THE AMERICANS WITH DISABILITIES ACT AND AMENDMENTS THERETO

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The Americans with Disabilities Act, 42 U.S.C.S §12111

The Americans with Disabilities Act of 1990 (the ADA) prohibits the discrimination of persons with disabilities and provides them with equal opportunities in employment. In 2008, the text of the ADA was amended to expand upon the interpretation of the coverage offered under the ADA and defines what disabilities are covered under the ADA. Complying with the ADA has been a challenge for many employers when addressing disabilities and injuries in the workplace. The ADA is applicable to all private employers with 15 or more employees and state and local governments, regardless of the number of employees.

The Current ADA and the Implementing Regulations

The ADA is divided into five titles. Title I covers employment, Title II covers public services, Title III covers public accommodations, Title IV covers telecommunications and Title V covers miscellaneous provisions.

Title I requires employers with 15 or more employees to treat qualified individuals with disabilities equally in all stages of employment. It requires employers to provide reasonable accommodations for applicants and employees with disabilities and prohibits discrimination on the basis of disability in all aspects of employment including the hiring process, compensation, benefits, trainings and promotions. Reasonable accommodation includes, for example, restructuring jobs, making work-sites and workstations accessible, modifying schedules, providing services such as interpreters, and modifying equipment and policies. Title I also regulates medical examinations, medical inquires, interviewing procedures and retaliation against someone for opposing discriminatory employment practices.

Title II prohibits public services, which include state and local government agencies, from denying services to people with disabilities or denying participation in programs or activities that are available to people without disabilities. All public programs and services, such as public transit buses, must be accessible to individuals with disabilities. Additionally, state and local government buildings must be accessible, and accommodations must be available for people who have vision, speech or hearing disabilities.

Title III requires that all new construction and modification of facilities such as restaurants, hotels, grocery stores, and retail stores, as well as privately owned transportation systems, be accessible to individuals with disabilities. For existing facilities, barriers to services must be removed if achievable without difficulty. Additionally, classes and examinations for professional, educational or trade-related purposes, licensing and certifications should be accessible to people with disabilities or alternative arrangements must be offered.

Title IV requires telecommunications companies offering telephone service to the general public to have telephone relay service available to individuals who use telecommunication devices, including the deaf.

Title V includes various provisions that are not necessarily covered by other titles, but have been used to clarify the application of the law. For example, this section notes that the ADA does not invalidate or override any other federal, state or local laws that provide equal or greater protections for people with disabilities. This title includes a provision prohibiting either (a) coercing or threatening or (b) retaliating against individuals with disabilities or those attempting to aid people with disabilities in asserting their rights under the ADA.

The ADA Amendments Act of 2008 (ADAAA) was enacted on September 25, 2008, and became effective on January 1, 2009. The amendment made a number of significant changes to the definition of "disability" under the ADA. It also directed the U.S. Equal Employment Opportunity Commission (EEOC) to amend its ADA regulations to reflect the changes made by the ADAAA. The EEOC issued a

Notice of Proposed Rulemaking (NPRM) on September 23, 2009. The final regulations were approved by a bipartisan vote and were published in the Federal Register on March 25, 2011.

This most recent amendment to the ADA included many changes to the ADA to clarify the legislature's intention in creating the ADA. The amendment included:

- Expansion of the definition of a "major life activity"
- Noting that an impairment that substantially limits one major life activity does not have to limit other major life activities to be considered a disability.
- Clarification of impairments that are episodic or in remission are considered a disability if they would substantially limit a major life activity when active;
- Overturning the Sutton standard by specifying that determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures; and
- Provided that an individual doesn't have to establish that his impairment limits or is perceived to limit a major life activity to be "regarded as being disabled."

