2019 ADA Update

Chris Kuczynski
Assistant Legal Counsel
EEOC

Definition of “Disability”: Expert Testimony Not Required

- *Mancini v. City of Providence*, 909 F.3d 32 (1st Cir. 2018)
- Medical evidence not needed to establish knee impairment is a disability
  - Knee injury is “among those ailments that are the least technical in nature and that are most easily understood by a lay jury”
  - Condition required surgery and limited duty
- No medical evidence needed to connect knee injury to limitations in major life activities like walking, standing, and bending
- But, plaintiff failed to establish substantial limitation

Definition of "Disability": Expert Testimony Needed to Show Actual Disability

- *Baum v. Metro Restoration Serv., Inc.*, 764 F. App'x 543 (6th Cir. 2019)
  - Former employee who claimed he was terminated due to heart condition could not show actual disability without expert medical evidence
  - Claimed that he was substantially limited in cardiovascular and circulatory functions
  - But his impairments, "unlike more common or less complicated ones" required medical knowledge to understand
    - Medical documentation included some words that rarely appear outside the medical profession, such as "AV block, Mobitz 1," and "Bradycardia"
    - Also contained some more common terms – "palpitations," "right heart failure," and "right ventricular enlargement," but these terms were also "packed with medical jargon"

Definition of Disability: Evidence Need Not Include Specific Diagnosis

- *Barlia v. MWI Veterinary Supply, Inc.*, 721 F. App'x 439 (6th Cir. 2018)
  - Sufficient evidence plaintiff was substantially limited in at least thinking and concentrating as result of hypothyroidism
  - Definition is to be construed broadly and without regard to mitigating measures, and conditions that are episodic can be disabilities
  - Hypothyroidism is an endocrine disorder, like diabetes, and EEOC regulations say diabetes should easily be concluded to be a disability
  - Plaintiff testified she experienced bouts of severe fatigue, reduced cognitive functioning, and dizziness without medication
  - Employer had documentation over several years indicating plaintiff had thyroid condition, even though it didn't specifically mention hypothyroidism

Definition of “Disability”: Plaintiff’s Declaration Sufficient to Withstand Summary Judgment

- *Williams v. Terrant Cty. College Dist.*, 717 F. App’x 440 (5th Cir. 2018)
  - Sufficient evidence in plaintiff’s declaration of difficulties she experienced with major life activities such as sleeping, concentrating, thinking, interacting with others, and communicating as the result of depression, PTSD, ADHD, and other impairments
  - Court applied broad definition of disability consistent with the ADA Amendments Act
  - Also found sufficient facts supporting plaintiff’s “regarded as” claim

Definition of “Disability”: Ability to Work Without Restrictions

- *Rowlands v. United Parcel Serv.*, 901 F.3d 792 (7th Cir. 2018)
  - Plaintiff, who had taken significant time off to recover from multiple knee injuries, was terminated allegedly for falsifying her time card; plaintiff argued this was pretextual
  - District court found that plaintiff did not have a disability because she had been cleared to work without restrictions
  - Court of Appeals reversed summary judgment, finding plaintiff presented testimony that she was substantially limited in walking, standing, squatting, and kneeling

Definition of Disability: No Evidence of Substantial Limitation

- *Hustved v. Allina Health Sys.*, 910 F.3d 399 (8th Cir. 2018)
  - Independent living skills specialist terminated when she did not take vaccination for measles, mumps, and rubella because of chemical sensitivity
  - Court finds no evidence of substantial limitation
  - Plaintiff had never been hospitalized, seen an allergist, been prescribed an epipen, sought medical attention, taken medication, or had to leave work early because of a chemical reaction

Definition of “Disability”: Condition, Manner, or Duration of Limitations

- *Nunies v. HIE Holdings, Inc.*, 908 F.3d 428 (9th Cir. 2018)
- Employer rescinded transfer from a driver job and asked plaintiff to resign 2 days after learning plaintiff had injured his shoulder
- Sufficient evidence plaintiff had a disability --
  - Impairment need not significantly or severely restrict major life activity’
  - Evidence plaintiff had 25-pound lifting restriction and experienced “stabbing pain” when lifting arm above shoulder

Definition of “Disability”: Obesity Requires Proof of Underlying Physiological Condition

- *Richardson v. Chicago Transit Auth.*, --- F.3d ---, 2019 WL 244786 (7th Cir. 2019)
  - Bus driver weighing over 400 pounds reassigned and ultimately terminated due to obesity
  - Court holds that obesity that does not have underlying physiological cause is not an impairment, so plaintiff did not have an actual disability and was not regarded as having disability

