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WRONGFUL TERMINATION, ADA, AND THE COURTS

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ABSTRACT

This article reviewed case law dealing with wrongful termination claims filed under Title 1 of the ADA to help employers better understand how the courts adjudicate these types of cases. The article is organized around the three defenses available to employers when faced with an ADA charge: 1) the employee does not belong to the protected class (i.e., is not legally disabled) and thus is not protected by the ADA; 2) the employee is not otherwise qualified; that is, the termination was justified because the employee could no longer perform the essential functions of the job, even with a reasonable accommodation; and 3) the employee was terminated for a legitimate, non-discriminatory reason, one that was unrelated to his/her disability. The discussion section addresses areas of potential concern for organizations in light of the judicial decisions reviewed and offers some recommendations for avoiding/defending wrongful termination suits under the ADA.

Title 1 of the Americans with Disabilities Act of 1990 (ADA) [1] is arguably the most sweeping piece of employment legislation enacted since the passage of the Civil Rights Act of 1964. This legislation is designed to remove barriers that prevent qualified individuals with disabilities from enjoying the same employment opportunities as their nondisabled counterparts. This law, which covers nearly all employers with fifteen or more employees, makes it illegal to discriminate against individuals with a disability who are otherwise qualified to perform the job in question.

The Equal Employment Opportunity Commission (EEOC) has issued a set of regulations accompanied by an interpretive appendix [2], a technical assistance

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manual [3], and other documentation (collectively referred to in this article as the *EEOC Guidelines* [4]) to assist employers in complying with the law. These documents have represented the primary source of information to guide employers. Case law, which takes legal precedence over EEOC interpretations, has been sparse due to the recency of the ADA's passage. Only now is a fairly substantial body of case law beginning to emerge.

The aim of this article is to analyze the existing case law dealing with wrongful termination claims filed under Title 1 of the ADA. Our goal is to help employers better understand how the courts adjudicate these types of cases. Are the courts' standards consistent with those promulgated by the EEOC? And what are the evidence requirements for meeting those standards? Armed with this knowledge, employers will be in a better position to respond to situations involving employees who become disabled, both proactively and reactively.

When terminated from their jobs, disabled employees can successfully establish an ADA claim by demonstrating the termination was disability-based and they are otherwise qualified to perform the job in question. An employer can defend such charges by using one or more of the following arguments: 1) the employee is not *legally* disabled and is thus unprotected by the ADA; 2) the employee is not otherwise qualified; that is, the termination was justified because the employee could no longer perform the essential functions of the job, even with a reasonable accommodation; and 3) the employee was terminated for a legitimate, nondiscriminatory reason, one that was unrelated to his/her disability.

The body of this article is organized around these three defenses. We first identified issues salient to each defense and then selected a random sample of cases (tried during the period of 1993-1998) dealing with each issue. In all, forty cases were reviewed. Seventeen were decided at the federal district court level and twenty two at the circuit court level. We also reviewed the one case decided thus far by the Supreme Court.

NOT LEGALLY DISABLED

When charged with disability discrimination in a wrongful termination suit, an employer can argue the charge is groundless because the claimant is not disabled (i.e., is not a member of the protected class). According to the *EEOC Guielines*, one may establish protected class membership in any of three ways. The person 1) has a physical or mental impairment that substantially limits one or more major life activities; 2) has a record of such an impairment; and 3) is regarded as having such an impairment [4]. The key terms to this definition are defined below:

> *Physical impairment*—any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.

> *Mental impairment*—any mental and psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. A person's physical or mental impairment is determined without regard to any medication or assistive device that s/he may use.
> *Substantially limits*—A condition is substantially limiting if an individual is unable to perform, or significantly limited in the ability to perform, an activity compared to the average person in the general population. Whether a person's disability is substantially limiting depends on its nature and severity, how long it is expected to last, and its long-term impact.
> *Major life activities*—Activities an average person can perform with little or no difficulty, such as walking, seeing, speaking, hearing, breathing, learning, caring for oneself, working, sitting, standing, lifting, and reading [4, p. 2].

There were fifteen cases in which the employer attempted to convince the court the plaintiff's condition did not meet the legal definition of "disabled." Each employer used one or more of the following arguments: the person presented no evidence of an impairment, the impairment did not substantially limit a major life activity (including "working"), the person had no record of impairment, and the person was not regarded as being disabled. These defenses and the courts' rulings are discussed in the following paragraphs.

Evidence of Impairment

The courts have consistently ruled that plaintiffs must present medical evidence of their impairments, unless the impairment is obvious. There were three cases in which the plaintiffs' claims were denied because no such evidence was shown. In *Abbasi v. Herzfeld and Rubin, P.C.*, the employee had suffered a minor stroke that caused him to miss two weeks of work [5]. He was discharged upon his return. He was allegedly told he was fired because his health would not permit him to take the stress of his job. However, he lost the case because he had no medical evidence that described the nature and extent of his alleged disability; he merely stated that he became sick and disabled for a temporary duration. Surprisingly, the plaintiff failed to argue that he was regarded as being disabled, as evidenced by his supervisor's alleged comments [5].

In *Miller v. National Casualty Company*, the plaintiff was given permission to take two days off due to a stressful family problem and was discharged for failing to return to work at the conclusion of this period [6]. The plaintiff argued that her stress reaction was a symptom of a disability (i.e., manic depression) and the employer should have accommodated her by allowing her additional time to medically document her disability. The employer argued that at the time of discharge it was unaware of plaintiff's disability and therefore, was not required to make an accommodation. The court ruled for the employer, stating that since National Casualty did not know of Miller's disability until after her employment was terminated, it would have been impossible for the company to base the

termination on that disability [6]. While one could argue that the company should have reconsidered its termination decision upon learning of the severity of her psychological problems, such reconsideration is not a *legal* requirement.

The *Sherman v. Optical Imaging Systems*, case involved an employee who was transferred to a position he was apparently unable to adequately perform [7]. He alleged that his problem was, in part, due to his dyslexia. However, he lost the case because he failed to produce any evidence in court that he suffered from dyslexia. Since no mention of dyslexia was made at the time of the discharge, the plaintiff appeared to have been "reaching for straws" in court[7].

Linking the Impairment to a Major Life Activity

In addition to proving the existence of an impairment, the courts also require that plaintiffs link the impairment to a major life activity. There were seven cases in which this issue arose. In one case, *Montandon v. Farmland Industries*, the plaintiff claimed that because of difficulties with his supervisor, he suffered knots in his stomach every morning before going to work [8]. His psychologist testified he was suffering from the disabilities of fatigue and loss of appetite. The judge ruled against this claim, stating the plaintiff made no attempt to show the impairment substantially limited any of his major life activities, such as arguing that a loss of appetite substantially limits the major life activity of eating [8].

