Section VI

ADA, FMLA and Reasonable Accommodation: or the Tale of the Stray Dog
I. Introduction

A. Recent decisions regarding the interpretation and application of ADA and FMLA present new challenges for employers. This outline will highlight some of the most challenging areas and give suggestions for handling those areas.

II. ADA Disability, Reasonable Accommodation and Other Major Issues

A. Disabled.

1. Must have impairment substantially interferes with major life activities.

   a. Impairment.

      (1) Any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more body systems (heart condition, tuberculosis, dwarfism, severe obesity, contagious disease, HIV/AIDS, cancer).

      (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities (dyslexia, bipolar, post-traumatic stress disorder etc).

      (3) Cause of condition irrelevant.

   b. Conditions that are not impairments:

      (1) Homosexuality and bisexuality.

      (2) Environmental, cultural, and economic disadvantages such as a prison record or a lack of education.

      (3) Age, by itself.

      (4) Medical condition (such as hearing loss, osteoporosis, or arthritis) often associated with age may be considered an impairment on the basis of the medical condition.

      (5) Physical characteristics. Simple physical characteristics are not impairments under the ADA. For example, a person cannot claim to be impaired because he/she is left handed or has blue eyes or black hair.
(6) Predisposition to illness or disease because of factors such as environmental, economic, cultural, or social conditions.

(7) Common personality traits. Poor judgment, irresponsible behavior and poor impulse control, impatience, rudeness, arrogance, etc.

(8) Normal deviations in height, weight, or strength.

(9) Being overweight.

c. Major life activities.

(1) Sleeping, eating, walking, caring for oneself, performing manual tasks, seeing, hearing, speaking, breathing, learning, sitting, standing, reaching, lifting, interacting with others and concentrating.

(a) Corley v. VA. Seizures causing intermittent problems with sleep not sufficient to establish substantial interference with major life activity of sleeping.

(2) Supreme Court declines to decide whether thinking, communicating, and social interaction are ‘major life activities’ under the ADA. Interaction with others covers a gamut of activity in the workplace, from the cantankerous or obnoxious worker to the withdrawn, isolated or non-communicative applicant or worker.

(3) Travel, driving in unfamiliar places, caring for one’s children, mall shopping, mowing lawn, operating machinery, etc., are not major life activities.

(4) Working: only use as last resort. Only consider work as major life activity if person not limited in any other major life activities.

(5) If employee chooses not to use mitigating measures (i.e., hearing aids) than employer must consider if employee disabled without consideration of mitigating measures.

d. Substantially limited.

(1) Employee either can’t perform major life activity at all or is significantly restricted.
(2) Work: significantly restricted in ability to perform either a class or a broad range of jobs or activities as compared to average person having comparable training, skills and abilities. Employee must prove inability to perform both (1) the job from which he/she was disqualified as well as (2) either (a) jobs utilizing similar training, knowledge, skills or abilities within her geographic area or (b) a broad range of jobs not utilizing similar training, knowledge, skills or abilities within the geographic area.

(3) Class of jobs such as computer, heavy labor, semi-skilled jobs, truck driving, assembly line jobs, manufacturing jobs, law enforcement positions. Does not necessarily include all jobs in career progression. Employee has burden of showing vocational training, geographic area to which employee has access or the number and type of jobs demanding similar training from which employee disqualified.

(a) Employee with open heart surgery, post-operative bacterial infection requiring employee to miss extended periods of work not sufficient to establish substantial interference with major life activity of working.

(b) Employee with multiple sclerosis causing extreme fatigue which caused cognitive difficulties, postponement of activities and falls did not show substantially limited in major life activity. Fact that employee needed to walk with a cane not sufficient to show that she was substantially limited in major life activity of walking.

(4) Depression causing difficulty in sleeping and getting along with co-workers not considered to be a substantial limitation.

(5) Diabetes: enforcement guidance indicates that may be a disability when it substantially limits major life activities, or when side effects from condition substantially limit major life activities. Enforcement guidance indicates determination should be made on case-by-case basis.

