The ADA

Qualifications, Requests for Accommodation, Fitness-for-Duty Examinations, and Disability Separations

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2020

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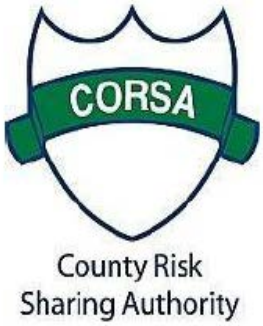

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I. WHAT IS THE ADA?

A. Purpose. The ADA was enacted to ensure that individuals with disabilities are given the same consideration for employment that individuals without disabilities are given.

B. Protection. The Americans with Disabilities Act of 1990 ("ADA") makes it unlawful for an employer to discriminate against an employee on the basis of a disability. 42 U.S.C. 12112(a) (1994); 42 U.S.C. 12112 (b)(4) (1994).

1. To be covered by the ADA, the employer must have had at least 15 employees for each working day in each of at least 20 weeks in the preceding year. 29 C.F.R. §1630.2(e).

2. Who is an employee? The mere fact that a person has a particular title in the organization (e.g. partner, director, vice president) does not necessarily mean that the person is an "employee" under the ADA. Nor does the mere existence of an employment agreement or contract automatically mean that the person is an employee. Instead, whether a person is an employee depends on the incidents of the relationship between the company and the organization. Courts will apply the "right to control" test to determine if the individual is an employee, analyzing the following six factors:

   a. Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;

   b. Whether and, if so, to what extent the organization supervises the individual's work;

   c. Whether the individual reports to someone higher in the organization;

   d. Whether and, if so, to what extent the individual is able to influence the organization;

   e. Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and

   f. Whether the individual shares in the profits, losses, and liabilities of the organization.

C. Additional Protection. The ADA also makes it unlawful to discriminate against individuals with disabilities in state and local government services, public accommodations, transportation and telecommunications.

D. CORSA BPPM Policy Language.

"The County prohibits discrimination in hiring, promotions, transfers, or any other benefit or privilege of employment, of any qualified individual with a permanent disability."

II. WHO IS A QUALIFIED INDIVIDUAL WITH A DISABILITY?

A. Who is a "Qualified Individual"?

1. Introduction.

    a. The battle ground in ADA litigation generally surrounds the question of whether the employee is a "qualified individual" with a disability.

    b. An individual with a disability must be qualified to perform the essential functions of the position with or without reasonable accommodation.

        i. An employer is not required to cut an essential job function to accommodate an employee with a disability.

    c. The individual must satisfy educational, experience, skill, license, and any other job qualification standards.

    d. The ADA does not interfere with the right of an employer to hire the best-qualified applicant. There are no affirmative action requirements; meaning that the employer does not have to choose a disabled employee over a more qualified applicant. The ADA simply prohibits employers from discriminating against qualified applicants or employees because of a disability.

2. Two-Step Process. The determination of whether an individual is a "qualified individual" is a two-step process:

    a. First, the employer must determine if the individual is "otherwise qualified."

    b. Second, the employer must determine if the individual can perform the "essential functions" of the position with or without "reasonable accommodation."

3. Otherwise Qualified Employee. An employee is otherwise qualified if he or she satisfies the prerequisites for the position, such as possessing the

appropriate educational background, employment experience, skills, licenses, etc.

a. For example, an employer must determine whether an accountant who is paraplegic is qualified for a certified public accountant's position by first finding out whether the applicant is a licensed accountant with a CPA.

B. Who is a "Qualified Individual" with a Disability?

1. An individual is protected by the ADA if that individual:

a. Has a physical or mental impairment that substantially limits a major life activity;

b. Has a record of a substantially limiting impairment; or

c. Is regarded as having a substantially limiting impairment.

III. WHAT IS A PHYSICAL OR MENTAL IMPAIRMENT?

A. Physical or Mental Impairment. A physical or mental impairment is any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of several body systems, or any mental or psychological disorder. 29 C.F.R. § 1630.2(h).

1. Physical impairments. Physical impairments under the ADA include, but are not limited to:

a. Hearing loss;
b. Osteoporosis; or
c. Arthritis.

2. What is not a physical impairment:

a. Eye color;
b. Hair color;
c. Left-handedness;
d. Height, weight or muscle tone that is "normal";
e. Predisposition to illness or disease; or
f. Being overweight.

