DEVELOPMENTS IN DISABILITY LAW AND ACCOMMODATIONS

Presented by
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I. American with Disabilities Act

A. General Standards.

1. The Americans with Disabilities Act ("ADA"), the Wisconsin Fair Employment Act ("WFEA"), and certain municipal ordinances (including the Madison Equal Opportunities ordinance) prohibit discrimination on the basis of disability.

    a. Employers **may not discriminate** against otherwise qualified applicants or current employees who have physical or psychological disabilities in any aspect of the employment relationship, including the application procedure, hiring, advancement, discharge, compensation, training, or any other term, condition or privilege of employment. This includes the provision of health insurance and other benefits.

    b. Employers **must provide reasonable accommodations** for applicants and employees, both in the hiring process and with regard to all other aspects of employment.

2. The ADA applies to employers with fifteen or more employees.

3. Under the ADA, employers must provide reasonable accommodations that will allow a qualified individual with a disability to perform the essential functions of the job, unless doing so will cause the employer undue hardship or there will be a "direct threat" of harm to the employee or others.

    a. Undue hardship

    Undue hardship means a significant difficulty or expense incurred by an employer.

    b. "Direct threat"

        i. The ADA does not prohibit an employer from refusing to hire or from removing an employee with a disability from a job if the employer can demonstrate that the individual would pose a "direct threat" to the health or safety of other individuals in the workplace," and the individual cannot perform the job safely with reasonable accommodation.

        ii. The "determination that an individual poses a 'direct threat' shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job . . . that relies on the most current medical knowledge and/or on the best available objective evidence."

iii. An employer must consider four factors:

(a) The duration of the risk;

(b) The nature and severity of the potential harm;

(c) The likelihood that the potential harm will occur; and

(d) The imminence of the potential harm.

iv. Any reasonable accommodations that would eliminate the risk of harm or reduce it to an acceptable level must also be considered.

v. The determination that a direct threat exists must be based on objective, factual evidence - not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes - about the nature or effect of a particular disability, or of disability generally. Relevant evidence may include:

(a) Input from the individual with a disability;

(b) The experience of the individual with a disability in previous similar positions; and

(c) Opinions of medical doctors, rehabilitation counselors, or physical therapists who have expertise in the disability involved and/or direct knowledge of the individual with the disability.

4. Definition of Disability. The ADA defines a disability as:

a. A physical or mental impairment that substantially limits one or more of the major life activities of an individual;

b. A record of having such an impairment; or

c. Being regarded as having such an impairment.

5. The ADA was amended effective January 1, 2009 by the Americans with Disabilities Amendments Act ("ADAAA"). The ADAAA was intended to reinstate a broad scope of protection under the ADA. The ADAAA did not change the core definition of "disability" or the definitions of "reasonable accommodation," "direct threat," or "undue hardship." Key amendments of the ADAAA include:

a. Congress's statement that "The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act."

b. Expansion of "major life activities," including the principle that one major life activity need not limit others. Major life activities include basic daily tasks such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. A new category of major life activities includes core bodily functions of the immune system, special sense organs and skin, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, lymphatic, musculoskeletal, and reproductive functions.

c. Rejection of the consideration of mitigating measures in determining disability status. This means that the ameliorative effects of any mitigating measure must not be considered in determining if a person is substantially limited in performing a major life activity. Examples of mitigating measures which are no longer to be considered are medications, medical supplies, low-vision devices, hearing aids, psychotherapy, behavioral therapy, physical therapy, assistive devices (exception - ordinary eyeglasses or contacts).

d. Rejection of the inappropriately high level of limitation necessary to obtain protection under the ADA. The question of whether someone is disabled under the ADA *should not demand extensive analysis.*

e. Establishment of the notion that an impairment that is episodic in nature or in remission is a disability if it would substantially limit a major life activity when active. This might include epilepsy, hypertension, asthma, diabetes, major depressive order, bipolar disorder, schizophrenia, and cancer.

