Recent Cases under the Americans with Disabilities Act And the Rehabilitation Act

Chris Kuczynski
Assistant Legal Counsel, EEOC

I. Definition of "Disability"

II.

Neely v. Benchmark Family Servs., 2016 WL 364774 (6th Cir. 2016). Plaintiff claimed to have sleep apnea, which limited him to only 2-3 hours of restful sleep per night and caused him to fall into microsleeps during the day. The court upheld summary judgment for the defendant, first observing that plaintiff was never diagnosed with sleep apnea. His doctor merely indicated that plaintiff reported that he had sleep apnea, and plaintiff never followed up with testing ordered by a second doctor. Even assuming plaintiff had sleep apnea, Sixth Circuit precedent decided prior to enactment of the ADA amendments Act holds that sleep problems like the ones plaintiff had do not limit a major life activity. Plaintiff never explained why the Pre-2008 holdings should not remain good law, and noted that even the "relaxed" standard for determining disability resulting from the ADAAA retained the term "substantially limits."

Jacobs v. N.C. Administrative Office of the Courts, 780 F.3d 562 (4th Cir. Mar. 12, 2015). Plaintiff, an office assistant who was promoted to deputy clerk, had duties that included microfilming and filing. Four or five of the 30 deputy clerks were assigned to provide back-up customer assistance at the front counter. When plaintiff began training on the front counter, she experienced extreme stress, nervousness, and panic attacks. She explained to management that she had social anxiety disorder with a past history of medical treatment including medication. She requested as an accommodation to handle a different task or only work at the counter once per week, and was subsequently terminated. In the ensuing ADA action, the district court granted summary judgment for the employer on the ground that plaintiff did not have a disability. Reversing, the Fourth Circuit ruled that a jury could conclude plaintiff's social anxiety disorder substantially limited her in interacting with others. Rejecting the employer's assertion that plaintiff could not be substantially limited in the major life activity of "interacting with others" because she "interact[ed] with others on a daily basis," "routinely answered inquiries from the public at the front counter," "socialized with her co-workers outside of work," and engaged in social interaction on Facebook, the Fourth Circuit held "[a] person need not live as a hermit to be 'substantially limited' in interacting with others." The court cited the American Psychiatric Association's definition of social anxiety disorder as including not just those who must avoid situations due to the condition, but also those who endure them with intense anxiety. "At a minimum, [plaintiff's] testimony that working at the front counter caused her extreme stress and panic attacks creates a disputed issue of material fact on this issue."

Cannon v. Jacobs Field Servs. N. Am., --- F.3d ---, 2016 1579832 (5th Cir. Jan. 13, 2016). Employer offered plaintiff a job as a field engineer but revoked the offer after learning that his rotator cuff impairment prevented him from lifting his right arm above the shoulder. The district court found that the Plaintiff could not prove he was disabled because his "injured shoulder did not substantially impair[] his daily functioning." The Fifth Circuit reversed because the district court failed to consider that the definition of disability was broadened by the ADA Amendments Act of 2008. First, plaintiff was disabled because his injury limited the major life activity of lifting. Second, it is sufficient that plaintiff presented evidence showing that the employer regarded him as having a physical impairment As amended, the ADA only requires that the plaintiff be regarded as physically impaired, not that he be regarded as being substantially limited in a major life activity.

Carothers v. Cnty. of Cook, 808 F.3d 1140 (7th Cir. 2015). Plaintiff is a hearing officer at a juvenile detention center. After an altercation with an inmate, she developed an anxiety condition that prevents her from interacting with juvenile detainees. The court held that plaintiff's anxiety condition was not a disability within the meaning of the ADA because it did not prevent her from "performing either a class of jobs or a broad range of jobs." Rather, the anxiety condition prevents only performing a "*unique aspect* of the *single specific job*" of working as a juvenile detention hearing officer.

Summers v. Altarum Institute, Corp., 740 F.3d 325 (4th Cir. 2014). Plaintiff, a senior analyst for a government contractor, was terminated while on short-term disability for injuries incurred when he fell getting off a subway car. Plaintiff's injuries, a broken left leg, a broken right ankle, and torn tendons in both legs, required surgery and seven months of recuperation before he could walk normally. Defendant moved to dismiss plaintiff's discriminatory discharge claim under the ADA on the ground that plaintiff did not allege an impairment that constituted a disability within the meaning of the amended ADA. Finding that plaintiff's complaint sufficiently alleged a violation of the ADA, the court emphasized the language in the ADAAA and in EEOC's regulations implementing the ADA directing that the definition of disability be construed broadly; cited language in the EEOC's regulations and interpretive guidance making it clear that short-term impairments can be disabilities if they are "sufficiently severe;" and referred to EEOC's view, as set forth in its interpretive guidance, that a back impairment resulting in a 20-pound lifting restriction lasting for several months is a disability. Defendant argued that EEOC's regulations were not entitled to deference because Congress could not have intended that temporary impairments be considered disabilities. At most, the court said, the language of the statute was ambiguous, since the only reference to the length of time an impairment lasts is mentioned in the "regarded as" definition of disability. EEOC'S regulations were reasonable, given Congress's goal of providing broad coverage. EEOC's interpretation would have consequences "less dramatic" than defendant envisioned, since prohibiting discrimination against individuals with temporary impairments would burden employers only as long as those impairments endure. "Temporary disabilities require only temporary accommodations." Finally, defendant argued that even if the EEOC's regulations covered impairments due to permanent or long-term conditions that have only a temporary impact, it did not cover temporary impairments resulting from injuries. The court found no basis for making such a distinction, pointing out that the definition of the term "impairment" in the regulations was very broad.

Gogos v. AMS Mechanical Systems, Inc., 737 F.3d 1170 (7th Cir. 2013). A welder and pipefitter was terminated when he asked to leave work because of a spike in his high blood pressure and a related visual problem. Reversing the district court's dismissal of his ADA complaint, the court found that plaintiff's intermittent spikes in blood pressure and visual loss could qualify as disabilities within the ADAAA's broader definition of "disability" by substantially limiting major life activities such as circulatory functions and eyesight. Specifically, the court noted provisions in the ADAAA, the EEOC's regulations implementing the ADAAA, and the interpretive guidance accompanying the EEOC's regulations which say that conditions that are episodic or in remission can be disabilities if they are substantially limiting when active, as well as language in the interpretive guidance that specifically identifies hypertension as a condition that is potentially episodic. The court also held that plaintiff's high blood pressure could be a disability substantially limiting cardiovascular and circulatory functions on an ongoing basis. In this regard, the court referred to the rule of construction in the ADAAA that whether an impairment substantially limits a major life activity is to be determined without reference to mitigating measures, such as medications.

Felkins v. City of Lakewood, 774 F.3d 647 (10th Cir. 2014). Plaintiff, an emergency dispatcher, alleged that the city refused to accommodate her avascular necrosis, a rare condition that can cause bone tissue to die from poor blood supply. On the issue of whether plaintiff was disabled, the court found that the record lacked any medical evidence showing she had a diagnosis of avascular necrosis, and moreover did not detail the degree to which it affects her major life activities. The only medical evidence was an FMLA form signed by a physician's assistant stating she did not have a chronic condition, a later note stating the date on which she could return to duty, and her own declarations stating that she has the condition and the difficulties it caused. The court ruled that as to establishing the existence of an impairment, only conditions that are susceptible to observation by an ordinary person may be proved by lay evidence. Plaintiff's own declarations describing her limitations were admissible to describe her injuries and symptoms, but could not be used to prove her diagnosis or the fact that her limitations were caused by that condition.

Weaving v. City of Hillsboro, 763 F.3d 1106 (9th Cir. 2014). Plaintiff was terminated from his job as a sergeant with the city's police department because of interpersonal problems he experienced when interacting with peers and subordinates. Plaintiff claimed that his ADHD substantially limited his ability to work and to interact with others. A jury agreed, concluded that plaintiff had been terminated because of his disability, and awarded plaintiff damages and attorney's fees. The Court of Appeals reversed, finding that evidence of plaintiff's competence as a police officer undermined his contention that he was substantially limited in working, and citing to two pre-ADAAA decisions in the Ninth Circuit – McAlindin v. City of San Diego and Head v. Glacier Northwest --to conclude that plaintiff was not substantially limited in interacting with others. By contrast to the plaintiffs in McAlindin and Head, who the court described as "so severely impaired that they were essentially housebound," plaintiff was able to engage in normal social interactions, and his interpersonal difficulties existed almost exclusively in his relationships with peers and subordinates. The court distinguished between the ability to "get

along with others" and "interacting with others," and noted that the ADA does not protect a "cantankerous person" who has "mere trouble getting along with coworkers."

Crowell v. Denver Health and Hosp. Auth., 572 Fed. Appx. 650 (10th Cir. July 23, 2014). Plaintiff, who sustained a shoulder injury in a motor vehicle accident, sued her employer under the FMLA and the ADA when she was terminated pursuant to an attendance policy under which an employee was automatically terminated if she had six or more "occurrences" in a 12-month period. Affirming summary judgment for the employer, the court concluded that plaintiff was not entitled to a reasonable accommodation with respect to application of the attendance policy because she did not have a disability within the meaning of the ADA. The court rested its conclusion on several facts. First, plaintiff's medical evidence described limitations in lifting plaintiff experienced two or three months before she was terminated and limitations with respect to walking she experienced as of the time of trial, but did not describe the limitations she actually experienced at the time the alleged discrimination occurred. Second, the court believed plaintiff was required, and failed, to present evidence of how her alleged limitations with respect to lifting, sitting, and walking compared to those of "most people" in the "general population." Third, the court said that evidence from plaintiff's doctor undermined her claim. Specifically, her doctor said that although plaintiff could not lift heavy objects, this would not affect her ability to work in a typical office setting; she could deal with any discomfort experienced while sitting by changing position; and if she walked without swinging her arms, plaintiff would feel "reasonably well." Finally, the court pointed to plaintiff's own testimony "that her allegedly impacted abilities to lift, sit, and walk did not prevent her from performing her job duties."

