thing. When the fourth worker realizes what is happening and does the same thing, the employer ends up with four welders doing all of the light duty work and one welder doing all of the heavy duty work, while all of them are receiving the same pay.

Ironically, placing all the heavy work on the remaining one welder will increase the risk of that welder injuring his or her back and becoming disabled. Pretty soon, there is no one left to perform the heavy work. This morale and practical problem is one reason why even employers who understand the job restructuring requirement are reluctant to provide it as a reasonable accommodation.

Interestingly, because few are aware of the job restructuring requirement, there are few cases dealing with it. Employers should expect that to change. The 2008 ADA amendments greatly expanded the scope of the ADA, meaning more persons have rights and are increasingly becoming aware of them.[159] The amendments made it easy for plaintiffs' lawyers to win ADA cases, which will attract more attorneys, and it is just a matter of time before they focus on the job restructuring accommodation. It remains to be seen how far courts will go in requiring job restructuring. As noted above, some courts have given great deference to employers' determinations as to what is an essential duty and thus it is not subject to the job restructuring accommodation.[160] However, this requires the employers to carefully write and follow written job descriptions.

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[158] *Id.*

[159] *See, e.g.*, Pub. L. No. 110-325, 122 Stat. 445 (2008).

[160] *See, e.g.*, Hawkins v. Schwan's Home Serv., 778 F.3d 877, 883–87 (10th Cir. 2015); Robert v. Bd. of Cty. Comm'rs of Brown Cty., 691 F.3d 1211, 1217 (10th Cir. 2012).

Telecommuting

A corollary issue to attendance at work is the issue of telecommuting—working at home. Fifteen years ago, courts seemed hesitant to impose telecommuting as a reasonable accommodation.[161] The courts questioned whether an employer even had to accommodate commute limitations, as opposed to disabilities that actually affected the performance of the duties of the job at the workplace.[162] Moreover, the courts also seemed to doubt that imposing a work at home accommodation could ever be "reasonable."

Fast forward to today, when many employers voluntarily allow telecommuting, and some even encourage it as a way to save on office space and lost productivity due to long commute times. The courts seem to have changed their view with respect to working at home as a reasonable accommodation. The courts seem more open to consider telecommuting as a reasonable accommodation.[163] This trend may well continue as technology expands, including as better quality videophone calling becomes available and more common.

In the past, courts have ruled that working at home is rarely a reasonable accommodation.[164] As one court noted, the "[p]laintiff has failed to present any facts indicating that his was one of those exceptional cases where he could have 'performed at home without a substantial reduction in quality of [his] performance.' "[165] Another court noted that "the reason working at home is rarely a reasonable accommodation is because most jobs require the kind of teamwork, personal

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[161] *See, e.g.*, Smith v. Ameritech, 129 F.3d 857, 867 (6th Cir. 1997); Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 544–45 (7th Cir. 1995).

[162] *See, e.g.*, Kimble v. Potter, 390 F. App'x 601, 601–04 (7th Cir. 2010) (holding that despite plaintiff's vertigo, which prevented her from driving to work, was not protected by the ADA because she could access other jobs in the area by foot or public transportation); Winsley v. Cook Cty., 563 F.3d 598, 603–04 (7th Cir. 2009) (holding that driving was not so important to everyday life to consider it a material limit).

[163] *See, e.g.*, Willingham v. Town of Stonington, 847 F. Supp. 2d 164, 166 (D. Me. 2012) (denying an employer summary judgment, holding the record did not show the job could not in part be performed at home).

[164] *See, e.g.*, *Vande Zande*, 44 F.3d at 544–45 ("No doubt to this as to any generalization about so complex and varied an activity as employment there are exceptions, but it would take a very extraordinary case for the employee to be able to create a triable issue of the employer's failure to allow the employee to work at home."). *But see, e.g.*, Carr v. Reno, 23 F.3d 525, 530 (D.C. Cir. 1994); Langon v. Dep't of Health and Human Servs., 959 F.2d 1053, 1055 (D.C. Cir. 1992).

[165] Smith v. Ameritech, 129 F.3d 857, 867 (6th Cir. 1997) (citing *Vande Zande*, 44 F.3d at 544).

interaction, and supervision that simply cannot be had in a home office situation."[166]

Other courts, however, have been more willing to address commute-related issues, and even mandate telecommuting as a reasonable accommodation.[167] In *Livingston v. Fred Meyer Stores, Inc.*,[168] the United States Court of Appeals for the Ninth Circuit held that a shift change is a reasonable accommodation, even if the need to change shifts is commute-related.[169] The Ninth Circuit held that a "commute-related" limitation must be accommodated. Likewise, in *Nixon-Tinkelman v. New York. City Department of Health & Mental Hygiene*,[170] the United States Court of Appeals for the Second Circuit reversed a grant of summary judgment for the employer on the disabled worker's request for a "commuting accommodation."[171] The court held that a reasonable accommodation might include transferring the worker to a "closer location, allowing her to work from home, or providing a car or parking permit."[172]

The United States Court of Appeals for the Fifth Circuit has explicitly ruled that reasonable accommodations are not limited to accommodations that allow workers to perform their essential functions at the work facility.[173] Rather, reasonable accommodations include "making existing facilities used by employees readily accessible," which the Fifth Circuit held included workers getting to their job.[174] The court ruled that providing a free on-site parking space to a worker with arthritis in her knee might be a reasonable accommodation.[175]

In *Dahlman v. Tenebaum*,[176] the court held it was a jury question as to whether part-time telecommuting was a reasonable accommodation.[177] The court noted that while some courts have held that employ-

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[166] Rauen v. U.S. Tobacco Mfg. L.P., 319 F.3d 891, 897 (7th Cir. 2003).