(6) Sleep: difficulty in sleeping extremely widespread. Employee must show that sleeping difficulties are worse than suffered by large portion of nation’s adult population. Example: insomniac who sleeps as little as 2 ½ hours at
time and as little as 4 ½ hours night be substantially impaired. One case held that 5 to 6 hours of sleep are enough to raise question as to whether substantially limited when Plaintiff said drowsy at work due to medication and a lack of sleep.

B. Record of disability includes people have recovered but are considered to have a disability.

1. Includes record of addiction to illegal drugs.

C. Regarded as disabled: employee has physical or mental impairment that does not substantially limit major life activities, but is treated by employer as having such limitation. Some courts have imposed a duty to reasonably accommodate employee.

1. Three different types of “regarded as:”
   a. Individual has an impairment that is not substantially limiting, but which is perceived as such by employer;
   b. Individual may have an impairment that is only substantially limiting because of other’s attitudes;
   c. Individual no impairment at all but is regarded as having a substantially limiting impairment.

2. Employee must show that Employer subjectively thought he/she disabled.

3. Also show that employer thought disability prevent employee from performing broad class of jobs.
   a. Nielsen v. Morini Feed Co. President of farming cooperative claimed that board members fired him because regarded as disabled because illegally using drugs. Summary judgment for company because no evidence employer perceived illegal drug addiction significantly restricted employee’s ability to perform either a class of jobs or broad ranges of jobs.
   b. Statement that could be unsafe to drive one of the company trucks could indicate that treated as limited in ability to perform job.
   c. Employer’s statement questioning ability of emergency room doctor with hepatitis to treat patients could be taken as questioning her fitness to practice emergency room medicine and therefore potentially demonstrates that regarded as disabled.
d. **EEOC v. Heartway.** Cook with Hepatitis C fired from nursing home because home perceived that her continuing employment would be a risk to residents if cook cut finger and got blood in food; home also concerned that there would be a mass exodus of residents if word got out. Administrator of home also asked EEOC investigator how the investigator felt about eating food containing cook’s blood. Court held question of fact as to whether statements by nursing home indicated that home perceived cook could not properly perform job because of how others perceived illness and therefore might demonstrate regarded as disability.

4. Employer recommending that employee apply for disability insurance not held to be regarded as discrimination. However, if company imposes severe restrictions on employee’s ability to work based on employee’s use of FMLA leave that may show that company regards employee as substantially limited in her ability to lift.

5. Reliance on medical opinion important.

6. Even if employer mistakenly believes that employee could not perform essential functions of job, did not regard as disabled unless also mistakenly believed that impairment substantially limited him in major life activity. Therefore, unless employer mistakenly believed that employee substantially limited in major life activity, it is free to decide that restrictions prevent from doing job. **Jones v. UPS** (lifting restriction: not disability or regarded as such).

D. Interactive process/reasonable accommodation.

1. Employee burden to initiate. The employer is not required to meet with people the employee demands that it meet with. For example, the employer is not required to meet with vocational rehabilitation counselors and attorneys simply because the employee demands that it do so.

2. The employee is required to provide a release and enough information on needed accommodation that the employer has the ability to assess the employee’s needs. Release can include permission for employer’s health care professional to discuss accommodation request with employee’s health care professional. Employer may also provide list of specific questions for employee’s health care professional to answer. Employer may also ask employee to take medical examination by doctor of employer’s choice at employer’s expense.

3. Mandatory shifts and seniority systems. Generally employer not required to circumvent seniority-based bid system for selecting shifts. Only exception may be if employer has made changes to other employee’s shifts when requested.
4. Reassignment to vacant position. Can cut pay if reassign employee to vacant position because employee no longer able to perform essential functions of job.

5. Work from home as reasonable accommodation. Generally, not required to allow unless allow other employees to do it. Can also be undue hardship if jeopardize confidentiality or make it difficult for others to access information.

E. Leave issues.

1. Conflict between leave and attendance. Since regular attendance is an essential function, indefinite leave may not be a reasonable accommodation.

   a. "Indefinite" refers to duration of impairment, not duration of leave.

      (1) Before the employer considers duration of leave, it should first consider if the leave request is reasonable. Simply because company policy may provide for a certain amount of leave does not mean that the request by the employee is reasonable. The first question is whether the leave will enable the employee to return to work.