Mazzeo v. Color Resolutions Int'l, LLC, 746 F.3d 1264 (11th Cir. 2014). A sales representative was terminated shortly after he asked for time off for surgery to repair a herniated disc. Citing to provisions in the ADAAA and the EEOC's regulations which say that the definition of "disability" is to be construed broadly and that conditions that are episodic or in remission may be disabilities if they are substantially limiting when active, the court concluded that evidence from the plaintiff's doctor that the herniated disc impacted plaintiff's ability to walk, bend, sleep, and lift more than ten pounds and that the condition was "substantial . . . and permanent" was sufficient to create an genuine issue as to whether plaintiff had a disability. Although plaintiff testified in his deposition that the only activities affected by his condition were golf and engaging in sexual intercourse, there was evidence that he was responding to a question about his post-surgical limitations.

Scavetta v. Dillon Cos., Inc., 569 Fed. Appx. 622 (10th Cir. 2014). Plaintiff, a pharmacist who was terminated because her rheumatoid arthritis made it impossible for her to give immunizations, claimed that her employer violated the ADA by not excusing her from performing this function. The Court of Appeals found that the trial court did not err when it refused to provide a jury instruction on the definition of "disability" that included references to major bodily functions, including immune and musculoskeletal functions. The court said nothing in the ADAAA or in the EEOC's regulations implementing the ADAAA indicated that rheumatoid arthritis inherently substantially limits immune and musculoskeletal functions; that all the evidence from plaintiff's doctor describing the effect of rheumatoid arthritis on major bodily functions concerned the effects of the impairment generally, not its effects on plaintiff's

major bodily functions in particular; and the evidence from plaintiff related to her particular limitations concerned the types of major life activities the district court specifically included in the jury instructions – performing manual tasks, walking, standing, and working.

Jones v. Honda of America Mfg., No. 3:13–cv–167, 2015 WL 1036382 (S.D. Ohio Mar. 9, 2015). Plaintiff, a Honda plant worker, had a back impairment that resulted in a 3-week medical restriction on performing repetitive movements with her right leg, which was then continued for thirty days after her return to work. "This demonstrates a limitation on the major life activity of performing manual tasks by repetitive motion, and, by extension, the major life activity of working particular to Jones in her occupation at Honda …. Furthermore, the undisputed evidence demonstrates that she suffered from back pain that was acute enough for her to miss work once or twice a year [typically for 5-6 days but in one instance 16 days] during the seven years before her termination …. This observation is in accord with the ADA's definition of disability, which states that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." 42 U.S.C.A. § 12102. A reasonable jury could conclude that this constituted a substantial limitation on the major life activity of working. The Court considers the foregoing evidence sufficient to state a prima face case of disability, particularly under the non-onerous standards set forth under the ADA after passage of the ADAAA in 2008."

II. Definition of "Qualified"

A. Qualification Standards

Samson v. Federal Express Corp., 746 F.3d 1196 (11th Cir. 2014). Plaintiff, who used insulin to treat type I diabetes, was offered a job as a technician at one of defendant's airport facilities, but the offer was withdrawn when he could not pass a medical examination required by the Department of Transportation for drivers of commercial motor vehicles that transport property or passengers in interstate commerce. The court rejected defendant's argument that DOT regulations afforded a complete defense to plaintiff's claim because they required defendant to exclude plaintiff because of his inability to pass the DOT examination due to his diabetes. The court found there was no evidence in the record indicating that the occasional test driving of trucks that mechanics might be required to do near defendant's airport facility involved transporting property or passengers in interstate commerce.

Nathan v. Holder, 2013 WL 3965241 (E.E.O.C. July 19, 2013). In this appeal of a complaint filed under Section 501 of the Rehabilitation Act by a rejected applicant for an FBI Special Agent position, the EEOC concluded that a vision requirement used to exclude complainant because of his monocular vision was a qualification standard, not an essential function as the agency had maintained. The Commission further found that the agency had failed to do an individualized assessment to determine whether complainant could perform the essential functions of the Special Agent position, particularly the function of "clearing a room," which the agency claimed complainant could not do effectively because of his monocular vision. In the absence of such an individualized assessment, the agency was unable to demonstrate that complainant would have posed a direct threat in the Special Agent position.

Complainant v. Donahoe, 2013 WL 8338375 (E.E.O.C. Dec. 23, 2013). The complainant bid for, and was ultimately denied, a job as a Sales, Services, and Distribution Associate at a Postal Service facility because she had a permanent 10-pound lifting restriction resulting from a shoulder injury and the Postal Service claimed that one of the job's essential functions was the ability to lift up to 70 pounds. On appeal, the EEOC determined that the 70-pound lifting requirement was not an essential function, as both the complainant and the agency maintained, but a qualification standard designed to measure whether individuals can perform the job's essential functions. Because the evidence showed that lifting 70-pound packages was not an essential function of the Sales, Services, and Distribution Associate position at the facility where complainant wanted to work, but that employees in that position were, at most, required to lift packages of up to 30 pounds, the qualification standard was not job-related and consistent with business necessity.

B. Essential Functions

1. Employer Judgment

Demyanovich v. Cadon Plating and Coatings, LLC, 747 F.3d 419 (6th Cir. 2014). A machine operator on a production line was terminated after requested leave related to a heart condition and diabetes. The court found that plaintiff's heart condition and diabetes substantially limited major life activities including standing, walking, and bending, and that there was sufficient evidence to create a genuine issue on the question of whether he was qualified to work as a machine operator. Noting that a written job description and the employer's judgment constitute evidence of whether a particular job function is essential, the court said that although the written job description for the machine operator position included loading and unloading equipment and visually inspecting the product as it moved along the production line, it included no lifting or other physical fitness requirements. Although the person who terminated plaintiff testified at his deposition that the machine operator job required several physically exerting tasks that plaintiff was no longer capable of performing at the time of plaintiff's deposition, there was no evidence that plaintiff was unable to perform these tasks at the time he was terminated. In fact, the person who terminated plaintiff testified that he was not terminated for performance issues and that he had been performing satisfactorily.

2. Limited Number of Employees

Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562 (4th Cir. 2015). Reversing summary judgment for the employer, the court held there was "ample" evidence for a reasonable jury to conclude that providing customer service at the front counter was not an essential function of a deputy clerk with social anxiety disorder, particularly since there were 29 other deputy clerks potentially available to perform this job duty. All deputy clerks had the same title and job description but only four or five of them routinely worked at the front counter; the others performed filing and record-keeping duties, many of which did not require face-to-face interaction with the public. Generally, the most junior clerks are assigned to the front desk because they can gain knowledge about the office, but some new clerks had been permitted to start their jobs filing. Upon getting the job, Jacobs was assigned to work at the counter four days a week, but she soon began experiencing extreme stress and panic attacks while working at the counter. The job description did not state that all deputy clerks must work at the front counter; fewer than 15% of the deputy clerks performed this function and some never performed it. Many employees were available to work at the front counter given that most deputy clerks received training to perform this duty. Finally, the employer failed to produce evidence that "mastery" of the front counter was essential to successful performance of the job or that excusing Jacobs from this task would negatively impact the operations.

3. Time Spent Performing/Consequences of Not Performing Function

Hawkins v. Schwan's Home Serv., Inc., 778 F.3d 877 (10th Cir. 2015). Affirming summary judgment for the employer, the court held that although the plaintiff had not driven a truck in the two and a half years prior to his leaving the company for failing to obtain DOT medical certification, he had previously driven trucks regularly (and had the DOT certification to do so) and there existed a "constant potential" that he might need to drive again. Therefore, the court found that the ability to drive a truck and to obtain DOT medical certification to operate such a vehicle are essential functions for a facility supervisor. DOT's regulation of the number of hours

a driver can operate a vehicle, re-stocking difficulties, the need to find a last-minute replacement driver to meet delivery requirements, and the fact that only one other employee at the facility, besides the plaintiff, was available to substitute as a driver "increased the likelihood" that the plaintiff would need to be able to drive on occasion. The plaintiff offered no evidence that the other employee qualified to drive would be on site and available when needed if he was excused from driving trucks.

Kauffman v. Petersen Health Care VII, LLC, 769 F.3d 958 (7th Cir. 2014). Reversing summary judgment for the employer, the court held there was a genuine factual dispute regarding the amount of time a nursing home hairdresser had to spend wheeling residents to and from the beauty salon and thus whether this duty was an essential function of her job. After surgery to reconstruct her bladder and hold it in place, the plaintiff's doctor advised her to stop pushing residents who use wheelchairs because that might cause her bladder to dislodge again. She requested that another employee bring residents to and from the salon, but the administrator refused so the plaintiff quit. The court noted that the administrator estimated that the plaintiff spent 60 to 65% of her workday wheeling residents, but the plaintiff estimated that, at most, she spent up to 12% of her day on this task and usually much less. The court acknowledged that the plaintiff's estimate might be incorrect, but it found the defendant's estimate highly suspect as it would mean that a hairdresser spends almost two-thirds of her workweek simply bringing residents to and from the salon. The court also noted that after the plaintiff quit, staff assisted the one remaining hairdresser by wheeling residents to and from the salon until a new hairdresser was hired. No evidence showed that using staff in this way was costly to the nursing home or impacted care of the residents.

4. Attendance and Work Schedules

Starts v. Mars Chocolate N. Am., LLC, 2015 WL 8593473 (5th Cir. Dec. 11, 2015). Plaintiff, a machine operator at a chocolate factory, injured his back, and was terminated for unapproved absences after exhausting his FMLA leave. Plaintiff sued alleging that employer did not reasonably accommodate his disability by offering a four-hour work shift. The court held that summary judgment for employer was appropriate because plaintiff was not qualified even with the proposed accommodation, and plaintiff's pain medication prevented him from operating machinery. Plaintiff could not show that he could have attended work as required because his back pain occurred at unpredictable times.

Taylor-Novotny v. Health Alliance Med. Plans, Inc., 772 F.3d 478 (7th Cir. 2014). Affirming summary judgment for the employer, the court held that regular attendance was an essential function of a contract specialist. The plaintiff argued that the fact that the company allowed employees to work at home established that regular attendance was not an essential function. The court disagreed, noting that the telework policy required employees "to adhere to an agreed-upon work schedule" which included being available by phone and e-mail during that schedule and to attend meetings by phone or in person as required by the employer. Furthermore, the defendant regularly evaluated employees on attendance. An employer's judgment is critical in determining whether a function is essential, and the defendant applied the same attendance requirements regardless of whether employees worked in the office or from home. Furthermore,

the employee did not identify any reasonable accommodation that would permit her to meet this requirement. The plaintiff's doctor had sent the employer a note shortly before her termination indicating that as a result of multiple sclerosis the plaintiff should be allowed a flexible schedule to work "when she is doing well" but allowed "rest periods" when she is having a bad day. This indicated the employee's disability prevented the plaintiff from meeting the regular attendance requirement and thus showed her to be unqualified.