3. Mental impairments. A mental impairment under the ADA refers to any mental or psychological disorder, including, but not limited to the following:

a. Intellectual disabilities;
b. Organic brain syndrome, e.g. brain injury;
c. Emotional or mental illness;

i. thought disorders, e.g. schizophrenia;
ii. mood disorders, e.g. manic-depression;
iii. anxiety disorders, e.g. neuroses, phobias;
iv. personality disorders;

d. Specific learning disabilities;
e. Certain sleep disorders.

4. Conditions that are not mental impairments, include:

a. Transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
b. Compulsive gambling, kleptomania and pyromania;
c. Psychoactive substance use disorders resulting from current illegal drug use; and
d. An inability to get along with others, irritability, chronic lateness and poor judgment.

B. **"Regarded as" substantially limited in a major life activity.** Courts will often look to whether or not the employer regards the individual as having a disability by looking at the employer's conduct towards the employee. Employers often have concerns that may result in excluding individuals with disabilities. Such concerns include:

1. Productivity;
2. Safety;
3. Insurance;
4. Liability;
5. Attendance;
6. Cost of accommodation and accessibility;
7. Workers' compensation costs; and
8. Acceptance by coworkers and customers.

C. **CORSA BPPM Policy Language**. "To be considered a qualified individual, the employee must satisfy the requisite skills, experience, education and other job-related requirements of the position held or desired and must be able to perform the essential functions of his/her position, with or without a reasonable accommodation."

D. Case Examples.

1. *Woolf v. Strada,* No. 19-860-cv, 2020 U.S. App. LEXIS 3555, at *7 (2d Cir. Feb. 6, 2020).

The 2nd Circuit Court of Appeals recently held that work-induced migraines do not constitute a disability under the ADA.

The Plaintiff employee began working as a sales representative for Bloomberg, L.P. in May 2011. Although the Plaintiff indicated he did not suffer from any physical or mental impairments that substantially limited one or more of his major life activities, from 2011-2013 the Plaintiff reported suffering migraines that left him temporarily incapacitated and unable to complete his work. The Plaintiff's doctor wrote him a letter indicating that the Plaintiff's condition placed him at a risk for stroke or heart attack "simply from the stress he is currently experiencing at work." First, the Plaintiff requested to be transferred to the employer's Asia office, but he was denied because of lack of good standing. The Plaintiff then requested not to be managed by his current supervisors. Neither accommodation was granted, but the employee was put on medical leave on May 31, 2013.

Throughout the Plaintiff's employment, his employer became aware of the Plaintiff's underperformance and attempted to address it. In 2012 his supervisors identified various areas the Plaintiff could improve upon, but these changes were never made. Finally, in 2013 the Plaintiff received another low performance review and received a written warning. Consequently, the Plaintiff was terminated on January 10, 2014.

The Plaintiff then sued his former employer for discrimination and retaliation. Among other things, the Plaintiff claimed his former employer failed to accommodate his disability. The district court granted the employer's motion for summary judgement because no reasonable trier of fact could conclude the Plaintiff was disabled since he admitted he could perform the exact same job functions under different management. The 2nd Circuit Court of Appeals affirmed the grant of summary judgment, concluding that the "inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." This holding is consistent with other jurisdictions, including the holding from *Allen v. Southcrest Hospital*, No. 11-5016, 2011 U.S. App. LEXIS 25488 (10th Cir. Dec. 21, 2011).

2. ***Darby v. Childvine, Inc.*, U.S. District Court for the Southern District of Ohio (1:18-cv-00669-MRB).**

Sherryl Darby was terminated two weeks after she underwent surgery for a double mastectomy. She sued her employer, Childvine, claiming she had breast cancer which constitutes a disability under the ADA.

Although the parties originally disputed whether a diagnosis of breast cancer constituted a disability under the ADA, the case quickly turned when it was discovered Darby was never actually diagnosed with breast cancer. Rather, Darby had a genetic mutation which is associated with an increased risk of developing breast cancer. Darby made the decision to have a double mastectomy given this diagnosis and family history of breast cancer.

The court ultimately granted Childvine's motion to dismiss because the ADA does not protect against future disabilities, only present ones. Therefore, the surgery conducted to decrease the plaintiff's risk of breast cancer in the future, and her associated mutated gene, were not considered a disability under the ADA.