2. Salary continuation programs. Just because the employer has a salary continuation program does not mean that the employer is required to grant leave for that period of time. The question is the reasonableness of the request, not the existence of the policy.


   a. Putting the employee on medical leave or short-term disability does not mean that the employer regards the employee as disabled. Likewise, granting FMLA leave does not establish that employer believes employee disabled.

4. Termination and leave issues.

   a. Leave policies that provide that an employee is terminated after an absence for a certain period of time violate the ADA.

F. Overbroad criteria.

1. Blanket requirements/prohibitions can cause problems. Courts require employers to show a specific connection between requirements and essential functions of the job.
2. DOT regulations should not be applied across the board even to non-covered employees. First assess the need to do so.

   a. UPS prohibited deaf drivers from driving any vehicles. The court found this to be overbroad. UPS didn’t show that the criteria were job-related and consistent with business necessity.

G. Permissible inquiries.

1. The questions in this area are “what is notification of a disability” and “how much can an employer ask?” Examples from EEOC enforcement guidance:

   a. Anesthesiologist with diabetes and insulin pump. Employer wants to have fitness for duty exam to ensure that blood sugar can be maintained during surgeries. Guidance states examination would violate ADA because no objective evidence that direct threat or unable to perform job.

   b. Pharmacy concerned about drug theft by employees. Requires employees to report all prescription and non-prescription medications taking. Violates ADA because goes beyond asking about illegal drug use and asks information likely to reveal a disability.

   c. Prescription drug policy. If the policy requires the employee to notify the employer when taking prescription drugs, the EEOC states that the employee can only be required to so notify the employer if such notification is job-related and consistent with business necessity, and if the prescription drug use could impair the employee’s ability to safely perform his/her job. The employer can only require the employee to report drug use if it poses a direct threat to job performance.

   d. If employee requests reasonable accommodation and need and/or disability not already known, may require reasonable medical information or documentation from health care provider to demonstrate that individual with disability and needs requested accommodation.

   e. If employer already knows of employee’s disability (i.e., bipolar condition) can’t ask for information about condition when employee has recurrence. Must simply request information about need for accommodating current problem.

H. Discipline for performance issues. If the employee’s work performance is poor, but the employee refuses to respond to the employer’s inquiry or to see a doctor,
the employer can discipline the employee. The employer’s focus should be on performance issues, not on potential health issues.

1. If employer has legitimate reason to believe that a medical condition is affecting an employee’s ability to do the job, the employer may ask questions or require the employee to have medical examination.

   a. EEOC guidance example: receptionist missed phone calls, not at desk to greet clients. Supervisor overhears receptionist tell co-worker that she feels tired much of the time, is always thirsty and constantly has to go to the bathroom. The supervisor may ask receptionist if she has diabetes or send for medical examination because she has reason to believe diabetes may be affecting receptionist’s ability to perform essential function of her job – sitting at desk for long periods of time.

2. Employer does not have to excuse violation of conduct standards even if misconduct caused by underlying disability.

3. Performance problems not connected to underlying impairment do not require employer to modify performance standards.

I. Notification from third party.

1. The employer can act on third-party notification of an employee’s disability if the source of the information is reliable and if the disability impairs the employee’s ability to do essential functions of his/her job or if the employer believes that the disability will pose a direct threat to the employee’s and others’ safety.

J. Which doctor?

1. If the employee does not provide sufficient documentation from his/her own doctor, the employer can request employee’s doctor to provide additional documentation. If the employer does not receive sufficient documentation, it can send the employee to a doctor of the company’s choosing.

K. Confidentiality.

1. Even if employee voluntarily discloses health condition, employer may not discuss condition with other employees except on a need-to-know basis. For example, an employee undergoing chemotherapy may need to avoid exposure to germs; the EEOC says that the employer cannot communicate the reason why other employees need to avoid coming to see the ill employee.

L. Retaliation.
1. Request for reassignment protected activity.

2. If the employee does supply sufficient documentation but the employer still insists on additional documentation, there could be retaliation. The employer must have a good-faith belief that the documentation provided was insufficient.