Two cases (*Bragdon* [9] and *Ennis* [10]) concerned people who were HIV positive. Neither court considered this condition to be a disability, per se; it had to be linked to a major life activity, which can only be determined on a case-by-case basis. In *Bragdon v. Sidney Abbott*, which is the lone Supreme Court decision, the plaintiff was an HIV-infected dental patient who was refused treatment because of her condition [9]. While not a Title I case (i.e., not an employment case), Court's ruling was none the less significant for employers. For her condition to be considered a legal disability, the plaintiff had to show that her impairment substantially limits a major life activity. The Court concluded that the major life activity of reproduction was substantially limited. Reproduction is a major life activity because "reproduction and the sexual dynamics surrounding it are essential to the life process" [9, at 2]. The plaintiff's HIV condition is substantially limiting because "conception and childbirth are not impossible for an HIV victim but, without doubt, *are dangerous to the public health*" [9, at 3].

In *Ennis v. National Association of Business and Educational Radio (NABER)*, the plaintiff's son was HIV-positive [10]. Her claim was that she was fired because of the insurance risks associated with her son's condition (the ADA prohibits employers from taking adverse employment action because of the known disability of a person with whom the qualified individual is known to have a relationship). The plaintiff lost the claim based on her own testimony that her son "suffers no ailments or conditions that affect the manner in which he lives on a daily basis" [10, at 59]. The judge thus concluded that the ADA did not protect

her because her son was not legally disabled—none of his major life activities were substantially limited by his HIV condition [10]. While this case preceded *Bragdon* [9], the argument used there would probably not apply here since her son was too young to engage in reproductive behavior.

In *Dutcher v. Ingalls Shipbuilding*, the plaintiff suffered a physical impairment from a gun accident and claimed she was denied re-employment because of this impairment [11]. In her testimony, Dutcher recited a list of activities she could still preform and those she could no longer perform. Her "can do" list included driving a car, feeding and grooming herself, carrying groceries, washing dishes, vacuuming, picking up trash, and all the basic things she needs to do in her life with her arm. Her "can't do" list included picking up little things from the floor, holding things up high or real tight for prolonged periods, and sometimes having trouble turning her car's ignition. The judge ruled she is not legally disabled because her "can't do" list contained no major life activities [11].

The plaintiff in *Howell v. Sam's Club* suffered a spinal disease and a knee impairment that resulted from a thirty-four-foot fall [12]. Howell claimed his impairment substantially limited his ability to care for himself and to walk. The judge disagreed with both claims. Regarding the first claim, the judge stated that Howell presented no medical evidence documenting his limitations; rather, he relied on his own testimony that his wife had to help him put on his trousers and tie his shoes. The judge further noted the plaintiff could drive a car, groom himself, have lunch with friends, cook meals for himself, do yardwork, and clean his house—clearly he was not substantially limited in caring for himself [12].

Howell's claim that he was substantially limited in the major activity of walking was based on the fact that he walked with a limp. However, the judge discounted this claim based on the testimony that Howell was in the habit of walking twenty to twenty two miles each day without any aid, such as a crutch or cane [12].

In *Soileau v. Guilford*, the plaintiff suffered from dysthymia, a psychological disorder that affected his ability to get along with people [13]. The key issue was the plaintiff's claim that getting along with people is a major life activity, a notion supported by the *EEOC Guidelines* [4]. The judge, however, stated that this manual, while sometimes helpful, is "hardly binding" [13 at 15]. The judge then ruled that getting along with others was a vague concept and to "impose legally enforceable duties on an employer based on such an amorphous concept would be problematic" [13, at 15].

Only one case was uncovered where the judge did not require the plaintiff to present evidence that linked the impairment with a specific major life activity. This exception occurred in *EEOC v. Kinney* where a plaintiff with diabetes was discharged because of several seizures at work that rendered him unconscious [14]. Evidence that linked these seizures to a major life activity was not needed because it was obvious to the judge that being unconscious limited the plaintiff "in significant ways" [14, at 5].

Working as a Major Life Activity

Several cases involved claims that the plaintiff's impairment was linked to the major life activity of working. These claims usually surfaced when the employee was unable to show that s/he was substantially limited with respect to any other major life activity. According to the *EEOC Guidelines*, such an argument requires evidence that the individual is significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities [4]. A "class of jobs" refers to the number and types of jobs in the same geographic area that utilize training, knowledge, skills, or abilities similar to the job for which the person was denied. A "broad range of jobs in various classes" refers to the number and types of jobs in the same geographic area for which the person is qualified that utilize different training, knowledge, skills or abilities.

Five cases dealt with this issue; the employer's arguments prevailed in each. In *Dutcher*, as noted earlier, the court found her restricted activities were not major life activities [11]. The plaintiff countered that her major life activity of working was substantially limited by arguing that her impairment prevented her from performing an entire class of jobs in the welding profession. The court rejected this argument based on evidence that her injured arm excluded her from only certain types of welding jobs (i.e., those that required substantial climbing). There were many other welding jobs she could still perform, and thus she was not prevented from performing an *entire class of jobs* [11].

In *Smaw v. Commonwealth of Virginia Department of State Police*, the plaintiff was terminated from her job of state trooper because of her obesity [15]. She was subsequently assigned to the job of dispatcher. The employer argued that Ms. Smaw was not prevented from performing an entire class of jobs, as evidenced by the fact that the job to which she was reassigned (i.e., dispatcher) fell within the same class of jobs as trooper. The judge agreed, stating the proper scope of her occupation is the field of law enforcement as a whole, which includes the position of dispatcher [15]. The judge cited as precedent a case in which the scope of a flight attendant's job included all ground positions at the airlines.

The plaintiff in *McKay v. Toyota* performed light-duty manufacturing work [16]. She was afflicted with carpal tunnel syndrome, which caused frequent absences that eventually led to her termination. The plaintiff claimed she was disabled because this impairment substantially limited her ability to perform a class of jobs, namely repetitive-motion factory work. The judge disagreed, stating her impairment disqualifies her from only a *narrow range* of assembly line manufacturing jobs that require repetitive motion; it does not restrict her ability to perform the *broad* class of jobs at issue, manufacturing jobs [16].

The *Stone v. CGS Distribution* case involved a truck driver who suffered an injury to his shoulder and hand that required surgery [17]. His doctor recommended that he not lift more than forty pounds occasionally, or more than thirty pounds frequently, and that he not do combined twisting and lifting activities for periods greater than two hours at a time or greater than four hours per eight hour day. Stone's application for rehire was rejected. In trying to substantiate his disability, Stone claimed his condition restricted him from performing a class of jobs. He based his argument on the example cited in the *EEOC Guidelines* that states:

> An individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs [4, p. 2].