The amendments to the ADA make it easier for an individual seeking ADA protection to establish that he or she has a disability under the statute and overturned a number of Supreme Court cases, including the 1999 decision in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), limiting the ADA's protection for employees and job applicants whose disabilities could be "mitigated" by measures such as medication, treatment, or assistive devices and the 2002 decision in *Toyota Motor Manufacturing, Ky, Inc. v. Williams*, 534 U.S. 184 (2002), tightened the standard for individuals to be considered "substantially limited" by their disability.

The amendment has been implemented through EEOC regulations. The regulations implement the changes Congress made to the statute, specifically how terms should be interpreted. The regulations also include "rules of construction" to determine if an individual is substantially limited in performing a major life activity. The regulations elaborate on the meaning of "substantially limits" too. "Substantially

limits" has a lower degree of functional limitation than the standard previously applied by the courts. An impairment does not need to prevent or severely or significantly restrict a major life activity to be considered "substantially limiting." Nonetheless, not every impairment constitutes a disability that "substantially limits" a major life activity, though the term "substantially limits" should be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. As was true prior to the amendment to the ADA the determination of whether an impairment substantially limits a major life activity requires an individualized assessment, and the determination of whether an impairment limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures, such as medication or hearing aids. Additionally, an impairment that is episodic in nature or in remission is a disability if it substantially limits a major life activity when the impairment is active.

The ADAAA makes it easier for an individual to establish coverage under the "regarded as" part of the definition of "disability". As a result of court interpretations, it had become difficult for individuals to establish coverage under the "regarded as" prong. Under the ADAAA, the focus for establishing coverage is on how a person has been treated because of a physical or mental impairment, rather than on what an employer may have believed about the nature of the person's impairment.

The regulations also clarify that an individual must be covered under the first prong ("actual disability") or second prong ("record of disability") in order to qualify for a reasonable accommodation. The regulations clear up the notion that it is generally not necessary to proceed under the first or second prong if an individual is not challenging an employer's failure to provide a reasonable accommodation. The final regulations differ from the NPRM in a number of ways. The final regulations modify or remove language that groups representing employer or disability interests had found confusing or had interpreted in a manner not intended by the EEOC. For example:

- Instead of providing a list of impairments that would "consistently," "sometimes," or "usually not" be disabilities (as had been done in the NPRM), the final regulations provide the nine rules of construction to guide the analysis and explain that by applying

those principles, there will be some impairments that virtually always constitute a disability. The regulations also provide examples of impairments that should easily be concluded to be disabilities, including epilepsy, diabetes, cancer, HIV infection, and bipolar disorder.

- Language in the NPRM describing how to demonstrate that an individual is substantially limited in “working” has been deleted from the final regulations and moved to the appendix.

Current Disabilities that need to be Accommodated under the ADA and the ADAAA

To retain coverage under the ADA and the ADAAA an employee must be a "qualified individual," which means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. In general, individual employees are “qualified” if they can perform the essential functions of a job with or without a reasonable accommodation. An individual is considered disabled if they are actually disabled (meaning they have a physical or mental impairment that substantially limits one or more major life activities), they have a record of a disability (meaning they had an actual disability in the past but are no longer disabled), or their employer regards then as being disabled.

The 2008 Amendment expanded upon what constitutes a major life activity. The listed activities include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. But by the ADAAA final regulations the listed activities should be interpreted broadly, in that if a particular activity is not listed in the statute, it is not precluded from being covered as a major life activity.

The Federal Register defines “physical or mental impairment” as:

> (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense

> organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or
>
> (2) Any mental or psychological disorder, such as an intellectual disability (formerly termed ‘‘mental retardation’’), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Exceptions from the definition include accommodations of a personal nature (e.g., eyeglasses or hearing aids) need not be provided, nor is it necessary to provide any superfluous accommodation (e.g., provision of a chauffeur to accommodate a blind person's traveling difficulties). No employer is required to hire two full time employees to perform one job in order to accommodate a disabled individual.

An Employer’s Reasonable Accommodation Requirements Including Utilizing an Interactive Process to Assess the Accommodation Requests/Needs.