3. ***Shell v. Burlington Northern Santa Fe Railway Company*, No. 19-1030.**

On October 29, 2019 the United States Court of Appeals for the Seventh Circuit held the Americans with Disabilities Act ("ADA") does not prohibit discrimination based on future impairments.

Ronald Shell applied for a safety-sensitive position with the Defendant BNSF as a machine operator. Like all applicants for the position, BNSF required Ronald to undergo a medical examination. During the examination, Ronald's body mass index ("BMI") was 47. BNSF had a practice of refusing to hire applicants with a BMI over 40 for safety-sensitive positions. BNSF expressed concerns that Ronald's obesity would likely cause disabilities in the future, although none were currently present, and ultimately denied him the position.

Ronald sued under the ADA, arguing he was disabled under the ADA because the employer regarded him as disabled. However, the court rejected this argument and instead held the ADA does not protect non-disabled employees from discrimination based on the perceived risk of future impairments.

The Seventh Circuit's opinion was consistent with opinions from the Eighth, Ninth, and Tenth Circuits all similarly holding the language of the ADA does not protect non-disabled individuals who have a risk of disability in the future.

IV. DO MEDICATION PRESCRIPTIONS OR MITIGATING MEASURES CONSTITUTE A DISABILITY?

A. Medication. For purposes of determining whether a worker suffers from a disability as defined by the ADA, it makes no difference whether the major life function is affected directly by a disability, or indirectly by the side effect of medication taken for a medical or physical condition.

B. Medication Case Examples.

1. **Verity Property Management, Inc. Settlement, 2019.**

Verity Property Management, Inc., reached a settlement agreement with the EEOC where they agreed to pay $22,500 and make substantial changes to their workplace policies. The applicant, who remains unnamed, originally applied for a position as an administrative assistant. However, Verity was so impressed with the applicant they offered her a position as a leasing agent. On her first day of work the applicant participated in a drug screening. The applicant tested positive for a medication which she was prescribed to treat a medical condition.

Concerned with the potential side effects of the medication, Verity questioned the applicant as to why she had not disclosed her usage. The next day Verity terminated the applicant without any further inquiry, even though the applicant did not experience any side effects from her medications and was able to perform the functions of her position.

In the settlement, the EEOC emphasized that employers are not prohibited from instituting drug screening to prevent illegal drug abuse. But, an employer's drug-free workplace policy should not result in an applicant being denied the opportunity to work lawfully because they are using a prescription medication to treat a medical condition.

2. ***Fehr v. McLean Packaging Corp.*, 860 F. Supp. 198 (E.D. Pa. 1994).**

A supervisor of one employee requested that the employee assist in loading trucks, a task that required him to work in a warm, confined space with minimal ventilation. The Employee refused to undertake the task, alleging that he was sensitive to heat caused by medication he was taking for depression. The Court held that breathing is unquestionably a major life function, and that it makes no difference whether the major life function is affected directly by a disability, or indirectly by the side effects of medication. Therefore, the inquiry must further be whether the breathing condition affects breathing in the sense that it is a major life activity, not just activity pertinent to a specific job.

3. ***Franklin v. U.S. Postal Service*, 687 F. Supp. 1214 (S.D. Ohio Western Division, 1988).**

   If an employee refuses to take medication that is available for his or her disability, then the employee may not be protected by the ADA.

C. When Medication is not a Disability. The following are examples of temporary, non-chronic impairments of short duration, with little or no permanent impact, that are usually not disabilities:

1. Broken limbs;
2. Sprained joints;
3. Concussions;
4. Appendicitis;
5. Influenza.

D. Mitigating Measures. With the sole exceptions of eye glasses and contacts, an employee may be "disabled" under the ADA regardless of mitigating measures if their impairment would render them "substantially limited in a major life activity" absent the mitigating measure.

1. Further, the Amendments specify that "episodic or in remission" impairments such as cancer or migraines are per se disabilities if they would substantially limit a major life activity when active.

V. REASONABLE ACCOMMODATIONS AND UNDUE HARDSHIP

A. What is a "Reasonable Accommodation"? A reasonable accommodation is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of the job, or to enjoy the benefits and privileges of employment equal to those enjoyed by employees without disabilities.

1. The ADA requires that the employer make reasonable accommodations for known physical or mental limitations of an otherwise qualified employee or applicant with a disability. 42 U.S.C. § 12112(b)(5)(A) (1994).