[167] *See, e.g.*, Livingston v. Fred Meyer Stores, Inc., 388 F. App'x 738, 740–41; Nixon-Tinkelman v. N.Y.C. Dep't of Health and Mental Hygiene, 434 F. App'x 17, 20 (2d Cir. 2011).

[168] 388 F. App'x 738 (9th Cir. 2010).

[169] *Id.* at 740.

[170] 434 F. App'x 17 (S.D.N.Y. 2011).

[171] *Id.* at 19–20.

[172] *Id.* at 20.

[173] *See* Feist v. Louisiana, 730 F.3d 450, 453 (5th Cir. 2013).

[174] *Id.* at 453 (quoting Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(9)(A)).

[175] *Id.* at 454 (quoting 29 C.F.R. pt. 1630 App. § 1630.2(o)).

[176] No. DKC 10-2993, 2011 WL 3511062 (D. Md. Aug. 9, 2011)

[177] *Id.* at *14.

ers do not need to allow unsupervised teleworking at home, those cases involved full-time telecommuting requests.[178] The court noted that other rulings have allowed part-time telecommuting, e.g., two days a week, and thus the court denied summary judgment to the employer on a request for part-time telecommuting.[179]

A case that shows how the courts have struggled with this issue is *EEOC v. Ford Motor Co.*[180] Ford refused to allow an employee to telecommute four days a week, arguing that face-to-face interaction with supervisors was required.[181] Initially, a panel of the court of appeals rejected that argument, noting how far the business world had come in utilizing telecommuting.[182] The initial Sixth Circuit panel held that allowing up to four days of telecommuting per week was a reasonable accommodation.[183] The full Sixth Circuit, however, in an *en banc* decision, reversed the panel ruling and upheld Ford's decision not to provide the four-day telecommuting option.[184] In a nine to four ruling, the full United States Court of Appeals for the Sixth Circuit ruled that the job required "face-to-face contact" and that Ford's policy of limiting resale buyers to one day a week of telecommuting and requiring them to come to work that day if needed was justified.[185]

The *en banc* decision started with the observation that a reasonable accommodation "does *not* include removing an 'essential function'" of the job.[186] The court then noted, as past decisions have held, that "regularly allowing work on-site is essential to most jobs."[187] The court, citing the EEOC's own regulations and guidance documents, went on to note that regular attendance on-site is particularly necessary for "interactive" jobs, such as Ford's resale buyers position.[188] The court also held that the employee's own self-serving testimony that she could perform the job at home would not defeat summary judgment.[189]

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[178] *Id.*

[179] *Id.*

[180] 752 F.3d 634 (6th Cir. 2014), *vacated en banc*, 782 F.3d 753 (6th Cir. 2015).

[181] *Id.* at 636.

[182] *Id.* at 647.

[183] *Id.* at 646.

[184] EEOC v. Ford Motor Co., 782 F.3d 753, 763, 766 (6th Cir. 2015) (en banc).

[185] *Id.* at 764.

[186] *Id.* at 761 (emphasis added) (quoting 29 C.F.R. § 1630.2(n) (2015)).

[187] *Id.*

[188] *Id.* at 762–63.

[189] *Id.* at 763–64.

The court of appeals carefully noted that it would not punish employers who allowed *limited* telecommuting by then forcing those employers to allow *unlimited* telecommuting.

> [I]f the EEOC's position carries the day, once an employer allows *one* person the ability to telecommute on a *limited* basis, it must allow *all* people with a disability the right to telecommute on an *unpredictable* basis up to 80% of the week (or else face trial). That's 180-degrees backward. It encourages—indeed, requires—employers to *shut down* predictable and limited telecommuting as an accommodation for *any* employee. A good deed would effectively ratchet up liability, which would undermine Congress' stated purpose of eradicating discrimination against disabled persons.[190]

Telecommuting is probably here to stay, and employers, having allowed it for certain well-performing, responsible employees, will be hard pressed to deny it as an accommodation for disabled employees, even if the disabled worker has performance issues. Nevertheless, employers can put limits on the amount of telecommuting that is allowed, particularly where interaction with supervisors, co-workers, or customers is an essential function of the job. The solution may be in the details of limiting the amount of telecommuting and providing effective supervision of teleworkers.

Employers need to implement safeguards to make sure employees working at home are really working and being productive. This may require having employees sign in and out by e-mail when they start and stop working during the day, having supervisors do check up calls or even home visits, and requiring employees to keep written logs of exactly what they worked on and when. To do less is to invite abuse.

It is unfortunate that rules must be written because of one or two bad apples, but the reality is if there are not rules in place to prevent abuse, more and more employees will find it hard to avoid the temptation of abusing the privilege of working from home. There is a reason why every car and every house comes with a lock—while most people do not steal, some will, particularly if the door is left wide open. We like to think that workers will do the right thing, but it is prudent to have a system in place that encourages them to do so.

It should also be noted that if telecommuting is mandated by the ADA, it raises issues under other statutes. For non-exempt employees, the employer is required under the Fair Labor Standard Act (hereinaf-

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[190] *Id.* at 765 (emphasis added) (quoting Smith v. Ameritech, 129 F. 3d 857, 868 (6th Cir. 1997)).

ter "FLSA") to track and pay for all hours worked.[191] Thus, the employer can explain its system of keeping track of workers' work time as being required by the FLSA. When the exempt employees complain that the FLSA does not require timekeeping for them, the employer can justify the action as being fair by treating all employees alike. Moreover, the reality is that recent lawsuits have shown many exempt employees are misclassified.[192] While they are salaried, they cannot meet the additional duties requirements for being an exempt employee.

Also of concern is providing workers' compensation insurance for telecommuting employees who may live in a different state than the employer's office. Employers need to be careful to assure that they have appropriate state specific workers' compensation insurance for workers who work at home in a different state than their usual office. Otherwise, the employer may face a substantial liability when the worker slips and falls at home while working, and indeed, in most states, it is a crime for an employer not to have workers' compensation insurance. Likewise, e-mail and computer security must be assured when a worker is telecommuting, and appropriate local taxes must be paid.