M. Direct threat.

1. Must do individualized assessment of employee's present ability to perform essential functions of job.

2. Must be based on reasonable medical judgment that relies on the most current medical knowledge rather than on speculation about what people with a particular impairment generally can do.

3. Employer not required to conduct independent medical examination when the available objective evidence is clear.

a. Enforcement guidance examples:

   (1) Not direct threat: phlebotomist at blood bank HIV positive. Enforcement guidance states that because HIV positive healthcare workers do not pose direct threat to the safety of patients if adhere to universal precautions, employee does not pose a direct threat.

   (2) Hospital physician found visibly intoxicated. After treatment refused to reinstate following treatment based on prior inability to detect prior conduct as well as violation of rule prohibiting from being intoxicated on job. Not violation of ADA.

III. FMLA

A. Trends.

1. Notice of need for FMLA leave.

   a. Unusual behavior alone can be enough to notify a reasonable employer that an employee suffered from a serious health condition.

   b. Constructive notice of leave for FMLA leave may be enough. Stray dog case.

   c. Interference with FMLA rights: if consider past use of leave in issuing work restrictions may violate FMLA.
(1) **Wysong v. Dow Chemical.** Employee took 464 hours of paid medical leave in 2001 and 783 hours in 2002 for various medical conditions. After employee complained that neck hurt, company doctor restricted from lifting based on concern that previous neck condition related to prior leaves. Sent home because no job that fit restrictions. Employer required functional capacity exam designed to duplicate actions required in her job. Because employer found comment in medical records from outside doctors alluding to possible “drug-seeking” behavior, employer thought employee might be drug dependent, so ordered employee to avoid all pain medications for two weeks. Not allowed to take test because didn’t stop the medications. Ultimately terminated because she had been on a medical leave of absence for six months.

(2) Company doctor actions stand “in direct conflict with the rule” under 29 U.S.C. § 825.220(c) that employers may not use the taking of FMLA leave as a negative factor in employment actions since he considered employee’s previous absences when he issued work restrictions and required her to abstain from medications.

d. Involuntary use of FMLA leave. Employee may have claim when an employer forces him to take FMLA leave needlessly. Claim only ripens if the employee later runs out of FMLA leave because his employer “wrongfully forced” him to squander it.

B. **Bonuses.** A recent court decision held that if an employer has a bonus program that is based on production rather than attendance, it doesn’t violate the FMLA to prorate the bonus. Pro-rating attendance-based bonuses violates FMLA.

C. FMLA does not protect employees from being fired for absenteeism, if the medical certifications the employee submitted are suspicious, contradictory, and unreliable.

D. Calculating FMLA leave. Holidays do not normally count as FMLA leave when it is taken intermittently; however, they do count when intermittent leave is taken in an increment of a week or more. As a result, Employee correctly terminated when failed to return to work following intermittent leave.
FMLA and ADA And the Tale of the Stray Dog
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ADA
Employee with disability who is able, with or without reasonable accommodation to perform the essential functions of the job is entitled to protection under the ADA.

Disabled
- Impairment
  - Physiological disorder or condition
  - Mental or Psychological disorder
- Cause irrelevant
Not Impairments

- Age
- Predisposition to illness or disease
- Common personality traits
- Normal deviations in height weight etc.
- Being overweight

Major Life Activities

- Eating, walking, caring for oneself, performing manual tasks, seeing, hearing, speaking, breathing, learning, sitting, standing, reaching, lifting, interacting with others and concentrating

Thinking communicating

Interacting with Others

- Supreme Court declines to decide if major life activities
- Broad range of interacting with others ranging from obnoxious behavior to non communicative
Working

- Last resort to consider
- Only consider if no other major life activities

Work restrictions

- Broad range of jobs compared to average person having comparable training, skills and abilities
- Employee prove unable to perform: 1. Job from which disqualified and 2. Either a. Jobs similar training or broad range of jobs not similar training in geographic area

Activities that are not major life activities

- Travel
- Driving
- Caring for one's children
- Mowing lawn
- Mall shopping
Substantially limited

- Can't perform at all or significantly limited

Mitigating measures

- If employee chooses not to use (hearing aids, eyeglasses, medication)
- Must consider if disabled without consideration of mitigating measures

Sleeping

- Corley v. VA, seizures causing intermittent problems with sleep not sufficient to cause substantial interference
- Other cases: sleep problems are worse than those suffered by large portion of adult population, may be substantially limited (2 1/2 hours at time-5-6 hours if unable to function at work)
Depression

- If difficulty in sleeping and interacting not substantial interference
- Need more limitations to be substantially limited.