Definition of “Disability”: Regarded As Disabled

- *Nunies v. HIE Holdings, Inc.*, 908 F.3d 428 (9th Cir. 2018)
  - Evidence plaintiff was regarded as disabled based on fact that employer rescinded transfer shortly after learning of plaintiff’s shoulder injury
  - Employer said job had been eliminated, but there was evidence it had not
  - Regarded as coverage does not require employer to believe that actual or perceived impairment substantially limits a major life activity
  - “Transitory and minor” exception is affirmative defense that employer did not prove

Definition of “Disability”: Regarded As Disabled

- *Baum v. Metro Restoration Serv., Inc.*, 764 F. App’x 543 (6th Cir. 2019) -- Evidence former employee was regarded as having disability where –
  - Decision-maker who terminated him knew about plaintiff’s heart catheter, CAT scan, trip to the ER, and fact that plaintiff wore a heart monitor; and
  - Decision-maker said plaintiff was being terminated because of his “health and his doctor’s appointments”

Essential Functions: Employer Judgment/Job Descriptions

- *Gunter v. Bemis Co, Inc.*, 906 F.3d 484 (6th Cir. 2018) – lifting 45 pounds and reaching 24 inches not necessarily essential functions of press operator job where –
  - Employer discouraged employees from lifting more the 40 pounds unassisted, and there was evidence that employees assisted one another
  - Employer provided lifting devices to assist with lifting as little as 20 pounds
  - Employees could use ladders in situations where they had difficulty reaching

Essential Functions: Employer Judgment/Job Descriptions (cont'd)

- *Denson v. Steak 'N Shake, Inc.*, 910 F.3d 368 (8th Cir. 2018)
  - Plaintiff not qualified for fountain operator job due to total hip replacement that his doctor said limited him to clerical or sedentary work with no lifting
  - Job of fountain operator would have required plaintiff to stand, walk, bend, and lift and other jobs to which he sought reassignment would have required lifting
  - Employer was not required to ignore plaintiff's doctor's restrictions

Essential Functions: Time Spent Performing/Consequences of Not Performing Function

- *Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166 (10th Cir. 2018)
  - Employees injured due to chemical exposure were limited to working indoors; sought their original boilermaker jobs
  - Evidence from 40-year employee that boilermaker job required working outdoors only 10% of the time
  - Employer might have to reassign duties performed only 10% of the time as reasonable accommodation

Essential Functions: Rotating Shifts

- *Sepulveda-Vargas v. Caribbean Rests., LLC*, 888 F.3d 549 (1st Cir. 2018) – Court holds working rotating shifts is essential function for assistant restaurant manager where –
  - Employer claimed it was necessary for equitable distribution of work
  - Employee acknowledged that he and all other assistant managers had to work rotating shifts
  - Position description listed working rotating shifts as an essential function
  - Working rotating shifts was included in newspaper advertisement for the job

Essential Functions: Full-time or Part-time Work

- *Hostettler v. Wooster Coll.*, 895 F.3d 844 (6th Cir. 2018) – working full-time might not be an essential function for HR generalist where –
  - She previously worked successfully, completing all of her assignments for 2 months prior to requesting an extension of an additional two months
  - A coworker testified she was unaware of any work not being completed while plaintiff worked part-time
  - She received a laudatory performance review that did not mention problems related to working part-time
  - There were no records of a performance improvement plan, discipline, written criticism, or even a complaint about plaintiff's work while she worked part-time

Essential Functions: Mandatory Overtime

- *Faidley v. United Parcel Serv.*, 889 F.3d 933 (8th Cir. 2018) (en banc) – working overtime was essential function of package car driver where --
  - Daily deliveries could be unpredictable; if plaintiff could not finish deliveries, other drivers would have to be sent to finish or packages would not be timely delivered
  - Overtime was listed in position description
  - Overtime was provided for in CBA, which allowed drivers to request only two exemptions a month
- Additionally, a feeder driver position to which plaintiff sought reassignment also required overtime

Essential Functions: Public Safety

- *Faulkner v. Douglas Cty. Nebraska*, 906 F.3d 728 (8th Cir. 2018)
  - Correction officer asked for indefinite assignment to control room, lobby, or night shift after she had used maximum amount of light duty
  - Court upheld summary judgment for employer because controlling fights between inmates and restraining them by force if necessary were essential functions of correction officer, even though plaintiff had never had to perform these functions at times when she worked in the lobby or on the night shift