2. However, the employer need not make the requested accommodation if it would result in further harm to the employee or applicant. *Chevron, U.S.A., Inc. v. Echazabal*, 122 S. Ct. 2045 (2002).

B. Identifying Accommodations. The challenging employee initially bears the burden of identifying an accommodation, the costs of which facially do not exceed its benefits. If the employee satisfies the burden, the employer then has the burden to demonstrate that the proposed accommodation creates an "undue hardship."

C. Examples.

1. The acquisition or modification of equipment or devices;

2. Job restructuring;

3. Part-time or modified work schedules;

4. Reassignment to a vacant position;

5. Adjusting or modifying examinations, training materials or policies;

6. Providing readers and interpreters; and

7. Making the workplace readily accessible to and usable by people with disabilities.

D. Employee Refusal.

1. If an applicant or employee refuses to accept a reasonable accommodation, then the individual may be considered non-qualified. *Hankins v. The Gap*, 84 F.3d 797 (6th Cir. 1996).

E. Undue Hardship. An employer violates the ADA when they fail to provide a reasonable accommodation for a known physical or mental limitation of a qualified individual with a disability. However, an employer does not violate the ADA when providing an accommodation would place an undue hardship on the employer's business.

1. Undue hardship means that an accommodation would be unduly costly, substantial or disruptive, or would fundamentally alter the nature or operation of the business.

2. Some factors to consider in determining if an accommodation is an undue hardship include: 29 C.F.R. §1630.2 (p)(1)

   a. The nature and the cost of the required accommodation, taking into account the availability of tax credits and deductions and/or outside funding;

   b. The overall financial resources of the facility(s) involved;

   c. The number of employees at such facility;

   d. The impact on expenses and resources, and the impact upon other aspects of the operation of the facility;

e. The overall financial resources of the covered entity;

f. The number of employees and number, type and location of its facilities;

g. The type of operation(s) of the covered entity, including its composition, structure, and work force functions; and

h. The geographic separateness, administrative or physical relationship of the facility (or facilities) in question to the covered entity.

3. If an accommodation is an undue hardship, the employer must make efforts to identify another accommodation that will not pose an undue hardship.

F. Case Examples.

1. ***Kassa v. Synovus Financial Corporation*, No. 19-10441 (11th Cir. Feb. 3, 2020).**

Plaintiff employee worked as a lead network support analyst in the Network Operation Center ("NOC") for Synovus. The Plaintiff informed his employer of his bipolar disorder and intermittent explosive disorder and requested he be given short breaks to cool his temper. His employer agreed to the accommodation so long as the Plaintiff's area was covered, and he could still be reached during breaks if necessary.

In 2016 the employer engaged in corporate restructuring and as a result the Plaintiff was transferred to the Automated Teller Machine ("ATM") team, where he would handle customer service calls about issues with Synovus ATMs. Plaintiff was unhappy about his new assignment and felt he would be unable to control his temper while fielding customer calls. He expressed his concerns to his senior director and the human resources manager, but he was not reassigned.

In 2017 the Plaintiff was terminated for making rude and unprofessional comments during customer services calls and calls with colleagues, including saying "I hate working with women." The Plaintiff subsequently sued his former employer for disability discrimination and failure to accommodate. The district court granted summary judgement in favor of the employer, but on appeal the 11th Circuit Court of Appeals reinstated the Plaintiff's failure to accommodate claim and remanded the case for further proceedings. Because the Plaintiff has previously been accommodated in his previous role, and the accommodation was successful at addressing the Plaintiff's disability, the district court must determine whether the employer

stopped all accommodations when they transferred the Plaintiff, as alleged by the Plaintiff.

2. ***Booth v. Nissan N. Am., Inc.*, 2019 U.S. App. LEXIS 17159 (6th Cir.).**

Plaintiff worked on the assembly line for Nissan and sustained a neck injury in 2004. He was then given work restrictions by his doctor and has continued to work on the line to this day. However, in 2015, Plaintiff requested to be transferred to a material handling position because it would be less stressful. Plaintiff's request was ultimately denied, and he brought suit under the ADA alleging failure to accommodate and disability discrimination.

The Sixth Circuit upheld the district court's grant of summary judgment for Nissan, holding that, among other things, Plaintiff failed to show he was actually disabled. The Court reiterated its prior holdings that an individual is not automatically disabled just because he or she has work restrictions from a doctor. As the Court held, a plaintiff who alleges a work-related disability is still required to show that his or her impairment limits his or her ability to perform a class of jobs or broad range of jobs, not just the unique aspects of a single specific job.