f. The ADAAA expanded the third prong or the "regarded as disabled" provision of the ADA. Prior to the ADAAA, an employee asserting that he was regarded as disabled had to show that the employer perceived him as substantially limited in the ability to perform a major life activity.

    i. Under the ADAAA, the concepts of substantial limitation and major life activity are no longer relevant in the determination of whether an employee has been regarded as disabled.

    ii. Rather, an employer regards an individual as having a disability if it takes an adverse action based on the individual's impairment or perceived impairment, that is not transitory and minor. Transitory means lasting or expected to last for six months or less.

iii. The employee need not prove the employer's beliefs regarding the severity of the impairment. However, the employer will only be found to have discriminated under the ADA if the individual is qualified for the job he holds or desires.

iv. Individuals "regarded as" having a disability are not entitled reasonable accommodations but are entitled to protection from discrimination, retaliation, and harassment.

II. Wisconsin Fair Employment Act – Differences from the ADA

A. Who is covered?

1. The Wisconsin Fair Employment Act applies to employers with one or more employees.

2. Wisconsin's definition of disability differs from the ADA:

   a. A physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;

   b. Someone who has a record of such an impairment; or

   c. Someone who is perceived as having such an impairment.

      i. Wisconsin courts have held that an impairment that "makes achievement unusually difficult" refers to a substantial limitation on a major life activity.

      ii. Wisconsin agencies and courts have interpreted the phrase "limits the capacity to work" to protect employees who can show that their impairments limit their capacity to perform the specific job at issue. This means that more people are considered disabled under state law.

B. Discrimination "because of disability."

1. Under the WFEA discrimination can occur one of two ways:

   a. The employer acts on the basis of actual discriminatory animus against an employee because that employee is an individual with disability; or

b. The employer acts on the basis of dissatisfaction with a problem with that employee's behavior or performance which is caused by the employee's disability.

i. *Wisconsin Bell, Inc. v. Labor Industry Review Commission* 2017 WI App. 24. The Wisconsin Supreme Court is reviewing this decision. Oral argument is scheduled for December 1.

ii. The employer has to have knowledge of the underlying disability.

iii. There must be a link between the conduct giving rise to the adverse employment action and the underlying disability; i.e., there must be expert proof that the disability caused the conduct.

iv. The employer can avoid liability if it demonstrates that it imposed the adverse employment action because it genuinely and in good faith believed its position.

(a) The employer cannot ignore the employee's medical evidence and rely on its own "prejudices and assumptions."

(b) An employer can procure its own expert to evaluate the issue and provide a basis to contradict the employee's position.

v. It is not a violation of the WFEA to take an action against an employee based upon the employee's disability "if the disability is related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment."

(a) The employer must evaluate whether there are any forms of reasonable accommodation to allow the employee to perform the job-related responsibilities.

(b) The employer is not required to provide such accommodation if such would pose a hardship on the employer.

C. Reasonable accommodation and damages also differ. More on Reasonable Accommodation below!

III. What Is Reasonable Accommodation?

A. A reasonable accommodation is a change in work environment or the way in which things are customarily done that allows a disabled employee the opportunity to successfully perform the employee's position and to enjoy equal employment opportunities.

1. An accommodation is reasonable if it is effective and does not cause "undue hardship" or a "direct threat" to the employee or others.

2. Specific categories of accommodations that might be required:

   a. Making existing facilities accessible.
   b. Job restructuring/reallocation of certain job functions.
   c. Temporary and possibly permanent part-time or modified work schedules.
   d. Acquiring or modifying equipment.
   e. Changing tests, training materials, or policies.
   f. Providing qualified readers or interpreters.
   g. Reassignment to a vacant position.
   h. Extended, unpaid leave of absence (even beyond FMLA entitlements).
   i. Temporary "forbearance" of attendance and performance issues.
   j. Work at home requests.