5. Driving and Travel

Shell v. Smith, 789 F.3d 715 (7th Cir. 2015). A mechanic's helper brought suit against city employer for failure to accommodate and wrongful termination on account of his hearing and vision impairments. Plaintiff had been working for the city's transit system for twelve years when a new general manager of the transit system was appointed. The new manager informed the plaintiff that his employment would be terminated unless he obtained a Commercial Driver's License (CDL), which was required to operate the city's buses. Because of his impairments, plaintiff was unable to obtain a CDL and as a result, he was promptly terminated. The district court granted summary judgment to the employer. The Seventh Circuit reversed, finding that there was "sufficient evidence from which a reasonable jury could conclude that driving a bus was not an essential function of [the job]." In reaching this conclusion, the court observed that the job description stated merely that a Mechanic's Helper "*may occasionally* drive and deliver buses to various field locations [emphasis added]." Moreover, though that job description was in place for all the years that the plaintiff had worked as a mechanic's helper, "driving buses on public roads was not part of his regular duties for any portion of the twelve years he held the position." The court also took into account the fact that "there was no informed 'decision' that keeping [the plaintiff] employed in the same position, and doing the same duties he had done for twelve years prior, was untenable because it required others to perform an essential function of the position." On the contrary, the new manager, "who had been on the job for one day before giving Shell the news that he would be fired unless he obtained a CDL, looked only to the job description to make this determination.

Minnihan v. Mediacom Commc'ns Corp., 779 F.3d 803 (8th Cir. 2015). Driving is an essential function of a technical operations supervisor who is required each quarter to do a prescribed number of quality inspections at customers' homes to ensure the adequacy of the work of the technicians he supervises. In addition, a supervisor must go into the field to follow-up on customer complaints, deliver equipment to technicians, and perform unannounced safety checks on technicians. All other supervisors drive themselves to customer homes to perform the quality inspections, as did the plaintiff before he developed a seizure disorder that resulted in a 6-month driving restriction each time he had a seizure. The plaintiff had three seizures over an 18-month period. The court noted that neither party established how much time the plaintiff actually spent driving before his disability precluded it, but Minnihan testified he spent at least 50% of his working hours in the field and the court concluded that the evidence was clear that driving facilitated Minnihan's ability to perform field work. Many of the duties required of a supervisor, including the quality control inspections and following up on customer complaints, required field work that, in turn, required the ability to drive. The court discounted the plaintiff's testimony that it was "rare" that he had to leave the office to complete his duties; of greater weight is the "general experience and expectations" of all employees in the supervisor position. The job description states that a supervisor must have a valid driver's license and that "good driving" was required in the position. The parties agreed that as a result of the driving restriction, other employees had to perform field work for Minnihan or had to drive him to an off-site location, even if they disagreed on how frequently these situations occurred and the length of time other employees had to assist Minnihan or assume some of his job duties. Finally, the court disagreed with the plaintiff's argument that because the company accommodated his inability to drive, off and on, for a total of ten months it meant that driving was not an essential function. The company told Minnihan within the first five months of his driving restriction that it could not permanently accommodate his inability to drive. The court noted that a company does not concede either that a function is marginal merely because it temporarily agrees to its removal as an accommodation or that temporary removal of a function signals that permanent removal would not be onerous. To find otherwise would punish employers that choose to go beyond what the ADA requires and discourage employers from helping employees by taking such action.

Hawkins v. Schwan's Home Serv., Inc., 778 F.3d 877 (10th Cir. 2015). Affirming summary judgment for the employer, the court held that the ability to drive a commercial vehicle and obtain DOT medical certification required to drive such vehicles were essential functions for a facility supervisor, and thus the plaintiff's failure to obtain DOT medical certification rendered him unqualified. The written job description required a supervisor to manage the company's fleet of trucks; the plaintiff's supervisor explained that this duty included supervisors, if necessary, driving trucks to facilitate repairs, fueling, and loading and unloading of goods. While such driving was not required on a daily basis, a supervisor needed to be able to step in to prevent delivery disruptions if drivers were unavailable. The defendant presented evidence showing its need for flexibility to assign a supervisor to drive; for example, the company could not predict when DOT rules regarding the hours a driver was permitted to operate a vehicle might require a supervisor to relieve a driver and get a truck where it needed to go. Although the job description did not explicitly require that a supervisor drive trucks, it did require that a supervisor meet DOT requirements – including obtaining medical certification -- and have an excellent driving record. Evidence also showed that all facility supervisors were required to have DOT medical certification and that other defendant facilities required facility supervisors to drive. Initially, the plaintiff obtained DOT medical certification and he had driven trucks when necessary, but after developing heart problems and high blood pressure he failed a routine DOT medical evaluation. A month later, still unable to pass the medical evaluation and having failed to obtain an alternative job within the company, the plaintiff signed a "voluntary resignation form" under protest. The court found that the plaintiff failed to offer "meaningful" evidence to refute the employer's judgment and the written job description that obtaining DOT certification is an essential function that makes possible performance of the essential function of driving a commercial vehicle. The EEOC's ADA regulations specify that both an employer's judgment and a written job description are key factors used to determine whether a function is essential. Since the plaintiff could not perform two essential functions, he failed to show he was qualified and therefore summary judgment for the employer was warranted.

Jarvela v. Crete Carrier Corp., 776 F.3d 822 (11th Cir. 2015). Affirming summary judgment for the employer, the court held that a commercial motor vehicle driver who was fired one week after receiving a clinical diagnosis of alcohol dependence failed to meet "an essential function" of the job that requires that a driver not have a current clinical diagnosis of alcoholism under U.S. Department of Transportation (DOT) regulations. The written job description states that a driver must meet DOT regulations, which includes having no current clinical diagnosis of alcoholism. Furthermore, EEOC regulations (29 C.F.R. §1630.16(b)(5)) specifically permit employers to comply with the DOT regulations. Jarvela had taken FMLA leave to obtain 30 days of intensive outpatient treatment for his alcohol addiction. Although the rehabilitaton program and the employer's doctor released Jarvela to return to work, both noted his "chronic" alcoholism and need for on-going treatment. While the court declined to address how much time would have to elapse before a diagnosis of alcoholism would no longer be considered "current," it held that a diagnosis of alcoholism received seven days prior to termination constituted a current condition under the DOT regulations, and as such it made Jarvela unqualified for his driver position.

EEOC v. LHC Group, Inc., 773 F.3d 688 (5th Cir. 2014). Reversing summary judgment for the employer, the court held that a genuine issue of material fact exists as to whether driving is an essential function of a nursing Team Leader. Kristy Sones was originally hired to be a Field Nurse providing home health care to patients. The parties disputed whether Sones was eventually promoted to be a Team Leader, which entailed more managerial functions, or whether she was merely being cross-trained for those duties. The job descriptions for both positions require a driver's license, vehicle insurance and access to a car; they also state that more than 50% of daily assignments require travel to a patient's location via car or public transportation. Sones had a grand mal seizure, leading her doctor to prohibit her from driving for one year. To the extent that Sones still held a Field Nurse position, the court affirmed summary judgment that driving is an essential function of that position. The court relied on the job description and Sones' testimony that as a Field Nurse she spent a couple of hours each day (25% of her time) driving to patients' homes. However, the court found evidence that in practice Team Leaders, despite the statements in the position description, drive far less frequently than Field Nurses; instead they performed many of their duties in the branch office.

6. Multiple Factors Considered

Stern v. St. Anthony's Health Center, 788 F.3d 276 (7th Cir. 2015). The plaintiff, Chief Psychologist at the health center, had short-term memory loss that rendered him unable to perform the essential functions of his job. Looking to the employer's judgment, the job description (written by the plaintiff), and the plaintiff's testimony on his job responsibilities, the court found that all three elements of his job (clinical practice, supervision, and administration) were essential to the position. "If, for example, the supervision element was eliminated, the employee would no longer be the 'chief'; if the clinical-practice element was eliminated, the employee would no longer be functioning as a 'psychologist'." Plaintiff's memory function test results indicated that he could not perform his supervisory responsibilities or his administrative duties but that he might be accommodated by keeping all or a reduced amount of his clinical responsibilities. However, as stated above, this proposed accommodation was not reasonable because it required the employer to eliminate essential functions of the plaintiff's job, and, secondly, because it was merely a "conclusory and untested opinion/hope that the proposed treatment/accommodation would enable [the plaintiff] to perform the essential function of [his] job." Notwithstanding the court's decision, the Sixth Circuit noted its agreement with the plaintiff that the employer "never engaged in any interactive process with [the plaintiff] to find any accommodations." However, "[f]ailure of the interactive process is not an independent basis for liability under the ADA."

Rorrer v. City of Stow, 743 F.3d 1025 (6th Cir. 2014). A firefighter with monocular vision was terminated because the defendant concluded he could not drive fire apparatus in emergency situations. The court reversed the district court's grant of summary judgment in favor of the city, finding that there were genuine issues of fact as to whether driving fire apparatus in emergency situations was an essential function of a firefighter position. Noting that an employer's judgment and the terms of a written job description are to be considered in determining whether a function is essential, neither is dispositive when the evidence is "mixed." Here, there was evidence that the job of driving fire apparatus in emergency situations was not highly specialized and that

other firefighters were available to perform this function if plaintiff could not. Although the city's doctor who disqualified plaintiff from the firefighter position said that he had reviewed standards which said that driving fire apparatus in emergency situations was an essential function of a firefighter and that individuals with monocular vision could not perform this function, his deposition testimony was unclear as to the specific standards her reviewed. Moreover, although the doctor claimed to have consulted standards of the National Fire Prevention Association (NFPA), his testimony was contradictory as to the portions of the standards he had reviewed and he did not know what the acronym "NFPA" meant. With respect to the job description, the court noted that 16 of 17 listed essential functions were framed in terms of unqualified language suggesting that performance of the functions was mandatory, while the one function described in conditional language (using the term "may") was the function of driving fire apparatus in an emergency situation. The court said that the conditional language, which differed from the mandatory language supposedly in the NFPA standards, may have reflected the peculiarity of the city's rotation policy, which required some, but not all, firefighters to be able to drive in emergencies. This conclusion, the court noted, was confirmed by the testimony of other firefighters.