A reasonable accommodation requires that steps be taken to enable a qualified individual with a disability to perform the essential functions of the position. In the reasonable-accommodation context, the ADA supports an interactive process by which employers and employees work together to assess whether an employee’s disability can be reasonably accommodated. The interactive process is an informal practice where the employee and the employer determine the limitations created by the disability and how best to respond with accommodation for it.

Employee’s Duty to Request an Accommodation

Generally, courts have recognized that an employee must request an accommodation to trigger the interactive process, but if it appears the employee needs an accommodation the employer should do what it can to help. *See EEOC v. Sears, Roebuck & Co*., 417 F.3d 789, 803 (7th Cir. Ill. 2005). The request may be either oral or written. The Equal Employment Opportunity Commission (EEOC) takes the position that requests for accommodation do not need to be in writing.[1] The employer may request, however, that the employee complete a written accommodation request for their records.

[1] http://www.eeoc.gov/policy/docs/accommodation.html

The ADA does not require employers to speculate about the accommodation needs of employees and applicants; rather, the individual requesting the accommodation has an obligation to provide the employer with enough information about the disability to determine a reasonable accommodation. "It is the employer's prerogative to choose a reasonable accommodation; an employer is not required to provide the particular accommodation that an employee requests." *Jay v. Intermet Wagner, Inc.*, 233 F.3d 1014, 1017 (7th Cir. 2000). Although courts endorse the view that an employer should not require an employee to use "magic" language, or even use the term "accommodation" in the request, an employee must be clear in indicating the need for an accommodation because of a medical condition.

<u>Duty to Provide an Accommodation Without an Express Request</u>

Although the general rule places the burden to request an accommodation on the employee or applicant, there are circumstances under which employers may have an obligation to provide an accommodation without a request. Employers should be aware that some courts have suggested that if the employer knows both about the disability and the need for accommodation, it may have an obligation to provide the accommodation—even without an express request that a modification is needed because of a disability. *Barnett v. U.S. Air*, 228 F.3d 1105 (9th Cir. 2000). This often occurs in circumstances where the employee's disability is obvious and it is clear that the disability is interfering with the employer's performance expectations.

Further, the EEOC's guidance suggests that accommodation should be provided without request if the employer

- knows that the employee has a disability,
- knows or should know that the employee is experiencing workplace problems because of the disability, or
- knows or should know that the disability prevents the employee from requesting a reasonable accommodation.

See EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002 (Oct. 17, 2002), at Question 40. The EEOC clarifies that,

under the latter circumstances, if the individual declines the offer of an accommodation, the employer will have fulfilled the accommodation requirement under the ADA.

Employer's Duty to Engage in the Interactive Process

Once an accommodation has been requested or the need for an accommodation is obvious, the employer should initiate an interactive process with the individual. Courts generally have held that the interactive process requires employers to:

- analyze job functions to establish the essential and nonessential job tasks,
- identify the barriers to job performance by consulting with the employee to learn the employee's precise limitations, and
- explore the types of accommodations that would be most effective.

Employers can demonstrate a good-faith attempt to accommodate by meeting with the employee, requesting information about the limitations, considering the employee's requests, and discussing alternatives if a request is burdensome.

Because the interactive process imposes mutual obligations on employers and employees, an employer cannot be liable for failure to accommodate if a breakdown in that process is attributable to the employee. *Walden v. CDC & Prevention*, 669 F.3d 1277 (11th Cir. 2012). Courts have consistently attributed the breakdown in the interactive process to the employee where the employee refuses to allow the employer to discuss the employee's alleged disability with the employee's doctor after attempts to accommodate the employee are unsuccessful. Further, courts have attributed the breakdown of the interactive process to the employee where the employee did not respond to the employer's request for information about the employee's abilities and the nature and extent of the restrictions. Finally, courts have held employees responsible for the breakdown in the interactive process when an employee uncompromisingly insists on a single accommodation that is unreasonable as a matter of law.

