ADA Open Issues - Transfers To Vacant Positions, Leaves Of Absences, Telecommuting And Other Accommodation Issues

Lawrence P. Postol
# ADA Open Issues – Transfers To Vacant Positions, Leaves of Absences, Telecommuting and Other Accommodation Issues

by

Lawrence P. Postol*  
SEYFARTH SHAW LLP  
975 F Street, N.W.  
Washington, DC 20004-1454  
(202) 828-5385  
Lpostol@seyfarth.com

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overview ................................................................. 4</td>
</tr>
<tr>
<td>Reassignment To A Vacant Job ........................................... 8</td>
</tr>
<tr>
<td>Attendance At Work And Leaves of Absence .......................... 11</td>
</tr>
<tr>
<td>Temporarily Filling Job Slots When An Employee Is On Leave .......... 16</td>
</tr>
<tr>
<td>Medical Issues and Mental Disabilities ............................... 17</td>
</tr>
<tr>
<td>What Are The Essential Functions Of The Job .......................... 20</td>
</tr>
<tr>
<td>Job Restructuring ........................................................... 26</td>
</tr>
<tr>
<td>Telecommuting ............................................................... 28</td>
</tr>
<tr>
<td>Safety Concerns ............................................................. 34</td>
</tr>
<tr>
<td>Required Employee Cooperation ............................................ 36</td>
</tr>
<tr>
<td>An Employer Need Only Provide An Accommodation .................... 38</td>
</tr>
<tr>
<td>Real World Medical Issues ................................................ 41</td>
</tr>
<tr>
<td>Limitations On The Employer’s Obligations To The Employee .......... 43</td>
</tr>
<tr>
<td>Conclusion .................................................................. 48</td>
</tr>
</tbody>
</table>

---

* Mr. Postol is a partner in the law firm of Seyfarth Shaw LLP in its Washington, D.C. office.
The Americans With Disabilities Act (“ADA”) was enacted in 1991 and amended in 2008. The ADA prohibits discrimination against persons with disabilities and requires employers to provide reasonable accommodations so disabled workers can perform the essential functions of their jobs. Even twenty-five years after the passage of the ADA, there are several significant open issues under the ADA, and employers’ understanding of their duties under the ADA is less than perfect.

The ADA is different from all other discrimination laws, since the other laws merely level the playing field. The employer need only put on blinders and treat all workers the same, irrespective of race, color, sex, age, etc. The ADA, in contrast, actually requires an affirmative duty on employers that can impose significant costs and burdens – providing reasonable accommodations.

The first open issue, that has badly split the United States Courts of Appeals, is whether the ADA goes even further, and has an affirmative action requirement. This issue comes up when a person with a disability can no longer perform his/her regular job, even with reasonable accommodations, but can perform the duties of a vacant job. The question is whether that disabled worker, who meets the minimum qualifications for a vacant job, is entitled to the vacant job over a more qualified non-disabled applicant or co-worker?

---

1 42 U.S.C. § 12101, et. seq.

2 To be complete, it should be noted that under Title VII, 42 U.S.C. § 2000e(j), an employer must also reasonably accommodate a worker’s religion. However, the courts have held that merely requires de minimus accommodations, Transworld Airline, Inc. v. Hardison, 432 U.S. 63 (1977). The ADA accommodation hardship limitation, in contrast, is based on a number of much more substantial factors, including the employer’s net worth. 42 U.S.C. § 12,111(10).
The second open issue involves unpaid leaves of absence. The EEOC believes an indefinite leave of absence is a reasonable accommodation, as well as taking a rather liberal view of the importance, or lack thereof, of regular attendance at work. The courts, in contrast, have said that regular attendance at work is an essential function of most jobs, and that there is a limit on how long an ADA-required unpaid leave of absence can go on. The courts, however, have not given any clear guidance as to when enough is enough, with respect to unpaid leaves of absences as an ADA reasonable accommodation. The question of when an employer can fill a job left open by a disabled person who is on unpaid leave is very problematic for employers in the real world. Unfortunately, the answer lies in employers having more patience than is the norm, and being more inventive in dealing with budgeted personnel slots - allowing a department to hire a replacement, and then deal with the returning disabled worker if and when the disabled worker is able to return to work.

There are also issues about where workers must perform their job duties. Must an employer accommodate problems with the commute to work? Many workers can perform their job duties, but medical issues make the commute to and from work a problem. The courts are split on whether employers must accommodate problems with a disabled worker’s commute to and from work, and the courts have struggled with how and when teleworking must be allowed as a reasonable accommodation. Likewise, rearranging work schedules – when a worker has to start and end the work day, and whether they can rearrange their work days, is often an issue.

A corollary question is defining what are the essential functions of a job, and whether face-to-face interaction with supervisors, co-workers and customers, at regular work times, is an essential function of the job. There is also an issue of who has the burden of proof. The

---

3 See Walsh v. United Parcel Service, 201 F.3d 718 (6th Cir. 2000) in which the Court rejected the EEOC’s view.
employer has the initial burden of production, producing evidence of what the essential functions of a job is, since the employer presumably controls that evidence. That does not change the fact that on all issues, including determining the essential functions of the job, the worker has the ultimate burden of persuasion.

One bright spot is that the courts do not follow the adage that “no good deed goes unpunished.” Thus, if a sympathetic employer allows a disabled worker to not perform certain job functions for a short period of time while the disabled worker recovers from an illness or injury, the courts recognized that does not mean the functions are not essential to the job. The courts understand that forcing other workers to pick up the slack for a disabled worker may work in the short run, but that does not mean that solution can be forced on the employer (and co-workers) in the long term. The act of kindness of allowing a disabled worker to not perform certain essential functions of the job for a short time is beyond what the ADA requires, and thus that situation cannot be forced on the employer as a reasonable accommodation. A worker must be able to perform the essential functions of the job, and excusing the worker from doing so for a short period of time, does not mean the essential functions of the job have changed.

The issue of the safety of the employee and others, the “direct threat” defense, continues to be a difficult issue because it is so fact specific, and deals with medical issues for which there are not always easy and clear answers. Certainly courts are not as quick to say a disabled employee can perform the essential duties of his/her job when it exposes the worker or others to a risk of significant injury. But what medical evidence is required to determine that there is a safety risk, and who bears the burden of proof, are issues upon which the courts cannot agree.

Employees also sometimes forget that they have an obligation to cooperate with their employer in determining whether they have a covered disability, and what reasonable
accommodations are necessary. An employer’s request for medical documentation and even an examination by a physician the employer selects cannot be ignored. At the end of the day, a disabled worker must be able to demonstrate he/she can perform the essential functions of his/her job, and in a reasonably safe manner. Disabled employees also must remember that they are entitled to an effective accommodation which allows them to perform their job, not necessarily the accommodation they prefer, nor are they entitled to a perfect solution.

While to some people, these issues may seem to be abstract, for those in the human resources profession, they are every day real questions, and very difficult ones at that. Nevertheless, one can frame the questions, review the arguments on both sides of the employment fence, and provide some practical guidance on how to handle these problematic situations.

**Overview**

The issue over whether there is a preference for the disabled to be given vacant jobs is the type of question law school moot courts love, because there are strong arguments on both sides. The United States Supreme Court will ultimately have to decide the reassignment to a vacant position issue, because the Courts of Appeals are split on the issue. It may come down to whether the court activists prevail and the Supreme Court fills in the uncertainty in the statute, or whether the conservatives prevail – refusing to mandate an outcome which Congress itself did not clearly direct.

On the one hand, it seems hard to believe Congress meant the reassignment to a vacant position accommodation to be a preference right, since it did not explicitly so state, and indeed, Congress excluded bumping rights with respect to union seniority systems. Congress clearly noted the ADA was not meant to override seniority systems. On the other hand, if the
reassignment reasonable accommodation is not a preference, then what is it, since even without the reassignment accommodation right, a disabled employee can always apply for a vacant job?

With respect to leaves of absence, three things seem fairly clear. First, if the worker’s doctor, after a reasonable healing period, cannot give a definite, or at least approximate, date for the worker to return to work, then it is a request for an indefinite leave of absence, and as a matter of law, such a request is unreasonable. Second, a leave of absence over a year is probably always going to be held to be unreasonable, and a leave of absence over six months is also probably going to be held to be unreasonable, particularly for smaller employers. Conversely, the employers who believe their obligation to provide a leave of absence ends with the 12 weeks of Family Medical Leave Act (“FMLA”) leave are sadly mistaken. That is when the ADA analysis for unpaid leave as a reasonable accommodation must begin.

While the fashionable trend seems to be in favor of telecommuting (working at home), some courts in the past have been hesitant to consider telecommuting as a reasonable accommodation, noting it is the exception rather than the rule. Moreover, almost all courts seem to recognize that few jobs will allow unlimited telecommuting. Thus, if the employer puts forth evidence that face-to-face interaction with supervisors, co-workers, or clients is needed, then the courts will likely consider such in-person duties an essential function of the job, and will not require the employer to allow telecommuting, or will certainly allow a limit on the amount of telecommuting.

However, as more and more employers voluntarily allow telecommuting, care must be taken by the employer when faced with a request for telecommuting. Many courts now are very willing to consider limited telecommuting as a reasonable accommodation. Thus, it will be the

---

rare employer who can justify excluding some amount of telecommuting as a reasonable accommodation. If an employer wants to do so, it better explain in their job description why face-to-face interaction is required. Courts do, however, recognize that an employer allowing a small amount of telecommuting, does not mean that a large amount of telecommuting is feasible. Likewise, the courts, recognizing that not requiring an essential function be performed for a short time period as an act of kindness for an ill or injured employee who is recovering from his/her injury or illness at home, does not mean the face-to-face interaction is no longer an essential function of the job.