The court rejected this argument because the plaintiff failed to produce evidence that his condition fits this example—he didn't show that he was precluded from performing "any heavy labor job" [17].

In *Bolton v. Scrivner, Inc.*, the plaintiff was an order selector at a grocery warehouse who experienced an injury causing pain, numbness, and limited ability to lift weight [18]. His request to return to work after a two-year medical leave was denied based on the company doctor's statement that he was unfit to perform his old job. The plaintiff presented the following evidence in an attempt to prove he was significantly restricted in the activity of working (and thus was legally disabled):

1. One doctor stated that Bolton was not ready to return to any kind of employment.
2. Another doctor stated that he could not return to any work where he has to stand up on a concrete floor all day.
3. Bolton was awarded unemployment benefits based on medical evidence that he could not perform work duties in keeping with his work experience, education, and training because of his limited ability to stand, walk, and lift things over his head.
4. State Workers' Compensation court found he sustained a nine percent permanent disability to his right foot and a 29 percent permanent disability in his left foot [18, at 944].

While this body of evidence seems to indicate the plaintiff would have great difficulty finding another job in his geographic area, the court nonetheless, was unconvinced [18].

> The above evidence does little to show that Bolton is restricted from performing a class of jobs. Bolton failed to meet his burden of providing evidence of his vocational training, geographic area with which he had access,

and the number and types of jobs demanding similar training from which he has been disqualified [18, at 944].

Record of Impairment

Unable to convince the court that he was substantially limited in a major life activity, as noted earlier, the plaintiff in *Howell v. Sam's Club* presented evidence that he had a record of impairment and was thus protected by the ADA [12]. The evidence in question consisted of a letter from the Veteran's Administration stating that he had a 20 percent disability due to his spinal disc condition. The plaintiff further established the fact that Sam's Club was aware of this as evidenced by a letter from the V.A. that thanked the employer for hiring a disabled veteran. The judge concluded, however, that his record of disability did not establish the fact that Howell had an impairment that *substantially limited a major life activity*. The letter described neither the limitations that Howell faced nor his prognosis concerning the impairment [12].

Being Regarded as Disabled

Plaintiffs who are unable to prove they are legally disabled can still prevail if they can convince a judge that their employer regarded them as being disabled. According to the *EEOC Guidelines*, one is regarded as disabled under any of the following three circumstances:

1. The individual may have an impairment that is not substantially limiting, but is treated by the employer as having such an impairment.
2. The individual has an impairment that is substantially limiting because of attitudes of others toward the condition.
3. The individual has no impairment, but is regarded by the employer as having a substantially limiting impairment [4, p. 2].

What type of evidence does the court require to prove that an employer regarded an employee as being disabled? Five cases dealt with this question. In *Doe v. Kohn Nast & Graf*, the plaintiff was HIV-positive and claimed to have been fired because his employer regarded him as being disabled [19]. The plaintiff introduced evidence that his manager knew of his condition prior to the discharge. Surprisingly, this evidence alone convinced the judge that he was regarded as being disabled [19].

The plaintiff's burden of proof was much greater in the other four cases. In *Muller v. The Hotsy Corporation*, the plaintiff was discharged as a foreperson because of the spinal injury he had suffered in a motorcycle accident [20]. His physician said it would be two to three months before he could return to work, at which time he would be 100%—no further back problems were expected [20, at 5]. The court required the plaintiff to prove that his employer perceived him as having an impairment that was *not* temporary; he also had to show the

employer perceived that this impairment substantially limited his ability to work [20].

The employer argued it believed Muller's injury was temporary and Muller was terminated because they could not leave his position open during that temporary two-to-three month period. Muller convinced the judge he was perceived as having more than temporary disability by introducing into evidence the following statements made by his immediate supervisor to Muller's wife:

1. I am concerned about Muller's need for additional time off in the future and the possibility of surgery.
2. I'm afraid if I allowed Muller to come back to work, he would either re-injure himself or somehow further delay his recovery.
3. I find it hard to believe that Muller could ever recover from such a severe injury, especially as quick as two or three months [20, at 18].

Regarding the second issue (i.e., the impairment substantially limited his ability to work), the employer contended Muller was never perceived as being substantially limited in his ability to find work in general. The court, however, disagreed, based on the following line of reasoning:

1. The employer regarded him as being unable to perform the job of foreperson, a job that entailed light work, such as walking the floor to check other employee's work, as opposed to more physical work, such as lifting, pulling, and pushing.
2. The employer must have considered him unfit for the other jobs that he was qualified for because these jobs were more physically strenuous than that of foreperson [20, at 20].

In *EEOC v. Chrysler*, the plaintiff, David Darling, suffered from diabetes [21]. Since he was clearly regarded as having a nontemporary impairment, the court restricted its assessment to the issue of whether he was perceived as being precluded from a wide range of jobs. Chrysler contended it viewed Darling as being unable to perform a single, particular job—he only applied for one position. He was not disqualified from any other position. The plaintiff balked that if this argument were accepted, "few skilled trades people would receive ADA protection because most only apply for a particular position" [21, at 5]. The plaintiff further argued that Chrysler must have perceived him to be unable to perform a broad class of jobs because he was told he could not qualify for the following jobs due to his impairment: pipefitter, millwright, sheet metal worker, welder, machine repairer, or a hi-lo mechanic. The court ruled in favor of Darling based on the above evidence and the fact that Chrysler did not consider him for any other position at the time [21].

The key issue in *Johnson v. American Chamber of Commerce Publishers* was whether a person had to have a specific kind or degree of impairment to be regarded as disabled [22]. The plaintiff, who was missing eighteen teeth, was fired as a telemarketer after three days on the job despite doing good work. The lower court ruled against the plaintiff's claim because Johnson's missing teeth are

not a disability. The appeals court reversed this decision, stating that a person may be regarded as impaired without actually having an impairment. The case was remanded to the lower court to determine whether the employer held such a perception. As noted by the judge:

> If for no reason whatsoever an employer regards a person as disabled—if, for example, because of a blunder in reading medical records it imputes to him a heart condition he never had—and takes adverse action, it has violated the statute . . . [22, at 819].