Samson v. Federal Express Corp., 746 F.3d 1196 (11th Cir. 2014). Plaintiff was offered a job as a technician (mechanic) repairing trucks at one of defendant's airport facilities. Because mechanics would sometimes test drive vehicles, defendant required them to hold commercial driver's licenses and to pass a medical examination mandated by the Department of Transportation for individuals who transport property or passengers in interstate commerce in trucks of specified weights. When plaintiff could not pass the examination due to his diabetes, defendant withdrew its job offer. Plaintiff claimed that test driving trucks was not an essential function of the mechanic job and that, in any event, the test driving duties involved in the job would not have required him to drive commercial motor vehicles to transport property or passengers in interstate commerce. The court found genuine issues of material fact as to whether test driving was an essential function of the mechanic position. The court accorded great weight to defendant's judgment that test driving was an essential function. It also pointed to the job description, which required mechanics to repair, maintain, and troubleshoot problems with trucks, which the court said could include test driving. The court also thought the consequences of not test driving could result in the failure to identify problems, and the fact that a commercial driver's license for the position was required might indicate that the test driving function was highly specialized. Other factors, however, the court said weighed in favor of test driving not being an essential function. There were a number of other employees at the facility where plaintiff would have worked among whom the function could be distributed. Also, another mechanic at the facility said that he had test driven a truck only three times in three years and one time had been a passenger in a truck driven by someone else while he diagnosed a mechanical problem. Finally, defendant's mechanics in general spent an average of 3.71 hours per year test driving trucks.

7. Safety Concerns

Olsen v. Capital Region Med. Ctr., 713 F.3d 1149 (8th Cir. 2013). A mammography technologist who experienced numerous unpredictable seizures at work, some of them while she

was assisting patients, was not qualified. The court noted that an essential function of plaintiff's job was to ensure patient safety, and defendant "need not subject its patients to potential physical and emotional trauma to comply with its duties under . . . the ADA." Several accommodations that defendant provided to reduce environmental factors that might trigger seizures, such as reducing light, eliminating mold, and routing heavily perfumed patients to other employees, did not work, and there was no evidence that the accommodation plaintiff proposed – allowing her to rest when seizures occurred – would have enabled her to perform her essential functions.

III. Disparate Treatment

Dawson v. New York Transit Authority, No. 14–4315–cv., 2015 WL 5438790 (2d Cir. Sept. 16, 2015). Plaintiff alleged a four-year campaign of letter writing, phone calls and in-person meetings to regain his previous title as train operator, a position with higher pay and more responsibilities than his current position of station agent. Due to Plaintiff's "prolonged efforts to regain a position he previously held, Defendant's repeated representation that those requests were under consideration, and Defendant's admission that its decision turned on Plaintiff's history of epilepsy (as opposed to an absence of available positions)," the court concluded that it was reasonable to infer that any application for a particular vacancy would have been futile and, thus, Plaintiff's efforts constituted a sufficient predicate for his failure-to-hire claim. The court distinguished Plaintiff's "quixotic" situation from that in Velez v. Janssen Ortho, LLC, 467 F.3d 802 (1st Cir. 2006), where the plaintiff had merely expressed interest in any available job, and Brown v. Coach Stores, Inc., 163 F.3d 706 (2d Cir. 1998), where the plaintiff had generally requested promotion.

Burton v. Freescale Semiconductor, Inc., No. 14–50944, 2015 WL 4742174 (5th Cir. Aug. 10, 2015). Reversing summary judgment for the employer, the court found that the plaintiff had produced sufficient evidence to raise an inference of pretext. The employer, a designer and manufacturer of microchips, claimed to have fired the plaintiff, a "temp" employee, due to poor performance. However, the plaintiff had received generally positive-to-neutral performance reviews for two years until an incident in which she broke a wafer at work. That incident was documented and six months passed before she was fired. The court stated that the employer's reliance on outdated performance reviews constituted some evidence of pretext. The employer also attempted to rely on the incident whereby plaintiff was caught using the Internet, unauthorized, right before the employer made the termination decision. The employer referred to this incident as the "final straw." However, inconsistency in supervisory employees' testimony raised a fact question as to whether the individual who fired the plaintiff actually knew of this incident at the time he fired her. Other evidence of pretext included 1) the employer's rush to produce documentation after it made the decision to fire the plaintiff, especially where the employer "had previously been lackadaisical about recording and reporting [plaintiff's] alleged deficiencies," and 2) its reliance on post-decision incidents as reasons for her termination. After it was revealed in the discovery phase of litigation that the termination decision predated the incidents the employer had relied upon to justify its decision, the employer then shifted to reliance upon the old performance reviews and the broken wafer incident. After compiling such "significant evidence of pretext," the court addressed the final issue of timing and found that the employer's decision to terminate the plaintiff, which was roughly two weeks after the plaintiff's

formal report of her health problems, was plainly sufficiently close in time to raise an inference of pretext.

Arroyo v. Volvo Grp. N. Am., LLC, 805 F.3d 278 (7th Cir. Oct. 6 2015). Ms. Plaintiff is a veteran with PTSD, who was employed as a material handler at Volvo's Parts Distribution Center, where she retrieves vehicle parts with a forklift and packs them for shipment. Defendant claimed that plaintiff was fired because she repeatedly clocked in late. Reversing the district court's grant of summary judgment for defendant, plaintiff pled sufficient direct evidence of disability discrimination. Internal emails showed that management considered disciplining Ms. Arroyo for absences despite knowing that she was in the hospital for PTSD. Another email showed a supervisor joking that there were rumors that plaintiff was vacationing in Hawaii. Weeks earlier, that supervisor had emailed another that Ms. Arroyo was "really becoming a pain with all this." In addition, there was evidence of "but for" causation. The timing of Volvo's initiating disciplinary actions coincided with the onset and diagnosis of PTSD.

Giles v. Transit Employees Federal Credit Union, 794 F.3d 1 (D.C. Cir. 2015). The plaintiff worked for the Transit Employees Federal Credit Union as a scanning specialist. Plaintiff had received two low performance ratings, one for her previous duties as a receptionist and a second low performance rating for her record maintenance duties as a scanning specialist. When new management took over at TEFCU, plaintiff and two other employees were terminated. Plaintiff claimed that her termination was unlawful discrimination due to the high costs of her health care associated with her disability, MS. The district court, in contrast with the Seventh Circuit's previous decisions, concluded that termination based on the cost of an employee's disability is not disability discrimination under the ADA. Here, the D.C. Circuit declined to reach the issue, instead affirming the district court's grant of summary judgment to TEFCU on factual grounds. TEFCU asserted the reason for the plaintiff's termination was her low performance. Though the court found that the plaintiff rebutted this asserted reason by "highlighting its inconsistencies with TEFCU's previous explanations," the court discredited the rebuttal as weak and thus unable to "undercut poor performance as a possible reason for her termination. Instead, TEFCU submitted uncontroverted evidence that two other employees were recommended for termination on the same day as [the plaintiff], and there is no suggestion this recommendation was based upon the other two employee's health status or their impact on insurance costs."

IV. Reasonable Accommodation

A. Notice of the Need for Reasonable Accommodation

McCall v. City of Philadelphia, 2015 WL 7274068 (3d Cir. Nov. 18, 2015). Philadelphia International Airport terminated Plaintiff, a custodial worker, due to unapproved absences. Plaintiff complained that the employer failed to accommodate his knee disability when it refused to allow him to use unpaid leave. The court held that summary judgment for the employer was appropriate because when seeking unpaid leave, plaintiff only relied on civil service regulations, and never mentioned his knee disability.

Walz v. Ameriprise Fin., Inc., 779 F.3d 842 (8th Cir. 2015). Affirming summary judgment for the employer on claims for wrongful termination and failure-to-accommodate, the court held that the employee failed to inform her employer about her non-obvious disability or request an accommodation. As a result of bipolar affective disorder, Walz began engaging in highly disruptive and erratic behavior. After several attempts by her supervisor to discuss her behavior and offer help, Walz requested and was granted FMLA leave by the defendant's third-party vendor that handles all such requests. She never told her supervisor or anyone else at Ameriprise the reason for her FMLA leave. Upon returning from leave, she gave her supervisor a note from her doctor at Allina Mental Health Services that cleared her to return to work and noted she had been stabilized with medication. But, the note did not specify Walz's condition nor did it request any accommodations. The court rejected Walz's argument that her disruptive behavior and use of FMLA leave, as well as the doctor's note put Ameriprise on notice that she had a mental illness. Nor did the court think sufficient notice of disability was provided based on the supervisor's testimony that after reading the doctor's note he "surmised" that Walz had been treated for her mental health. Even if the court were to agree with Walz that all of this evidence constituted notice of a disability, it did not specify any resulting limitations that would require accommodation. As a result, she was not entitled to reasonable accommodation and without reasonable accommodation she could not show she was qualified.

Taylor-Novotny v. Health Alliance Med. Plans, Inc. 772 F.3d 478 (7th Cir. 2014). Affirming summary judgment for the employer, the court held that while the plaintiff requested and received a number of reasonable accommodations, she never explained how her request to use her badge scan to report her arrival times was needed because of her multiple sclerosis. The plaintiff had a long history of problems meeting attendance and punctuality requirements, both before and after her diagnosis of multiple sclerosis. The defendant granted intermittent leave under the FMLA, as necessary, but always required the plaintiff to notify a manager when she would be late or absent and explain why. About three years after her diagnosis, the plaintiff requested reasonable accommodations to reduce the physical fatigue she experienced as a result of her disability. The accommodations included having a coworker retrieve documents and deliver mail and reducing the files and other items she needed to carry between her office and her home. The plaintiff also asked to use her badge scan to document her arrival time rather than having to notify her supervisor. The defendant granted the accommodations to reduce fatigue but rejected the request to use her badge scan because it would not provide advance notice of her late arrival nor the reason for it. The defendant ultimately fired the plaintiff after several more months of continuing attendance and punctuality problems, including failure to provide advance notification of a late arrival or explain the reason for it. The court upheld the defendant's refusal to permit the plaintiff to rely on badge scans rather than notifying her manager because the plaintiff did not link this request to a limitation resulting from her disability. Clearly, physical fatigue did not necessitate use of the badge scan. In her brief, the employee claimed she also had problems with memory and mental fatigue as a result of her multiple sclerosis, but there is no evidence that she ever communicated this to the employer. The court rejected the plaintiff's argument that because the defendant deals in health matters it should have known that mental fatigue was caused by multiple sclerosis. Individuals with the same disability may experience different symptoms and limitations so an employee must tell an employer what limitations she

experiences as the result of her disability rather than relying on the employer to assume what accommodations are needed and why.