Essential Functions: Driving and Travel

- *EEOC v. McLeod Health, Inc.*, 914 F.3d 876 (4th Cir. 2019)
  - Evidence that traveling to employer campuses might not be essential function for employee newsletter editor
  - Charging Party said that it was helpful, but not required
  - EEOC produced evidence that Charging party could also gather information from various locations by phone

Disparate Treatment

- *Diggs v. Burlington N. & Santa Fe Ry.*, 742 F. App'x 1 (5th Cir. 2018)
  - Plaintiff sought to return to work after 5-year absence due to foot problems, myocitis, and diabetes
  - Employer requested medical documentation that it determined was inadequate to address its concerns
  - Court found that "an employee's refusal to comply with ADA-permitted inquiries can provide the employer with a legitimate, nondiscriminatory reason to take an adverse employment decision"

Disparate Treatment (cont'd)

- *Lindeman v. Saint Luke's Hosp. of Kansas City*, 899 F.3d 603 (8th Cir. 2018)
  - Employee with OCD, ADHD, bipolar disorder, and other impairments terminated for mentioning name of patient to individuals inside and outside the hospital
  - Other employees who had also disclosed patient names were not at the final stage of progressive discipline
  - Also, unlike other employees, plaintiff disclosed name after being expressly told that this violated hospital policy
  - Record of positive performance under previous supervisors not sufficient to create issue of material fact

Disparate Treatment: Causation Standard Under Rehabilitation Act

- *Natofsky v. City of New York*, 921 F.3d 337 (2nd Cir. 2019)
  - Court holds that ADA causation standard displaces "solely by reason of disability" standard for claims of discrimination arising under Section 504 of the Rehabilitation Act
  - Court concludes "but for" standard applies, rather than 'motivating factor"
  - Employee with hearing impairment unable to meet "but for" standard in case challenging his demotion
  - Dissent would hold that "motivating factor" standard applies and that employee presented sufficient evidence to withstand summary judgment; ADA incorporates remedies, rights, and procedures available under Title VII, including those in section 2000-e(5) of title VII, which was amended in 1991 to include "motivating factor" standard

Notice of the Need for Reasonable Accommodation

- *Miceli v. JetBlue Airways, Inc.*, 914 F.3d 73 (1st Cir. 2019) – employee failed to request reasonable accommodation related to employer's leave policy
  - She complained to company officials that third party administrator was handling FMLA leave requests inappropriately
  - Never requested reasonable accommodation pursuant to company policy that was advertised in handbook and was mentioned in paperwork she received but did not submit
  - Complained to one manager in email that she hoped the the company would treat "those of us with disabilities with compassion and reasonable accommodations"

Notice of the Need for Reasonable Accommodation (cont'd)

- *Fox v. Costco Wholesale Corp.*, 918 F.3d 65 (2nd Cir. 2019)
  - Employee with Tourette's Syndrome and OCD transferred to assistant cashier position after twice making inappropriate comments while working as greeter
  - Before taking new position, took month of leave to have medication adjusted
  - Was offered a stocker position that he did not accept and requested no other transfer
  - Employer had no way of knowing assistant cashier job could worsen conditions; employee had worked in the job before

Interactive Process

- *Hannah P. v. Coats*, 916 F.3d 327 (4th Cir. 2019) – employer engaged in interactive process:
  - Proposed alternative schedule for employee with depression who came in late or not at all; required her to call by 11:00, and if she didn't, supervisor would call her
  - Employee did not comply with modified schedule shortly after it was implemented, so employer revised it to require employee to call in by 10:00
  - When employee could not do that, employer required her to go to EAP

Interactive Process (cont'd)

- *Brunckhorst v. Oak Park Heights*, 914 F.3d 117 (8th Cir. 2019) – employer engaged in interactive process:
  - Employer extended employee's leave beyond FMLA 3 times
  - Employer offered severance package or a lower-level accountant position when plaintiff's job was eliminated during his long leave
  - Employer granted graduated schedule for employee's return to work, but not telework, because certain essential functions could not be performed remotely
  - Employee asked to meet with mayor and other "high officials" and declined employer's offer to meet with "appropriate staff" to discuss accommodation

Interactive Process (cont'd)

- *Garcia v. Salvation Army*, 918 F.3d 997) (9th Cir. 2019) – employer engaged in interactive process:
  - Granted several requests for leave
  - In response to employee request that she receive a copy of a complaint or summary of a complaint made prior to her taking FMLA leave, employer provided summary of the complaint
  - Employee thereafter insisted on a copy of the complaint itself; provided no documentation of how this related to her ability to return to work