3. Accommodations that will generally not be required:

   a. Longer-term lowering of job standards (performance/attendance).
   b. Bumping another employee out of a job.
   c. Repeatedly excusing prohibited behavior on the job.
   d. Indefinite leaves of absence.
   e. Hiring additional employees to assist or perform part of the job.
   f. Transferring a light duty job reserved for worker's comp injuries into a regular job.
   g. Creating a new position.

4. The employer may choose among reasonable accommodations as long as the chosen accommodation is effective.

5. Under the ADA, a proposed accommodation is not reasonable (and thus an employer is not required to implement it) if the accommodation does not enable the disabled employee to perform the "essential functions" of the job. Thus, employers are not required to remove or significantly alter essential job functions to reasonably accommodate disabled employees. If an employee cannot perform essential functions, even with an accommodation, then the employee is not qualified for the job and can be terminated. However, employers may have to restructure jobs to remove marginal tasks.

6. Wisconsin law does not use the "essential functions" analysis. Instead, "reasonableness" of an accommodation goes to whether it allows the employee to "adequately" perform his or her job responsibilities -- not whether the accommodation allows the employee to perform some, most or all of the duties. Employers in Wisconsin must individually assess accommodation requests to restructure a job or remove tasks, even those that would remove essential functions, before refusing such a request.

    a. An employer who has refused a reasonable accommodation must prove either: that even with the accommodation, the employee would not be able to perform his or her job responsibilities adequately OR the reasonable accommodation would impose an undue hardship on the employer.

    b. The employer can show undue hardship by showing that providing the accommodation will create significant operational difficulty or expense. Hardship is judged on a case-by-case basis. Lowered morale amongst co-workers is generally not deemed to be undue hardship.

B. **Requests For Accommodation.**

1. What constitutes a request for an accommodation?

    a. There are no formal requirements for disability accommodation requests.

    b. Requests can be verbal or in writing.

    c. An employee need not mention disability laws or use term "reasonable accommodation" in making a request. There is no magic language required.

    d. Generally, employers should not proactively ask whether an employee has a disability or whether an accommodation is needed. When an employee is struggling in some aspect of job performance, the employer should focus on the job performance and leave it to the employee to raise any health issues. However, if the employee has a known disability which is suspected of causing workplace issues, the employer may want to initiate the "interactive process." Approaching these issues correctly requires an individualized of each situation.

2. What are the employer's obligations after receiving a request for accommodation?

    a. A request for accommodation triggers the interactive process: a discussion and exchange of information to establish the need for accommodation and to identify appropriate reasonable accommodation(s).

b. The employer may ask relevant questions, including what kind of accommodation is needed.

c. The employer must not ignore or fail to follow up on the employee's requests for accommodation.

d. Unless the disability is obvious, the employer can request information from the employee's health care provider about the nature of the disability, the functional limitations caused by the disability, and what reasonable accommodations might exist.

e. Employers must pursue the interactive process in good faith, making an individualized inquiry and assessment for each situation.

f. An accommodation cannot be categorically ruled out as unreasonable. Insight and creativity may be necessary to devise an appropriate solution.

g. Employers must play an active role in identifying potential available positions for a disability employee; simply advising the employee to review posted positions is not enough.

h. The EEOC advises employers to focus on position outcomes, rather than position tasks when considering accommodation requests. When analyzing whether an accommodation is reasonable, the job description will not control; the real daily functions of the employee will control.

3. Practical Pointers.

a. No matter how counter-intuitive it may be, always attempt accommodation, particularly to determine whether hardship exists. *Wisconsin Bell, Inc. v. Labor & Indus. Review Comm'n*, 2017 WI App 24, 375 Wis. 2d 293, 895 N.W.2d 57, 62

i. Employee worked at a call center and during his employment is diagnosed with bipolar disorder. He informs his supervisor who allows him accommodations including time spent offline. Employee moves to a different call center, but does not inform supervisors of his condition. He is disciplined at the new position for disconnecting eight straight customer calls. Management was not aware of his disability, but during a review board hearing, documentation was provided regarding his disability. Management determined that intentionally disconnecting customers would not be allowed under any condition. He was suspended and had to enter into a back to work agreement where Wisconsin Bell would have just cause to terminate him for any further infractions relating to customer care, or

for a breach of integrity during a 1-year time period. During this period under the back to work agreement, he left early due to his condition but had activated a health code which prevents calls. During that time when he activated the health code, he was chatting with employees about personal matters on the system chat. Management did not think he was actually ill and fired him.