To the contrary, if the breakdown in the interactive process is attributable to the employer, courts have generally held this to be an adverse employment action. However, an employer's failure to initiate the interactive process is not itself a "per se" violation of the ADA, where no accommodation is possible.

The ADA requires the parties to engage in an informal, interactive process, to explore possible accommodations, but an employer's failure to participate in the interactive process is not actionable unless the employee can demonstrate that the employee could have been reasonably accommodated but for the employer's lack of good faith. If no accommodation would allow the employee to perform his or her job, the employer is not obligated to participate in the interactive process of accommodation required by the ADA.

The Employer Is Not Required to Provide the Specific Accommodation Requested

Finally, employers are not obligated to provide the specific accommodation requested by the employee; employers are only required to provide a reasonable accommodation. Although the ADA provides a right to a reasonable accommodation, it does not provide a right to any specific requested or preferred accommodation. Thus, an employee is not entitled to his or her "choice" accommodation but rather a "reasonable" accommodation. For example, an employer may choose to let an employee call off work without penalty as a reasonable accommodation, rather than provide the employee's requested accommodation of working from home.

An employee may refuse an accommodation offered by the employer; however, if the employee cannot perform the job without the accommodation, the employee will not be considered "qualified" under the ADA. For instance, a court held that an employee was not "qualified" where she could not be around workplace fumes, and she refused the potential accommodation—use of a respirator—which was proposed by the employer. *Lockett v. Bd. of Comm'r of County of Allen*, 2009 LEXIS 76896 (N.D. Ind. Aug. 26, 2009).

Non-Disabled Employees Related to an Individual with a Disability

An employer is only required to provide an accommodation that is for the disability of the employee or applicant. The association provision of the ADA does not obligate employers to accommodate the schedule of an employee with a disabled relative because the plain language of the ADA indicates that the accommodation requirement does not extend to relatives of the disabled individual. Specifically, the appendix entry for the association-bias provisions in the ADA's

implementing regulations (29 C.F.R. § 1630.8 (2013)) provides that "an employer need not provide the . . . employee without a disability with a reasonable accommodation because that duty only applies to qualified . . . employees with disabilities."

<u>Can an Employer Lawfully Deny an Accommodation Request?</u>

Employers may deny accommodation requests or defend against legal claims of failure to accommodate for qualified individuals by citing to undue hardship or direct threat.

Undue hardship: Under the ADA, an employer is not required to make reasonable accommodations that would impose an "undue hardship" on the employer. The burden is on the employer to prove an undue hardship. Whether an accommodation will impose an undue hardship is determined on a case-by-case basis. For example, while an employer with 30 employees may legitimately claim that an extended period of disability leave for one of its employees would create an undue hardship, an employer with 25,000 employees, that employs hundreds of employees in the same position as the employee requesting leave, will have difficulty arguing undue hardship as a defense. Undue hardship includes any action that is

- unduly costly,
- extensive,
- substantial,
- disruptive, or
- fundamentally alters the nature or operation of the business.

See 29 C.F.R. § 1630.2(p) (2013).

The ADA and EEOC regulations identify several factors to consider when determining whether an accommodation would impose an undue hardship. *See* 42 U.S.C. § 12111(10)(B) (2013); 29 C.F.R. § 1630.2(p) (2013). For example, employers may consider the nature and net cost of the accommodation, the overall financial resources of the covered entity, and the number of employees employed by the covered entity. Employers asserting "cost" as the reason for undue hardship should note that the EEOC

has routinely said that the cost that must be spent on an accommodation depends on the employer's resources, not on the employee's salary, position, or status within the company. *See* EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship, supra, at Question 45.