Employers must also remember that telecommuting is not the only reasonable accommodation for commuting limitations. In *EEOC v. LHC Group Inc.*,[193] a nurse was unable to drive due to epileptic seizures, and her job required her to drive to patients' homes.[194] The court of appeals reversed summary judgment for the employer, finding that it was an issue of fact as to whether the provision of a taxi or van service would be a reasonable accommodation.[195] Conversely, it should also be remembered that in many cities, there is free access van service for the disabled, which may be a cost-free reasonable accommodation.

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[191] *Wage and Hour Division*, U.S. Dep't of Lab. (July 2009), http://www.dol.gov/whd/regs/compliance/whdfs53.htm.

[192] Doug Miller, *Don't Get Burned: Misclassifying Managers Under the FLSA,* Elarbee Thompson (Nov. 19, 2013), http://www.elarbeethompson.com/media/article/don't-get-burned-misclassifying-managers-under-flsa (discussing examples of recent lawsuits misclassifying exempt employees).

[193] 773 F.3d 688 (5th Cir. 2014).

[194] *Id.* at 692.

[195] *Id.* at 699.

Safety Concerns

Safety still counts, or in the ADA vernacular, an employee cannot be a "direct threat" to himself or others.[196] The protection against a safety risk includes not only risks of injury to co-workers and the public, but also to the worker's own safety.[197] Moreover, the courts will consider even low-risk safety threats if the consequences of the risk are horrific.[198] Even if a disability only causes a low-percentage risk of an event occurring which can lead to death or serious injury, that is enough to disqualify a disabled worker from the job.[199]

While an individual assessment is often needed, the courts have also upheld across-the-board safety protections when a job warrants it.[200] The courts have also been generous in protecting public safety. For example, courts have upheld Department of Transportation regulations, which exclude all persons diagnosed with alcoholism as truck drivers, even if they are not currently drinking.[201] There is, however, a split in the courts as to which party bears the burden of proof about whether there is a safety risk.[202] The difference is whether you consider the ability to perform a job safely as an essential function of the job, or the direct threat issue as an affirmative defense.[203]

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[196] Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111(3), 12113(b) (2012).

[197] Chevron USA, Inc. v. Echazabal, 536 U.S. 73, 78–79 (2002); 29 C.F.R. § 1630.15(b)(2) (2015).

[198] *Chevron*, 536 U.S. at 86. *See, e.g.*, Taylor v. Rice, 451 F.3d 898, 906 (D.C. Cir. 2006) (discussing the imminence of the risk compared with the severity of the harm); Donahue v. Consol. Rail Corp., 224 F.3d 226, 231 (3d Cir. 2000) (stating that "[i]f the threatened harm is grievous . . . even a small risk may be 'significant.'").

[199] Darrell v. Thermafiber, Inc., 417 F.3d 657, 661 (7th Cir. 2005) (upholding the exclusion of a worker with uncontrolled diabetes from working near a blast furnace); Hutton v. Elf Atochem N. Am. Inc., 273 F.3d 884, 894 (9th Cir. 2001) (finding that if the potential harm is catastrophic, it does not matter that the likelihood of it occurring is small).

[200] EEOC v. Exxon Corp., 203 F.3d 871, 874 (5th Cir. 2000).

[201] *E.g.*, Jarvela v. Crete Carrier Corp., 776 F.3d 822, 831 (11th Cir. 2015).

[202] McKenzie v. Benton, 388 F.3d 1342, 1354 (10th Cir. 2004), *cert. denied*, 544 U.S. 1048 (2005) (discussing the split among the federal appellate courts regarding which party bears the burden of proof).

[203] *Id.* at 1356 (holding the employee bears the burden to show he can safely perform the job as part of his burden to show he can perform the essential duties of the job.); Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996), *cert. denied*, 519 U.S. 1118 (1997) ("The employee retains at all times the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations were available."). *But see* Branham v. Snow, 392 F.3d 896, 906–907 (7th Cir. 2004) (analyzing whether the burden of proof is on the employer or employee and holding that the burden is on the agency); Hargrave v. Vermont, 340 F.3d 27, 35 (2d Cir. 2003) (finding

The inconsistent court holdings may be attributed to whether safety is considered a central factor to the job. Thus, it would seem that when safety is a significant part of a job, e.g., a police officer or fire fighter, then safety is a key component of the job and thus an essential function of the job. In those jobs, the courts are more likely to hold that the employee bears the burden of showing the employee can safely perform the job because it is always the employee's burden to show that he or she can perform the essential functions of the job.[204]

In other cases where safety is not a big part of the job, e.g., a secretary where the biggest threat is a paper cut, then the direct threat defense may more properly be viewed as an affirmative defense, with the employer bearing the burden of proof. Nevertheless, safety issues can arise in any job. For example, what if the secretary is prone to seizures, and there is no medical facility nearby? Is the employer required to hire the secretary who has uncontrollable, life-threatening seizures, and how will the other employees react when the secretary has a seizure at work?

A better view is that safety is always paramount and thus an essential function of every job, and the burden of proof is always on the employee to show that he or she can safely perform the job. However, there can be a question as to the burden of production. The employer should first be required to produce credible evidence of a safety threat. Then, the worker will have the burden to rebut that evidence, and he or she will also carry the ultimate burden of persuasion.

The evidence of a safety risk must be based on reliable, updated medical opinions.[205] Thus, just like employees can find doctors to say

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that it is the employer's burden to establish that the employee poses a "direct threat"); *Hutton*, 273 F.3d at 893 (upholding that the direct threat is an affirmative defense and thus the burden of proof is on the employer).