ii. The Labor and Industry Review Commission ("LIRC") interprets "because of" to include discriminatory animus which occurs "from the employer acting on the basis of dissatisfaction with a problem with that employee's behavior or performance which is caused by the employee's disability." The LIRC found that the first suspension did not violate WFEA because the people who disciplined the employee were not aware of his disability, and it would not have been a reasonable accommodation to hang up on customers. However, at the time of termination, the employer did have knowledge of the bipolar disorder and symptoms. The conduct involving the chat system and medical code activation were consistent with evidence submitted regarding descriptions from doctors describing the symptoms. It is possible to escape liability if an employer acts in good faith, but based on the evidence the LIRC found that the employer did not act in good faith.

b. Employers should document all key aspects of the interactive process.

i. Documentation requested and received.
ii. Key discussions.
iii. Accommodations considered and reasons for accepting or rejecting them.
iv. Impacts (positive and negative) of providing accommodations.

c. All employee medical information and accommodation information must be kept confidential and shared only on a need-to-know basis.

d. Train supervisors on accommodation basics. This is often where communication suffers, and the interactive process breaks down.

e. Approach accommodation requests positively and with an open mind.

f. If an employee is having performance issues, address those in a direct and timely fashion. If you avoid addressing performance issues, and then the employee raises an accommodation issue, you

are in a bad position to begin addressing the employee's performance.

g. Refusal to grant an employee their desired accommodation in lieu of a reasonable accommodation does not amount to a breakdown or failure of the interactive process. *Bunn v. Khoury Enters*., 753 F.3d 676, 683 (7th Cir. 2014).

h. He who breaks down the accommodation process loses.

i. If any employee refuses to cooperate in a new reasonably accommodated position because they prefer an alternative, the employer does not need to grant the desired accommodation. *See Dillard v. City of Austin*, 837 F.3d 557 (5th Cir. 2016).

ii. An employer's refusal to provide a specific accommodation will not indicate that the employer failed in the interactive process, especially in situations where the accommodation offered was reasonable and the employee is not requesting a reasonable accommodation that would enable the employee to perform an essential function. *Zaffino v. Metro. Gov't of Nashville & Davidson Cty., Tennessee*, 688 F. App'x 356 (6th Cir. 2017).

- Employee is a guidance counselor at a Middle School and suffers from FibroMuscular Dysplasia, which places her at risk for strokes. She is told that she will be transferred to another Middle School, and she notifies the school of her disability. She requests to remain at the current Middle School because it is close to her Medical Center and because moving may cause her undue stress and trigger health issues. Both schools are nearly the same distance from her Medical Center. At one point the school district offers to move her to an elementary school that is even closer to her medical center instead. She refuses both. A doctor ultimately approves the transfer to the other Middle School.

- The District Court held that the employee rejected a reasonable accommodation, and the Sixth Circuit upheld. Employee provided no authority stating that stress of workplace change requires employers to keep employees at a specific location. Distance from doctors is unrelated to the essential functions of the job and involves problems outside of the workplace. These

concerns are beyond the employer's duties to accommodate under the ADA.