Some general principles may be gleaned from cases evaluating whether an accommodation is an undue hardship:

- An accommodation that would result in other employees having to work harder or longer is not required under the ADA.
- Where an employer has waived certain requirements for other employees, the employer cannot claim that it would cause an undue hardship to waive those same requirements for an individual with a disability.
- An employer may assert that a modified schedule for an employee would be an undue hardship because of the significant cost of keeping the facility open, which may include additional hours for other personnel such as security personnel.
- An accommodation to one employee that violates the seniority rights of other employees in a collective-bargaining agreement is not reasonable because it would expose the employer to potential union grievances and costly remedies.

Direct Threat

Some disabilities pose a "direct threat" to the health and safety of individuals in the workplace. Where there is no reasonable accommodation available to negate that threat, employers may cite the direct-threat defense.

Employers can assert the direct-threat defense only if the individual poses a significant risk that cannot be reduced or eliminated by accommodation. A speculative or remote risk is insufficient. The assessment of whether an individual poses a direct threat is based on reasonable medical judgment that may be based on current medical knowledge or the best available objective evidence. Factors considered in assessing whether an individual poses a direct threat include:

- the duration of the risk,
- the nature and severity of the potential harm,
- the likelihood that the potential harm will occur, or
- how soon the potential harm may occur.

See 29 C.F.R. § 1630.2(r) (2013). If no reasonable accommodation is available (i.e., an open position to which the employee could be reassigned), the employer would not violate the ADA by terminating the employee.

Best Practices

As part of employer best practices regarding the interactive process, and for each accommodation request, the employer should do the following:

- Document in writing its receipt of the request for accommodation, providing a copy to the individual and retaining a copy for the employer's records. This allows the employer to show that it took the request seriously and responded promptly.
- Ask the individual for information about the extent of the impairment, including notes from doctors or other health-care providers, and request medical testing relevant to the accommodation at issue.

The EEOC has specifically issued policy to this effect in its ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (Oct. 10, 1995). Specifically, the EEOC policy states that if someone requests a reasonable accommodation, and the disability and/or the need for accommodation is not obvious, an employer may ask for reasonable documentation about the individual's disability and functional limitations. In its Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (Oct. 17, 2002) at Question 6, the EEOC reiterated that an employer may require documentation to establish that a person has an ADA disability and that the disability necessitates a reasonable accommodation.

- Confer with the individual to discuss accommodation alternatives, which includes listening to the individual's preference and the option to suggest alternatives.
- Document in writing the discussion about the accommodation and the final determination about how the accommodation request is resolved, including any undue-hardship analysis.

The obligation to provide a reasonable accommodation is ongoing. An employer may be required to provide more than one accommodation to a covered individual, and the employer may be required to provide a different accommodation if the disability or other circumstances change. Because unique and challenging situations can arise with respect to disabilities in the workplace, employers must understand their obligations to engage in the interactive process and reasonably accommodate individuals with disabilities.

Accommodations

Job Accommodations enable people with disabilities to perform essential job functions, be productive and accomplish work tasks with greater ease and independence. Examples include modifications such as ergonomic desk chairs, reserved parking, flexible schedules, telecommuting, alternate workstations and periodic rest, food or bathroom breaks. According to the Job Accommodation Network (JAN), nearly 60 percent of the accommodations needed by workers with disabilities cost absolutely nothing, and only 36 percent of employers incurred a one-time cost of roughly $500. JAN's publication, the Employees' Practical Guide to Requesting and Negotiating Reasonable Accommodations under the Americans with Disabilities Act (ADA) summarizes the provisions of the ADA, common accommodation issues and JAN's practical solutions for resolving them.

Accessible Public Transportation, such as buses, trains, subway systems, paratransit and ferries, makes it possible for people with disabilities to get to work, medical appointments and social activities in their communities. Common accessibility features include accessible parking, elevators, raised lettering and Braille signage, automatic doors, wheelchair turnstiles and lifts, public address systems, curb cuts, elevator status announcements and TDDs.

What Is Reasonable And What Is Not Reasonable Accommodations Under The ADA?