An important fact to remember in the interactive process of evaluating request for reasonable accommodations is that a worker and the worker’s doctor must cooperate with the employer’s request for information, e.g., for copies of medical records or for the worker to submit to an examination by a physician chosen by the employer. If the employee fails to provide necessary information to the employer for the evaluation of whether the person is disabled and needs a reasonable accommodation, then the worker will not be entitled to the requested accommodation. Likewise, the disabled employee must be able to show that even with accommodations, he/she can safely perform the essential functions of the job.

The key to finding practical solutions to reasonable accommodation requests should focus on two main tenets of the ADA: (1) the employee must be able to perform the essential duties of the job; and (2) the employer need only provide an effective accommodation which works, not necessarily the one the worker requests. Thus, employers should focus on determining what are the true essential functions of a job, and what effective accommodation will work best for the employer, not necessarily the employee. Of course, the ADA interactive
process requires all this be discussed with the employee, and it is a good practice to document all key communications.

Finally, as for safety issues, the courts have been very understanding that employers have a duty to protect the safety of customers, the public, and even the worker himself/herself. Nevertheless, the employer must document the medical information as to the risk of injury, and not rely on mere conjecture or assumptions. The courts are also split on whether the burden of proof on a safety issue is on the employer or the employee. The key may be whether safety is a key component of the job, e.g., a policeman or fireman, in which case the burden of proof may well be on the employee to prove he/she can safely perform the job.

These issues under the ADA are becoming more into focus because the coverage of the ADA was greatly expanded with the passage of the 2008 Amendments to the ADA. Now, employees with any chronic condition are covered by the ADA, even if mitigating measures such as medicine limits the adverse effects of the condition. Indeed, even a temporary condition can be a protected disability.

Congress passed the 2008 Amendments to change the focus of employers and the courts from deciding whether a condition is a disability, to determining what reasonable accommodations are needed to allow disabled workers to perform the essential duties of the job. Congress explicitly stated that the ADA was to be liberally interpreted to expand its coverage. As such, plaintiff attorneys will be more attracted to ADA claims, and they can be expected to push these open issues to resolution.

---


**Reassignment To A Vacant Job**

The courts are divided as to whether the ADA gives a preference to disabled workers who are no longer able to perform their regular job, even with reasonable accommodations, but who meet the minimum qualifications for a vacant job. The question is simple – who gets a vacant job, the most qualified person or a disabled worker who meets the minimum qualifications for the job and who cannot perform his/her regular job even with reasonable accommodations? The answer, however, is not at all clear, having badly divided the United States Courts of Appeals, and indeed, several of the Courts of Appeals have reversed themselves on the issue either in en banc decisions, or in one case, one panel declining to follow another panel’s earlier decision.

The Courts of Appeals for the District of Columbia, Seventh and Tenth Circuits have held that the minimally qualified disabled worker gets the job,8 reasoning that otherwise the reasonable accommodation of “reassignment to a vacant position”9 is meaningless, since even without the ADA, a disabled person could always apply for a vacant job.

The Courts of Appeals for the Fifth, Eighth and Ninth Circuits disagree.10 They have held that the ADA is not an affirmative action statute, and thus disabled workers are not to be given a preference over other workers. Rather, they are only to be assured a level playing field – to be considered equally with others – no better, no worse.

---

8 *Aka v. Washington Hospital Center*, 156 F.3d 1284 (D.C. Cir. 1995) (en banc); *Smith v. Midland Brake Inc.*, 150 F.3d 1154 (10th Cir. 1999) (en banc); *EEOC v. United Airlines, Inc.*, 673 F.3d 543 (7th Cir. 2012), overruling its prior decision in *EEOC v. Hymiston-Keeling*, 227 F.3d 1024 (7th Cir. 2000).

9 42 U.S.C. § 12111(9).

10 *Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995); *Huber v. Wal-Mart*, 486 F.3d 480 (8th Cir. 2007), reh’g en banc denied, 493 F.3d 1002 (8th Cir. 2007); *Sharpe v. ATT*, 66 F.3d 1045 (9th Cir. 1995).
The problem is that each side has a compelling argument. On the one hand, if the employer need only “consider” a disabled employee for a vacant position and not give a preference, then why even include the reassignment accommodation in the list of reasonable accommodations? Even without explicitly listing it as a reasonable accommodation, employers have to consider all applicants for an open job, even a currently disabled employee. On the other hand, giving a preference over other applicants is so different from everything else in the ADA, it seems very odd that Congress would do so without saying that was its intent, and providing a discussion in the legislative history.

In resolving this conflict, it would seem three arguments turn the balance of this debate against there being a preference. First, and foremost, is the fact the ADA limits the reasonable accommodation of transfer to a vacant position to current employees, it is not available to disabled applicants. Why would Congress give a preference to a disabled employee over a more qualified person, but not give the same preference to a disabled applicant?

Second, Congress probably put the transfer to a vacant position in the list of reasonable accommodations to not only make sure a disabled employee was at least considered for the job, but also to make sure the disabled employee obtained the job if he was the most qualified applicant, or the only applicant.

Finally, Congress explicitly indicated in the legislative history that a disabled employee cannot bump someone out of a job, a position even the EEOC has followed. Putting a less

---

qualified disabled employee in a job over a more qualified applicant no doubt has the same feeling of being bumped to the more qualified applicant.

Indeed, Congress also directed that an employer need not violate its collective bargaining agreement in order to accommodate a person with a disability. Thus, if the choice in deciding who gets a light duty job is between the disabled worker and the employee with more seniority, in the union setting of a seniority clause, the senior employee gets the job. 12

A preference would be totally beyond any of the other reasonable accommodations. While all the other accommodations cost the employer money or inconvenience, none of them adversely affect other workers to any significant degree. At most, a modified work schedule or transfer of non-essential duties, might inconvenience other workers slightly. However, the real cost of the accommodation in most cases is borne by the employer – e.g., the cost of special equipment, or machines to aid the disabled worker.

In contrast, giving the disabled worker a preference for a vacant job is going to cost someone else that job. Congress made it clear that such a burden on other workers was not the intent of the ADA, when Congress explicitly noted that the ADA does not trump union seniority systems, and the ADA does not allow a disabled worker to bump another worker out of a job. 13 Well, giving a disabled worker a vacant job over a more qualified worker, is essentially the same as bumping the more qualified job applicant from the job.

12 Filar v. Board of Education, 526 F.3d 1054 (7th Cir. 2008). Congress suggested that collective bargaining agreements be negotiated to give a preference for disabled workers, such as for light duty jobs, S. Rep. No. 116, 101st Cong., 1st Sess. 32 (1989), but in practice, few collective bargaining agreements have been so modified.

It is surprising the United States Supreme Court has not yet taken up this issue, and a resolution by the Supreme Court is long overdue. The Courts Of Appeals have nicely set forth the arguments for each side, and it is now time for the Supreme Court to decide the issue.

**Attendance At Work And Leaves of Absence**

Many disabilities make attendance at work on a regular schedule a challenge at best. When disabilities will flare up and cause absences is often not predictable. In addition, it is sad to say, but some workers will abuse leave policies by saying they are sick when they are not, *e.g.*, a pattern of illness on Fridays and Mondays, and the day right before or after a holiday.

The courts have put some limits on such abuse by holding that regular attendance at work is an essential function of most jobs, and “the ADA does not protect persons who have erratic, unexplained absences, even when those absences are a result of a disability.”\(^\text{14}\) The courts have noted that “a regular and reliable level of attendance is a necessary element of most jobs.”\(^\text{15}\) An accommodation of an open-ended schedule with the privilege to miss workdays frequently and without notice, is “unreasonable.”\(^\text{16}\)

The courts have held that regular attendance is a basic requirement of most jobs,\(^\text{17}\) observing that “[a]n employee who cannot meet the attendance requirements of the job at issue

\(^{14}\) E.E.O.C. v. Yellow Freight Sys., Inc., 253 F.3d 943, 948 (7th Cir. 2001) (*quoting* Waggoner v. Olin Corp., 169 F.3d 481, 484 (7th Cir. 1999)). See also Brammen v. Luco Map Co., 521 F.3d 843 (8th Cir. 2008); Rios-Jimenez v. Sec. of Veterans Affairs, 520 F.3d 31 (1st Cir. 2008); Hypes v. First Commerce Corp., 134 F.3d 721, 727 (5th Cir. 1998).


\(^{16}\) See Mobley v. Allstate Ins. Co., 531 F.3d 539, 547-48 (7th Cir. 2008); Jovanovic v. In-Skink- Erator Div. of Emerson Elec. Co., 201 F.3d 894, 899 n.9 (7th Cir. 2000); Waggoner v. Olin Corp., 169 F.3d 481, 485 (7th Cir. 1999).

\(^{17}\) Brenneman v. MedCentral Health Sys., 366 F.3d 412 (6th Cir. 2004) (holding the plaintiff pharmacy technician was unqualified for the position because of his excessive absenteeism)
cannot be considered a ‘qualified’ individual protected by the ADA.”

Likewise, multiple courts have held that an indefinite leave of absence is not a reasonable accommodation.

Even the usually liberal Ninth Circuit has recognized that regular attendance can be an essential function of the job. The courts have also recognized that rotating shifts may be an essential function of the job, not only for cross-training, and also for employee morale. The ability to engage in job rotation may be an essential function of a job such as at a prison or in a warehouse. The courts have held that the ability to work overtime may be an essential job function if it is required for all persons in a job category. The courts have also held that punctuality can be an essential duty.

While employers should take care before rejecting a request for a minor scheduling accommodation, the Courts have recognized some flexibility demands go beyond what the ADA


20 Samper v. Providence St. Vincent Medical Center, 675 F.3d 1233 (9th Cir. 2012).

21 Kallail v. Alliant Energy Corporation Services, Inc., 691 F.3d 925 (8th Cir. 2012). See also Laurin v. Providence Hosp., 150 F.3d 52 (1st Cir. 1998) (24 hour shift for maternity ward nurses was an essential job duty).