4. Representative cases on what constitutes a reasonable accommodation.

   a. Leave of absence. *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017).

      i. Severson had a chronic back condition. The condition would flare up at times, making it difficult for Severson to walk, bend, lift, sit, stand, move, and work.

      ii. In June 2013, Severson had a significant flare-up and took an FMLA leave from work. Over the summer months, he submitted periodic notes from his doctor informing Heartland that he was experiencing ongoing symptoms and could not work.

      iii. Two weeks before Severson's FMLA leave was to expire, he informed Heartland that his condition had not improved and that he needed surgery on the date that his 12 weeks of FMLA leave expired. He told Heartland's HR Director that the typical recovery time for this surgery was at least two months and requested the extended leave.

      iv. Heartland notified Severson the day before his surgery that his employment with Heartland would end when his FMLA leave expired the day after his surgery and invited him to reapply with the company when he recovered from surgery and was medically cleared to work.

      v. On appeal, the parties focused their arguments on whether a long-term leave of absence is a reasonable accommodation under the ADA.

      vi. The Court's analysis focused on the fact that the ADA makes it unlawful for an employer to discriminate against a "qualified individual on the basis of disability." A qualified individual under the ADA is one who, with or without reasonable accommodation, can perform the essential functions of the job.

      vii. The Court confirmed that a "reasonable accommodation" is one that allows the disabled employee to perform the essential job functions.

      viii. The Court went on to state that "a long-term leave of absence cannot be a reasonable accommodation" because an

extended leave "does not give a disabled employee the means to work." Instead, it excuses the employee from working.

ix. The Court noted that shorter periods of intermittent leave, such as a period of a few days or a "couple of weeks," may constitute a reasonable accommodation. However, a leave spanning months "removes the employee from the class protected by the ADA."

x. This federal court ruling under the ADA is arguably inconsistent with well-established rulings on disability accommodation under the WFEA.

(a) Wisconsin law does not rely on an essential functions analysis, and instead looks to whether an accommodation allows the employee to adequately undertake job functions.

(b) LIRC and courts have consistently held that a leave of absence is a valid type of accommodation under the WFEA.

(c) Wisconsin case law has generally held that temporary leaves may be reasonable accommodations but leaves of an "indefinite" duration are not reasonable under the law. *Kinion v. Portage Community Schools,* (LIRC, 09/19/03)("Although a temporary leave to permit medical treatment over a relatively short period of time may be reasonable accommodation, the indefinite leave suggested in this case would not, particularly given the fact that the employer had already granted the Complainant a series of medical leave requests spanning nearly a year's time period, none of which have had enabled the Complainant to return to work.").

(d) In several cases where the employee's leave was deemed indefinite, however, the employee had been absent from work between 12 and 18 months.

b. Reassignment to a vacant position will ordinarily be a reasonable accommodation. In *EEOC v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012), the Seventh Circuit Court of Appeals reversed its previous position and held that reassignment to a vacant position ordinarily will constitute a reasonable accommodation when an

employee cannot be accommodated in the employee's current position.

i. United developed guidelines for accommodating employees who were unable to perform essential functions of their jobs. With regard to transferring such employees to a different position, United's position was that the employee would have to compete for any such transfer. Employees requesting transfers would be interviewed and would receive priority consideration over a similarly qualified applicant. But the employee would not automatically receive the transfer, even if they were qualified.

ii. The Appeals Court ruled that the ADA mandates that an employer transfer employees with disabilities to vacant positions for which they are qualified, "provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to the employer."

c. Reductions in marginal and some essential functions may be a reasonable accommodation, but employers are not obligated to provide a reasonable accommodation that allows the employee to perform a fraction of the productive work needed. *Schulz v. Wausau School District*, LIRC (April 30, 2012).

i. School district transferred custodian with Multiple Sclerosis from a first shift job to a less physical second shift job. The employee argued that the school district failed to engage in the interactive process in transferring her because the transfer caused her further fatigue and because the employer could have continued to allow her to perform her first shift tasks within her work restrictions.

ii. The Labor and Industry Review Commission ("LIRC") ruled in the school district's favor.

iii. The school district showed that permitting the employee to continue on first shift with limited duties meant that she would perform 2.5 to 3 hours of actual work during an 8-hour shift.

iv. Her limitations meant that she could not fill in for co-workers which caused operational inefficiencies and expenses for the district.