In *Ennis*, as noted earlier, the plaintiff charged the company terminated her because of the known disability of a person with whom she was associated, namely her son who was HIV-positive [10]. The company denied knowledge of the specific nature of the son's disability, conceding only that he was viewed as a "special needs" child. Ennis argued that the director of human resources had been informed of her son's status at the time she was hired and that his condition was a "known fact" around the office. The court accepted her argument, noting "the evidence presented, although a slender reed, is sufficient to create a triable issue" regarding the extent to which disability discrimination had taken place [10, at 60].

OTHERWISE QUALIFIED

A second defense an employer may use when faced with an ADA-related wrongful termination suit is to claim the plaintiff is not otherwise qualified to perform the job in question regardless of any disabling condition. Prior to the passage of the ADA, people with disabilities were often denied jobs because they were unable to perform functions that were only marginal to the job. This practice is not unlawful under the ADA [1]. Employment and retention decisions must be based on the individual's ability to perform functions that are *essential* to the job. To lawfully discharge someone because of a disability, then, an employer must be able to show the individual can no longer perform the essential functions of the job, with or without reasonable accommodations. We now examine the issues of essential functions and reasonable accommodations.

Identifying Essential Job Functions

The *EEOC Guidelines* state that a function is considered essential if it meets any of the following criteria:

1. The position exists to perform the function.
2. There are a limited number of other employees available to perform the function.
3. The function is highly specialized, and the person in the position is hired for special expertise or ability to perform it [4, p. 2].

The evidence necessary to prove that a function meets one of these criteria includes the employer's judgement, a written job description, and the terms of a collective bargaining agreement [4].

Documentation of Essential Functions. There were five cases in which the court had to assess the validity of the employers' claim that certain job functions were *essential.* The courts accepted the essential functions specified by the employer unless consented by the plaintiff. In *Larkins v. CIBA Vision Corp.*, the judge accepted the employer's testimony that the ability to use the telephone was an essential function for their customer service representatives since these representatives spend eight and a half hours per day on the phone [23]. In *EEOC v. Kinney*, the employer was able to establish "security" as an essential function for the job of shoe salesperson [14]. The employer accomplished this aim by convincing the judge that the salesperson had to "keep an eye out" to protect against theft because there were no security guards [14].

In *Ethridge v. State of Alabama*, the plaintiff was terminated from a police recruit training program because he could not pass the handgun qualification test required by the state [24]. Specifically, he could not shoot accurately using a two-handed stance (called the Weaver stance) because of a disability in his right hand. The employer claimed that firing a gun in this stance was an essential function of the training program because it was a state requirement. The plaintiff failed to contest this point. The judge ruled for the employer noting:

> The defendants have presented evidence that this stance is a required position for passage of the handgun qualification course as required by state law. Given the ADA's direction to consider the employer's judgement [sic] and any written job requirements in determining which job functions are essential and given *the absence of any contrary evidence from the plaintiff*, the court must conclude that . . . the ability to shoot in the Weaver stance is an essential function [italics added] [24, at 816].

There were two cases in which the employer attempts to document essential functions were successfully contested by the plaintiffs. In *Muller*, the defendant claimed Muller could not perform the essential functions, which included "heavy work," such as pushing, pulling, and lifting [20]. These functions were listed on the plaintiff's job description. The plaintiff, however, claimed the defendant manufactured the job description after the fact in an attempt to justify his discharge. The judge ruled for Muller based on the testimony of two of his former coworkers that he did virtually no lifting, pushing, pulling, or anything else that could be construed as heavy work [20].

In *Benson v. Northwest Airlines*, the plaintiff was a mechanic who was inflicted with a rare neurological disorder causing pain, weakness, or numbness in the arm and shoulder [25]. The employer, Northwest Airlines, claimed Benson was unable to perform the essential functions of the mechanic's job as outlined in a

job description contained in the collective bargaining agreement. The plaintiff, however, was able to convince the court the job description did not reflect the essential functions of his particular mechanic's position. The judge ruled it was the employer's burden to:

> introduce some evidence of those essential functions. The sketchy job description contained in the collective bargaining agreement was not sufficient since not all mechanics positions are alike—essential functions should reflect the actual circumstances of the particular position in question [25, at 8].

Nature of Essential Functions. In most cases the employer's list of essential functions consisted of job duties or tasks. Two other types of essential functions, however, were often claimed; these were work attendance and psychological adjustment.

There were several cases in which employers terminated workers because their disabilities prevented them from coming to work on a regular basis. The employers tried to justify these terminations by claiming attendance was an essential function the employees were unable to perform. The courts accepted the notion that attendance can be an essential function, but required each of these employers to justify this claim on a case-by-case basis.

For instance, the plaintiff in *Tyndall v. National Education Center Inc. of California* was fired from her job as a teacher because her condition (lupus) caused frequent absences [26]. The plaintiff argued she was otherwise qualified for the job because she could perform all of its essential functions (i.e., teacher duties). The court, however, disagreed, stating that attendance was also an essential function; she was not otherwise qualified for the job because she was unable to demonstrate her teaching skills by attending work on a regular basis [26].

> Except in the unusual case where an employee can effectively perform all work-related duties at home, an employee who does not come to work cannot perform *any* of his functions, essential, or otherwise [26, at 213].

The attendance issue also arose in *EEOC v. AIC Security Investigation* [27]. Here, the plaintiff was AIC's executive director and suffered from terminal cancer. He was fired because his illness caused him to be absent 25 percent of the time; there were several periods where he would miss a chunk of days (15-20) at a time. AIC argued that regular, predictable, full-time attendance was an essential function of the position. The EEOC argued the director's absences did not prevent him from performing the job's essential functions. He got the work done by working long hours on Saturday and doing a lot of work at home. The court ruled in the plaintiff's favor, stating that attendance is not, *per se*, and essential function:

> To be sure, attendance is necessary to any job, but the degree of such, especially in an upper management position . . . where a number of tasks are effectively delegated to other employees requires close scrutiny. He is likely to handle a number of his business matters through customer contact by phone or in person at the customer's site—things he could do from his home or car phone. Whether a contact is negotiated in the office or out of the office is immaterial. What is material is that the job gets done [27, at 1064].

The court's decision was strongly influenced by the supervisor's testimony that the plaintiff's work performance was completely satisfactory [27].

The court in *Dutton v. Johnson County Board of County Commissioners* took a similar view regarding attendance as an essential job function [28]. Here, the plaintiff was fired because of absenteeism due to migraine headaches. The employer argued that an essential function of any job is the requirement of reasonably regular and predictable attendance. The judge disagreed, stating that the necessary level of attendance is a question of degree depending on the circumstances of each position and must be determined on a case-by-case basis. In this case, Dutton's attendance record was adequate.

> The defendant has not been able to produce any evidence to show that the plaintiff's absences resulted in essential work not being completed in a timely manner. While disruptive for managers and other employees, it was not, as the ADA demands, *unduly* disruptive (italics added) [28, at 508].