3. ***Tinsley v. Caterpillar Fin. Servs., Corp.*, 2019 U.S. App. LEXIS 8252 (6th Cir. 2019).**

Plaintiff worked for the employer in various positions for 19 years, most recently as a financial analyst. In 2015, she complained that she could no longer handle the stress of her position due to her many work responsibilities. Plaintiff's supervisor met with her and took steps to reduce Plaintiff's stress, including reassigning many of her responsibilities to other employees. However, the two sides still had issues and Plaintiff ultimately requested that she be transferred to a new supervisor as an accommodation for her PTSD, as she did not feel comfortable working under her supervisor because he allowed other employees to bounce stress balls on the ground while working and other horseplay. The employer denied Plaintiff's request for accommodation but allowed her to take 18 weeks of FMLA leave. After the FMLA leave, Plaintiff's doctor cleared her to return to work, but her doctor recommended she report to a new supervisor. Plaintiff retired after the employer denied her repeated requests for a new supervisor and to extend her FMLA leave beyond the 18 weeks already provided to her.

Plaintiff then filed suit, alleging failure to provide reasonable accommodation under the ADA and retaliation for exercising her FMLA rights due to a poor performance review. The district court granted the employer's motion for summary judgment on both claims. The Sixth Circuit upheld the dismissal of Plaintiff's ADA claim, holding that Plaintiff

failed to show that her PTSD sufficiently limited her ability to perform a class of jobs of a broad range of jobs. It was undisputed that Plaintiff could perform her job and her issues related directly to her supervisor's management style. Specifically, her disability was triggered by "the way [Supervisor] managed . . . with all the ball bouncing." Plaintiff was not entitled to a reasonable accommodation because she was not considered disabled under the ADA, as her inability to work was only related to one supervisor, and thus, a unique aspect of her single specific job.

However, the Sixth Circuit did overturn the district court's dismissal of Plaintiff's FMLA retaliation claim, holding that she made a prima facie case of retaliation due to the negative performance review, the alleged adverse employment action at issue, occurring within two months of her FMLA leave. The Court noted it has consistently held adverse employment actions occurring within 2 to 3 months of the protected activity at issue is sufficient to satisfy the causation prong of a retaliation claim.

VI. INTERACTIVE PROCESS

A. As previously noted, the employee seeking an accommodation has the burden of identifying an accommodation. Often, when a qualified individual with a disability requests a reasonable accommodation, the appropriate accommodation is obvious.

B. When the appropriate accommodation is not obvious, then the employer must make a reasonable effort to identify a reasonable accommodation by engaging in an interactive process with the employee. The best method is to ask the employee or applicant about potential accommodations that would allow them to perform the essential functions of the job or participate in the application process.

1. Accommodations must be made on a case-by-case basis, depending on the nature and extent of the disability and the requirements of the job.

2. The principal test is effectiveness, e.g. does the reasonable accommodation allow the individual to perform the essential functions of the job?

3. The accommodation does not need to be the best accommodation or the accommodation that the individual would prefer, although primary consideration should be given to the individual involved. An accommodation is reasonable so long as it is effective.

C. CORSA BPPM Policy Language. "The County will provide reasonable accommodation to a qualified applicant or employee with a disability unless the accommodation would pose an undue hardship on or direct threat to the facility. Decisions as to whether an accommodation is necessary and/or reasonable shall be made on a case-by-case basis. An employee who wishes to request an accommodation shall direct such request to [At Least Two, No More Than Four

Designees, Title, Phone Number], each of whom shall have the authority and responsibility to work directly with [someone outside the office] to investigate and take appropriate action concerning the request. Requests for accommodation should be in writing to avoid confusion; however, verbal requests will be considered. The employer and employee will meet and discuss whether an accommodation is appropriate and, if applicable, the type of accommodation to be given."

VII. EMPLOYEE MISCONDUCT

A. The requirement of reasonable accommodation does not necessarily include a duty to tolerate misconduct by the employee. This area has proven especially problematic for the courts and administrative agencies because it is often difficult to separate the employee's behavior from the disorder itself. The following cases provide some examples:

1. ***Curley v. City of N. Las Vegas*, 772 F.3d 629 (9th Cir. 2014).**

Michael Curley was an employee for the City of North Las Vegas from 1996 until 2009. He also suffered a hearing impairment. Over the course of Curley's employment, he received numerous oral and written reprimands for his performance. In short, Curley was an awful employee; he had been involved in numerous verbal altercations with coworkers, made insensitive remarks about a coworker's motorcycle accident, damaged city property, and made several violent threats to coworkers, among other incidents.