v. Accommodating the employee caused morale problems on the custodial staff who had to complete the employee's job duties in lieu of completing their own duties at times. While morale issue do not necessarily constitute undue hardship,

where an accommodation truly overburdens co-workers, considerations of morale are appropriate.

vi. The transfer to second shift was a reasonable accommodation as the employee's work restrictions had never referred to shift, the employee previously had worked extra night hours, and her doctor's note recommending first shift came after the transfer had already been made, which the employer could reasonably interpret as a recommendation as opposed to a medical restriction.

d. Employers are not required to create positions or maintain positions that no longer fit operational needs. *Gratzl v. Office of Chief Judges*, 601 F.3d 674 (7th Cir. 2010).

i. Gratzl was hired as an electronic court reporter specialist to work in a control room in the county courthouse. She suffered from incontinence and needed to be able to reach a restroom within minutes which was possible in her original location.

ii. The County changed it procedures and decided to have all court reporters rotate through live courtrooms and the control room. Gratzl informed the employer of her condition and asked to be assigned to the control room on a fulltime basis.

iii. The County offered to place her in courtrooms with adjacent bathrooms, avoid courtrooms with an active trial, and to arrange for a signal to alert the judge when she needed a break. She declined these offers, and was terminated.

iv. The 7th Circuit Court of Appeals ruled in favor of the County, finding that the employee was not qualified to perform the essential functions of the job. The court stated that the County was not required to maintain a position that it believed was no longer necessary, nor was it required to strip a position of duties. Finally, the employee terminated the interactive process when she rejected the offered accommodations.

e. Providing a teacher with a classroom with a window to the outside can be a form of reasonable accommodation. *Ekstrand v. Sch. Dist. of Somerset*, 583 F.3d 972 (7th Cir. 2009).

i. In the fall of 2005, after the school year began, Ekstrand began to experience symptoms of seasonal affective disorder, a form of depression. Both her psychologist, Dr.

Erickson, and her primary care physician recommended that she take a leave of absence due to illness.

ii. Her initial leave was only three months. Dr. Erickson wrote a letter on November 28, 2005 which was delivered to the school district's office. The letter detailed Dr. Erickson's opinion that natural light was crucial to Ekstrand's recovery and that her classroom without windows had been a major cause of her condition. This letter backed up Ekstrand's prior conversations with both the superintendent and the school principal in which she had communicated the importance of natural light to her recovery.

iii. School officials refused each request for a classroom change.

iv. A federal court awarded Ekstrand damages arising from her allegation that the school district failed to accommodate her disability.

f. Keeping the employee away from "unruly students." *Brown v. Milwaukee Bd. of Sch. Directors*, 855 F.3d 818 (7th Cir. 2017).

i. After injuring her knee and having surgery, the employee and her doctor told Milwaukee Schools that she could not be "in the vicinity of potentially unruly students." Since virtually all students are "potentially" unruly, Milwaukee Schools understood that limit to bar virtually all contact with students.

ii. The undisputed facts show that Milwaukee Schools acted consistently with the restrictions imposed by Brown's doctors, which said that Brown simply could not work in the vicinity of potentially unruly students. To the extent Brown is arguing that her restrictions were less severe than Milwaukee Schools believed, the undisputed facts show that Brown "failed to hold up her end of the interactive process by clarifying the extent of her medical restrictions."

iii. Brown's rigid distinction between work environment and job functions is not realistic. Some job functions can be performed without regard to some aspects of work environment. In many office environments, for example, it may be possible to change the temperature, lighting, or desk arrangements to accommodate someone's needs. But sometimes a job function requires a specific work environment. Lawn maintenance cannot be performed indoors; a jockey must often work atop a horse; receptionists must be near office visitors. Neither Brown's evidence, nor

her arguments suggest that the positions she wanted could have been modified to avoid student contact.

g. Changing the employee's supervisor or changing supervision practices by the employer?

h. Clemency and Forbearance. Employers must not immediately punish employees for absences or limitations they know are related to a disability. *Stelloh v. Wauwatosa Savings Bank,* LIRC (June 19, 2012).