The ADA covers a wide breadth of disabilities. Cases throughout the country have helped defined what are and what are not reasonable accommodations to make for qualified individuals under the ADA and the ADAAA. Below is a summary of recent 7th circuit cases that help outline reasonable accommodation under the ADA.

Cases where the employer met the reasonable accommodation:

- In an accommodation for PTSD the 7th Circuit held that a Plaintiff who was allowed to retake his exams and review each failed exam with an instructor before each retake for his doctoral degree was a reasonable accommodation for the plaintiff. *Patrick Novak v. Board of Trustees of Southern Illinois University, et al*., 777 F.3d 966 (7th Cir. 2015). The Department eventually offered Plaintiff to transfer his doctoral degree to a master's degree and Plaintiff accepted, and then sued Department for failure to provide reasonable accommodation.
- Reasonable accommodations for working pregnant women include limits on manual labor, more frequent bathroom breaks and space to breastfeed. Additionally, a pregnant woman can't be forced to take a leave of absence when another accommodation is available.
- In *Nancie J. Cloe v. City of Indianapolis*, 712 F.3d 1171 (7th Cir. 2013), the Seventh Circuit affirmed the district Court's holding of summary judgment for the defendant-employer on the ADA claim because the record showed that once plaintiff informed defendant of her multiple sclerosis condition and requested closer parking spot and in-office printer, defendant took steps to give plaintiff other parking spots and took printer away from co-worker to give to plaintiff and because plaintiff failed to make specific request for proof-reader and thus failed to trigger any obligation on defendant to

accommodate such request. The Seventh Circuit did hold that the District Court erred in granting summary judgment on retaliation claim and the discriminatory termination claim.

- *Shirley Mood and Take Care Employer Solutions, Charge* Nos. 2010SF1183, 2010SF0118, 2010SF0775 (Dec. 7, 2012) (Judge William J. Borah, Presiding) The Court held that the employer satisfied its duty to reasonably accommodate Complainant's religious beliefs by offering her employment at other locations at which pants or coveralls were not required. In order to fulfill some of her job responsibilities, Complainant was required to enter into areas of a customer's workplace that involved the manufacturing of ethyl alcohol, which is flammable and which required flame retardant pants. Complainant had religious convictions that prohibited her from wearing pants or coveralls. Complainant proposed, as a reasonable accommodation, either that she be allowed to "sew two NOMEX [the flame-retardant fabric] lab coats together to create an ankle-length, open bottom NOMEX dress," or have employees from the plant that manufactured the ethyl alcohol come to an administrative area where the wearing of NOMEX was not required. Respondent established that Complainant's request to sew together two pairs of NOMEX pants would result in undue hardship for Respondent. Respondent offered to accommodate Complainant by allowing her to service other plants/customers that did not have a pants or coverall safety requirement, but these customers were all out of state, so Complainant turned down these positions.
- In *Elizabeth Hoppe v. Lewis University*, 692 F.3d 833 (7th Cir. 2012), the Seventh Circuit held that Dist. Ct. did not err in granting defendant-university's motion for summary judgment in plaintiff-professor's ADA action where doctor wrote note on behalf of plaintiff seeking change in her office location, plaintiff failed to establish any ADA violation where her doctor failed to provide defendant with necessary information about

requested accommodation and where defendant nevertheless offered plaintiff three options for changing her office location.