22 Dargis v. Sheahan, 526 F.3d 981 (7th 2008).

23 Rehs v. The Iams Co., 486 F.3d 353 (8th Cir. 2007).

24 Tiernajel v. Gates Corp., 533 F.3d 666 (8th Cir. 2008).

requires. Thus, for example, in *Haynes v. Community Hospital of Brazosport*, the court granted the employer’s motion for summary judgment, denying a nurse’s ADA claim. The nurse wanted her employer hospital to accommodate her three-hour commute to work, which adversely affected her diabetes, by allowing her to work a four-day week, and not work weekends or on-call as was required of other nurses. Instead, the hospital offered the nurse a part-time position, which the nurse rejected. The court held the nurse was not qualified for the essential duties of the full-time nursing job, which required working weekends and being on call.

Courts are also reluctant to second-guess the employer’s determination as to what are the essential functions for a job, as one court aptly observed:

> The ADA requires us to consider “the employer’s judgment as to what functions of a job are essential[.]” 42 U.S.C. §12111(8). The employer describes the job and functions required to perform that job. We will not second-guess the employer’s judgment when its description is job-related, uniformly enforced, and consistent with business necessity. In short, the essential function “inquiry is not intended to second-guess the employer or to require the employer to lower company standards.”

Nevertheless, employers are also limited on what they can claim is an essential function of the job, by the actions of their own employees. For example, a job description for a policeman might say policemen must run a 100 yard dash in 10 seconds, but if the desk sergeant is 60 years old and 50 pounds overweight, and runs the 100 yard dash in 10 minutes, not 10 seconds, then the police department’s own workforce has shown that running a 100 yard dash in 10 seconds is not an essential function of the job. Likewise, employers and unions cannot say a

---


27 *Mason v. Avaya Communications, Inc.*, 357 F.3d 1114, 1119 (10th Cir. 2004). See also *Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1018 (8th Cir. 2000).
longshoreman must be able to lift 100 pounds, when there are 70-year-old longshoremen who simply drive trucks and forklifts, essentially a sedentary job.

Similarly, all employees take vacation and occasionally get sick unexpectedly. Thus, drawing the line as to what is reasonable and acceptable, and what is not, is often difficult to say. Of particular importance is the question as to whether the judge will decide the issue as a matter of law, or where the court will determine the issue is one of fact for the jury. Employers must look carefully as to what they say, or fail to say, in their written job description, as well as what their workforce in real life actually does. If an employer wants to argue that regular predictable attendance is a required essential job function, the employer should say so in its written job description, and follow that requirement even for its best job performers.

Of course, while regular attendance can be required, and an indefinite leave of absence need not be allowed, employers must remember that “part-time or modified work reschedules” can be a reasonable accommodation.28 Thus, for example, in one case, a Court of Appeals held it was a jury question whether coming to work on time was an essential function of the job, because the job was not time sensitive.29 Again, the failure to state requirements in a written job description, and being laxed in what the employer tolerated from other employees, can be problematic. If the employer allows varied attendance by a valued employee, then when faced with a disabled worker’s claim for a modified schedule, the employer will face the axiom that “no good deed goes unpunished.”

28 42 U.S.C. § 12111(9)(B). But see Treanoss v. MCI Telecomm’s Corp., 200 F.3d 570, 575 (8th Cir. 2000) (an employer is not required “to create a part time position where none previously existed.”)

29 Holly v. Clairson Industries, LLC, 492 F.3d 1247 (11th Cir. 2007)
Employers must also recognize that short unpaid leaves of absence are a required reasonable accommodation under the ADA.\(^{30}\) Many employers believe that once an employee runs out of their 12 weeks of Family Medical Leave Act (FMLA) leave,\(^{31}\) they can be fired if they remain out of work. However, once the 12 weeks of FMLA leave runs out, the employer must make an ADA analysis, since unpaid leave is one of the explicit reasonable accommodations under the ADA. If the medical condition is a covered disability,\(^{32}\) then the employer must engage in the ADA interactive process.\(^{33}\) The employer needs to inquire as to when the employee can be expected to return to work. Only once the employee is at maximum medical improvement\(^{34}\) and his/her medical provider cannot give a return to work date, can the

\(^{30}\) EEOC Enforcement Guidance; Reasonable Accommodations an Undue Hardship Under the Americans With Disabilities Act, No. 915.002 at 13 (10/17/02). See \textit{e.g.}, \textit{Taylor v. Rice}, 451 F.3d 898, 910 (D.C. Cir. 2006); \textit{Holly v. Clairson Industries, LLC}, 492 F.3d 1247, 1263 (11th Cir. 2007).


\(^{32}\) After the 2008 Amendments to the ADA, essentially any condition which significantly limits a bodily function is a covered disability. Public Law 10-325 (2008); Regulations To Implement The Equal Employment Provision Of The Americans With Disabilities Act; as amended, 76 Fed. Reg. 16977 (3/25/11).

\(^{33}\) 29 U.S.C. § 1630.2(0)(3); \textit{Fiellestad v. Pizza Hut of America, Inc.}, 188 F.3d 944, 951 (8th Cir. 1999). But the failure to engage in the interactive process may not create an independent cause of action. \textit{Rehling v. City of Chicago}, 207 F.3d 1009 (7th Cir. 2000); \textit{Hohider v. United Parcel Service}, 574 F.3d 169 (3rd Cir. 2009); \textit{Basden v. Professional Transportation, Inc.}, 714 F.3d 1034 (7th Cir. 2013); \textit{McKane v. UBS Financial Services, Inc.}, 363 F. Appx. 679 (11th Cir. 2010); \textit{Noll v. IBM}, _ F.3d _2nd Cir. 2015).

\(^{34}\) Maximum medical improvement (“MMI”) refers to when a patient is unlikely to get any better. It is a term frequently seen in workers’ compensation cases. See \textit{e.g.}, Minnesota Statutes 176.011, subdivision 25. See, \textit{e.g.}, \textit{Willingham v. Town of Stonington}, 847 F.Supp. 2d 164, 188 (D. Maine 2012) (a leave request while the employee’s condition and status is being determined is not a request for indefinite leave).
employer consider terminating the disabled worker’s employment.\textsuperscript{35} For some conditions, this can take six months to a year.\textsuperscript{36}

**Temporarily Filling Job Slots When An Employee Is On Leave**

There is no one size fits all solution to leave of absence requests. Rather, they will always be fact specific, and require patience by the employer. Managers will be anxious to fill the job slot, and human resources personnel need to counsel them that they cannot rush to judgment. If needed, the employer should hire a temporary employee to fill the slot, but the employer cannot terminate the disabled employee while there is a reasonable chance the disabled employee normally might recover and be able to return to work. The employer can even hire a “permanent” replacement, provided it is understood the replacement may later need to move to another job if the disabled worker recovers and can return to work. The interactive process must be used to determine what possibilities exist for the disabled worker’s return to work. Indeed, if the employer engages in good faith in the interactive process, the employer cannot be liable for compensatory or punitive damages, even if it is found the employer should have provided a reasonable accommodation.\textsuperscript{37}

The employer will need to communicate with the disabled worker’s physician or medical provider as to the worker’s medical status and possible return to work date. If the medical

\textsuperscript{35} Robert v. Board of County Commissioners of Brown County, 691 F.3d 1211 (10th Cir. 2012), Citing Cisneros v. Wilson, 226 F.3d 1113, 1129 (10th Cir. 2000); Rascon v. U.S. West Communications Hampshire v. Maine, 143 F.3d 1324 (10th Cir. 1998). But see Peyton v. Fred’s Stores of Arkansas, Inc., 561 F.3d 900 (8th Cir. 2009) (upholding a job termination and a replacement as soon as cancer was diagnosed).

\textsuperscript{36} E.g., back fusion surgery usually requires 12 months for a recovery. But see Epps v. City of Pine Lawn, 353 F.3d 588, 593 (8th Cir. 2003), holding a six-month leave of absence was unreasonable.

provider is not forthcoming or does not seem to be giving candid responses, the employer can obtain an IME – independent medical examination by a medical provider the employer chooses.

All too often employers become frustrated because they deal with artificial budget slot limitations, and feel they must terminate the disabled worker before the job can be filled with someone else. Human resources and the finance departments need to be more flexible in order for the managers to make the right and legal decision. To do less might “follow the budget process”, but can lead to hundreds of thousands of dollars in liability.

When dealing with a disabled worker, the finance department would be well advised to allow workers on unpaid leave to not count against headcount limitations. The disabled worker on an unpaid leave does not cost the company any money, so why count them as a headcount? Yet, if they are counted against a headcount limitation, the manager may prematurely deny continued unpaid leave, in order to fill the position. This can lead to an ADA failure to accommodate claim; whereas, filing the position with a temporary employee might well be a viable solution.

**Medical Issues and Mental Disabilities**

One of the fundamental problems in this process is that treating doctors normally will say whatever the patient wants them to say. So if the disabled worker says they are in too much pain to work, the doctor will write an out of work slip without really evaluating the issue. While of course pain is subjective and thus cannot be verified, medical professionals can do more than just take the patient’s word for it. Physicians can and should first ask whether the pain complaint make sense. If the x-ray and MRI are normal, does disabling pain months after a back strain make sense?

Moreover, while physicians do not like to challenge their patients, there are ways to do so. Does the patient give pain complaints that make no anatomical sense? For example, pushing
on the top of one’s head cannot cause back pain, yet some patients who are malingering will say that it does cause them back pain. Does the patient give inconsistent results, e.g., a straight leg test for a herniated disc can be done laying down or sitting up, and both ways should give the same result. Does the patient say he cannot move his neck more than 10 degrees, but when a pretty nurse walks by, he fully rotates his neck? Some doctors will even look at the patient as they leave the building and see how they act walking to their car in the parking lot, or even view them when they wait in the waiting room.

Employers also have tools in their arsenal to avoid abuse. The IME can be a very effective tool. Oftentimes a treating doctor knows the patient is not being honest, but does not want to confront the patient. If, however, an IME doctor says the patient can work, the treating physician may well feel more comfortable agreeing with that opinion. The treating physician can then focus the employee’s displeasure on the IME doctor and avoid having the patient place all the blame on the treating doctor, and run to another physician more willing to give the worker the requested out of work disability slip.