The issue of psychological adjustment arose in two cases. In *Grenier v. Cyanamid Plastics, Inc.*, the plaintiff was terminated while on disability leave due to psychological problems [29]. The plaintiff claimed he could perform the job's essential functions, as evidenced by his nine years of experience. The judge disagreed, stating that technical skills and experience are not the only essential requirements of a job. The plaintiff was described by a psychiatrist as having somewhat paranoid beliefs concerning the malevolent intent of company management and had become "obsessed" with his immediate supervisor. The judge ruled psychological stability is an essential function and stated, "an employer may reasonably believe that an employee known to have a paranoia about the plant manager is not able to perform his job" [29, at 11].

In a similar case, *Hunt-Golliday v. Metropolitan Water Reclamation District of Greater Chicago*, the plaintiff was diagnosed as suffering from depression and frequent panic attacks [30]. The panic attacks made her lightheaded and not always aware of her surroundings. She was fired because she was not able to get along with her supervisor—the mere sight of him caused her to have a panic attack. The court ruled the discharge was appropriate because "acceptance of supervision" is an essential job function [30].

Performance of Essential Functions and Reasonable Accommodation

The *EEOC Guidelines* state an employer must provide a reasonable accommodation to the known disability of an employee if that accommodation will enable that individual to perform the essential functions of the job [4]. An employer does not have to make an accommodation if the individual is not otherwise qualified for the position or if the accommodation poses an undue hardship (i.e., significant difficulty or expense, given the resources available to the business). In addition, the employer is expected to provide an accommodation that is reasonable and not the "best accommodation possible." Thus, employers must consider whether a reasonable accommodation can be made before discharging a disabled employee who can no longer perform one or more essential job functions [4].

Reasonable accommodation may take a number of forms. The three primary forms addressed in the cases reviewed are flexible leave policies, job reassignment, and job restructuring. The process for arriving at an accommodation is also addressed. These issues are discussed in the following paragraphs, where we first describe the *EEOC Guidelines* and then the courts' rulings.

Identifying a reasonable accommodation. In identifying a reasonable accommodation, the *EEOC Guidelines* suggest employers should adopt a "flexible, interactive process," involving both employers and employees [4, p. 4]. This problem-solving process should involve analyzing the job to determine its purpose and essential functions, determining the nature of the limitations imposed by the individual's disability, identifying possible accommodations in concert with the disabled individual, and selecting an accommodation that considers the preferences of the employee and the resources of the employer. *Beck v. University of Wisconsin Board of Regents* explicitly addressed this issue [31].

The plaintiff, who claimed to suffer from a variety of medical ailments, sought accommodation for her ailments in the form of workplace modification and workload reductions. The employer complied and simultaneously requested more detailed information about the nature of the plaintiff's apparent disabilities so that more specific accommodations could be provided. The plaintiff questioned the value of the accommodations and refused to sign a release enabling the defendant to obtain this information [31].

The court noted that the central issue is to determine who has responsibility for deciding exactly what constitutes a reasonable accommodation. Initially, the *EEOC Guidelines* suggested that both parties have equal responsibility [4]. Because neither the ADA nor the *EEOC Guidelines* assign blame in the event the interactive process breaks down, the circuit court argued that some attempt should be made to isolate the cause of the breakdown and assign blame accordingly. In determining the cause of a breakdown in discussions, the court indicated that where missing information could be provided by only one of the parties, a

failure to provide that information may lead to the conclusion that the withholding party is responsible for the breakdown. In this case, the plaintiff withheld information requested by the defendant regarding what constituted a reasonable accommodation [31].

Flexible Leave Policies. The *EEOC Guidelines* state that flexible leave policies should be considered as a reasonable accommodation when people with disabilities require time off from work because of their disability [4]. An employer is not required to provide additional paid leave as an accommodation, but should consider allowing use of accrued leave, advanced leave, or leave without pay, where this will not cause an undue hardship.

The issue arose in *Mannell v. American Tobacco* [32], and in *Myers v. Frederick County Board of Commissioners* [33]. *Mannel* involved an accountant who had Chronic Fatigue Immune Deficiency Syndrome or CFIDS [32]. *Myers* involved a county bus driver who suffered from diabetes, a heart condition, and hypertension [33]. These plaintiffs were no longer able to perform the essential functions of their jobs and requested leaves of indeterminate length. Both judges ruled that the requested leaves were not reasonable. As noted by the *Myers* judge: "The reasonable accommodation provision was constructed for accommodation that presently, or in the immediate future will achieve the intended effect. It is not the employer's responsibility to wait for an indefinite period" [33, at 8].

A third case, *Dutton* involved a plaintiff who was fired for excessive absences caused by frequent migraine headaches [28]. The issue here centered on the employer's refusal to allow the plaintiff to use accrued vacation leave once his sick leave was exhausted. The court ruled against the employer, stating:

> The accommodation proposed by plaintiff would be effective. Plaintiff performs his job satisfactorily when he is at work . . . by allowing him to use his vacation time, then plaintiff would be able to successfully perform the essential functions of his job [28, at 507].

Job Reassignment. The *EEOC Guidelines* state that reassignment should be considered when there is no accommodation that will enable the person to perform the present job, or when such an accommodation would pose an undue hardship. An employer is not required to create a new job or bump another employee from a job in order to provide reassignment [4].

The job reassignment accommodation provides an exception or loophole to the requirement that a disabled employee must be able to perform the essential job functions. Here, the employee cannot perform them, but is given the opportunity to preform another job.

There were five cases in which disabled employees requested reassignment as an accommodation, but it was not granted. In three cases, the court sided with the employer. In *Daugherty v. El Paso,* the plaintiff was a city bus driver who became inflicted with insulin dependent diabetes [34]. Because the department of

transportation regulations bar diabetics from holding such positions, the plaintiff requested reassignment to another job. The city offered him a position, but with less pay; the plaintiff turned it down. He was then encouraged to apply for other jobs, but was unable to find one for which he was interested and qualified. The judge ruled the city had met its burden and did not have to accommodate him in any other way [34].

The judge in *Turco v. Hoechst Celanese Chemical Group* echoed the same viewpoint [35]. Here, the plaintiff was a chemical process operator who could no longer perform his job due to diabetes. He asked the employer to accommodate him by finding him a job that was less physically demanding. There were two such jobs vacant, but the plaintiff was not qualified for either position and was subsequently fired. The judge ruled for the employer, stating that the ADA does not require an employer to place disabled employees in jobs for which they are not qualified [35].