[204] *See, e.g.*, EEOC v. Amego, Inc., 110 F.3d 135, 144 (1st Cir. 1997) ("[I]t is the plaintiff's burden to show that he or she can perform the essential functions . . . and is therefore 'qualified.' Where those essential job functions necessarily implicate the safety of others, plaintiff must demonstrate that she can perform those functions in a way that does not endanger others."); Shepheard v. City of New York, 577 F. Supp. 2d 669, 675–77 (S.D.N.Y. 2008) (holding that an employee failed to meet the burden of proving she could perform the essential functions of her position as Captain for Department of Corrections with or without reasonable accommodation).

[205] *See generally* Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(d)(4) (2012) (explaining medical examinations); EEOC v. Prevo's Family Mkt., Inc., 135 F.3d 1089, 1093 (6th Cir. 1998) (discussing medical testimony to address safety risk for transmitting a disease).

whatever they want, some employers are prone to do the same. An employer should use a board-certified specialist and make sure the specialist has medical literature to back up his or her opinion. At a minimum, courts will not allow "junk science" to be presented to a jury,[206] and in many cases, the employer will have to convince the jury that there is a significant risk of injury, which is a far more difficult task than making that argument to a judge.[207]

Required Employee Cooperation

Disabled employees often complain that their employers do not engage in the interactive process, i.e., discuss with the employee their ideas for what accommodations will allow the employee to perform the essential duties of his or her job.[208] However, employees often forget the interaction process obligation is a two-way street.[209] If an employee

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[206] Gen. Elec. Co. v. Joiner, 522 U.S. 136, 153 (1997) ("[T]his is not the sort of 'junk science' with which *Daubert* was concerned."); *see also* Daubert v. Merrell Dow Pharms. Inc., 509 U.S. 579, 589 (1993) (stating "under the Rules[,] the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.").

[207] *See* Branham v. Snow, 392 F.3d 896, 908 (7th Cir. 2004). *But see* McKenzie v. Benton, 388 F.3d 1342, 1353 (10th Cir. 2004) (stating with respect to whether employee poses direct threat of harm to self or others, employee bears burden of proof to show he or she is not a threat); EEOC v. Amego, Inc., 110 F.3d 135, 144 (1st Cir. 1997) (stating burden on [employee] to show he or she poses no threat of harm when that harm is tied to essential function of the job); EEOC v. Rexnord Indus., LLC, 966 F. Supp. 2d 829, 843 (E.D. Wisc. 2013).

[208] Gile v. United Airlines, Inc., 213 F.3d 365, 373 (7th Cir. 2000) (quoting Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 693 (7th Cir. 1998)) (noting that the process is supposed to bring the employee and employer together to "identify the employee's precise limitations and discuss accommodations which might enable the employee to continue working"). *But see* Noll v. IBM, 787 F.3d 89, 92 (2d Cir. 2015); Basden v. Prof'l Transp., Inc., 714 F.3d 1034, 1038–39 (7th Cir. 2013); McKane v. UBS Fin. Servs., Inc., No. 09-13011, 2010 WL 200831, at *1–2 (11th Cir. Jan. 21, 2010) (noting that the failure to engage in the interactive process is not an ADA violation by itself; it is only a violation if it results in a reasonable accommodation not being provided); Hohider v. UPS, 574 F.3d 169, 171 (3d Cir. 2009); Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 951 (8th Cir. 1999); Rehling v. City of Chi., 207 F.3d 1009, 1016 (7th Cir. 2000) (finding that the failure to engage in the interactive process may not create an independent cause of action).

[209] *See, e.g.*, EEOC v. Kohl's Dep't Stores, 774 F.3d 127, 133–34 (1st Cir. 2014) (affirming summary judgment for the employer because the employee declined the employer's invitation to discuss her accommodation request, stating, "the employee must engage in good-faith effort to work out potential solutions with the employer prior to seeking judicial redress"); 29 C.F.R. § 1630.2(o)(3) (stating that the interactive process "should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations").

or his or her physician refuses to provide information which the employer needs in order to evaluate a reasonable accommodation request, then the employee has not complied with his or her duty to properly engage in the interaction process, and thus the employer will have no liability for failing to provide an accommodation.[210]

This most often occurs when the employer writes the worker's treating doctor to get clarification as to the nature of the worker's medical condition and possible reasonable accommodations.[211] The employer has a right to know if the medical condition is severe enough to qualify as a covered disability, and the employer can ask if other accommodations will work that are less burdensome than the one the employee requested.[212]

The employer also has the right to have an IME, which is a misnomer since the IME is not independent because the doctor is the medical provider that the employer selects.[213] While the FMLA puts limitations on when a second medical opinion can be obtained, the ADA has no such limitation.[214] Thus, under the ADA, the employee has an obligation to submit to and cooperate with an IME, as well as to provide the employee's medical records for the IME to review.[215]

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[210] Hoppe v. Lewis Univ., 692 F.3d 833, 840 (7th Cir. 2012); Steffes v. Stepan Co., 144 F.3d 1070, 1072 (7th Cir. 1998); Templeton v. Neodata Servs., Inc., 162 F.3d 617, 619 (10th Cir. 1998) (quoting Beck v. Univ. of Wisc. Bd. of Regents, 75 F.3d 1130, 1136 (7th Cir. 1996)).

[211] *See Beck*, 75 F.3d at 1137.

[212] *See* Humphrey v. Mem'l Hosp. Ass'n, 239 F.3d 1128, 1137 (9th Cir. 2001); Peter v. Lincoln Tech. Inst., 255 F. Supp. 2d 417, 436 (E.D. Pa. 2002).