Employers have also been known to have supervisors call the worker at home, or even do a home visit, and some employers will even hire surveillance companies to see what the employee is doing while out sick. While this may sound unseemly, there are unfortunately some employees who work very hard at not working.

Many employers mistakenly forget that the ADA protects not only physical disabilities but also mental disabilities. Unfortunately, since mental disabilities are less obvious, employers

---

38 This is one of the Waddell tests, which anatomically cannot cause back pain, and if the patient says it causes pain, then the physician should doubt the accuracy of their pain complaints. Waddell, Gordon; John McCulloch, Ed Kummel, Robert Venner. “Nonorganic Physical Signs in Low-Back Pain,” 5 Spine 117-125 (March/April 1980). See “Low Back Disorders.” Occupational Medicine Practice Guidelines at 43-44 (Kurt Hegmann, ed. 2007) (American College of Occupational and Environmental Medicine).
are often times less tolerant of them. We can confirm a diagnosis of cancer, we can see a limp from a bad knee, but the person who is bipolar looks all too healthy to us. However, their disability is no less real, and the ADA analysis and obligations for mental disabilities are no different than for physical disabilities.

Employers must address mental disabilities with the same caution they do physical disabilities. Of course, this requires that a mental disability be proven, and the courts do have limitations on what they will consider to be a mental disability. In Weaving v. City of Hillsboro, an employee who had attention deficit hyperactivity disorder (“ADHD”) argued he was disabled because his ADHD made it difficult for him to get along with others. While the court recognized that the ability to “interact” with others may be a major life activity, the court refused to hold that the inability to “get along with others” was a major life activity. As the court concluded, albeit with a dissent:

One who is able to communicate with others, though his communications may at times be offensive, “inappropriate, ineffective, or unsuccessful,” is not substantially limited in his ability to interact with others within the meaning of the ADA. Jacques, 386 F.3d at 203. To hold otherwise would be to expose to potential ADA liability employers who take adverse employment actions against ill-tempered employees who create a hostile workplace environment for their colleagues.

Conversely, in Jacobs v. Administrative Office of the Courts, the Court of Appeals held that whether social anxiety disorder is a disability a fact issue for a jury. The court adopted the EEOC’s position that the ability to interact with others is a major life activity.

---

39 763 F.3d 1106 (9th Cir. 2014).
40 Id. at 1114.
41 780 F.3d 562 (4th Cir. 2015).
42 29 C.F.R. § 1630.2(i)(l)(i).
There are some employees who cannot get along with their supervisor. It may be the supervisor gave the employee a negative performance review, or it may be that the supervisor is a lousy manager. This naturally can cause stress and anxiety for the employee. If the employee goes to a psychiatrist or psychologist, they may be given a diagnosis of adjustment disorder or depression, and a note that they should be transferred to a different supervisor. Most courts, when faced with this situation, have held the person does not have a protected disability under the ADA, and thus are not entitled to the requested transfer.43 While working is a major life function, in most cases a person must be disqualified from a class of jobs to be found to be disabled, not just a single job.44 And even those courts who are willing to consider a single job as a major life function, they will not go so far as to extend the activity of working to include merely being unable to work with a particular supervisor.45

**What Are The Essential Functions Of The Job**

In deciding whether a disabled employee can return to work, and what reasonable accommodations will allow the employee to do so, a critical question in virtually every ADA case is determining what are the essential functions of a job. A disabled worker need only perform the essential duties of a job, and it takes more than a listing of a function on a job description to make the duty essential. What job duties are essential, and which are marginal, is not something many employers have thought about. Yet, it is critical, because at the end of the

---


44 29 C.F.R. § 1630 Appendix (Guidance), 1630.2(j)(5)(6) (“the individual can do so by showing that the impairment substantially limits his or her ability to perform a class of jobs or broad range of jobs in various classes as compared to most people having comparable training, skills, and abilities.”).

45 Higgins-Williams, supra, at __
day, the disabled employee need only be able to perform the essential functions of the job, and non-essential duties may have to be transferred to others as part of the job restructuring reasonable accommodation.

Most courts will start their analysis of the essential functions issue with the EEOC regulations. The EEOC, in its regulations, defines essential functions as the “fundamental” duties as opposed to “marginal” tasks, and provides factors to consider:

The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term “essential functions” does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

   (i) The function may be essential because the reason the position exists is to perform that function;

   (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

   (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

   (i) The employer's judgment as to which functions are essential;

   (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

   (iii) The amount of time spent on the job performing the function;

   (iv) The consequences of not requiring the incumbent to perform the function;

   (v) The terms of a collective bargaining agreement;
(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs. 46

The Court of Appeals for the Tenth Circuit, in Robert v. Board of County Commissioners of Brown County, 47 provided an excellent analysis of the essential duties issue, and a helpful discussion of the realities of the workplace. The Tenth Circuit noted that in determining whether a duty is an essential function, the court will not hold an employer to what the employer allows temporarily while the worker is recovering from his/her illness. The court recognized that employers often allow temporary changes to job duties when someone is recovering from an illness (in the Robert case, not requiring site visits), which an employer cannot allow on a permanent basis. The reality is that co-workers being asked to cover certain job duties for an ill employee on a short-term basis, does not change the fact those job duties are essential functions of the job. 48

The Court’s ruling is a very helpful decision, since it recognizes that an employer should not be punished for doing more in the short term which goes beyond what the ADA requires. It

46 29 C.F.R. § 1630.2(n).

47 691 F.3d 1211 (10th Cir. 2012).

48 691 F.3d 1211, 1214 (10th Cir. 2012) (“Nor do we see the county’s willingness to excuse Robert’s inability to perform site visits as evidence that those duties were nonessential. To be sure, we have often said that the essential-function inquiry turns on “whether an employer actually requires all employees in the particular position to satisfy the alleged job-related requirements.” Tate v. Farmland Indus., Inc., 268 F.3d 989, 993 (10th Cir. 2001); see also Davidson, 337 F.3d at 1191 (quoting Tate). But a plaintiff cannot use her employer’s tolerance of her impairment-based, ostensibly temporary nonperformance of essential duties as evidence that those duties are nonessential. To give weight to such a fact would perversely punish employers for going beyond the minimum standards of the ADA by providing additional accommodation to their employees.”). Accord, Laurin v. Providence Hosp., 150 F.3d 52, 60-61 (1st Cir. 1998); Shring v. Runyon, 90 F.3d 827, 831 (3rd Cir. 1996); Rehrs. v. Iams Co., 486 F.3d 353, 358 (8th Cir. 2007).
is one thing to ask other workers to take up the tasks of a sick worker in the short term, essentially making them perform some of the disabled worker’s duties for free, while paying the disabled worker full pay even though he/she is unable to perform all the essential functions of the job. Many employees are kind enough to do this in the short run, but cannot be expected to accept such an arrangement on a permanent basis. The other workers will usually not tolerate such an arrangement for long, and the employer is essentially giving a gift to the disabled worker, paying them full pay for working only part of the job, something even the ADA does not require.

The decision of the Tenth Circuit, moreover, hardly stands alone. The Courts of Appeals have repeatedly held that an employer going beyond what the ADA requires on a temporary basis, does not change the limits of what the ADA mandates. Thus, reassigning some of a disabled worker’s essential duties to others on a temporary basis, does not change the facts they are still essential duties, and thus the ADA does not require their reassignment away from the disabled worker. Nor does giving an extended leave to an employee on a voluntary basis change what is a reasonable leave of absence.49 Likewise, allowing a disabled employee to work part

49 Wood v. Green, 323 F.3d 1309, 1314 (11th Cir. 2003); Amadio v. Ford Motor Co., 238 F.3d 919, 929 (7th Cir. 2001) (“[T]he fact that Ford generously granted extended leaves to its employees in rare cases, up to two years, does not necessarily bind Ford to repeatedly grant successive leaves to [plaintiff,]” where plaintiff is unable to perform the essential functions of his job and does not qualify for protection under the ADA); Myers v. Hose, 50 F.3d 278, 284 (4th Cir. 1995) (same); Walton v. Mental Health Ass’n. of Southeastern Pennsylvania, 168 F.3d 661, 671 (3rd Cir. 1999) (termination of unpaid leave); Holbrook v. City of Alpharetta, Ga., 112 F.3d 1522, 1528 (11th Cir. 1997) (discontinuing accommodation which eliminated an essential function of the job); Phelps v. Optima Health, Inc., 251 F.3d 21 (1st Cir. 2001) (ending a restructured alternative job).
time on a short term basis, does not establish that the job can be performed on a part time basis, if there are no permanent part time positions.\textsuperscript{50}

While the courts often will cite to and go through the EEOC’s regulatory checklist,\textsuperscript{51} a more practical and definitive test would be to look at how frequently a task is performed and if there are others who can perform it besides the disabled worker. If there are multiple persons available to perform a function, and the task is not often performed by the employee, it is unlikely to be an essential function.

For example, the Legislative History notes that a counselor at a juvenile hall might have to drive an injured juvenile to a hospital. However, since there are several counselors at the facility, all the counselors do not have to have the ability to drive, so driving would not be an essential function.\textsuperscript{52} Likewise, in one case there were multiple welders and only 12\% of the welding assignments required lifting over 25 pounds. The court held the heavier tasks were not an essential function, and thus the employer was required, for a disabled worker who was unable to lift over 25 pounds, to transfer the heavy assignments to other welders as the reasonable accommodation of job restructuring.\textsuperscript{53}

Conversely, if one is a litigator, the ability to speak in court is obviously an essential function. The key fact is that there is normally no one else available to do that task, and it occurs

\textsuperscript{50} Rabb v. School Board of Orange County Florida, 2014 WL 5369020 (11th Cir. 2014); Minnihan vs. Mediacom Communications Corp., 779 F.3d 803 (8th Cir. 2015).