In *Willis v. CONOPCO*, the plaintiff was allergic to the enzymes contained in the detergents that she packaged [36]. Her request for reassignment was denied, and she was fired when she refused to report to work. The court ruled for the employer because the plaintiff failed to produce evidence that there were any vacant positions for which she was qualified [36].

The court favored the plaintiffs' arguments in the other two cases (*Howell* [37]; *Benson* [25]). In *Howell v. Michelin Tire*, the plaintiff was a machinist who suffered from a congenital disease of the hip area called hip dysplasia [37]. Unable to perform his duties, he was transferred to a temporary, light-duty position for thirteen weeks. Still unable to perform his regular job upon completion of this period, he was terminated. Howell contended he should have been assigned to a permanent light duty position. He cited the *EEOC Guidelines* provision that states that while an employer need not create a permanent, light-duty position, if it already has one vacant, it would be a reasonable accommodation to assign the worker to it (if the worker is qualified). Michelin claimed there were no such vacancy. The plaintiff, however, swayed the court with evidence that Michelin had created such positions for others and could have done so for him [37].

In *Benson*, the plaintiff was an engineer for Northwest Airlines who suffered from a disorder (Parsonage-Turner Syndrome) that can cause pain, weakness, or numbness in the arm and shoulder [25]. His request for reassignment to a vacant foreperson position was denied, and he was subsequently terminated. The court ruled for the plaintiff, stating the employer had failed to assess the plaintiff's ability to perform as a foreperson and thus could not claim the transfer to be an undue hardship [25].

Job Restructuring. The *EEOC Guidelines* state that one way to accommodate a disabled employee is to reallocate or redistribute the *marginal* functions of a job [4]. There is no requirement, however, to reallocate *essential* functions because these functions, by definition, are those a qualified individual must perform, with or without accommodation.

There were six cases in which the employer refused employees' requests to restructure their jobs in various ways, including modifying their work schedules, job assignments, and the manner in which essential functions are performed. The employers prevailed in all six cases.

In *Carrozza v. Howard County*, the plaintiff suffered from bipolar disorder and was terminated for behavior that was caused by the disorder—insubordinate behaviors and outbursts directed toward her supervisor; behavior that was "loud, abusive, and insubordinate" [38, at 367]. The plaintiff suggested the following accommodations: change her work schedule to alleviate stressful periods, reassign her to a less-demanding and less-demeaning, supervisor, and eliminate her performance evaluation, which had proved to be demeaning and intolerable. In ruling for the employer, the judge stated that the ADA does not require an employer to restructure a job as to change its fundamental requirements, such as the ability to cope with its inherent stressors [38].

The *Johnston v. Morrison* case involved a waitress who suffered from a panic disorder, which causes "meltdowns" when the restaurant gets crowded [39]. She requested the employer to provide another employee to handle her food-server duties when the "meltdown" occurred. The employer refused this request and terminated her. The court ruled for the employer, stating that the plaintiff's position as food server required her to perform her duties during all times she was at her workstation, both slow and busy [39].

The plaintiff in *Larkins*, suffered a head injury that resulted in a number of disabilities–continual panic attacks, seizures, and an anxiety disorder [23]. She was consequently unable to handle her telephone responsibilities as a customer service representative, despite many attempts to accommodate her. The plaintiff requested that her job be restructured to exclude telephone duties, which was an essential function. Rather, the company should assign her duties involving research, keying, and special projects. The court ruled for the defendant, stating that the ADA does not require a company to eliminate essential duties to accommodate a disabled employee [23].

The fourth case, *Reigel v. Kaiser Foundation Health Plan*, involved a physician whose disability (reflex sympathetic dystrophy) prevented her from performing the more physical aspects of her job as an internal medicine physician (e.g., performing orthopedic manipulation, pelvic exams, etc.) [40]. She requested one of two accommodations: 1) allow her to work part time in a sedentary position, such as a supervising midlevel practitioner, or 2) permanently assign her an existing physician or hire a new one to help her perform the physical aspects of her job. The employer refused, and instead, terminated her employment. The judge ruled that neither accommodation was reasonable because each entailed the elimination of the job's essential functions [40].

In *EEOC v. Amego*, the plaintiff suffered from severe depression and attempted suicide on several occasions [41]. She was fired from her job as a behavioral therapist where she had to supervise disabled patients because her psychological

instability put her patients at risk. The plaintiff asked the employer to alleviate her stress by hiring a new worker to help her perform her job. The judge ruled that the expense of hiring additional staff would be too great for such a small nonprofit agency [41].

Finally, in *Miller v. Illinois Dept. of Corrections*, the plaintiff was a correctional officer who became legally blind due to an automobile accident [42]. The plaintiff conceded she could no longer perform the essential functions of standing guard, inspecting for contraband, searching for escaped prisoners, etc. However, she claimed her discharge was discriminatory because the defendant did not approve the accommodation she had requested. She had asked to be excused from performing the duties she could no longer perform and be limited to the ones she could—operating the switchboard and issuing weapons. The judge ruled that this accommodation was unreasonable because it excused the plaintiff from performing the job's essential functions [42].

Direct Threat

There is one stipulation in the ADA that allows employers to terminate a disabled employee who is otherwise qualified to perform the essential functions of the job. Such an action is lawful if the continued employment of a worker would pose a direct threat to health or safety of the individual or others [1]. According to the *EEOC Guidelines*, the determination of "direct threat" must be based on an individualized assessment of objective and specific evidence, not on general assumptions or speculations about a disability [4]. The employer must be prepared to show, based on reasonable medical judgment, that there is an actual and significant risk (i.e., a high probability) of substantial harm if the person were retained. Moreover, where such a risk is present, the employer must consider whether there is a reasonable accommodation that would eliminate or reduce the risk so that it is below the level of direct threat [4].

Two cases dealt with this issue. In *Bombrys v. City of Toledo*, the employer's claim of direct threat failed because the employer did not make an individualized assessment [43]. Here, a police officer who had completed recruit training was terminated when it was learned he had insulin-dependent diabetes. The employer argued the plaintiff could become confused, combative, or even unconscious while on duty and this would endanger him and those around him. The court shared the employer's concern that retaining the plaintiff could lead to tragic consequences, stating:

> This court does not intent to belittle the very real concerns of the City of Toledo. Were Mr. Bombrys in an emergency situation, he may not have the time to monitor his blood sugar . . . if Mr. Bombrys were to become incapacitated while involved in an emergency situation, the consequences to him and those around him could be tragic [43, at 1218].