Interactive Process (cont'd)

- *Brumley v. United Parcel Serv., Inc.*, 909 F.3d 834 (6th Cir. 2018) – employer not required to continue interactive process
  - Employee returned to work following back injury with restriction
  - Employer sent her home because restrictions were inconsistent with job duties, but offered to provide reasonable accommodation
  - Company treated union grievance as request for accommodation
  - Company followed up when employee did not provide medical information, and once it was provided, took a month to set up a meeting to discuss accommodation
  - Employee then said she was going to have doctor lift restrictions

Interactive Process (cont'd)

- *EEOC v. Dolgencorp, LLC*, 899 F.3d 428 (6th Cir. 2018)
  - Employee with type II diabetes asked to keep juice at her counter; denied because of company policy that prohibited food or drink at workstation
  - Employee experienced 2 hypoglycemic incidents for which she took orange juice from a cooler and paid for it immediately after drinking it
  - Terminated under company grazing policy
  - Employer argued she could have consumed other items, like glucose tablets, candy, or peanut butter crackers, but policy prohibited eating or drinking
  - Policy included "disability-related exceptions," but supervisor denied accommodation without discussing it or referring request to a superior

Interactive Process (cont'd)

- *Rowlands v. United Parcel Serv.*, 901 F.3d 792 (7th Cir. 2018) – employer could not ignore request for accommodations because employee's doctor had released her to work without restrictions:
  - Employee had knee injuries
  - When she returned to work, she told employer about her knee pain and asked for several accommodations, including computer training and training to operate a forklift to minimize standing, access to a first floor bathroom, and a place to elevate and ice her knee

Burdens of Proof

- *Snapp v. United Transp. Union and Burlington N. & Santa Fe Ry. Co.*, 889 F.3d 1088 (9th Cir. 2018) – court declined to extend the holding in *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), to the trial stage:
  - Plaintiff argued that he had only a slight burden of production to show that an accommodation might be possible and that the employer could prevail only if it could meet an affirmative defense of demonstrating that no accommodation was possible
  - Court noted that extending Barnett to the trial stage might result in a jury finding an employer liable with no evidence that an accommodation was actually possible

Assistance From others

- *Gardea v. JBS USA, L.L.C.*, 915 F.3d 537 (8th Cir. 2019)
  - Not a reasonable accommodation for mechanic to have other mechanics assist him with lifting objects such as ladders and machinery
  - Some areas were too small for two people to perform a lift
  - Evidence other mechanics would not always be available

Assistance From Others (cont'd)

- *Hill v. Associates for Renewal in Educ., Inc.*, 897 F.3d 232 (D.C. Cir. 2018)
  - Teacher with prosthetic leg experienced pain and bruising on his stump when standing for long periods of time to supervise students
  - Requested an aide
  - Reasonable jury could find that requiring Hill to endure pain that could be mitigated with a reasonable accommodation violated ADA
  - Aide would not perform essential function of supervising students, but would allow Hill to avoid standing for prolonged periods of time to supervise students without the presence of an aide

Telework

- *Brunckhorst v. Oak Park Heights*, 914 F.3d 1177 (8th Cir. 2019) p. 97
  - Telework not reasonable accommodation for accountant whose functions could not be performed from home
- *Mosby-Meachem v. Memphis Light, Gas & Water Div.*, 883 F.3d 595 (6th Cir. 2018) p. 98
  - In-house counsel with pregnancy-related limitations could perform essential functions from home

Leave: Employer Did Not Delay in Acting on Employee's Request for Leave

- *Hannah P. v. Coats*, 916 F.3d 327 (4th Cir. 2019)
  - Employee has difficulty reporting to work on time; employer and employee try schedule changes with which employee cannot comply
  - Employer tells employee to report to EAP; at same time employee requests four weeks of leave
  - Employer immediately grants leave day after employee reports to EAP, but employee places request "on hold"
  - Employee renews request after a week and employer provides it 2 weeks later
  - Court disagrees it took employer a month to provide the leave

Leave: Obligation to Hold Open Original Position?