\textsuperscript{51} E.g., Dahlman v. Tenerbaum, 2011 U.S. Dist. LEXIS 88220 (D. Md. 2011); Holly v. Clairson Industries, LLC, 492 F.3d 1247 (11th Cir. 2007).


\textsuperscript{53} Ackerman v. Western Electric Co., 643 F.Supp. 836 (N.D. Calif. 1986) (under the Rehabilitation Act). Of course, only non-essential duties must be transferred under the job restructuring accommodations. EEOC v. Convergys, 491 F.3d 790, 796 (8th Cir. 2007).
frequently. Indeed, the lack of an available other worker to perform the duty is often a key factor.\footnote{Earl v. Meryns, Inc., 207 F.3d 1361, 1365 (11th Cir. 2000) ("[A] job function may also be essential if there are a limited number of employees among who performance of the job can be distributed").} Thus, while pilots spend less than one percent of their time landing a plane, few would doubt that landing the plane is nevertheless clearly an essential function for a pilot, there is no one else who can perform the function (the co-pilot is always held in reserve, and indeed is usually needed to assist in the landing).\footnote{See Knutson v. Schwan’s Home Serv., Inc., 711 F.3d 911 (8th Cir. 2013) (manager had to be DOT qualified even though he has to drive infrequently).}

One issue that often arises is who has the burden of proof as to establishing what are the essential duties of a job. In Hawkins v. Schwan’s Home Services, Inc.,\footnote{778 F.3d 877 (10th Cir. 2015).} the court held that while many courts have indicated the employer has a burden of initial production, the employee always has the ultimate burden of persuasion, as the employee does on all issues in proving discrimination.\footnote{Id. at 893, citing Mason v. Avaya Communications, 357 F.3d 1114, 1119 (10th Cir. 2000).}

Employers would do well to review their written job descriptions and make sure they include all duties they view as essential. Conversely, when deciding whether a disabled employee can perform a job, employers must recognize that the written job description may not be accurate. Job duties change over time, much faster than job descriptions are updated, particularly if technology is involved.

Moreover, many job descriptions are written as wish lists, and simply do not accurately reflect what the worker actually does. An employer cannot say a secretary must be able to type 80 words a minute, when the current secretaries cannot type over 60 words a minute. An
employer cannot require more from a disabled employee than the employer requires from its worse job performer. In a discrimination lawsuit, the disabled applicant will find that worse job performer and they will be the comparator used at trial to show a discriminatory motive.

**Job Restructuring**

What is an essential function is also critical to one of the most straightforward, but least understood reasonable accommodation – job restructuring. 58 Job restructuring is “reallocating or redistributing nonessential marginal job functions” which a disabled employee cannot perform, to other workers. 59 The restructuring accommodation only applies to non-essential duties; an employer need not transfer essential functions of a job. 60 Job restructuring also assumes that there is some other employee available who can perform the nonessential functions. An employer need not hire a helper to perform job duties if there is no one else available to perform them, in which case, they would be considered essential. 61 Employers should remember that it may be a jury issue as to whether a job function is essential or non-essential, and thus whether it must be transferred to other workers. 62 Juries are likely to be more sympathetic towards the employee, and less worried about corporations’ profit levels.

While job restructuring has been in the ADA as a reasonable accommodation since the ADA’s inception in 1991, few human resources personnel are even aware it is a requirement

59 29 C.F.R. § 1630.2(o) App. (EEOC Interpretive Guidance).
60 Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, 950 (8th Cir. 1999); Bratten v. SSI Servs., Inc., 185 F.3d 625, 632-33 (6th Cir. 1999); Barber v. Nabers Drilling USA, Inc., 130 F.3d 702 (5th Cir. 1997).
61 Majors v. General Electric, 714 F.3d 527 (7th Cir. 2013).
62 Supinski v. UPS, 413 Fed. Appx. 536 (3rd Cir. 2011).
under the ADA. Part of the problem may simply be that employers find it hard to accept that any job function is not essential. After all, it is argued a worker is paid to perform 100% of the job duties. However, if there are several workers who perform the same job, this argument will rarely hold water. It is hard to argue that a part of the job which is performed infrequently is “essential,” if others are available to perform it. What is the harm of having the other workers handle the infrequent function which the disabled worker cannot perform?

Instructive is the case of Kauffman v. Petersen Health Care VII LLC,⁶³ in which a hairdresser at a nursing home had surgery and was given a work restriction against pushing wheelchairs. Her job required her to sometimes push nursing home patients in wheelchairs to and from her hairdresser station. She testified this took up 6% to 12% of her time. The trial court held pushing the patients in wheelchairs was an essential job duty, and granted the employer summary judgment dismissing her ADA claim. The court of appeals vacated that judgment, and held it was a fact issue for the jury. The Court of Appeals noted the nursing home had many orderlies who pushed wheelchairs and that a job duty should not be considered to be essential if it was “so small a part that it could be reassigned to other employees at a negligible cost to the employer.”⁶⁴

It should be noted, however, that while job restructuring may sound great in theory, it can easily cause resentment in the real world. For example, assume you have five welders and only 10% of the welding jobs involve lifting material over 25 pounds. First one welder gets a doctor’s note saying he has a bad back and cannot lift over 25 pounds. Then a second and later a third welder see this as a way to make their lives easier, and they do the same thing. When the fourth

⁶³ 769 F.3d 958 (7th Cir. 2014).
⁶⁴ 769 F.3d at 962.
worker realizes what is happening and does the same thing, you end up with four welders doing all the light duty work weighing under 25 pounds, and one welder has to perform all the heavy work, and all of them are receiving the same pay.

Ironically, placing all the heavy work on the remaining one welder will increase the risk of that welder injuring his/her back and becoming disabled. Pretty soon, there is no one left to perform the heavy work. This morale and practical problem is one reason why even employers who understand the job restructuring requirement are reluctant to provide it as a reasonable accommodation.

Interestingly, because few are aware of the job restructuring requirement, there are few cases dealing with it. Employers should expect that to change. The 2008 ADA Amendments greatly expanded the scope of the ADA, meaning more persons have rights and are increasingly becoming aware of them. The Amendments made it easy for plaintiff lawyers to win ADA cases, so that will attract more attorneys, and it is just a matter of time before they focus on the job restructuring accommodation. It remains to be seen how far courts will go in requiring job restructuring. As noted above, some courts have given great deference to employers’ determinations as to what is an essential duty and thus is not subject to the job restructuring accommodation. However, this requires the employers to carefully write and follow written job descriptions.

**Telecommuting**

A corollary issue to attendance at work is the issue of telecommuting -- working at home. Fifteen years ago, courts seemed hesitant to impose telecommuting as a reasonable accommodation. The courts questioned whether an employer had to even accommodate commute limitations, as opposed to disabilities which actually affected the performance of the
duties of the job at the workplace. Moreover, the courts also seemed to doubt that imposing a work at home accommodation could ever be “reasonable.”

Fast forward to today, when many employers voluntarily allow telecommuting, and some even encourage it as a way to save on office space and lost productivity due to long commute times, and the courts seem to have changed their view with respect to working at home as a reasonable accommodation. The courts seem more open to consider telecommuting as a reasonable accommodation. This trend may well continue as technology expands, including as better quality video phone calling becomes available and more common.

In the past, courts have ruled that working at home is rarely a reasonable accommodation. As one court noted, the “[p]laintiff has failed to present any facts indicating that his was one of those exceptional cases where he could have ‘performed at home without a substantial reduction in quality of [his] performance.’” Another court noted that “the reason working at home is rarely a reasonable accommodation is because most jobs require the kind of teamwork, personal interaction, and supervision that simply cannot be had in a home office situation.”

65 See, e.g., Willingham v. Town of Stonington, 847 F. Supp. 2d 164 (D. Maine 2012) (denying an employer summary judgment, holding the record did not show the job could not in part be performed at home).

66 See e.g., Vande Zande v. Wisconsin Dept. of Admin., 44 F.3d 538, 544-45 (7th Cir. 1995) (“No doubt to this as to any generalization about so complex and varied an activity as employment there are exceptions, but it would take a very extraordinary case for the employee to be able to create a triable issue of the employer’s failure to allow the employee to work at home.”); But see Langon v. Dept.’s of Health and Human Servs., 959 F.2d 1053 (D.C. Cir. 1992) and Carr v. Reno, 23 F.3d 525 (D.C. Cir. 1994).


68 Rauen v. United States Tobacco Mfg. L.P., 319 F.3d 891 (7th Cir. 2003).
Other courts, however, have been more willing to address commute-related issues, and even mandate telecommuting as a reasonable accommodation. In *Livingston v. Fred Meyer Stores, Inc.* 69 the United States Court of Appeals for the Ninth Circuit held that a shift change is a reasonable accommodation, even if the cause for the need to change shifts is commute related. The Ninth Circuit held that a “commute-related” limitation must be accommodated. Likewise, in *Nixon-Tinkelman v. N.Y. City Department of Health & Mental Hygiene*, 70 the United States Court of Appeals for the Second Circuit reversed a grant of summary judgment for the employer on the disabled worker’s request for a “commuting accommodation.” The court held that a reasonable accommodation might include transferring the worker to a “closer location, allowing her to work from home, or providing a car or parking permit.”

The United States Court of Appeals for the Fifth Circuit has explicitly ruled that reasonable accommodations are not limited to accommodations which allow the worker to perform their essential functions at the work facility. Rather, reasonable accommodations include “making existing facilities used by employees readily accessible”, which the Fifth Circuit held included workers getting to their job. 72 The court ruled that providing a free on-site parking space to a worker with arthritis in her knee might be a reasonable accommodation.

In *Dahlman v. Tenebaum*, 73 the court held it was a jury question as to whether part-time telecommuting was a reasonable accommodation. The court noted that while some courts have

---

69 388 Fed. Appx. 738 (9th Cir. 2010).
70 434 Fed. Appx. 17 (2nd Cir. 2011).
71 Id.
held that employers do not need to allow unsupervised teleworking at home, those cases involved full time telecommuting requests. The court noted other rulings have allowed part-time telecommuting, *e.g.*, two days a week, and thus the court denied summary judgment to the employer on a request for part-time telecommuting.