[213] Kennedy v. Superior Printing Co., 215 F.3d 650, 656 (6th Cir. 2000) (discussing the employer's efforts to pay for employee's independent medical exam for appointments that were scheduled by the employer); *see also* Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(d)(4)(A) (2012); EEOC v. Prevo's Family Mkt., 135 F.3d 1089, 1094 (6th Cir. 1998) ("[T]he employer need not take the employee's word for it that the employee has an illness that may require special accommodation. Instead, the employer has the ability to confirm or disprove the employee's statement."); Hennenfent v. Mid Dakota Clinic, P.C., 164 F.3d 419, 422 (8th Cir. 1998) (finding request for IME to determine extent of disability was job-related and consistent with business necessity and thus did not violate ADA); 29 C.F.R. §1630.14(c) (2015) (asserting employers may "require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity" or "may make inquiries into the ability of an employee to perform job-related functions").

[214] 29 U.S.C. § 2613 (c)(1)–(2) (2012).

[215] Monterroso v. Sullivan & Cromwell, LLP, 591 F. Supp. 2d 567, 579 (S.D.N.Y. 2008) ("An employee's provision of medical information is an indispensable aspect of that interactive process and where an employee fails to provide documentation sufficient to

The IME is a tool some employers foolishly overlook in their hurry to replace a worker who is disabled, or in denying an accommodation as unreasonable. If a case goes to litigation, an employer will want an expert witness on its side. It is much better practice to obtain the expert witness' opinion as part of the interactive process than after a lawsuit is filed. Obtaining an IME opinion early on avoids surprises, usually presents the employer with more options, and will be seen by judges and juries alike as evidence of good faith on the employer's part, as opposed to the denial of an accommodation request being an arbitrary decision that the employer is trying to justify after the fact.

An Employer Need Only Provide an Accommodation

Many employees mistakenly believe they have the right to whatever reasonable accommodation they request. However, an employer need only provide *an* accommodation that allows the worker to perform the essential duties of his or her job, not necessarily *the* accommodation the employee requests.[216] There are many ways to fix a problem, some are very expensive and/or burdensome, and some are very cheap and/or easy.

For example, a worker may say he cannot perform part of a job because he cannot sit for a long period of time. An easy solution is to buy a desk that can be raised and lowered, so the worker can stand or sit at his or her option.

A worker may claim certain dusts are a problem for his or her asthma and therefore the worker needs a private enclosed office. While that might work, buying a respirator would be a much cheaper solution. Moreover, the worker may find that wearing a respirator is uncomfortable, and his or her asthma may then miraculously be cured by a simple inhaler. This view of human nature may seem harsh, and admittedly it does not apply to all. Nevertheless, it is a reality that does often occur.

The employer should seek the advice of medical providers, industrial engineers, ergonomic experts, and those alike to find a solution

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allow an employer to assess the parameters of the employee's disability, ADA liability does not follow.").

[216] *E.g.*, Hoppe v. Lewis Univ., 692 F.3d 833, 840 (7th Cir. 2012); Rehling v. City of Chi., 207 F.3d 1009, 1014 (7th Cir. 2000); Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1285–86 (11th Cir. 1997) (citing Lewis v. Zilog, Inc. 908 F. Supp. 931, 947–48 (N.D. Ga. 1995).

that works best for the employer, while still allowing the employee to perform the essential job functions.[217] All too often, the employer fails to engage in the interactive process with the employee and does not seek out other options and that failure looks very bad to a jury. Moreover, for many disabled employees, they truly want to work and not to be a burden, and they will meet the employer halfway or more in finding a solution. The employer should make the gesture to not only look good to a jury, but to see whether the disabled employee is a good worker making a necessary request, as opposed to one looking to abuse the system.

An employer must provide *an* accommodation that effectively allows the disabled employee to perform his or her job, not necessarily *the* accommodation the employee deserves, nor does the accommodation need to be perfect.[218] This issue was instructively addressed in *Noll v. IBM*[219] when a deaf employee wanted to view videos and recordings off of the company's Intranet for its employees.[220] The employer was rather sophisticated when it came to disabilities and made American Sign Language interpreters available in person and remotely.[221] However, the deaf employee found it tiring to watch videos and the sign reader at the same time, and thus demanded that all videos on the Intranet be captioned and that he be provided transcripts for all audio recordings.[222] The court rejected that request.[223] The court affirmed summary judgment for the employer, emphasizing that *an* accommodation need only be *effective*, and the accommodation need not be perfect.[224]

The employer, moreover, only has to accommodate the disabilities it knows about.[225] Thus, the question is not whether the worker at trial can show he has a disability, but rather whether the worker gave the employer enough knowledge to know that his condition was significant enough to qualify as a covered disability.[226] Likewise, unless it is

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[217] 29 C.F.R. § 1630.9(d).
[218] Noll v. IBM Corp., 787 F.3d 89, 95 (2d Cir. 2015) (citing 29 C.F.R. § 1630.9).
[219] *Id.*
[220] *Id.* at 92.
[221] *Id.* at 95.
[222] *Id.* at 93, 96.
[223] *Id.* at 96.
[224] *Id.* at 96–98.
[225] Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(b)(5)(a) (2012).
[226] Pollard v. High's of Balt., Inc., 281 F.3d 462, 470 n.3 (4th Cir. 2002) (quoting EEOC v. Stowe-Pharr Mills, Inc., 216 F.3d 373, 379 (4th Cir. 2000)); Griffith v. Wal-Mart Stores, Inc., 135 F.3d 376, 380 (6th Cir. 1998), *cert. denied*, 526 U.S. 1144 (1999).

an obvious disability that clearly needs an accommodation, the worker must request an accommodation.[227]

Of course, after the 2008 amendments to the ADA, the threshold for proving that a worker is disabled has been significantly lowered.[228] Virtually anyone with a chronic bodily function limitation is protected by the ADA.[229] Moreover, when an employer first receives a request for an accommodation, the employer may have limited knowledge of the worker's medical condition, and therefore will not be able to determine if the condition qualifies as a disability until more medical tests are performed.[230] Thus, the safe course for many conditions may be to assume, at least initially, that a condition is a covered disability and that the employee is entitled to ADA protection.