Reeves ex rel. Reeves v. Jewel Food Stores, Inc., 759 F.3d 698 (7th Cir. 2014). A grocery store bagger with Down syndrome was fired after cursing at a cashier in earshot of customers. The court held that an earlier request by plaintiff's mother that a job coach be brought in after plaintiff was disciplined for taking an American flag pin without paying for it did not constitute a request for an accommodation that would have avoided the verbal outburst for which the plaintiff was ultimately terminated. The court noted that plaintiff's mother never expressed a fear that future verbal outbursts would occur when she made her accommodation request and have never requested accommodations when such outbursts had occurred in the past. "A tentative request for an accommodation to address minor theft does not imply a request for an accommodation for inappropriate verbal outbursts that violate the employer's anti-harassment policies."

Withers v. Johnson, 763 F.3d 998 (8th Cir. 2014). Affirming summary judgment for the employer, the court found that the plaintiff never requested a reasonable accommodation. After injuring his back at work, an assistant probation officer took leave. Upon his return to work, the defendant honored all work restrictions imposed by the employee's doctor. After taking more leave, the employee was released to return to work. He left two phone messages asking his employer to call him but did not specify the reason for his call. He next talked to a law clerk who, after checking with the judge who supervised the plaintiff, told the plaintiff to fax his medical release. Six days after being released for work, the judge received the medical release. The court's rules require an employee to immediately provide a medical release; having failed to do so is considered a resignation. Among the claims brought was one for denial of reasonable accommodation, but the court found that all medical restrictions were honored. The plaintiff's claim that he intended to ask that marginal functions be eliminated upon his return to work was immaterial because his employment ended for reasons unrelated to his disability before he made any such request.

EEOC v. Product Fabricators, Inc., 763 F.3d 963 (8th Cir. 2014). Affirming summary judgment for the employer, the court found that an employee never requested a reasonable accommodation. The employee suffered a workplace injury to his right shoulder in 2008. A year later he mentioned to his boss he was going to his doctor to discuss surgery on his shoulder, and he may have inquired about taking leave for surgery. The meeting with his doctor occurred about one week after he was fired and a formal medical assessment occurred several weeks after that. There was no evidence that the employee ever submitted documentation requesting leave for surgery prior to his termination. Evidence that the defendant was aware of the possibility of surgery was insufficient to constitute a request for leave as a reasonable accommodation.

B. Interactive Process

Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562 (4th Cir. 2015). Summary judgment for the employer was inappropriate given that evidence showed a reasonable accommodation was possible and a reasonable jury could conclude that the defendant acted in bad faith by failing to engage in the interactive process after a deputy clerk requested accommodation. Jacobs, who had social anxiety disorder, began experiencing extreme stress and panic attacks a few weeks after being assigned to provide customer service at the front counter. She told her supervisor about her disability and the problems she was experiencing, and that she had previously received treatment for the condition, including medication. The supervisor suggested Jacobs resume treatment and reported this conversation to the clerk of the court. Jacobs did seek medical treatment, but about four months later she sent an e-mail to her three immediate supervisors in which she requested, due to her disability, that she be trained to fill a different role in the office and work at the front counter only one day a week rather than the current four days. The next day, Jacobs contacted one of the supervisors in person who told her that only the clerk of the court had authority to grant her request, but the clerk was on a three-week vacation. Jacobs forwarded the e-mail to the clerk and asked the supervisor if she could take accrued leave. The supervisor questioned the need for leave and then denied it, even though previous requests for leave had always been granted without asking the reason it was being taken. When the clerk returned to the office, she promptly fired Jacobs without ever discussing the request for accommodation which was clearly sitting on her desk. Undisputed evidence showed that all three supervisors refused to discuss Jacobs' request for reasonable accommodation, even though the clerk testified that they had authority to reassign her to different job duties.

Gleed v. AT & T Mobility Services, LLC, No. 14–2088, 2015 WL 3505399 (6th Cir. June 4, 2015). Plaintiff has chronic cellulitis, "a leg condition that causes him great pain and increases his risk of skin infections when he stands for prolonged periods." When Plaintiff was hired as a retail salesperson for AT&T, he worked at a desk. The following year, AT&T moved Plaintiff's store to a new location, which included standing terminals in place of desks. Plaintiff asked for permission to use a chair on the sales floor, noting that a pregnant coworker had gotten permission to sit. AT&T refused. Seven months later, Plaintiff contracted a bad skin infection and asked for a schedule adjustment to receive treatments without missing work. AT&T responded that his "only option was to take unpaid leave and apply for back-pay later." Plaintiff resigned and sued for sex discrimination, failure to accommodate and constructive discharge. The district court granted summary judgment to the employer on all claims. The Sixth Circuit affirmed the district court's judgment regarding the sex discrimination claim, the constructive discharge claim, and the claim for failure to accommodate his medical treatments with a schedule change. With respect to the last of these claims, the court concluded that the plaintiff was responsible for the breakdown in the process of finding a reasonable accommodation by quitting after AT&T refused his request for leave. Plaintiff never stated AT&T's proposed accommodation of unpaid leave with the possibility of applying for back-pay would not work; instead, he resigned the following day.

Stern v. St. Anthony's Health Center, 788 F.3d 276 (7th Cir. 2015). The plaintiff, the chief psychologist for the defendant, had short-term memory loss that made him unable to perform essential functions of his job, which included supervision, administration, and clinical duties. The court noted that although he might be accommodated by keeping all or a reduced amount of his clinical responsibilities, this proposed accommodation was not reasonable because it required the employer to eliminate essential functions of the plaintiff's job, and because it was merely a "conclusory and untested opinion/hope that the proposed treatment/accommodation would enable [the plaintiff] to perform the essential function of [his] job." Th court noted its agreement with the plaintiff that the employer "never engaged in any interactive process with [the plaintiff] to find any accommodations." However, "[f]ailure of the interactive process is not an independent basis for liability under the ADA."

Minnihan v. Mediacom Commc'ns Corp., 779 F.3d 803 (8th Cir. 2015). The court held that the employer engaged in good faith in an interactive process with the plaintiff in attempting to find a reasonable accommodation after a seizure disorder made it impossible for the plaintiff to continue driving, an essential function of his job. Affirming summary judgment for the employer, the court found no evidence that the company refused to provide Minnihan with an appropriate reasonable accommodation; to the contrary, during the interactive process the company offered Minnihan the only viable accommodations possible. The plaintiff's supervisor and Human Resources personnel suggested that he apply for non-driving jobs in another facility and told him he could use company time to learn about and apply for the available positions. The plaintiff rejected these jobs and instead asked about job openings in his current facility; he was told no open jobs were available. Next, the plaintiff requested and was granted the right to continue being excused from driving for another couple of months until his driving restriction ended. (During a 16-month period, the company excused Minnihan from driving for 10 months.) A few months later, after having another seizure which triggered another six-month driving restriction, the company offered the plaintiff a non-driving job in another facility with the same pay and benefits. The plaintiff responded that the commute to the new facility was not possible given his driving restriction and he again inquired about non-driving jobs in his current facility. The company responded that there were no non-driving jobs with comparable pay, and provided the plaintiff with information about possible transportation options to the other facility, including information on rideshares and public transportation. It also gave Minnihan the name of another employee who could drive him to the new facility. The company rejected Minnihan's suggestion that they hire an employee to perform the driving functions of his job. Finally, the company said that Minnihan could apply for FMLA leave, but when he did not he was terminated.

EEOC v. Kohl's Department Stores, Inc., 774 F.3d 127 (1st Cir. 2014). Affirming summary judgment, the court held that an employer's refusal to provide the accommodation specifically requested does not constitute bad faith as long as the employer makes an "earnest attempt" to discuss other possible accommodations. Furthermore, an employee's refusal to participate in discussions about other accommodations demonstrates a lack of good faith participation in the interactive process. An employee with type I diabetes found that her disability was aggravated when the employer adopted a new schedule requiring her to work various shifts at different times. Her doctor requested that she be given a day shift so she could better manage her stress, glucose level, and insulin therapy. The employer instead suggested that the employee be exempt from swing shifts (having a night shift followed by a day shift) but that she still work nights and weekends and have breaks. The employee reiterated a wish to return to a steady daytime shift but was told that would not be possible. At that, the employee said she had no choice but to quit and stormed out of the office. The store manager followed and asked what she could do to help the employee and requested that the employee consider other accommodations rather than resigning. The employee responded that the store had basically said it wouldn't help her so she cleared out her locker and left. A few days later the store manager contacted the employee to ask if she would consider alternative accommodations for both part-time and full-time work rather than resigning, but nothing came of this exchange and the defendant terminated the employee. While the court acknowledged that the store's response to the accommodation request may have been "ham-handed," it nonetheless found that the defendant's subsequent overtures were not "empty gestures." They showed a willingness to discuss alternative accommodations that would meet the needs of both the employee and the store but the employee refused to listen or engage in a dialogue to determine if a mutually-agreeable accommodation was possible. As a result, the employee was primarily responsible for the breakdown in the interactive process.

EEOC v. LHC Group, Inc., 773 F.3d 688 (5th Cir. 2014). Reversing summary judgment for the employer, the court held that the defendant's failure to engage in the interactive process helped to create genuine issues of material fact whether a nursing Team Leader with a seizure disorder could still perform the essential functions of her job and therefore be considered qualified. The issues of engaging in the interactive process and reasonable accommodation were addressed solely as part of analyzing whether a registered nurse was qualified, an element of her claim that she was unlawfully terminated. The court affirmed summary judgment on the failure-to-accommodate claim because EEOC abandoned this claim on appeal. Kristy Sones was originally hired to be a Field Nurse providing home health care to patients. The parties disputed whether Sones was eventually promoted to be a Team Leader, which entailed more managerial functions, or was merely being cross-trained for those duties. Sones had a grand mal seizure, leading her doctor to prohibit her from driving for one year. To the extent that Sones still held a Field Nurse position, the court affirmed summary judgment that driving is an essential function of that position. But, if Sones held a Team Leader position where driving might not be an essential function, then the defendant's failure to engage in the interactive process to discuss alternative modes of transportation may undermine its argument that Sones was not qualified for that position. The court concluded that given the "relative infrequency" of driving in a Team Leader position, Sone's proposed solutions to the inability to drive were "not so unreasonable" that they excused the defendant from discussing accommodations with her. The court also found that the defendant failed to engage in an interactive process when Sones requested "extra help" with computer-related requirements of her job; new antiseizure medications were causing memory problems. In response, the branch manager simply walked away.