A case that shows how the courts have struggled with this issue is *EEOC vs. Ford Motor Co.* Ford refused to allow an employee to telecommute four days a week, arguing that face to face interaction with supervisors was required. Initially, a panel of the Court of Appeals rejected that argument, noting how far the business world had come in utilizing telecommuting. The initial Sixth Circuit panel held that allowing up to four days of telecommuting a week was a reasonable accommodation. The full Sixth Circuit, however, in an en banc decision, reversed the panel ruling, and upheld Ford’s decision not to provide the four day telecommuting option. In a 9 to 4 ruling, the full Court of Appeals for the Sixth Circuit ruled that the job required “face-to-face contact” and that Ford’s policy of limiting resale buyers to one day a week of telecommuting, and requiring them even on that day to come to work if needed, was justified.

The en banc decision started with the observation that a reasonable accommodation “does not include removing an ‘essential functions’” of the job. The Court then noted, as past decisions have held, that “regularly allowing work on-site is essential to most jobs.” The Court, citing the EEOC’s own regulations and guidance documents, went on to note that regular attendance on site is particularly necessary for “interactive” jobs, like Ford’s resale buyers

---

74 752 F.3d 634 (6th Cir. 2014), *rev’d en banc*, 782 F.3d 753 (6th Cir. 2015).

75 782 F.3d 753 (6th Cir. 2015).

76 *Id.* at 760.

77 *Id.* at 761.
The Court also held that the employee’s own self-serving testimony that she could
perform the job at home would not defeat summary judgment.  

The Court of Appeals carefully noted that it would not punish employers, who allowed
limited telecommuting, by then forcing those employers to allow unlimited telecommuting:

[I]f the EEOC’s position carries the day, once an employer allows one person the
ability to telecommute on a limited basis, it must allow all people with a disability
the right to telecommute on an unpredictable basis up to 80% of the week (or else
face trial). That’s 180-degrees backward. It encourages — indeed, requires —
employers to shut down predictable and limited telecommuting as an
accommodation for any employee. A good deed would effectively ratchet up
liability, which would undermine Congress’ stated purpose of eradicating
discrimination against disabled persons.  

Telecommuting is probably here to stay, and employers having allowed it for certain
good performing responsible employees, will be hard pressed to deny it as an accommodation for
disabled employees, even if the disabled worker has performance issues. Nevertheless,
employers can put limits on the amount of telecommuting that is allowed, particularly where
interaction with supervisors, co-workers or customers is an essential function of the job. The
solution may be in the details of limiting the amount of telecommuting and of providing effective
supervision of teleworkers.

Employers need to implement safeguards to make sure employees working at home are
really working and being productive. This may require having them sign in and out by email
when they start and stop working during the day, having supervisors do checkup calls and even
home visits, and requiring employees to keep written logs of exactly what they worked on and
when. To do less is to invite abuse.

78 Id. at 762.
79 Id. at 764.
80 Id. at 765.
It is unfortunate that rules must be written because of one or two bad apples, but the reality is if there are not rules in place to prevent abuse, more and more employees will find it hard to avoid the temptation of abusing the privilege of working from home. There is a reason why every car and every house comes with a lock – while most people do not steal, some will, particularly if the door is left wide open. We like to think that workers will do the right thing, but it is prudent to have a system in place which encourages them to do so.

It should also be noted that if telecommuting is mandated by the ADA, it raises issues under other statutes. For non-exempt employees, the employer is required under the Fair Labor Standard Act (“FLSA”) to track and pay for all hours worked. Thus, the employer can explain its system of keeping track of workers’ work time as being required by the FLSA. When the exempt employees complain that the FLSA does not required timekeeping for them, the employer can justify the action as being fair by treating all employees alike. Moreover, the reality is that recent lawsuits have shown many exempt employees are misclassified. While they are salaried, they cannot meet the additional duties requirements for being an exempt employee.

Also of concern is providing workers’ compensation insurance for telecommuting employees who may live in a different state than the employer’s office. Employers need to be careful to assure that they have appropriate state specific workers’ compensation insurance for workers who work at home in a different state then their usual office. Otherwise, the employer may face a substantial liability when the worker slips and falls at home while working, and indeed, in most states, it is a crime for an employer not to have workers’ compensation insurance. Likewise, e-mail/computer security must be assured when a worker is telecommuting, and appropriate local taxes paid.
Employer must also remember that telecommuting is not the only reasonable accommodation for commuting limitations. In EEOC v. LHC Group Inc., a nurse was unable to drive due to epileptic seizures, and her job required her to drive to patient’s homes. The Court of Appeals reversed summary judgment for the employer, finding it was a fact issue as to whether the provision of a taxi or van service would be a reasonable accommodation. Conversely, it should also be remembered, that in many cities there is free access van service for the disabled, which may be a cost free reasonable accommodation.

**Safety Concerns**

Safety still counts, or in the ADA vernacular, an employee cannot be a “direct threat” to himself or others. The protection against a safety risk includes not only risks of injury to co-workers and the public, but also the worker’s own safety can be a consideration. Moreover, the courts will consider even low risk safety threats, if the consequences of the risk are horrific. Even if a disability only causes a low percentage risk of an event occurring which can lead to death or serious injury, that is enough to disqualify a disabled worker from the job.

While often an individual assessment is needed, the courts have also upheld across the board safety protections when a job warrants it. The courts have also been generous in

---

81 773 F.3d 688 (5th Cir. 2014).
82 Id. at slip op. 13-14.
83 42 U.S.C. § 12111(3) and 12113(b).
84 Chevron USA, Inc. v. Echazabal, 536 U.S. 73 (2002); 29 C.F.R. § 1630.15(b)(2).
85 Darrell v. Thermafiber, Inc., 417 F.3d 657 (7th Cir. 2005) (upholding the exclusion of a worker with uncontrolled diabetes from working near a blast furnace); Hutton v. Elf Atochem N. Am Inc., 273 F.3d 884 (9th Cir. 2001) (if the potential harm is catastrophic, it does not matter that the likelihood of it occurring is small).
86 EEOC v. Exxon Corp., 203 F.3d 871 (5th Cir. 2000).
protecting public safety, for example, upholding DOT regulations which exclude all persons diagnosed with alcoholism, as truck drivers, even if they are not currently drinking.\textsuperscript{87} There is, however, a split in the courts as to which party bears the burden of proof as to whether there is a safety risk. The difference is whether you consider the ability to perform a job safely as an essential function of the job, or the direct threat issue as an affirmative defense.\textsuperscript{88}

The inconsistent court holdings may be attributed to whether safety is considered a central factor to the job. Thus, it would seem that when safety is a significant part of a job, \textit{e.g.}, a police officer or fire fighter, then safety is a key component of the job, and thus an essential function of the job. In those jobs, the courts are more likely to hold that the employee bears the burden of showing the employee can safely perform the job, because it is always the employee’s burden to show he can perform the essential functions of the job.

In other cases where safety is not a big part of the job, \textit{e.g.}, a secretary where the biggest threat is a paper cut, then the direct threat defense may more properly be viewed as an affirmative defense with the employer bearing the burden of proof. Nevertheless, safety issues can arise in any job. For example, what if the secretary is prone to seizures, and there is no medical facility nearby? Is the employer required to hire the secretary who has uncontrolled life threatening seizures, and how will the other employees react when the secretary has a seizure at work?

\textsuperscript{87} \textit{Jarvela v. Crete Carrier Corp.}, 776 F.3d 822 (11th Cir. 2015).

\textsuperscript{88} \textit{McKenzie v. Benton}, 388 F.3d 1342, 1354 (10th Cir. 2004), \textit{cert. denied}, 544 U.S. 1048, 125 S.Ct. 2294, 161 L.Ed 2d 1088 (2005) (holding the employee bears the burden to show he can safely perform the job as part of his burden to show he can perform the essential duties of the job.); \textit{Moses v. American Nonwovens, Inc.}, 97 F.3d 446, 447 (11th Cir. 1996), \textit{cert. denied}, 519 U.S. 1118, 117 S.Ct. 964, 136 L.Ed 2d 849 (1997) (same). \textit{But see Hargrove v. Vermont}, 340 F.3d 27, 35 (2nd Cir. 2003) (the direct threat is an affirmative defense and thus the burden of proof is on the employer); \textit{Hutton v. Elf-Atochem N. Am. Inc.}, 273 F.3d 884, 893 (9th Cir. 2001) (same); \textit{Branham v. Snow}, 392 F.3d 846 (7th Cir. 2004) (same).
A better view is that safety is always paramount, and thus it is an essential function of every job, and the burden of proof is always on the employee to show he/she can safely perform the job. However, there can be a question as to the burden of production. The employer should first be required to produce credible evidence of a safety threat. Then, the worker will have the burden to rebut that evidence, and also carry the ultimate burden of persuasion.

The evidence of a safety risk must be based on reliable updated medical opinions. Thus, just like employees can find doctors to say whatever they want, some employers are prone to do the same. An employer should use a Board certified specialist and make sure the specialist has medical literature to back up his/her opinion. At a minimum, courts will not allow “junk science” to be presented to a jury, and in many cases, the employer will have to convince the jury there is a significant risk of injury, a far more difficult task than making that argument to a judge.