- *Brunckhorst v. Oak Park Heights*, 914 F.3d 1177 (8th Cir. 2019)
  - ADA did not require employer to show that it would have been an undue hardship to hold open a position it had decided to eliminate for non-discriminatory reasons while employee was on extended leave

Leave: Employee Must Support Request for Leave Related to Disability

- *Lipp v. Cargill Meat Sols. Corp.*, 911 F.3d 537 (8th Cir. 2018)
  - Employee took 9 months of leave – well in excess of employer's leave policy – to care for her mother, then wanted to take additional intermittent leave for flare-ups related to a lung condition
  - Employer was allowed to ask for medical documentation supporting additional absences
  - Employee failed to provide medical verification until 3 weeks after she had been terminated

Reassignment: Employee Must Be "Qualified" for New Position

- *Faidley v. United Parcel Serv. of Am., Inc.*, 889 F.3d 933 (8th Cir. 2018) (en banc) – employer did not fail to make reasonable accommodation for truck driver with permanent restrictions:
  - "Feeder driver" position to which employee sought reassignment required overtime
  - Although "substantial objective evidence that conflicts with a physician's statement" may create genuine issue of fact, there was no such evidence
  - Employee was offered, but rejected, part-time job
  - Employee presented no evidence of other jobs he could have performed

Reassignment: “Best Qualified” Rules

- *Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166 (10th Cir. 2018)
  - Employer can’t use “best qualified” rule to automatically reject reassignment as reasonable accommodation; contrary to position in EEOC guidance and Supreme Court decision in *U.S. Airways v. Barnett*
  - Employer could use “best qualified” policy plus facts showing minimally qualified disabled employee fell significantly below qualifications of someone else to show reassignment is not plausibly reasonable accommodation or would be an undue hardship

Direct Threat Defense

- *Nall v. BNSF Ry. Co.*, 917 F.3d 335 (5th Cir. 2019)
  - Trainman with Parkinson's disease subject to medical evaluation and field test following report of co-worker
  - Three medical professionals cleared him to work
  - BNSF refused based on its own doctor's recommendation and results of tests
  - Court holds that although process for evaluating direct threat need not be reasonable, decision must be
  - Evidence employee was excluded solely because of his disability, including fact that employer added more job requirements for evaluation

Disability-Related Inquiries and Medical Exams

- *EEOC v. McLeod Health, Inc.*, 914 F.3d 876 (4th Cir. 2019)
  - Newsletter editor sent for medical exam because of having fallen several times
  - Occupational therapist recommends certain restrictions that employer says are inconsistent with job; plaintiff terminated following six months involuntary leave
  - Court denies summary judgment to employer on claim that medical exam was unlawful
  - Jury could also find it was not reasonable to conclude plaintiff posed direct threat

Disability-Related Inquiries and Medical Examinations: Who Pays?

- *EEOC v. BNSF Ry. Co.*, 902 F.3d 916 (9th Cir. 2018), pet. for cert. filed, No. 18-1139 (U.S. May 4, 2019)
  - During post-offer medical evaluation, applicant for patrol officer position disclosed prior back injury
  - Employer required him to pay for follow-up MRI
  - Ninth Circuit holds that employer should have to bear cost of follow-up
  - Also finds that district court made insufficient factual findings to justify nationwide injunction

Confidentiality of Medical Information

- *Hannah P. v. Coats*, 916 F.3d 327 (4th Cir. 2019)
  - Information an employee discloses voluntarily is not subject to confidentiality under ADA
  - Plaintiff claimed she disclosed information to supervisor about her depression in response to questions about attendance
  - Court finds this was insufficient to create genuine issue of material fact, since there was no evidence inquiring supervisor knew of plaintiff's depression or was fishing for medical information
  - Information disclosed by EAP psychologist did not trigger confidentiality provisions

Association with an Individual with a Disability

- *Marcropoulos v. Metropolitan Life Ins. Co.*, 2018 WL 1508564 (S.D.N.Y. Mar. 26, 2018)
  - Plaintiff, an attorney, teleworked part-time and had a flexible schedule that employer knew was to care for her mother
  - New supervisor requires more predictability; performance reviews refer to lateness, problems with accessibility while teleworking, missed deadlines, and using profanity
  - No evidence that employer's legitimate non-discriminatory reasons are pretext for discrimination on the basis of plaintiff's association with an individual with a disability
  - Conduct and deficiencies of other employees not comparable, and plaintiff's performance criticisms lasted over a long period of time before she was terminated

Interference with ADA Rights

- *EEOC v. CRST*, 351 F. Supp. 3d 1163 (N.D. Iowa 2018)
  - EEOC could prevail on interference claim if it showed that truck driver was entitled to his requested accommodation (service animal to ride with him) and employer threatened not to hire him unless he abandoned his accommodation request