Rorrer v. City of Stow, 743 F.3d 1025 (6th Cir. 2014). The court held that a firefighter with monocular vision who was discharged because the city concluded he could not drive fire apparatus in emergencies had proposed two accommodations and that there was evidence the city did not engage in good faith in the interactive process, making the failure to engage in the process an independent violation of the ADA. The first accommodation plaintiff proposed was to exempt him from driving in emergencies. The court found that there was evidence that one doctor had cleared plaintiff to perform all job functions, but that a second doctor reversed that decision without ever examining plaintiff. There was also evidence that the fire chief never inquired of other firefighters who would be working with plaintiff whether plaintiff could be exempted from driving in emergencies. As to the second proposed accommodation – reassigning the plaintiff to a job as a fire inspector – there was evidence that the fire chief never considered this possibility because inspectors were designated as firefighters, and as such, had to be able to drive fire apparatus in emergencies. However, there was no evidence that a fire inspector was ever required to do so.

Born v. Knight Facilities Mgt., Inc., 2014 WL 715711 (6th Cir. Feb. 25 2014). Defendant did not fail to engage in the interactive process with a janitor whose doctor imposed a restriction that she not be exposed to cleaning solutions. The employer accommodated an initial restriction that plaintiff not clean bathrooms more than two hours per day and that the spaces where she worked be ventilated. When the restriction was changed to provide for no exposure to cleaning solutions, the employer contacted plaintiff's doctor to see if she would reconsider. When the doctor did not alter the restrictions, the employer contacted plaintiff to discuss possible

accommodations. The fact that the conversation with plaintiff occurred by telephone rather than in person did not mean the interactive process was ineffective. Nor was defendant required to meet with plaintiff and her doctor together.

Kauffman v. Petersen Health Care VII, LLC, 769 F.3d 958 (7th Cir. 2014). Reversing summary judgment for the employer, the court ruled that an employer fails to engage in the interactive process when its only response to a request for reasonable accommodation is to deny it rather than to explore the request with the employee. A nursing home hairdresser had to wheel residents to and from their appointments. After surgery to reconstruct her bladder and hold it in place, the plaintiff's doctor advised her to stop pushing residents who use wheelchairs because that might cause her bladder to dislodge again. She requested that another employee bring residents to and from the salon. After checking with his superiors, the administrator refused the request so the plaintiff quit. The court noted that the employer should have asked the plaintiff how much time she spent bringing residents to and from the salon, as well as posing the same question to the other hairdresser. Only then could the employer have decided whether the requested accommodation could be made without causing an undue hardship.

Spurling v. C & M Fine Packing, Inc., 739 F.3d 1055 (7th Cir. 2014). Plaintiff, a packer and inspector, was given multiple warnings and a suspension over a 12-month period for falling asleep at work. At the time defendant issued her a suspension pending a decision on whether to terminate her, defendant gave plaintiff a letter concerning the ADA and paperwork that her physician could complete. The physician checked "yes" next to a box that asked whether plaintiff had a mental or physical impairment covered by the ADA, noted that plaintiff experienced periods of drowsiness that affected her work performance, recommended periods of scheduled rest, but did not identify a specific impairment. A week after she submitted the paperwork, defendant fired the plaintiff, and a month after plaintiff's termination, she was diagnosed with narcolepsy that could be controlled with medication. The court held that although failure to engage in the interactive process is not an independent basis for liability under the ADA, it is actionable if it prevents identification of an accommodation for a qualified individual. The court held that although plaintiff provided paperwork, at defendant's behest, indicating that she had a disability and needed an accommodation, defendant never followed through by contacting her doctor to discuss the severity of plaintiff's condition or whether she could be accommodated. Moreover, there was evidence of a possible accommodation that could have been provided –further medical testing to diagnose her condition and medication to control it.

Ward v. McDonald, 762 F.3d 64 (D.C. Cir. 2014). An attorney for the Department of Veterans Affairs sought to work at home four days a week because of the effects of chronic, severe lymph edema in one of her legs, which she alleged required daily treatments that could take from one to three hours per day and limited her ability to commute to the office. Defendant believed, based on the initial letter it received from plaintiff's doctor, that she might not be able to work a full-time schedule even at home, and the agency requested additional information concerning plaintiff's ability to work from home for 8.5 to 10 hours per day while sitting and to carry sometimes heavy case files. Plaintiff never provided the information, but claimed she resigned involuntarily as a result of the agency's failure to provide her with a reasonable accommodation.

Ultimately, the agency claimed that it offered plaintiff the opportunity to try working from home on a full-time basis, though plaintiff claims she did not receive the letter until after the date by which she was supposed to respond to the agency's offer. The Court of Appeals upheld the grant of summary judgment in the agency's favor, finding that plaintiff did not engage in the interactive process by providing the agency with information it needed to determine whether telework was an appropriate accommodation. One judge, in dissent, said that medical documentation was not required to demonstrate eligibility for telework, and that in any event, the type of information the agency asked for was not necessary to evaluate her request, because the functions of her job did not need to be carried out in the manner described in the letter (e.g., sitting from 8.5 to 10 hours continuously per day).

C. Whether Accommodation Is "Reasonable"

Spears v. Creel, 607 Fed. Appx. 943 (11th Cir. 2015). Plaintiff was a lieutenant corrections officer in the medical unit at the Wakulla County Jail. In 2012, all medical jobs at the jail were terminated when a private health-care provider took control of medical care of the inmates. Plaintiff requested to be transferred to the corrections department at the jail and, for the first time, informed the Sheriff that she was undergoing cancer treatment. Since there were no open lieutenant positions, Plaintiff was directed to apply to a detention deputy position, which was accompanied by a pay cut and a reduction in duties. Plaintiff submitted paperwork indicating she could return to work and perform the detention deputy's duties. However, one day before her assigned start date, she informed Sheriff in writing that she could not start work the next day because of her medical treatment. She again "requested assignment to an open lieutenant position where she could work 'roughly the 8 to 5 shift' and be able to 'take intermittent leave.'" Plaintiff exhausted her FMLA leave three months later and sought again to return to a supervisory position based on her doctor's recommendations. "Thereafter, [the Sheriff] informed [the plaintiff] that, because [the plaintiff] was unable to perform the essential job functions of her position as a detention deputy, her employment would be terminated." Plaintiff sued the Sheriff for failure to accommodate her disability. The district court granted Sheriff's motion for summary judgment. The Eleventh Circuit affirmed, noting that the plaintiff's proposed accommodations were not reasonable. Plaintiff had proposed "(1) transfer to a non-shift, light duty, or part-time position until she was able to return to full-time work; and (2) an extension of her leave by using donated leave from other employees." The first proposal was unreasonable because there was no vacant lieutenant or supervisor position. The second proposal was unreasonable because "the ADA does not require an employer to reallocate job duties in order to change the essential functions of a job," and "accommodating Spear's request would have caused uncertainty in scheduling, caused other officers to be held over from previous shifts or called into work on their days off, and increased the amount of overtime others worked."

D. Job Restructuring, Part-Time Work, and Modified Work Schedules

Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562 (4th Cir. 2015). Summary judgment for the employer was inappropriate given that a factual issue existed whether a deputy clerk's request for job restructuring to deal with her social anxiety disorder would have enabled

her to perform the essential functions of her position. The disability was causing Jacobs to experience extreme stress and panic attacks as a result of being assigned to provide customer service at the front counter four days a week. Jacobs asked to work only one day a week at the front counter and spend more days performing other deputy clerk duties that did not entail working with the public. The requested accommodations did not require the defendant to increase the workload of Jacobs's coworkers; all 30 deputy clerks had the same job description so Jacobs was merely asking for a change in one assignment. Although the request would have required a departure from the defendant's informal practice to assign the most junior deputy clerks to front counter duty, changing an informal seniority policy does not make an accommodation unreasonable. Finally, there was no evidence that the disability generally interfered with the ability to perform all other job duties, suggesting that with the reasonable accommodation requested Jacobs would have been able to perform the essential functions of her position.

Minnihan v. Mediacom Commc'ns Corp., 779 F.3d 803 (8th Cir. 2015). Since driving is an essential function of a technical operations supervisor, and state law made it illegal for the plaintiff to drive for six months following a seizure, there was no reasonable accommodation possible to permit the plaintiff to drive and therefore still be considered qualified for the job. Affirming summary judgment for the employer on a wrongful termination claim, the court held that the company did not have to eliminate driving because it was an essential function. The court also noted that an employer does not have to provide an accommodation that would cause employees to work harder and longer which the plaintiff conceded was the result when the company temporarily relieved him of his driving functions.

EEOC v. LHC Group, Inc., 773 F.3d 688 (5th Cir. 2014). Reversing summary judgment for the employer, the court held that a genuine issue of material fact exists as to whether a nursing Team Leader with a seizure disorder could still perform the essential functions with job restructuring and therefore be considered qualified. The issue of reasonable accommodation was addressed solely as part of analyzing whether a registered nurse was qualified, an element of her claim that she was unlawfully terminated. The court affirmed summary judgment on the failure-to-accommodate claim because EEOC abandoned this claim on appeal. Kristy Sones was originally hired to be a Field Nurse providing home health care to patients. The parties disputed whether Sones was eventually promoted to be a Team Leader, which entailed more managerial functions, or was merely being cross-trained for those duties. Sones had a grand mal seizure, leading her doctor to prohibit her from driving for one year. To the extent that Sones still held a Field Nurse position, the court affirmed summary judgment that driving is an essential function of that position and that EEOC failed to offer sufficient evidence that she could perform the function with reasonable accommodation. Although EEOC noted that the defendant had permitted Sones' mother to drive her one day to six patients and that there may have been a "handful" of public transportation options, this evidence was insufficient to show that these accommodations were feasible on a daily basis to permit adequate performance of the essential functions. However, the court held that there was an issue of material fact whether driving was required of a Team Leader. In practice Team Leaders drive far less frequently than Field Nurses; instead they performed many of their duties in the branch office. Also, a management official conceded that a Team Leader might be able to use a taxi or van service to perform duties requiring travel,

something expressly permitted in the job description. If on remand the court concludes that driving is not an essential function of a Team Leader, and that other transportation options were available to enable Sones to perform her duties, then Sones would be qualified by restructuring her job to permit alternative forms of transportation.