   i. An employer violated the WFEA when it terminated an employee after three instances of poor customer service, when two of those instances were caused by the employee's absence due to disability (migraine headaches). The situations arose when customers left voicemails for the employee which were not returned timely due to the employee's illness-related absences.

   ii. The employer argued that the employee's disability was reasonably related to her ability to do the job and that it had provided reasonable accommodation by granting the employee FMLA leave.

   iii. LIRC rejected the employer's argument, ruling that the employer did not establish a sufficient back up system for customers to be transferred to other employees for immediate help when the employee was absent. According to LIRC, the record showed that the employer was not interested in working with the employee and disciplined her for absences that it knew were protected by law.

i. In order to discontinue an accommodation, an employer must have concrete evidence that an accommodation causes undue hardship. *Austin v. Walgreen Co.,* LIRC (June 30, 2011).

   i. The employer had accommodated the employee's medical restrictions for over two years by allowing him to work an adjusted schedule and spend 50% of his time on sedentary work, when 25% as was customary.

   ii. The employer discontinued the accommodation, claiming that they had to assign an extra manager to the store at significant expense. The employer also claimed that by assigning the employee nearly all of the paperwork for the

store, it deprived the other employees aspiring to be managers of the needed training on paperwork.

iii. LIRC ruled that the employee showed probable cause of the employer's failure to provide a reasonable accommodation.

- Statistical evidence did not support the employer's argument that other employees were deprived of doing paperwork.

- Analysis of the work available at the store also failed to support that the employee's disability required the hiring of another manager.

- Practice pointer: Employer's must have factual evidence to support allegations of undue hardship. Mere statements by managers will not persuade courts.

IV. Disability-Related Inquiries or Medical Examinations

A. Under the ADA, an employer's ability to make disability-related inquiries or require medical examinations is analyzed in three stages: pre-offer, post-offer, and employment.

B. Prior to an offer of employment, the ADA prohibits all disability-related inquiries and medical examinations, even if they are related to the job.

1. Disability-related inquiries may include the following (these apply equally to current employees):

a. asking an applicant whether the applicant has (or ever had) a disability or how the applicant became disabled or inquiring about the nature or severity of an applicant's disability;

b. asking an applicant to provide medical documentation regarding he applicant's disability;

c. asking an applicant's co-worker, family member, doctor, or another person about an applicant's disability;

d. asking about an applicant's genetic information;

e. asking about an applicant's prior workers' compensation history;

f. asking an applicant whether the applicant currently is taking any prescription drugs or medications, whether the applicant has taken any such drugs or medications in the past, or monitoring an applicant's taking of such drugs or medications; and,

g. asking an applicant a broad question about the applicant's impairments that is likely to elicit information about a disability (e.g., What impairments do you have?).

2. Questions that are permitted include the following (applies equally to current employees):

a. asking generally about an applicant's well-being (e.g., How are you?),

b. asking an applicant who looks tired or ill if s/he is feeling okay,

c. asking an applicant who is sneezing or coughing whether s/he has a cold or allergies, or asking how an applicant is doing following the death of a loved one or the end of a marriage/relationship;

d. asking an applicant about non-disability-related impairments (e.g., How did you break your leg?)

d. asking an applicant whether the applicant can perform job functions;

f. asking an applicant whether the applicant has been drinking;

g. asking an applicant about the applicant's current illegal use of drugs;

h. asking a pregnant applicant how she is feeling or when her baby is due; and,

i. asking an applicant to provide the name and telephone number of a person to contact in case of a medical emergency.

C. At the second stage - after an applicant is given a conditional job offer, but before the applicant starts work - an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category.