Real World Medical Issues

While we like to think of medicine as a science, most doctors will admit that it is more of an art than a science. While our knowledge has come a long way, our ignorance is still vast. We still are a far cry from finding a cure for cancer, as well as for the common cold. Why do some people develop arthritis, but others do not? Why does a disc herniate in some backs with minor trauma, and others can withstand substantial force with no ill effects? Orthopedists and neurosurgeons routinely put a twenty-five pound permanent weight lifting restriction on someone who has had back surgery. Yet, if you are looking in the medical literature for studies or articles that justify this common practice, then you will be disappointed because you will shockingly find nothing to justify this almost universally applied work restriction.

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[227] Walz v. Ameriprise Fin., Inc., 779 F.3d 842, 846 (8th Cir. 2015).

[228] Act of Sept. 25, 2008, Pub. L. No. 110-325, 2008 U.S.C.C.A.N. (122 Stat.) 3553, 3555.

[229] The EEOC has provided a non-exhaustive list of conditions which the EEOC believes will "virtually always" be found to be a covered disability: deafness, blindness, "an intellectual disability (formerly termed mental retardation)[,]" "partially or completely missing limbs or mobility impairments requiring the use of a wheelchair[,]" autism, cancer, cerebral palsy, diabetes, epilepsy, Human Immunodeficiency Virus (HIV) infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. 29 C.F.R. § 1630.2(j)(3)(ii)–(iii) (2015).

[230] U.S. Equal Emp't Opportunity Comm'n, Notice No. 915.002, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), (July 27, 2000), http://www.eeoc.gov/policy/docs/guidance-inquiries.html.

Treating doctors will often say whatever the patient wants. If the worker says he or she wants to go back to work, then his or her doctor will usually sign a full duty release form without a second thought. Conversely, some doctors will say a worker is "unfit for duty" without giving any specifics as to what part of the job the worker cannot perform. And, of course, physicians are often presented with some job descriptions that are outdated, or worse, are an unrealistic wish list that no workers meet. Doctors also sometimes give what appear to be precise work restrictions for which there is no medical justification.

For example, a person who had back surgery for a herniated disc might get a permanent work restriction of no lifting over twenty-five pounds. Not only can one ask why the restriction is not thirty-five pounds or fifty pounds, but when one looks at the medical literature, one is hard-pressed to find any justification for any lifting restrictions. Physical therapists do functional capacity examinations (hereinafter "FCE"), which are supposed to objectively document a worker's physical abilities.[231] However, one can argue that they are based primarily on what the employee says he can and cannot do, and thus the FCE largely just documents a worker's subjective complaints. While there is some attempt to verify consistency, in the end, the FCE test is limited by the employee's effort given during the FCE.

Examples of abuse are all too common. A doctor will permanently restrict a worker to no lifting over twenty-five pounds. Then, when the employer says the worker cannot perform his job with that restriction and is about to terminate the employee's employment, the same doctor, with no additional examination or testing, will give a full duty release. Likewise, even if a FCE is accurate, it only measures a worker's physical ability today and does not address the risk of reinjury.[232]

If an employer has doubts about a worker's ability to safely perform his or her job, then the employer should consider requesting a certification from the employee's physicians as follows, particularly when a worker returns to work after a prolonged absence:

> I hereby certify that the employee can perform the essential functions of his job based on the attached job description, which I have reviewed, with or without reasonable accommodations, and the worker will not be a direct threat to the safety of himself or others. I have identified any reason-

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[231] *Functional Capacity Evaluation*, The Am. Occupational Therapy Ass'n, Inc. (2012), http://www.aota.org/about-occupational-therapy/professionals/wi/capacity-eval.aspx.

[232] *Id.*

> able accommodations that are required. I hereby certify that the workers' return to work will not result in a significant risk of substantial harm to the health or safety of the employee or others ("direct threat"). My opinion is based on a reasonable medical judgment that relies on the most current medical knowledge and best available objective evidence. I understand and agree that the employer can rely upon my certification herein. If I believe there is a direct threat to the employee's or other's safety, but that threat can be eliminated by a reasonable accommodation, then I will identify that direct threat and suggest a reasonable accommodation to eliminate it, i.e., reduce the risk so the risk is no longer significant, and/or such that the potential harm will no longer be substantial.

If the treating physician and IME cannot agree on whether it is safe for the employee to return to work, then the employer should try to agree with the employee on a third doctor to resolve the conflict, possibly a professor at a local medical school.

Limitations on the Employer's Obligations to the Employee

As expansive as the employer's duties under the ADA are, the courts have put some limits on what is required of employers.[233] An employer need not create a job for a disabled person.[234] Thus, for example, if a disabled worker can only perform parts of two part-time jobs, the employer is not required to combine the two part-time jobs to create a full-time job for the disabled worker.[235]

An employer can give a preference to one disabled person as compared to another disabled person.[236] Thus, it is permissible for an employer to reserve light duty jobs for those with work-related disabilities, as compared to those with personal conditions.[237] This is often done to reduce workers' compensation costs when there are only a limited

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[233] *See, e.g.*, Majors v. Gen. Elec. Co., 714 F.3d 527, 534 (7th Cir. 2013) (holding that having another employee perform an essential function of a job was not considered a reasonable accommodation); Gaul v. Lucent Techs. Inc., 134 F.3d 576, 581 (3d Cir. 1998) (noting that transferring an employee away from situations that would cause him stress in individual projects would require too much oversight, and accordingly was not a reasonable accommodation); White v. York Intern. Corp, 45 F.3d 357, 362 (10th Cir. 1995) ("[T]he ADA does not require an employer to promote a disabled employee as an accommodation, nor must an employer reassign the employee to an occupied position, nor must the employer create a new position to accommodate the disabled worker.").