- In *Teresa Kotwica v. Rose Packing Company, Inc*., 637 F.3d 744 (7th Cir. 2011), the Seventh Circuit affirmed the District Court summary judgment for defendant-employer in ADA action alleging that defendant terminated plaintiff based on her physical limitations arising out of her hip surgery after plaintiff returned to work with certain weight-lifting restrictions that precluded her from doing all of her assigned tasks. Plaintiff failed to demonstrate that she was covered under ADA where she had failed to present evidence that her hip problems substantially limited her ability to engage in major life activity of working. Moreover, record showed that plaintiff's problems prior to her surgery did not stop her from working on regular basis, and plaintiff claimed that she was in better physical condition after her surgery. Additionally, the Court held that the defendant was not required to create new position consisting of subset of duties performed by plaintiff in her existing position as accommodation for her permanent impairment.
- In *Joseph M. Bellino v. Mary E. Peters, Secretart, United States Department of Transportation*, 530 F.3d 543 (7th Cir. 2008), the Seventh Circuit affirmed the District Court grant of defendant-employer's motion for summary judgment in action under Rehabilitation Act alleging that defendant failed to reasonably accommodate plaintiff-air-traffic controller's disability (injured knee) when it offered plaintiff another job in airport. Defendant's offer of sit-down position with same salary, duties and responsibilities, but with lower annual bonus, qualified as reasonable accommodation.

Cases where the employer did not meet the reasonable accommodation requirement:

- In *Debra Kauffman v. Petersen Health Care VII, LLC*,769 F.3d 958 (7th Cir. 2014), the Seventh Circuit held that the record suggested pushing wheelchairs of clients formed only a small part of plaintiff’s job, such that a question remained as to whether defendant could reasonably accommodate plaintiff’s request that co-worker push the clients to her

hairdressing studio. Moreover, the Court held that defendant's stance that it would not accommodate anyone with permanent restriction does not excuse the defendant from making an attempt to accommodate it.

- In *Darrell Lynn Miller v. Illinois Department of Transportation*, 643 F.3d 190 (7th Cir. 2011), the Seventh Circuit held that the District Court erred in granting defendant-employer's motion for summary judgment in ADA action alleging that defendant failed to accommodate plaintiff's panic attacks associated with performing bridge repair tasks at certain heights because the record contained genuine issue as to whether defendant regarded plaintiff as substantially limited in major life activity of working where: (1) prior to first panic attack, plaintiff's supervisor allowed plaintiff and others to trade tasks among co-workers without incident; and (2) after panic attack, defendant precluded plaintiff from performing any tasks, including those that plaintiff could perform without accommodation at time when plaintiff had been cleared by two medical professionals to work without significant restrictions. Moreover, plaintiff's requested accommodation of trading tasks with his co-workers was arguably reasonable where said request had been granted in past.

Cases where the Plaintiff was unable to meet the essential work function of the employment to qualify for a reasonable accommodation:

- The Seventh Circuit decided in *Kiersten M. Taylor-Novotny v. Health Alliance Medical Plans, Inc.*, 772 F.3d 478 (7th Cir. 2014), that Plaintiff with multiple sclerosis was unable to meet the essential work function that the employee be accessible at regular times to supervisors, staff, and customers and therefore could not satisfy the essential function of regular attendance. The Court held there was not a reasonable accommodation to be made because the plaintiff was not a qualified individual.

- *Renee S. Majors v. General Electric Company*, 714 F.3d 527 (7th Cir. 2013), the Seventh Circuit affirmed the District Court's holding that Plaintiff's shoulder condition that precluded plaintiff from performing an essential function of the position which was to lift objects weighing more than 20 pounds. Plaintiff's proposed accommodation of having someone else perform said lifting duties was not a reasonable accommodation since the lifting of the objects was an essential function of the position.
- In *Keith Powers v. USF Holland, Inc.,* 667 F.3d 815 (7th Cir. 2011), the Seventh Circuit held the District Court did not err in granting defendant-employer's motion for summary judgment in plaintiff's action alleging that defendant violated ADA by enforcing its 100% healed policy when refusing plaintiff's request to return to work with certain medical restrictions and by failing to provide him with reasonable accommodation of allowing him to return to work as long-haul truck driver that did not require plaintiff to perform certain loading dock duties. Plaintiff failed to show that he was qualified under ADA as individual who was substantially limited in major life activity of working, where record showed that plaintiff was capable of performing long-haul truck driving work, and record showed at most that he was unable to return to city-driver position that he held at time of his medical leave of absence. The Court further held that defendant's 100% healed policy did not subject defendant to per se liability under ADA where record showed that defendant considered plaintiff's impairment as affecting only plaintiff's ability to perform defendant's city-driver position.
- In *Gail King v. City of Madison*, 2008 U.S. App. LEXIS 24515 (7th Cir.), the Seventh Circuit affirmed the District Court summary judgment for the defendant-employer in ADA action where record showed that plaintiff could no longer perform essential duties of current position, and collective bargaining agreement prevented defendant from transferring plaintiff to job she requested. Moreover, defendant was not required to