Bunn v. Khoury Enterprises, Inc., 753 F.3d 676 (7th Cir. 2014). Allowing an employee who was legally blind to perform only one of several functions that other employees were expected to perform was a form of job restructuring and "exactly the kind of accommodation envisioned by the regulations applicable to the ADA." There was no violation of the ADA based on the employer's failure to engage in the interactive process. Plaintiff had claimed he requested other accommodations and that his requests were rebuffed. The court noted that ultimately defendant provided plaintiff with a reasonable accommodation. "Bunn's apparent displeasure with the way in which Khoury decided on that accommodation, or with its failure to provide the exact accommodation he would have preferred, is irrelevant."

Solomon v. Vilsack, 763 F.3d 1 (D.C. Cir. 2014). A senior budget analyst for the Department of Agriculture requested a "maxiflex" schedule as a reasonable accommodation for her depression. The schedule would have enabled her to arrive at work later or leave early on days when her condition required her to do so, as long as she could complete her work promptly and securely. The Court of Appeals reversed summary judgment in favor of the agency on the plaintiff's claim under Section 501 of the Rehabilitation Act, rejecting the agency's categorical position that regular and predictable attendance is an essential element of any job. The court relied on cases in its own circuit and in sister circuits that have held that physical presence by or at a certain time is not an essential function of all jobs. The court also observed that the Office of Personnel Management considers a maxiflex schedule as appropriate for some jobs, and the director of human resources for plaintiff's division testified that some agencies offer maxiflex. Turning to whether there were factual issues to be resolved by a jury, the court pointed out that although the agency argued that plaintiff's job involves tight and sometimes unpredictable deadlines, there was also evidence that plaintiff had never missed a deadline during the time that she had informally worked what amounted to a maxiflex schedule. Additionally, the agency had provided a flexible schedule for another budget analyst. The court also joined other circuits in holding that an employee who requests a reasonable accommodation in good faith engages in protected activity for purposes of the ADA's anti-retaliation provision, and that there was evidence in the record from which a jury could conclude that the agency's denial of a maxiflex schedule was in retaliation for plaintiff's having requested one.

E. Leave

Aston v. Tapco Int'l Corp., 2015 WL 7434652 (6th Cir. Nov. 23, 2015). Plaintiff worked for Tapco, a manufacturer of building materials, for twenty years as, variously, a shipping and receiving clerk, a display builder, and a maintenance worker. Aston suffered a heart attack in 2006 and received 26 weeks of leave. In May 2010, Aston suffered a second heart attack. He received 12 weeks of FMLA leave and an additional 14 weeks of short-term disability leave. Aston was terminated November 22, 2010 because he could not return to work at full duty. Aston was scheduled for implantable cardioverter defibrillator surgery and certified as disabled

until January 1, 2011. The Sixth Circuit held that holding Aston's job until January 1, 2011 would impose an undue hardship. Tapco reasonably questioned whether Aston would be able to return to work in January, or ever. When "an employer has already provided a substantial leave, an additional leave period of a significant duration, with no clear prospects of recovery, is an objectively unreasonable accommodation."

Walz v. Ameriprise Fin., Inc., 779 F.3d 842 (8th Cir. 2015). Affirming summary judgment for the employer, the court held that an employer did not have to force an employee to take leave when she failed to ask for it as a reasonable accommodation. As a result of bipolar affective disorder, Walz began engaging in highly disruptive and erratic behavior. After several attempts by her supervisor to discuss her behavior and to offer help, Walz requested and was granted FMLA leave by the defendant's third-party vendor that handles all such requests. She never told her supervisor or anyone else at Ameriprise the reason for her FMLA leave. Upon returning from leave, she gave her supervisor a note from her doctor at Allina Mental Health Services that cleared her to return to work and noted she had been stabilized with medication. But, the note did not specify Walz's condition nor did it request any accommodations. A few months after returning to work, Walz's disruptive behavior returned. After Walz became aggressive with coworkers at a meeting her supervisor warned her to be "more gentle" but to no avail. Eventually, Walz's behavior led to her termination. The court rejected Walz's argument that her erratic behavior, her prior FMLA leave, and the doctor's note put Ameriprise on notice that she had a medical problem and the company should have responded by forcing her to take more leave. The court found that Walz never disclosed her disability, the resulting limitations, or requested accommodations when her disruptive behavior returned. Furthermore, Walz had previously requested FMLA leave and her supervisor suggested multiple times in response to her behavioral problems that she take time off. The court declined to hold that an employer has a duty to guess an employee's disability or to force the employee to take leave as a reasonable accommodation.

Hwang v. Kansas State Univ., 753 F.3d 1159 (10th Cir. 2014). Plaintiff, a university professor on a one-year contract to teach during the fall and spring semesters and during the summer, was diagnosed with cancer and requested leave prior to the fall semester and again for the spring semester. When she was terminated for exceeding the university's six-month maximum leave policy, she sued under Section 504 of the Rehabilitation Act, claiming she was denied additional unpaid leave as a reasonable accommodation. Upholding summary judgment in favor of the university, the court held that although allowing a "brief absence from work" for medical reasons might constitute a "legally required reasonable accommodation so that the employee could proceed to discharge her essential job duties, . . . it's difficult to conceive how an employee's absence for six months—an absence in which she could not work from home, part-time, or in any way in any place—could be consistent with discharging the essential functions of most any job in the national economy today."

F. Telework

EEOC v. Ford Motor Co., 782 F.3d 753 (6th Cir. 2015). Plaintiff, a resale buyer at Ford with irritable bowel syndrome, sought telework four days a week. Ford denied her request, deeming

regular on-site attendance essential to plaintiff's job. Granting summary judgment to Ford, the district court held that "working from home up to four days per week" was not a reasonable accommodation and that, regarding the retaliation claim, "the evidence [did] not cast doubt on Ford's stated reason for terminating Harris's employment: poor performance." A panel of the Sixth Circuit reversed, but the The Sixth Circuit en banc agreed with the district court's reasoning and affirmed its grant of summary judgment to Ford on both claims. The court specifically stated that "regular and predictable on-site attendance was essential for Harris's position, and Harris's repeated absences made her unable to perform the essential functions of a resale buyer," which included "teamwork, meetings with suppliers and stampers, and on-site availability to participate in . . . face-to-face interactions." The Sixth Circuit went on to reject the EEOC's arguments that summary judgment was precluded by 1) Harris's testimony that she could perform her job functions from home 2) other resale buyers' telecommuting schedules 3) the fact that "technology has advanced enough for employees to perform at least some essential job functions at home." Rejecting arguments 1 and 3 outright, the court gave the most credence to the argument that "because Ford allowed several other resale buyers to telecommute, working from the worksite must not have been essential." The court acknowledged that reference to the employer's judgment in other employees' individual cases comports with common sense and 29 C.F.R § 1630.2(N)(3)(vii). However, the court ultimately rejected the EEOC's argument because the other employees' schedules were materially dissimilar: "Harris's coworkers worked from home on materially *different* schedules: on one set day per week—no more, and sometimes less. The most any employee was even *authorized* to work from home was two days per week, and that employee actually telecommuted only one day per week.Additionally, every telecommuter agreed in advance to come into work on their set telecommuting day if needed at the worksite."

G. Job Coaches/Assistance from Other Employees

Belasco v. Warrensville Heights City Sch. Dist., 2015 WL 8538096 (6th Cir. Dec. 11, 2015). Plaintiff, a teacher ,was fired because she falsified records and because a physical fitness-for-duty examination concluded that "issues of unsteady gait (with poor/fair balance) and shortness of breath would interfere with [her] ability to sustain prolonged activity, to maneuver safely or to respond quickly in emergency situations." The employer refused plaintiff's requested accommodation, a part-time teaching aid, as causing an undue hardship. The court agreed. "The ADA does not require employers to accommodate individuals by shifting an essential job function on to others." Similarly, "the ADA does not require employers to hire a second person to fulfill the job responsibilities ordinarily performed by one person." The "unreasoneableness of [plaintiff's] proposed accommodation is further illustrated by the fact that" hiring a part-time aide without the union's consent would have violated the collective bargaining agreement, and the union was unwilling to consent.

Reeves v. Jewel Food Stores, Inc., 759 F.3d 698 (7th Cir. 2014). Affirming summary judgment, the court held that the parents of a grocery store bagger with Down syndrome failed to request a job coach to work with their son to prevent him from cursing at other employees or customers. The defendant had provided a number of reasonable accommodations over the years, including use of a job coach, individual training by a store manager, help calming down when frustrated, and changes in supervision and job duties. Reeves had several incidents over the years involving

cursing, but his parents never requested a job coach or other accommodation to deal with this misconduct. One day Reeves took a flag pin without paying for it and was written up for theft. Although theft is grounds for immediate termination, the store decided against it and instead notified his parents. They requested that a job coach be brought in, but Reeves' supervisor did not believe that was necessary. About a month later Reeves was terminated for violating disciplinary and anti-harassment policies by cursing another employee, in front of a customer and other employees, who had rejected his offer of assistance in ringing up an alcohol sale. The parents contended that the defendant's failure to provide a job coach after the flag pin incident led to their son's termination and thus constituted denial of reasonable accommodation. But, the court noted that the job coach was requested to deal with the flag pin incident and not to prevent future profane outbursts. After Reeves' supervisor told them he did not think a job coach was necessary, the parents did not protest or raise any concerns that the incident might lead to more serious behavioral problems if not addressed with accommodation, and thus the defendant had no way of knowing a job coach might be needed to deal with inappropriate verbal outbursts.