1. Medical examinations include, but are not limited to, the following:

a. vision tests conducted and analyzed by an ophthalmologist or optometrist;

b. blood, urine, and breath analyses to check for alcohol use;

c. blood, urine, saliva, and hair analyses to detect disease or genetic markers (e.g., for conditions such as sickle cell trait, breast cancer, Huntington's disease);

d. blood pressure screening and cholesterol testing;

e. nerve conduction tests (i.e., tests that screen for possible nerve damage and susceptibility to injury, such as carpal tunnel syndrome);

f. range-of-motion tests that measure muscle strength and motor function;

g. pulmonary function tests (i.e., tests that measure the capacity of the lungs to hold air and to move air in and out);

h. psychological tests that are designed to identify a mental disorder or impairment; and,

i. diagnostic procedures such as x-rays, computerized axial tomography (CAT) scans, and magnetic resonance imaging (MRI).

j. Procedures and tests employers that generally are not considered medical examinations, include:

    i. tests to determine the current illegal use of drugs;

    ii. physical agility tests, which measure an employee's ability to perform actual or simulated job tasks, and physical fitness tests, which measure an employee's performance of physical tasks, such as running or lifting, as long as these tests do not include examinations that could be considered medical (e.g., measuring heart rate or blood pressure);

    iii. tests that evaluate an employee's ability to read labels or distinguish objects as part of a demonstration of the ability to perform actual job functions;

    iv. psychological tests that measure personality traits such as honesty, preferences, and habits; and,

    v. polygraph examinations.

D. At the third stage - after employment begins- an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity.

1. Generally, a disability-related inquiry or medical examination of an employee may be "job-related and consistent with business necessity" when an employer has a reasonable belief, based on objective evidence, that:

a. an employee's ability to perform essential job functions will be impaired by a medical condition;

b. an employee will pose a direct threat due to a medical condition;

c. Disability-related inquiries and medical examinations that follow up on a request for reasonable accommodation when the disability or need for accommodation is not known or obvious also may be job-related and consistent with business necessity; or

d. Periodic medical examinations and other monitoring under specific circumstances may be job-related and consistent with business necessity.

2. When a disability or the need for the accommodation is not known or obvious, it is job-related and consistent with business necessity for an employer to ask an employee for reasonable documentation about the employee’s disability and its functional limitations that require reasonable accommodation.

a. An employer may require an employee to provide documentation that is sufficient to substantiate that the employee has an ADA disability and needs the reasonable accommodation requested, but cannot ask for unrelated documentation. This means that, in most circumstances, an employer cannot ask for an employee's complete medical records because they are likely to contain information unrelated to the disability at issue and the need for accommodation.

b. Documentation is sufficient if it: (1) describes the nature, severity, and duration of the employee's impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits the employee's ability to perform the activity or activities; and, (2) substantiates why the requested reasonable accommodation is needed.

c. The ADA does not prevent an employer from requiring an employee to go to an appropriate health care professional of the employer's

choice if the employee provides insufficient documentation from his/her treating physician (or other health care professional) to substantiate that s/he has an ADA disability and needs a reasonable accommodation.

d. The employee has a duty to cooperate, even when the medical condition is not known and whether its existence is even in question. "Where a police department reasonably perceives an officer to be even mildly paranoid, hostile, or oppositional, a fitness for duty examination is job related and consistent with business necessity." A department is not required to wait to order an exam until perceived threat becomes real or questionable behavior results in injury. *Watson v. City of Miami Beach*, 177 F.3d 932 (11th Cir. 1999). *But see McGreal v. Ostrov*, 368 F.3d 657 (7th Cir. 2004).

e. Failure of the employee to cooperate may constitute insubordination warranting serious disciplinary consequence. *Thomas v. Corwin*, 483 F.3d 516 (8th Cir. 2007).

3. An employer may make disability-related inquiries or require a medical examination when an employee who has been on leave for a medical condition seeks to return to work

a. If an employer has a reasonable belief that an employee's present ability to perform essential job functions will be impaired by a medical condition or that the employee will pose a direct threat due to a medical condition, the employer may make disability-related inquiries or require the employee to submit to a medical examination.

b. Any inquiries or examination, however, must be limited in scope to what is needed to make an assessment of the employee's ability to work.