During his employment, Curley requested to work away from one of the trucks he was operating because it was allegedly detreating his hearing. However, because an essential duty of Curley's position was to be around that type of truck, the City rejected Curley's requested accommodation and instead recommended he use dual hearing protection.

Shortly after his request for accommodation, Curley was involved in another incident with a coworker. The coworker asked Curley to remove his hearing protection so they could discuss a work-related task. In response, Curley began swearing at his coworker and rhetorically asked whether he was a doctor. Upon learning of the incident, Curley's employer put him on administrative leave to conduct an investigation. During the investigation, the employer uncovered additional concerning behavior related to Curley's work performance, including:

a. Threatening to put a bomb under a coworker's car;
b. Threatening to give a coworker a "blanket party" where he would throw a blanket over the person and then beat them;
c. Insinuating mafia connections;

d. Threating to kick the teeth out of a coworker if the coworker did not join the union;
e. Threatening to shoot his supervisor's children in the kneecaps; and
f. Spending up to three hours a day on his cell phone, allegedly to operate his outside ADA consulting business.

Part of the City's investigation included a fit-for-duty evaluation to assess whether Curley could return to work or whether he was a danger to himself or others. Upon completing the evaluation, the doctor determined Curley was fit for duty. Despite this determination, Curley was terminated at the conclusion of the investigation. His employer explained his termination was motivated by his excessive phone use, threats of violence to coworkers, conducting and soliciting personal business on work time, and making disparaging remarks about his supervisors and the City. After his termination Curley filed a charge with the EEOC alleging discrimination and retaliation.

Ultimately, the Ninth Circuit Court of Appeals affirmed summary judgement for the employer. They upheld the conclusion that an employee's disability does not excuse their misconduct. Even if an employee can pass a fitness for duty evaluation, this alone does not require the employer to reach a favorable employment decision.

2. ***Landefeld v. Marion General Hospital, Inc.*, 994 F.2d 1178 (6th Cir. 1993).**

A physician was recorded on a hidden video camera stealing or destroying mail from other physicians' hospital mailboxes. After the hospital suspended his staff privileges, he brought suit under the Rehabilitation Act, contending that he suffered from a bipolar mental disorder, and that he should not have been disciplined. The Court of Appeals affirmed the granting of judgment in the hospital's favor on a variety of grounds, including the fact that the hospital was unaware of the physician's mental disorder and the lack of trust that would exist even after he sought treatment.

3. ***Leatherwood v. Houston Post Co.*, 54 F.3d 553 (5th Cir. 1995).**

The Employee was a writer and editor who missed three to four months of work over a nine-month period. After he was discharged, he brought suit contending that the inconvenience caused to the Employer for his absence was "no more of an inconvenience to the Houston Post than if he had a long vacation." A jury entered a verdict in favor of the Employee, but the Court of Appeals reversed, concluding that absences of that duration were unreasonable as a matter of law.

VIII. WHAT CAN I DO IF I BELIEVE AN EMPLOYEE'S DISABILITY INTERFERES WITH THEIR ABILITY TO WORK?

A. Medical and Psychological Fitness for Duty Testing

1. A fitness for duty exam must be job related and consistent with business necessity. Job descriptions can help employers determine whether an employee is "fit for duty" and defend against any subsequent discrimination claim.

    a. Generally, an examination of an employee may be job-related and consistent with business necessity when the employer has a reasonable belief based on objective evidence that (1) the employee's ability to perform essential job functions is impaired by medical condition; or (2) the employee poses a direct threat due to the medical condition.

2. If a supervisor believes that an employee's injury or condition is interfering with the employee's job performance or may keep the employee from performing the essential functions of the job, the employee may be recommended for a medical fitness for duty evaluation.

3. Likewise, if it is suspected that personal traits, disorders, etc., are causing or contributing to an employee's subpar performance or creating other issues at work, a psychological fitness for duty evaluation may be recommended.