Despite these concerns, the judge ruled for the plaintiff, claiming the risk posed by employing the plaintiff was not determined on the basis of an individualized assessment of his condition. The employer should have examined his medical history and his physician's recommendations regarding the nature, duration, and severity of the risk and the probability that potential injury would actually occur. The judge did not state what that probability level must be to justify a termination [43].

The issue of direct threat also arose in *EEOC v. Kinney*, where the employer discharged an employee with epilepsy because it believed his condition put him at risk [14]. Kinney was concerned the employee could have a seizure while climbing a ladder to restock the shelves. Kinney claimed it complied with the *EEOC Guidelines* by basing its decision on an individualized assessment of the plaintiff's condition. It produced medical testimony that the plaintiff was at risk for bodily injury should he fall from the ladder and testimony from a vocational expert that the workplace could not be made safe for him. The court disagreed, ruling that the "potential risk of injury . . . cannot be characterized as a high probability of substantial harm" [14, at 9]. The judge's conclusion was based on the following analysis:

1. The duration of risk is fleeting (falling is a split-second event).
2. The nature and severity of potential harm is not overwhelming. The plaintiff could hurt himself significantly were the shelves high. However, as an accommodation, Kinney had already lowered them.
3. The likelihood of potential harm is only minor, given the complete absence of any history of the plaintiff seriously injuring himself during his seizures [14, at 9].

LEGITIMATE, NONDISCRIMINATORY REASON

In the defenses presented thus far, the employers had not contested the fact that the terminations were impairment-related. Rather, the employers attempted to justify their actions by arguing the impairment did not constitute a "legal" disability or the employee was not otherwise qualified for the job, even with reasonable accommodation. In this section, we discuss the third defense open to employers in a wrongful termination suit—the workers' disabilities had nothing to do with the terminations; these individuals were terminated for legitimate, nondiscriminatory reasons.

Seven such cases were identified. The employer prevailed in each case by convincing the court that the terminations stemmed from misconduct or poor performance, and not from the employee's disability. In *Ennis*, the employer claimed Ennis was discharged for poor performance [10]. It supported this claim with very strong documentation. Her annual performance evaluations were low and several internal memos documented the fact that she had been warned about excessive socializing and personal phone calls, inaccuracies in her data entry and

filing, and tardiness. Ennis claimed the employer's explanation was merely a pretext; the "real" reason for her discharge was the fact that her adopted son had HIV and the employer feared the effect this would have on its health insurance rates. As evidence to support this motive, Ennis provided a memo sent to all employees stating, "if we have a couple of very expensive cases, our rates could be more dramatically affected than they currently are" [10, at 56]. The court ruled the evidence of her poor performance was substantial and pervasive. Further, the insurance memo was too remote and too tenuous to be considered sufficient evidence of pretext. Tying that memo to the employer's action was merely "unsupporitve speculation" [10, at 62].

In a similar case, *Leffel v. Valley Financial Services*, the plaintiff was a multiple sclerosis victim who was fired as the branch manager of a bank [44]. To justify her ADA claim, she presented evidence pointing to the bank's desire "to rid itself of employees who, like her, had medical conditions that were expensive and made coworkers ill at ease, and so it invented a set of criticisms that would justify discharging her" [44, at 795]. The court's ruling favored the bank, however, because of the strong, uncontested evidence it had to document her poor performance. "What dooms her case . . . is her failure to confront the criticisms that the bank has articulated" [44, at 795].

In *Birchem v. Knights of Columbus*, the plaintiff was an insurance agent who claimed he was discharged because he suffered from a bipolar disorder [45]. The employer claimed the discharge stemmed from his poor job performance. Birchem claimed the employer's stated reason was pretexual, arguing that two other agents performing less well than he were retained. The court ruled for the defendant, stating that Brichem's argument failed to include any evidence that linked his discharge to his disability [45].

In *Magruder v. United States Postal Service*, the plaintiff was allegedly discharged for falsifying time records, deliberately forging her supervisor's signature on three occasions, and lying to the postal inspectors [46]. The plaintiff argued pretext, stating the real reason for the discharge was her alcoholism. However, she was unable to convince the court the employer knew of her disability. The court stated that even if her alcoholism were known to the employer, the termination was warranted by her behavior; her misconduct signals a lack of trustworthiness and honesty, which are essential functions of her position [46].

In *Carrozza v. Howard County*, the employer argued that the plaintiff was fired for her loud, abusive, and insubordinate workplace behavior [38]. The plaintiff did not dispute this behavior. Rather, she claimed it was caused by her disability, bipolar disorder, and therefore she was protected from discharge. The court disagreed stating that even through that behavior might have been caused by the plaintiff's bipolar disorder, the employer was justified in terminating her—the law does not bar termination or other disciplinary proceedings where there is misconduct, even if the misconduct was caused by a qualifying disability [38].

The same issue arose in *EEOC v. Amego*. As noted earlier, the plaintiff was fired from her jobs because the instability of her condition, as evidenced by several suicide attempts, put her patients at risk. The plaintiff argued that the ADA prohibits adverse employment action based on conduct related to a disability (i.e., her suicide attempts were related to her depression). The judge disagreed with this view, stating that the link between the two was not sufficiently direct—depression may directly cause one to have suicidal thoughts, but does not compel one to attempt suicide. An example of a direct linkage is the use of profanity caused by Tourette's Syndrome [41].

DISCUSSION

By reviewing several cases on the various topics related the ADA and wrongful termination, we have tried to increase employers' understanding of how the courts adjudicate these types of cases. Our findings, however, should be viewed as tentative, given that the list of cases reviewed for each topic is less than exhaustive. One finding concerns the need for employees to provide courts with medical evidence that describes both the nature and severity of their impairments. They must also be prepared to prove their employers know about their impairments prior to their discharge. The courts require such evidence to prevent disgruntled ex-employees from lodging frivolous claims, such as the one illustrated in *Sherman v. Optical Imaging Systems* [7]. Moreover, employers are apparently shielded from liability even when the employee's impairment can be documented, as long as it can prove ignorance at the time of discharge. As noted by the judge in *Miller v. National Casualty*:

> The ADA does not require clairvoyance. National Casualty was not obligated to define the presence of a disability from Miller's extended absence from work and the company's knowledge that she was in some sort of stressful family situation [6, at 629].

Prior to discharging a worker with a *known* impairment, employers must determine whether the impairment substantially limits any major life activities. The *EEOC Guidelines* recognize that most impairments do not, *per se*, qualify as disabilities; rather it depends on the effect that impairment has on the life of the individual [4]. However, the *EEOC Guidelines* do note that some impairments, such as HIV infection, are inherently substantially limiting, and are thus disabilities *per se* [4]. The courts, however, disagree; they do not consider HIV or other serious impairments (e.g., carpal tunnel syndrome, diabetes, spinal disc injuries) to be disabilities, *per se*. The employee must prove that the impairment substantially limits a major life activity on a case-by-case basis.