[234] *White*, 45 F.3d at 362.

[235] *See Gaul*, 134 F.3d at 576.

[236] *See* Urbano v. Cont'l Airlines, 138 F.3d 204, 205–06, 208 (5th Cir. 1998), *cert. denied*, 525 U.S. 1000 (1998), *abrogated on other grounds by* Young v. United Parcel Serv., Inc., 575 U.S. ____, ____, 135 S. Ct. 1338, 1347–48, 1350, 1356 (2015).

[237] *Id.*

number of light duty jobs. Indeed, some employers have light duty shops where injured workers can work, so as to prevent them from getting used to being out of work and collecting workers' compensation benefits.[238]

While employers must provide readers for the blind and interpreters for the deaf, an employer need not provide a helper to perform an essential job function that the disabled worker is supposed to perform.[239] Thus, if a job requires heavy lifting a large part of the time, or even a small part of the time if no one else is available to perform the lifting, then an employer does not have to hire a helper to do the heavy lifting that a disabled worker cannot perform.

However, employers should not jump to the conclusion that a disabled worker cannot perform his or her job simply because there is a minor duty listed on the job description which the disabled worker cannot perform. For example, purchasing a lifting machine to lift the heavy objects would be a reasonable accommodation that might work. Buying the worker a back lifting belt might allow the worker to perform the heavy lifting. The employer needs to make sure it asks the employee about any accommodation the employee has in mind, and the employer needs to make a reasonable effort to consider all possible accommodations. The employer would be wise to carefully document these efforts.

Another issue is whether an employer needs to make a temporary light duty job permanent in order to accommodate a disabled worker. The answer is no because while the ADA requires reasonable accommodations, the employer need not change the essential functions of the job, and that includes if the job is temporary.[240]

When it comes to the ADA, it can truly be said that ignorance is bliss. If an employee does not know of a disability, then the employer cannot have engaged in disability discrimination.[241] Thus, not only does the ADA require that the employer does not inquire into medical

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[238] U.S. Equal Emp't Opportunity Comm'n, Notice No. 915.002, Enforcement Guidance: Workers' Compensation and the ADA, (July 6, 2000), http://www.eeoc.gov/policy/docs/workcomp.html.

[239] Majors v. Gen. Elec. Co., 714 F.3d 527, 534 (7th Cir. 2013).

[240] *See* Koessell v. Sublette Cty. Sheriff's Dep't, 717 F.3d 736, 745 (10th Cir. 2013); *cf.* Hendricks Robinson v. Excel Corp., 154 F.3d 685, 697 (7th Cir. 1998) (quoting Dalton v. Subaru-Isuzu Auto., 141 F.3d 667, 680 (7th Cir. 1998)).

[241] Adeyemi v. District of Columbia, 525 F.3d 1222, 1224–25, 1228 (D.C. Cir. 2008).

questions or disabilities before a tentative job offer is made,[242] but an employer in fact should try to make its initial job selection cuts before it can even know of any medical conditions or disabilities, e.g., on a paper review of resumes or job applications. For example, for large law firms, those with poor school records are never going to be hired, so why even call them in for an interview? Make the job cut before knowing of their race, age, religion, and yes, any disability.

Moreover, poor job performance is not enough to put the employer on notice that the worker has a disability.[243] Thus, if an employee, after being terminated, in litigation blames his or her poor job performance on being depressed or having a mental limitation, it is too late. If the worker needed an accommodation, the employee should have notified the employer of his or her condition and requested an accommodation before the employer terminated his or her employment. Likewise, an employer generally does not have to provide a reasonable accommodation unless it is requested.[244]

The courts have also held that the employer merely following a doctor's work restrictions is not treating a person as disabled—complying with a doctor's work restrictions does not perceive the person as having a disability.[245] Thus, if the restrictions themselves are not enough to qualify as a covered disability, the disabled worker cannot create coverage claiming his employer's mere act of following the work restrictions is the equivalent of perceiving him or her as being disabled.

Employers are not required to provide a reasonable accommodation if doing so would violate a collective bargaining agreement.[246] Thus, if a collective bargaining agreement has a seniority clause, which allows workers with the most seniority to get the first pick with respect to jobs, the inherently light duty jobs will go to workers with more se-

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[242] *See* U.S. Equal Emp't Opportunity Comm'n, Notice No. 915.002, Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, 6–7 (Mar. 25, 1997).

[243] *See* Miller v. Nat'l Cas. Co., 61 F.3d 627, 630 (8th Cir. 1995); Hamm v. Runyon, 51 F.3d 721, 725–26 (7th Cir. 1995); Hedberg v. Indiana Bell Tel. Co., 47 F.3d 928, 934 (7th Cir. 1995).

[244] *See* Walz v. Ameriprise Fin., Inc., 779 F.3d 842, 846 (8th Cir. 2015) (holding that the employer was not required to force the employee to take a leave of absence when the employee acted in a disruptive manner).

[245] Rivera v. Pfizer Pharm., LLC, 521 F.3d. 76, 86 (1st Cir. 2008); Gruener v. Ohio Cas. Ins. Co., 510 F.3d 661, 665 (6th Cir. 2008).

[246] Filar v. Bd. of Educ., 526 F.3d 1054, 1068 (7th Cir. 2008).

niority and not to those with disabilities who cannot perform the more physically challenging jobs. While Congress encouraged unions and employers to amend collective bargaining agreements to avoid this result, Congress did not require them to do so.[247]

This is very unfortunate. There are employers who have a wide range of manual labor jobs. Some are very physically demanding and some are inherently light duty. For example, for long shoring work, i.e., unloading ships, there are lashers who go onto the ship and use heavy lashing rods to unhook containers—it is physically demanding work. On the other hand, there are drivers who just drive trucks to and from the docks to carry the containers away.