transfer plaintiff to different job where such transfer would violate legitimate, non-discriminatory provisions of collective bargaining agreement.

Other cases to consider:

- In *Shell v. Smith*, 2015 U.S. App. LEXIS 10011, the 7th Circuit held that the district court erred in granting defendant-employer's motion for summary judgment in an ADA action alleging the defendant-employer terminated the plaintiff on account of his disability, holding it was a question of fact for the jury to determine whether the driving of the buses was an essential duty of the mechanic's helper position. The defendant-employer states that the plaintiff was terminated because of his failure to obtain CDL required to drive the buses he worked on as mechanic's helper as the job description called for the mechanic's helper to drive buses which required a CDL license. The court observed that even though the plaintiff performed less than the written duties did not indicate whether the defendant considered the duties he was not expected to perform to be essential. The job description clearly required the plaintiff to obtain the CDL license, though the question remained whether the driving of the buses was essential to the position where (1) driving bus on public roads was not part of plaintiff's regular duties during prior 12 years of plaintiff's tenure in position; (2) defendant failed to present any evidence that reassignment of bus driving duty had an adverse impact on defendant's business; and (3) record was silent as to how often mechanic's helper might be required to drive bus and how the job was performed before the plaintiff was in the position. The court, however, observed that the defendant may be able to prevail if it could show that it had previously restructured the plaintiff's job, but only if the defendant could show driving buses was an essential duty of the position.
- In *Equal Employment Opportunity Commission v. United Airlines, Inc*., 693 F.3d 760 (7th Cir. 2012), the Seventh Circuit found that defendant-employer's accommodation policy violated ADA where defendant gave preferential treatment to individuals who,

because of their disability, could no longer do essential functions of their current job, even with reasonable accommodation, by assigning said individuals to vacant positions for which they qualified, but only if no more-qualified candidate existed. The Court overruled *Humiston-Keeling,* 227 F.3d 1024, finding that the ADA requires automatic placement of disabled employees into vacant positions as long as they are qualified for said positions, and as long as said placement would not present undue hardship to employer. The Court further observed that under Barnett, 535 US 391, accommodation requests that would violate seniority systems would ordinarily be unreasonable, but disabled employees would still be free to present evidence on case-by-case basis to show that placement in spite of seniority would be reasonable.

- In *Jeanne Gratzl v. Office of the Chief Judges of the 12th, 18th, 19th and 22nd Judicial Circuits*, 601 F.3d 674 (7th Cir. 2010), the prescribed job Plaintiff desired no longer existed. The Seventh Circuit affirmed the District Court summary judgment for employer in ADA action alleging that defendant failed to accommodate plaintiff-employee's request to be placed in court-reporter's job that did not require any in-court reporting, but allowed her to continue exclusively in control room position. While plaintiff had performed requested control-room job in past, said job no longer existed, and defendant's requirement that plaintiff rotate through courtrooms performing in-court services was essential function of plaintiff's job that precluded her from establishing that she was qualified individual with disability. Court held employer need not create new job, or strip current job of its principal duties, or reassign employee to permanent light-duty position when attempting to accommodate disabled employee.

There is also a comprehensive list of Accommodations for specific disabilities at JAN web page http://askjan.org/pubsandres/list.htm .