4. In both situations, the evaluating doctor or physiatrist is provided with a copy of the employee's job description and is taxed with determining the following:

    a. Determine that the employee is physically/psychologically capable of performing the essential functions of the job and therefore capable of remaining in the position.

    b. If the medical professional determines otherwise, it is then determined what steps can be taken that will allow the employee's condition to improve so he or she can adequately perform the job and return to work.

    c. Finally, the reasonable accommodations that need to be in place to allow the employee to work despite his or her physical or mental condition.

    d. Employers should insure that the referral is specific, including any incidents that preceded the referral, as this will help the medial

professional determine the correct course of action as accurately as possible.

5. The doctor or psychiatrist's evaluation will include the following:

   a. The employee's information;

   b. The reason for the evaluation;

   c. Background information including past incidents, etc.;

   d. Observations (including clinical interview and behavioral observations if it is a psychological fitness for duty test as well as psychological test findings if necessary);

   e. Review of the employee's medical/mental health records; and

   f. Conclusions and Recommendations.

6. Employers must beware of violating anti-discrimination laws in this context, including the ADA and FMLA.

   a. An employer is entitled only to the information necessary to determine whether an employee can perform the essential functions of the job without posing a direct threat.

   b. Generally, an employer cannot request an employee's medical records because they are likely to contain information unrelated to whether the employee can perform his/her essential functions.

   c. An employer may require an employee to provide a medical certification that he/she can safely perform a physical agility or physical fitness test. However, the employer is only entitled to a note stating that the employee can perform the test, not the employee's complete medical records or any information about any conditions that do not affect the employee's ability to perform the tests safely.

IX. WHAT DO I DO IF I RECEIVE AN EEOC OR OCRC COMPLAINT?

A. EEOC Complaints. The Equal Employment Opportunity Commission ("EEOC") investigates complaints of discrimination against job applicants or employees on account of the person's race, color, religion, sex, national origin, age (40 +), *disability* or genetic information. When the EEOC receives an allegation of discrimination they provide the employer with a "Notice of a Charge of Discrimination." This notice informs the employer that a charge of discrimination

has been filed against them, however, it does not mean the EEOC has determined the employer has engaged in the alleged conduct**.**

1. Review the EEOC notice charge and follow the instructions within.

    a. The charge may include instructions to respond with a "position statement," explaining why the claims in the charge are inaccurate or why the conduct is not illegal.

2. Consider EEOC mediation to resolve the charge quickly, confidentially, and at no cost.

    a. Mediation is a free, voluntary, and informal process to resolve disputes between employees and their employer with the assistance of a neutral mediator.

    b. An employer's participation in mediation is not an admission of guilt. The mediator does not decide who is right or wrong; rather, the mediator helps the parties develop their own solution.

    c. If parties are unable to reach a mutually acceptable solution, parties can continue with the EEOC procedures to investigate and address the complaint.

3. Respond to any additional requests for more information by the EEOC, even if you believe the underlying charge to be frivolous.

    a. The EEOC may request additional evidence to support the employer's claims asserts in their position statement. Such evidence may include documents, interviews, conferences, or an on-site inspection.

    b. Remember, the information you provide may help dismiss the charge!

4. Protect Employees from Retaliation.

    a. Ensure employees are not punished for reporting allegations of discrimination or for participating in subsequent investigations.

5. If the EEOC determines there is no probable cause for discrimination, their investigation ends, and the employee is issued a "Notice of Right to Sue."

6. However, if the EEOC finds discrimination has occurred, they will first attempt conciliation. If conciliation is successful, neither party may sue, and the conciliation decision is implemented. If conciliation is unsuccessful, the

EEOC may bring a lawsuit against the employer on behalf of the employee or release the matter for the individual employee to pursue the claim in court.

B. **OCRC Complaints.** The Ohio Civil Rights Commission ("OCRC") similarly investigates charges of discrimination in employment on the bases of race, color, religion, sex, national origin, disability, age, ancestry, military status or familial status.

1. Once an employee files a charge against you, you will be asked whether you will agree to mediate the claim.

2. If the employee and employer do not agree to mediation, then the OCRC assigns a neutral investigator to determine whether there is enough evidence to support the discrimination charge.

3. The investigator will generally request the employer respond to the charge with a position statement.

4. If the OCRC investigator determines that there is probable cause showing discrimination occurred, you will be offered a chance to try to resolve the charge. You may also request the OCRC reconsider the charge.

5. If the OCRC finds no probable cause of discrimination, the employee will be issued a "Notice of Right to Sue" and may bring their complaint to court.