If a longshoreman injures his back or shoulder while lashing, it would be nice to place the injured worker in a truck driver job. Yet, the jobs are assigned by seniority under the union contract, so the injured worker, if he is young and has low seniority, will not be able to get the driver's job. Instead, a healthy but older worker with seniority will get the easier driver's job. Unfortunately, unions seem very reluctant to change the seniority system. At the very least, an exception should be made for disabled workers.

While the ADA mandates an interactive process wherein the employer and employee discuss possible reasonable accommodations, which will allow a worker to perform the essential duties of a job,[248] the duty rests on both the employer and the employee. Thus, as noted above, an employee must cooperate and answer questions, give requested medical information, and submit to his or her employer the requested medical examinations when appropriate.[249]

Also of note, if an employee represents to the Social Security Administration that he is disabled from working and the presentation is

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[247] S. REP. NO. 101-116, at 29–30 (1989); H.R. REP. NO. 101- 485, pt. 2, at 63 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 345–46.

[248] *See* Amy Renee Brown, *Mental Disabilities Under the ADA: The Role of Employees and Employers in the Interactive Process,* 8 WASH. U. J.L. & POL'Y 341, 342–43 (2002).

[249] *See generally* Loulseged v. Akzo Nobel Inc., 178 F.3d 731, 735 (5th Cir. 1999) (discussing the need for employee cooperation in the interactive process mandated by the ADA); Templeton v. Neodata Servs., Inc., 162 F.3d 617, 619 (10th Cir. 1998) (discussing an the employee refusing to give requested medical information to the employer in the interactive process); Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1135–37 (7th Cir. 1996) (discussing an employee's lack of cooperation in providing medical information in the interactive process).

inconsistent with his job performance even with reasonable accommodations, then the employee is barred from pursuing an ADA claim.[250]

The courts have recognized that employers can enforce work rules against everyone, including the disabled.[251] Thus, if an employer honestly believed there was a violation of its rules that justifies discipline, then that belief is a defense to an ADA claim, even if hindsight proves the employer was mistaken.[252] Moreover, even if the disability caused the rule violation, if the rule is job-related and a business necessity, then the courts will not require that an exception be made for the disabled worker.[253] The EEOC's guide to enforcing the ADA states: "nothing in the ADA prevents an employer . . . from disciplining an employee who steals or destroys property," or engages in misconduct such as theft, violence, or threats, "[e]ven if the misconduct was caused by a disability."[254] Conversely, if a policy is not job-related and a business necessity, then an employee can be required to modify it as a reasonable accommodation.[255]

One example of this, which unfortunately is not an uncommon occurrence, is for an employee to threaten a supervisor or co-workers and then claim that his actions were caused by a mental disability. The EEOC has stated that the ADA does not protect employees who make

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[250] *See* Myers v. Knight Protective Serv., Inc., 774 F.3d 1246, 1248–49 (10th Cir. 2014).

[251] *See generally*, Hamm v. Runyon, 51 F.3d 721, 726 (7th Cir. 1995) (affirming summary judgment for an employer who terminated an allegedly disabled employee for poor attendance); *Americans with Disabilities Act Questions and Answers*, U.S. Equal Emp. Opportunity Comm'n & U.S. Dep't of Just. C.R. Division (Feb. 2001), http://www.ada.gov/qandaeng.htm.

[252] Kariotis v. Navistar Int'l Transp. Corp., 131 F.3d 672, 681 (7th Cir. 1997).

[253] McElwee v. County of Orange, 700 F.3d 635, 645–46 (2d Cir. 2012); Macy v. Hopkins Cty. School Bd. of Educ., 484 F.3d 357, 366–71 (6th Cir. 2007); Palmer v. Circuit Court of Cook Cnty., Ill., 117 F.3d 351, 352–53 (7th Cir. 1997).

[254] U.S. Equal Emp't Opportunity Comm'n, Notice No. 915.002, Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities 15 (Mar. 25, 1997), http://www.eeoc.gov/policy/docs/psych.html.

[255] Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(9)(B) (2012); *see also* Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1086 (10th Cir. 1997) (finding that "[a]s a general rule, an employer may not hold a disabled employee to precisely the same standards of conduct as a non-disabled employee unless such standards are job-related and consistent with business necessity").

such threats,[256] and the courts likewise agree that employees who threaten supervisors or co-workers are not protected by the ADA.[257]

Conclusion

The ADA is certainly not an easy statute for employers to comply with, but it is the law and cannot be ignored. Moreover, as much of a pain as the ADA can be for employers, paying hundreds of thousands of dollars to defend a lawsuit and pay a judgment is a much greater pain. With knowledge of the law and patience, employers can make the right decision. However, in some critical areas, further clarification from the courts is needed.

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[256] *See* U.S. Equal Emp't Opportunity Comm'n, Notice No. 915.002, Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities 16 (Mar. 25, 1997), http://www.eeoc.gov/policy/docs/psych.html (advising that an employee who "has a hostile altercation with his supervisor and threatens the supervisor with physical harm" is "no longer a qualified individual").

[257] Mayo v. PCC Structurals, Inc., 795 F.3d 941, 946 (9th Cir. 2015); Calef v. Gillette Co., 322 F.3d 75, 87 (1st Cir. 2003); Williams v. Motorola, Inc., 303 F.3d 1284, 1290–91 (11th Cir. 2002); Sullivan v. River Valley Sch. Dist., 197 F.3d 804, 809, 813 (6th Cir. 1999); Palmer v. Circuit Court, 117 F.3d 351, 352 (7th Cir. 1997).