**Required Employee Cooperation**

Disabled employees often complain that their employers do not engage in the interactive process – discuss with the employee their ideas for what accommodations will allow them to perform the essential duties of their job. However, employees often forget the interaction

---


90 The interactive process “should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.” 29 C.F.R. § 1630.2. The process is supposed to bring the employee and employer together to “identify the employee’s precise limitations and discuss accommodations which might enable the employee to continue working.” Gile v. United Airlines, Inc., 213 F.3d 365, 373 (7th Cir. 2000). But see footnote 33, supra, and the cases cited, noting that the failure to engage in the interactive process is not an ADA violation by itself, it is only a violation if it results in a reasonable accommodation not being provided.
process obligation is a two-way street. 91 If an employee or his/her physician refuses to provide information which the employer needs in order to evaluate a reasonable accommodation request, then the employee has not complied with his/her duty to properly engage in the interaction process, and thus the employer will have no liability for failing to provide an accommodation. 92

This most often occurs when the employer writes the worker’s treating doctor to get clarification as to the nature of the worker’s medical condition and possible reasonable accommodations. The employer has a right to know if the medical condition is severe enough to qualify as a covered disability, and the employer can ask if other accommodations will work that are less burdensome then the one the employee requested.

The employer also has the right to have an IME - independent medical examination, which is a misnomer, since the IME is not independent, the doctor is the medical provider the employer selects. 93 While the FMLA puts limitations on when a second medical opinion can be requested, 94 the ADA permits an employer to require a medical examination if the examination is “job related and consistent with business necessity.” 42 U.S.C. § 12112(d)(4)(A). Employers may “make inquiries or require medical examinations when there is a need to determine whether an employee is still able to perform the essential functions of his or her job.” 29 C.F.R. 1630.14(c). Employers may also “require medical examinations necessary to the reasonable accommodation process described in [29 C.F.R. Part 1630].” Id. See also Kennedy v. Superior Painting Co., 215 F.3d 650, 656 (6th Cir. 2000)(“The ADA permits employers…to make inquiries or require medical examinations necessary to the reasonable accommodation process…”); E.E.O.C. v. Prevo’s Family Market, 135 F.3d 1089, 1094-95 (6th Cir. 1998)(“the employer need not take the employee’s word for it that the employee has an illness that may require special accommodation. Instead, the employer has the ability to confirm or disprove the employee’s statement.”); Hennenfent v. Mid Dakota Clinic, P.C., 164 F.3d 419 (8th Cir. 1998)(request for IME to

---

91 See e.g., EEOC v. Kohl’s Dept. Stores, Inc., 774 F.3d 127 (1st Cir. 2014) (affirmed summary judgment for the employer because the employee declined the employer’s invitation to discuss her accommodation request: “the employee must engage in good-faith effort to work out potential solutions with the employer prior to seeking judicial redress.”)

92 Hoppe v. Lewis University, 692 F.3d 833 (7th Cir. 8/31/12); Steffes v. Stephan Co., 144 F.3d 1070, 1073 (7th Cir. 1998); Templeton v. Neodata Servs., Inc., 162 F.3d 617, 619 (10th Cir. 1998).

93 The ADA permits an employer to require a medical examination if the examination is “job related and consistent with business necessity.” 42 U.S.C. § 12112(d)(4)(A). Employers may “make inquiries or require medical examinations when there is a need to determine whether an employee is still able to perform the essential functions of his or her job.” 29 C.F.R. 1630.14(c). Employers may also “require medical examinations necessary to the reasonable accommodation process described in [29 C.F.R. Part 1630].” Id. See also Kennedy v. Superior Painting Co., 215 F.3d 650, 656 (6th Cir. 2000)(“The ADA permits employers…to make inquiries or require medical examinations necessary to the reasonable accommodation process…”); E.E.O.C. v. Prevo’s Family Market, 135 F.3d 1089, 1094-95 (6th Cir. 1998)(“the employer need not take the employee’s word for it that the employee has an illness that may require special accommodation. Instead, the employer has the ability to confirm or disprove the employee’s statement.”); Hennenfent v. Mid Dakota Clinic, P.C., 164 F.3d 419 (8th Cir. 1998)(request for IME to
obtained, the ADA has no such limitation. Thus, under the ADA, the employee has an obligation to submit to and cooperate with an IME, as well as provide the employee’s medical records for the IME to review.94

The IME is a tool some employers foolishly overlook, in their hurry to replace a worker who is disabled, or in denying an accommodation as unreasonable. If a case goes to litigation, an employer will want an expert witness on its side. It is much better practice to obtain the expert witnesses opinion as part of the interactive process, than after a lawsuit is filed. Obtaining an IME opinion early on avoids surprises, usually presents the employer with more options, and will be seen by judges and juries alike as evidence of good faith on the employer’s part, as opposed to the denial of an accommodation request being an arbitrary decision which the employer is trying to justify after the fact.

An Employer Need Only Provide An Accommodation

Many employees mistakenly believe they have the right to whatever reasonable accommodation they request. However, an employer need only provide an accommodation which allows the worker to perform the essential duties of his/her job, not necessarily the accommodation the employee requests.95 There are many ways to fix a problem, some very expensive and/or burdensome, and some very cheap and/or easy.

determine extent of disability was job-related and consistent with business necessity and thus did not violate ADA).

94 As the court noted in Monterroso v. Sullivan & Cromwell, LLP, 591 F.Supp. 2d 567, 579 (S.D.N.Y. 2008): “An employee’s provision of medical information is an indispensable aspect of that interactive process and where an employee fails to provide documentation sufficient to allow an employer to assess the parameters of the employee’s disability, ADA liability does not follow.”

95 Rehling v. City of Chicago, 207 F.3d 1009, 1014 (7th Cir. 2000); Stewart v. Happy Herman’s Cheshire Bridge, Inc., 117 F.3d 1278, 1285-86 (11th Cir. 1997); Hoppe v. Lewis University, 692 F.3d 833 (7th Cir. 2012).
A worker may say, for example, he cannot perform part of a job because he cannot sit for a long period of time. An easy solution is to buy a desk that can be raised and lowered, so the worker can stand or sit at his/her option.

A worker may claim certain dusts are a problem for his/her asthma, and the worker needs a private enclosed office. While that might work, buying a respirator would be a lot cheaper solution. Moreover, the worker may find that wearing a respirator is uncomfortable, and his /her asthma may then miraculously be cured by a simple inhaler. This view of human nature may seem harsh, and admittedly it does not apply to all. Nevertheless it is a reality that does often occur.

Employers should seek the advice of medical providers, industrial engineers, ergonomic experts and alike to find a solution that works best for the employer, while still allowing the employee to perform the essential job functions. All too often the employer fails to engage in the interactive process with the employee, and to seek out other options, and that failure looks very bad to a jury. Moreover, for many disabled employees, they truly want to work and not be a burden, and they will meet the employer half way or more in finding a solution. The employer should make the gesture to not only look good to a jury, but to see whether the disabled employee is a good worker making a necessary request, as opposed to one looking to abuse the system.

An employer must provide an accommodation which effectively allows the disabled employee to perform his/her job, not necessarily the accommodation the employee deserves, nor need the accommodation be perfect. This issue was instructively addressed in Noll v. IBM,\textsuperscript{96} when a deaf employee wanted to view videos and recordings off the Company’s Intranet for its

\textsuperscript{96} \textit{F.3d} \_ (2nd Cir. 2015).
employees. The Employer was rather sophisticated when it came to disabilities, and made
American Sign Language interpreters available in person and remotely. However, the deaf
employee found it tiring to watch videos and the sign reader at the same time, and thus
demanded that all videos on the Intranet be captioned, and that he be provided transcripts for all
audio recordings. The Court rejected that request. The Court affirmed summary judgment for
the employer, emphasizing that an accommodation need only be effective, and the
accommodation need not be perfect.97

The employer, moreover, only has to accommodate the disabilities it knows about. Thus,
the question is not whether the worker at trial can show he has a disability, but rather whether the
worker gave the employer enough knowledge to know his condition was significant enough to
qualify as a covered disability.98 Likewise, unless it is an obvious disability which clearly needs
an accommodation, the worker must request an accommodation.99

Of course, after the 2008 Amendments to the ADA, the threshold for proving a worker is
disabled has been significantly lowered. Virtually anyone with a chronic bodily function
limitation is protected by the ADA.100 Moreover, when an employer first receives a request for

97 Id. at slip opin. at 12-13
100 The EEOC has provided a non-exhaustive list of conditions which the EEOC believes will
“virtually always” be found to be a covered disability: “Deafness, blindness, an intellectual
disability (formerly termed mental retardation) partially or completely missing limbs or mobility
impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy,
Human Immunodeficiency Virus (HIV) infection, multiple sclerosis, muscular dystrophy; major
depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive
disorder, and schizophrenia.” 29 C.F.R. § 1630.2(j)(3).
an accommodation, the employer may have limited knowledge of the worker’s medical condition, and not be able to determine if the condition qualifies as a disability until more medical tests are performed. Thus, the safe course for many conditions may be to assume, at least initially, that a condition is a covered disability and that the employee is entitled to ADA protection.

Real World Medical Issues

While we like to think of medicine as a science, most doctors will admit it is more of an art than a science. While our knowledge has come a long way, our ignorance is still vast. We still are a far cry from finding a cure for cancer, as well as the common cold. Why do some people develop arthritis, but others do not? Why does a disc herniate in some backs with minor trauma, and others can withstand substantial force with no ill effects? Orthopedics and neurosurgeons routinely put a 25 pound permanent weight lifting restriction on someone who has had back surgery. Yet, if you look in the medical literature for studies or articles which justify this common practice, you will be disappointed because you will shockingly find nothing to justify this almost universally applied work restriction.

Treating doctors will often say whatever the patient wants. If the worker says he/she wants to go back to work, their doctor will usually sign a full duty release without a second thought. Conversely, some doctors will say a worker is “unfit for duty” without giving any specifics as to what part of the job the worker cannot perform. And, of course, physicians are often presented with some job descriptions which are outdated, or worse, are an unrealistic wish list that no workers meet. Doctors also sometimes give what appear to be precise work restrictions, for which there is no medical justification.

For example, a person after back surgery for a herniated disc might get a permanent work restriction of no lifting over 25 pounds. Not only can one ask why not 35 pounds or 50 pounds,
but when one looks at the medical literature, one is hard pressed to find any justification for any lifting restrictions. Physical therapists do FCEs – functional capacity examinations, which are supposed to objectively document a workers’ physical abilities. However, one can argue they are based primarily on what the employee says he can and cannot do, and thus the FCE largely just documents a worker’s subjective complaints. While there is some attempt to verify consistency, in the end, the FCE test is limited by the employee’s effort given during the FCE.