When attempting to determine whether an employee's impairment substantially limits a major life activity, an employer should first consult the list of major activities contained in the *EEOC Guidelines* (e.g., walking, seeing, speaking,

hearing, breathing, learning, caring for oneself, working, sitting, standing, lifting, and reading [4]). Unfortunately, the guidelines do not provide clear operational definitions of these activities. For instance, how severe must one's walking, seeing, or speaking problems go to qualify as a disability? The major life activities receiving the greatest attention among the cases we reviewed are "caring for oneself" and "working."

The judges in both *Dutcher v. Ingalls Shipbuilding* [11] and *Howell v. Sam's Club* [12] provided similar criteria for determining whether caring for oneself has been substantially limited. A plaintiff must provide evidence of an inability to perform such daily activities as feeding and grooming oneself, cleaning one's house, and driving a car [11, 12]. These criteria appear to exclude infrequent activities, such as holding things tight for prolonged periods or having occasional difficulty turning a car's ignition.

The courts have set very strict (i.e., employer-friendly) criteria for determining whether an employee's impairment substantially limits the major life activity of working. To substantiate this type of claim, plaintiffs apparently must list the specific jobs in their geographic area for which they are qualified and can no longer perform because of their impairment, where job categories are quite broad (e.g., dispatcher included in the category of police officer). A plaintiff would prevail only if his/her list were long enough or inclusive enough to convince a judge that the plaintiff's job opportunities had been severely restricted because of the impairment. Moreover, plaintiffs who provide such evidence may find themselves in a Catch-22 dilemma—the evidence used to prove a disability (i.e., a nearly complete inability to work) can be used by the defense to prove the plaintiff is so disabled that s/he is not otherwise qualified to perform the job at issue.

The EEOC's list of major life activities is not inclusive. As noted by the Supreme Court in *Bragdon*, reproduction or the ability to reproduce and to bear children is a major life activity despite its omission on the list [9]. When making a determination of whether an employee is legally disabled, then, employers must be willing to consider the feasibility of any reasonable activity offered by an employee as a possible major life activity. As noted in *Soileau* however, ambiguous activities, like "getting along with others" would not qualify as such an activity [13, at 12].

There is one major exception to the requirement that an employee's impairment must be linked to a major life activity. This exception occurs when the worker can prove the employer *regards* him or her as having such impairment. In some instances, a plaintiff can prove this contention by producing managerial statements to that effect (as in *Muller v. The Hotsy Corporation* [20]. The obvious recommendation here is to train managers to avoid making statements that would indicate a concern about how an employee's disability might hinder future job performance. Evidence that the employer was unaware of the employee's impairment could also rebut such a charge.

When employees incur a legal disability, a company must determine whether they can still perform the essential functions of the job. The *EEOC Guidelines* define essential functions as *job duties* the individual holding the position must be able to perform [4]. However, the courts have broadened this definition to include such dimensions as being able to work with others effectively, being able to accept supervision, and being trustworthy and honest. The courts also consider attendance to be an essential job function for some jobs, where the key issue for employers is not the number of days missed, but rather, whether the work is getting done without causing undue disruptions (*EEOC v. AIC Security* [27]).

Rulings on his issue are consistent with the writings of Borman and Motowidlo, who distinguished between task and nontask performance [47]. The latter has been defined as demonstrations of conscientious behavior and the absence of counterproductive behavior. Given the fact that the courts have begun to recognize these nontask behaviors as essential functions, we recommend organizations explicitly list them as such in the job description.

A related issue concerns the need for companies to develop job descriptions that are position-specific. In *Benson*, for instance, the company argued that the plaintiff could not perform the essential functions contained in the job description [25]. However, the job description was written in broad, general terms; it did not adequately capture the essential functions of the *specific position* held by the plaintiff. The court ruled that the job description must be more position-specific ". . . essential functions should reflect the actual circumstances of the particular position in question" [25, at 113].

Although this issue arose in only one case, we believe it to be important. In the 1990's job analysis research (e.g., Sanchez [48]) argued that traditional forms of job analysis (i.e., position-specific) are inadequate, given the changing nature of work. Sanchez called for a transition to work analysis in which the emphasis is placed on identifying the flow of work across jobs rather than developing job-bounded lists of tasks and duties applicable to a given set of incumbents. Because work analysis is less job-specific than a traditional job description, its usefulness for documenting essential functions is limited; the work performed by each employee must be carefully spelled out.

The courts appear to be taking an "employer-friendly" stance when determining how far companies must go to accommodate a disabled employee. Consider the following quotes:

> The City is not required to fundamentally alter its program, nor is the City required to find or create a new job for the plaintiff. We do not read the ADA as requiring affirmative action in favor of individuals with disabilities in the sense of requiring the disabled persons to be given priority in hiring or reassignment over those who are not disabled (*Daugherty v. El Paso* [34, at 7]).

> The case law is clear that, if a handicapped employee cannot do his job, he can be fired, and the employer is not required to assign him to alternative employment. Similarly, . . . employers are not required to assign existing employees or hire new employees to perform certain functions or duties of a disabled employee's job which the employee cannot perform by virtue of his disability. . . . The ADA cannot be construed to require an employer to make substantial modifications in its operations to assure that every disabled individual has the benefit of employment (*Reigel v. Kaiser Foundation Health Plan* [40, at 973]).

> The law does not impose upon employers an obligation to abandon all goals of profitability in order to pursue the philanthropic goal of providing work to ill or disabled employees (*Turco v. Hoechst Celanese Chemical Group* [35, at 20]).

Based on the cases reviewed, two conclusions seem warranted concerning accommodations. First, an employer's obligation to grant leave as an accommodation is restricted to situations in which the amount of time needed is of a known, short duration (*Mannell v. American Tobacco* [32] and *Myers v. Frederick County Board of Commissioners* [33]). Second, employers need not create light-duty posts to accommodate request for reassignment (*EEOC Guidelines* [2, 3, 4]) unless they have created such posts for other employees (*Howell v. Michelin Tire* [37]).

When a disabled employee is allegedly discharged for misconduct or poor performance, the evidence and proof requirements in ADA cases are similar to those in other types of EEO cases. The court clearly sanction terminations for misconduct or poor performance, even when the problem is caused by the employee's disability (*Carrozza v. Howard County* [38] and *EEOC v. Amego* [41]). It is important, however, for employers to document poor performance to support a claim an individual was dismissed for legitimate, nondiscriminatory reasons.

* * *

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