Diabetes

- May be disability if effects substantially limit
- Case by case evaluation

Examples:

- Open heart surgery, post operative bacterial infection-not substantially limited in working
- Multiple sclerosis-extreme fatigue, use of cane because of falls- not enough to show substantially limited in walking
Record of Disability

- Includes people recovered still considered to be disabled
- Includes people misdiagnosed
- Could include record of addiction to illegal drugs

Regarded as disabled

- Three types
  - Impairment does not substantially limit but perceived as such by employer
  - Has impairment only substantially limiting because of other's attitudes
  - Individual no impairment at all treated as having substantially limiting impairment

Subjective belief

- Employee must show employer subjectively believed that disabled
- Employee must show employer subjectively believed disqualified from broad range of jobs
Cases

- Nelson v. Morini Feed Co. President claimed fired because regarded as illegally using drugs. Summary judgment because no evidence company perceived that addiction substantially limited employee’s ability to perform class or broad range of jobs

Other regarded as cases

- Statement may not be safe to drive company truck
- ER doctor with hepatitis
- EEOC v. Heartway-cook with hepatitis
- Limitations based on use of FMLA leave

Not regarded as

- Granting FMLA leave
- Suggestion apply for disability leave
- Suggestion get counseling
Important factors

- Reliance on medical opinion
- Question of whether considered employee substantially limited major life activities—not just if unable to perform job. Jones v. UPS

Interactive process/reasonable accommodation

- Employee burden to initiate
- Release company doctor discuss with employee's health care professional
- Specific questions
- Medical examination

Mandatory shifts/seniority systems

- Honor shift bid process not reasonable accommodation to expect to bump another, more senior employee
- Exception if have done for others
Pay cut

- If can't perform essential functions - may reassign to vacant position and cut pay

Work from home

- Not reasonable unless done for others
- May have confidentiality and access to information concerns

Conflict between Leave and Attendance

- Since Regular Attendance is Essential Function of Most Jobs
- How Handle Leave Requests
Indefinite Leave

• Duration of Impairment Versus Duration of Leave
• Before Consider Duration of Leave, First Consider if Reasonable (Expected Duration of Impairment)
• Then Consider Leave Policies

Termination after Extended Absence

• Termination Policies Provide that if Absent Extended Time or Given Long Term Disability, Employee Terminated
• Court Decision Violates ADA

Permissible Inquiries

• What is Notification
• How Much Can Ask
### Enforcement Guidelines

- Anesthesiologist - diabetes insulin pump - not allowed fitness for duty exam
- Pharmacy drug theft employees - mandatory reporting all drugs - not allowed
- Prescription drug policy - direct threat
- Can request documentation

### Discipline

- Legitimate reason to believe medical condition affecting ability to do job ask employee or require medical examination
- Eeoc guidance - receptionist thirsty bathroom missing calls
- Don’t have to excuse violation conduct rules
- Connection with impairment

### CONFIDENTIALITY

- Can’t discuss employee condition with other employees even if employee discloses
Retaliation

- Request for Reassignment protected activity
- Documentation

Direct threat

- Individualized assessment
- Reasonable medical judgment
- Phlebotomist: HIV positive
- Hospital physician visibly intoxicated

FMLA

- Notice of unusual behavior enough to notify employer
Interference with FMLA rights

- If considering use of past leave in imposing work restrictions
- Wysong v. Dow: work restrictions; leave; FMLA leave; drug seeking behavior
- Involuntary use of FMLA leave

Calculating FMLA leave

- Holidays

Stray Dog

- Behavior after dog came into office