Examples of abuse are all too common. A doctor will permanently restrict a worker to no lifting over 25 pounds. Then when the employer says the worker cannot perform his job with that restriction and is about to terminate the employee’s employment, the same doctor, with no additional examination or testing, will give a full duty release. Likewise, an FCE, even if accurate, only measures a workers’ physical ability today, it does not address the risk of reinjury.

If an employer has doubts about a worker’s ability to safely perform their job, the employer should consider requesting a certification from the employee’s physicians as follows, particularly when a worker returns to work after a prolonged absence:

I hereby certify that the employee can perform the essential functions of his job based on the attached job description which I have reviewed, with or without reasonable accommodations, and the worker will not be a direct threat to the safety of himself or others. I have identified any reasonable accommodations which are required. I hereby certify that the workers’ return to work will not result in a significant risk of substantial harm to the health or safety of the employee or others (“direct threat”). My opinion is based on a reasonable medical judgment that relies on the most current medical knowledge and best available objective evidence. I understand and agree that the employer can rely upon my certification herein. If I believe there is a direct threat to the employee’s or other’s safety, but that threat can be eliminated by a reasonable accommodation, then I will identify that direct threat and suggest a reasonable accommodation to eliminate it, i.e. reduce the risk so the risk is no longer significant, and/or such that the potential harm will no longer be substantial.
If the treating physician and IME cannot agree on whether it is safe for the employee to return to work, the employer should try to agree with the employee on a third doctor to resolve the conflict, possibly a professor at a local medical school.

Limitations On The Employer’s Obligations To The Employee

As expansive as the employer’s duties under the ADA are, the courts have put some limits on what is required of employers. An employer need not create a job for a disabled person. Thus, for example, if a disabled worker can only perform parts of two part-time jobs, the employer is not required to combine the two part-time jobs to create a full-time job for the disabled worker.101

An employer can give a preference to one disabled person as compared to another disabled person. Thus, it is permissible for an employer to reserve light duty jobs for those with work-related disabilities, as compared to those with personal conditions.102 This is often done to reduce workers’ compensation costs, when there are only a limited number of light duty jobs. Indeed, some employers have light duty shops, where injured workers can work so as to prevent them from getting used to being out of work collecting workers’ compensation benefits.

While employers must provide readers for the blind and interpreters for the deaf, an employer need not provide a helper to perform an essential job function the disabled worker is supposed to perform.103 Thus, if a job requires heavy lifting a large part of the time, or even a small part of the time if no one else is available to perform the lifting, then an employer does not have to hire a helper to do the heavy lifting that a disabled worker cannot perform.

103 Majors v. General Electric Co., 714 F.3d 527 (7th Cir. 2013).
However, employers should not jump to the conclusion a disabled worker cannot perform their job simply because there is a minor duty listed on the job description which the disabled worker cannot perform. For example, purchasing a lifting machine to lift the heavy objects would be a reasonable accommodation which might work. Buying the worker a back lifting belt might allow the worker to perform the heavy lifting. The employer needs to make sure it asks the employee about any accommodation the employee has in mind, and the employer needs to make a reasonable effort to consider all possible accommodations. The employer would be wise to carefully document these efforts.

Another issue is whether an employer needs to make a temporary light duty job permanent in order to accommodate a disabled worker. The answer is no, because while the ADA requires reasonable accommodations, the employer need not change the essential functions of the job, and that includes if the job is temporary.104 When it comes to the ADA, it can truly be said that ignorance is bliss. If an employee does not know of a disability, then the employer cannot have engaged in disability discrimination.105 Thus, not only does the ADA require that the employer not inquire into medical questions or disabilities before a tentative job offer is made, but an employer in fact should try to make its initial job selection cuts before it can even know of any medical conditions or disabilities, e.g., on a paper review of resumes or job applications. For example, for large law firms, those with poor school records are never going to be hired, so why even call them in for an interview. Make the job cut before knowing of their race, age, religion and yes, any disability.

104 Koessell v. Sublette County Sheriff’s Dept., 717 F.3d 736 (10th Cir. 2013), citing Hendricks Robinson v. Excel Corp., 154 F.3d 685, 697 (7th Cir. 1998).

Moreover, poor job performance is not enough to put the employer on notice the worker has a disability.\textsuperscript{106} Thus, if an employee, after the fact of being terminated, in litigation blames his/her poor job performance on being depressed or having a mental limitation, it is too late. If the worker needed an accommodation, the employee should have notified the employer of his/her condition and requested an accommodation before the employer terminated his/her employment. Likewise, an employer generally does not have to provide a reasonable accommodation unless it is requested.\textsuperscript{107}

The courts have also held that the employer merely following a doctor’s work restrictions is not treating a person as disabled – complying with a doctor’s work restrictions is not perceiving the person as having a disability.\textsuperscript{108} Thus, if the restrictions themselves are not enough to qualify as a covered actual disability, the disabled worker cannot create coverage claiming his employer’s mere act of following the work restrictions is perceiving him as being disabled.

Employers are not required to provide a reasonable accommodation if doing so would violate a collective bargaining agreement.\textsuperscript{109} Thus, if a collective bargaining agreement has a seniority clause, which allows workers with the most seniority to get the first pick of jobs, the inherently light duty jobs will go to more seniority workers, and not those with disabilities who

\textsuperscript{106} Miller v. National Casualty Co., 61 F.3d 627 (8th Cir. 1995); Hamm v. Runyon, 51 F.3d 721 (7th Cir. 1995); Hedberg v. Indiana Bell Telephone Co., 47 F.3d 928 (7th Cir. 1995).

\textsuperscript{107} Walz v. Ameriprise Financial, Inc., 779 F.3d 842 (8th Cir. 2015) (the employer was not required to force the employee to take a leave of absence when the employee acted in a disruption manner).

\textsuperscript{108} Gruener v. The Ohio Casualty Insurance Company, 510 F.3d 661 (6th Cir. 2008); Rivera v. Pfizer Pharmaceuticals, 521 F.3d. 76 (1st Cir. 2008).

\textsuperscript{109} Filar v. Board of Education, 526 F.3d 1054 (7th Cir. 2008).
cannot perform the more physically challenging jobs. While Congress encouraged unions and employers to amend collective bargaining agreements to avoid this result, Congress did not require them to do so.¹¹⁰

This is very unfortunate. There are employers who have a wide range of manual labor jobs. Some are very physically demanding and some are inherently light duty. For example, for longshoring work (unloading ships), there are lashers who go on the ship and use heavy lashing rods to unhook containers – it is physically demanding work. On the other hand, there are drivers who just drive trucks to and from the docks to carry the containers away.

If a longshoreman injuries his back or shoulder lashing, it would be nice to place the injured worker in a truck driver job. Yet, the jobs are assigned by seniority under the union contract, so the injured worker, if he is young and has low seniority, will not be able to get the driver’s job, and instead, a healthy but older worker with seniority will get the easier driver job. Unfortunately, unions seem very reluctant to change the seniority system. At the very least, an exception should be made for disabled workers.

While the ADA mandates an interactive process wherein the employer and employee discuss possible reasonable accommodations which will allow a worker to perform the essential duties of a job, the duty rest on both the employer and the employee. Thus, as noted above, an employee must cooperate and answer questions, give requested medical information, and submit to employer requested medical examinations where appropriate.¹¹¹


¹¹¹ Templeton v. Neodata Services, Inc., 162 F.3d 617 (10th Cir. 1998); Loulseged v. Akzo Nobel Inc., 178 F.3d 731 (5th Cir. 1999); Beck v. University of Wisconsin Board of Regents, 75 F.3d 1130 (7th Cir. 1996).
Also of note, if an employee represents to the Social Security Administration that he is disabled from working, and the presentation is inconsistent with his performing his job even with reasonable accommodations, then the employee is barred from pursuing an ADA claim.\textsuperscript{112}

The courts have recognized that employers can enforce work rules against everyone, including the disabled. Thus, if an employer honestly believed there was a violation of its rules that justifies discipline, that is a defense to an ADA claim, even if hindsight proves the employer was mistaken.\textsuperscript{113} Moreover, even if the disability caused the rule violation, if the rule is job related and a business necessity, the courts will not require that an exception be made for the disabled worker.\textsuperscript{114} The Equal Employment Opportunity Commission’s guide to enforcing the ADA states: “nothing in the ADA prevents an employer … from disciplining an employee who steals or destroys property,” or engages in misconduct such as theft, violence, or threats, even if the misconduct was caused by a disability.”\textsuperscript{115} Conversely, if a policy is not job related and a business necessity, an employee can be required to modify it as a reasonable accommodation.\textsuperscript{116}

\textsuperscript{112} Myers v. Knight, 774 F.3d 1246 (10th Cir. 2014).

\textsuperscript{113} Kariotis v. Navistar International Transportation, 131 F.3d 672 (7th Cir. 1997).

\textsuperscript{114} Macy v. Hopkins County School Board, 484 F.3d 357 (6th Cir. 2007); Palmer v. Cir. Ct. of Cook County, 117 F.3d 351 (7th Cir. 1997); McElwee v. City of Orange, 700 F.3d 635 (2nd Cir. 2012).


\textsuperscript{116} 42 U.S.C. § 12111(9)(B). Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1086 (10th Cir. 1997) (“[a]s a general rule, an employer may not hold a disabled employee to precisely the same standards of conduct as a non-disabled employee unless such standards are job-related and consistent with business necessity”).
Conclusion

The ADA is certainly not an easy statute for employers to comply with, but it is the law and cannot be ignored. Moreover, as much as a pain as the ADA can be for employers, paying hundreds of thousands of dollars to defend a lawsuit and pay a judgment, is a much greater pain. With knowledge of the law, and patience, employers can make the right decision. In some critical areas, however, further clarification from the courts is needed.