H. Reassignment

Reyazuddin v. Montgomery County, Maryland, 789 F.3d 407 (4th Cir. 2015). Plaintiff, who was blind, began working at the County's Department of Health and Human Services as an Information and Referral Aide in 2002. In 2009, the County consolidated all of its services into a new call center so that all of its services could be reached by dialing 311. The technology the employer chose to provide at the new facility was not accessible to plaintiff. The County chose not to move the plaintiff to the new facility along with her coworkers, and instead offered her a different slate of work that consumed four to five hours of her workday to complete. The district court found that the County provided a reasonable accommodation by reassigning her to "comparable employment." Alternatively, the district court held that the proposed accommodations would have been an "undue burden" for the employer. The Fourth Circuit reversed the district court's grant of summary judgment as to the failure-to-accommodate and the disparate treatment claim. With respect to the failure to accommodate claim, the Fourth Circuit observed that the employment provided to the plaintiff took only "a maximum of four to five hours per day" and superiors had stated that plaintiff's job responsibilities would be "make work" as opposed to "real, meaningful work"). The Fourth Circuit then attacked the reasons the district court gave for concluding that making accommodations to enable the employee to use the new software would have constituted an "undue burden." First, the district court had criticized the estimated cost of $129,000 proffered by plaintiff's expert as 'unsupported' because 'it [did] not take into account increased costs for maintenance and upkeep.' Second, the district court claimed that, as a result of plaintiff's proposed accommodation, the employee-facing portion of MC311 "would be altered and would result in increased maintenance and more downtime, which could spill over into the customer service realm." The Fourth Circuit concluded that "the district court's analysis improperly weighed conflicting evidence, did not view the evidence in the light most favorable to [the plaintiff], and overemphasized one factor while overlooking the others." Lastly, the Fourth Circuit criticized the district court for relying on the County's small budget for reasonable accommodations in concluding that the proposed accommodations would create an undue burden. Though the County's overall budget may be relevant, relying upon the employer's line-item budget for reasonable accommodations could, taken to its extreme, allow an employer

to "budget $0 for reasonable accommodations and thereby always avoid liability." Plaintiff also sued the County under Title II of the ADA for not hiring her for a vacant position at the new call center. Following the majority of circuit courts (the Second, Seventh, Ninth and Tenth Circuits constitute the majority and the Eleventh Circuit constitutes the minority), the Fourth Circuit held that public employment discrimination claims are not viable because "Title II unambiguously does not create a vehicle for public employment discrimination claims."

Adams v. Anne Arundel County Public Schools, 789 F.3d 422 (4th Cir. 2015). Plaintiff was an assistant principal at a large middle school where he had an altercation with a student that resulted in controversy and, eventually, a formal reprimand from the School Board for the way he handled the situation. During the Board's investigation, Plaintiff suffered from stress, anxiety, high blood pressure and panic attacks. His FMLA paperwork was later updated to reflect his diagnosis of PTSD. In early June, the Board informed the plaintiff that it intended to transfer him to J. Albert Adams Academy (JAA), a smaller, specialized middle school for children with behavioral issues. Both of the plaintiff's psychologists had recommended his transfer to a "supportive, lower-stress school environment." Indeed, one of plaintiff's doctors stated that the plaintiff was "not averse to the possibility of being assigned to a specialized program such as the [JAA], which has been mentioned as a possibility." After his transfer, the plaintiff reportedly did well at JAA and did not request a transfer. Nonetheless, the plaintiff filed suit against the Board for, among other things, alleged violations of FMLA and the ADA. The district court dismissed some of his claims for failure to state a claim and graned summary judgment on the other claims. The Fourth Circuit affirmed the district court's rulings. As to the discrimination and retaliation claims, the court found that the principal's verbal "attacks," the Board's reprimands and poor performance evaluations were insufficient to constitute "adverse employment action. As to the failure-to-accommodate claim, the court found that the Board's decision to transfer him to JAA, notwithstanding a reduction in pay, was "plainly reasonable" because 1) it was consistent with the doctors' recommendations, 2) the Board acted in a timely manner, 3) in light of plaintiff's disability, "the Board sensibly sought a 'less stressful environment' for him," 4) Plaintiff did not object to his reassignment or request a transfer, and 5) "the eventual decrease in [the plaintiff's] salary stemmed from a systemwide collective-bargaining agreement."

Dunderdale v. United Airlines, Inc., 807 F.3d 849, (7th Cir. 2015). Dunderdale worked for United Airlines as a ramp serviceman at O'Hare International Airport. After he injured his back, United transferred plaintiff to the ramp serviceman "Matrix" position, which does not require heavy lifting. The Matrix positions were reserved for people on work restriction. Five years later, United changed its policy so that any union member could bid for Matrix positions. As a result, Dunderdale did not have sufficient seniority to retain a Matrix position, and was placed on Extended Illness Status and encouraged to apply for other open positions. Dunderdale's request for appointment to a no-bid position was declined, and Dunderdale filed suit. Applying US Airways, Inc. v. Barnett, 535 U.S. 391 (2002), the Sixth Circuit held that United did not have to maintain plaintiff in the Matrix position because it would have violated United's seniority system. The Sixth Circuit rejected the contention that this case presented the "special circumstances" contemplated in Barnett warranting an exception. Dunderdale argued that special circumstances existed because the Matrix position had first been restricted to ramp servicemen on work restriction, and because United changed the bidding system for Matrix positions without

any union member first filing a formal grievance. However, "employers do not have to maintain positions or job structures that provide reasonable accommodations if the employer finds, for legitimate business reasons, that the position or job structure should be eliminated."

Rorrer v. City of Stow, 743 F.3d 1025 (6th Cir. 2014). Prohibited from working as a firefighter because the city believed his monocular vision prevented him from driving fire apparatus in an emergency, plaintiff requested a transfer to a job as a fire inspector with the city's Fire Prevention Bureau (FPB). The city argued that there were no vacant positions in the FPB and that the positions that existed in the FPB were designated as firefighter positions that required driving fire apparatus in emergencies. The court found there was evidence that there had been three positions in the FPB until one employee was promoted out. Concerning plaintiff's qualifications to be a fire inspector, the city did not dispute that plaintiff had the expertise, training, and certification to qualify for the position, but instead argued that because the position was designated as "firefighter," which includes the requirement to drive an apparatus during emergencies. Noting that the purpose of the inspector position is to prevent fires, not to fight them, the court said that "[t]he City's unwillingness to modify a job description to accommodate Rorrer, even though that modification would not have required any change in job duties, falls short of the City's obligation "to locate a suitable position" for Rorrer after he identified a vacancy and requested a transfer.

Koessel v. Sublette Cnty. Sheriff's Dept., 717 F.3d 736 (10th Cir. 2013). Plaintiff, a former patrol officer who was terminated when the defendant concluded that effects of a stroke prevented him from performing high stress jobs and there were no other types of jobs available, claimed he had requested, and was denied, reassignment as a reasonable accommodation. The court concluded plaintiff had presented no evidence of a vacant position for which he was qualified, and the one position to which he was temporarily reassigned was not intended to be permanent.

EEOC v. United Airlines, Inc., 693 F.3d 760 (7th Cir. 2012), cert. denied, 133 S. Ct. 2734 (2013). Overruling EEOC v. Humiston-Keeling, 227 F.3d 1024 (2000), and reversing summary judgment, the court held that reasonable accommodation may require reassigning an employee who will lose her current position due to a disability to a vacant position for which she is qualified, provided that such an accommodation would be ordinarily reasonable and would not cause an undue hardship. The court recognized that Humiston-Keeling was inconsistent with the Supreme Court's decision in U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002). See summary at § VII.D.15, at page **Error! Bookmark not defined.**. In Barnett, the Supreme Court had rejected arguments similar to those endorsed in Humiston-Keeling, specifically: (1) the ADA does not require preferential treatment; (2) employers are free to implement neutral rules that may disadvantage employees with disabilities; and (3) reassignment to a vacant position generally will be unreasonable in the run of cases. On remand, the district court should determine if mandatory reassignment is ordinarily reasonable in the facts of this case and, if so, whether it would cause the defendant an undue hardship.

Sanchez v. Vilsack, 695 F.3d 1174 (10th Cir. 2012). In a case of first impression, the court reversed summary judgment for the employer and held that reassignment may be a reasonable

accommodation for an employee able to perform the essential functions of her current job when such an accommodation is needed for the purpose of receiving medical care or treatment. In this Rehabilitation Act case, the plaintiff fell at work, which resulted in a brain injury that significantly and permanently affected her vision. She requested reassignment to a different location where she could receive specialized treatment for her condition. The Forest Service refused because the plaintiff's request had nothing to do with an inability to perform her current job. As an initial matter, the court rejected the defendant's argument that reassignment generally is not mandatory. The court reiterated earlier holdings that reasonable accommodation may include reassignment as long as the employee is qualified for the new job and it would not pose an undue hardship. Next, the court noted that EEOC's regulations recognize that reasonable accommodation may be required in situations having nothing to do with an inability to perform an essential function. Furthermore, requiring reasonable accommodation only to enable an individual to perform an essential function would seem inconsistent with case law recognizing leave to obtain medical care or treatment as a reasonable accommodation. The court remanded the case for a determination of whether the plaintiff actually needed reassignment to obtain treatment and whether the accommodation would result in undue hardship.

I. Parking

Feist v. Louisiana Dept. of Justice, Office of the Atty. Gen., 730 F.3d 450 (5th Cir. 2013). Plaintiff, a former Assistant Attorney General for the state, requested and was denied a free onsite parking space to accommodate her osteoarthritis of the knee. While expressing no view on whether plaintiff's proposed accommodation was "reasonable," the court rejected defendant's argument that an employer only has to provide reasonable accommodations to enable individuals with disabilities to perform the essential functions of their jobs. The court noted numerous accommodations listed in EEOC's regulations implementing Title I of the ADA that may not necessarily relate to performance of essential functions, including the accommodation of making facilities readily accessible to and usable by individuals with disabilities. The court also observed that the regulations provide that accommodations may need to be provided for applicants and to enable employees to enjoy equal "benefits and privileges of employment," as well as to perform essential functions. The interpretive guidance to EEOC's regulations specifically mentions reserved parking as a possible accommodation in some circumstances. Though defendant argued that the EEOC's regulations were not entitled to deference, the court found that argument irrelevant, since nothing in the statute itself could be read as limiting reasonable accommodations to those that enable performance of essential functions.

J. Sign Language Interpreters and Captioning

Noll v. International Business Machines Corp., 787 F.3d 89 (2d Cir. 2015). Plaintiff was a deaf employee of IBM. First, the plaintiff alleged that IBM failed to reasonably accommodate his deafness by providing prompt captioned videos and transcripts of audio on its website. The district court granted summary judgment to IBM and the Second Circuit affirmed, holding that IBM's grant of several accommodations, including provision of ASL interpreters available to

translate in real-time, transcripts upon requests, and certain videos with captioning, was "plainly reasonable." In reaching its decision, the court pointed to the fact that the plaintiff did not dispute the effectiveness of the translators for live meetings, and there was no reason to distinguish between live meetings and videos because both require the plaintiff to shift his eyes from the interpreter to the proceedings. Secondly, the plaintiff contended that IBM failed to engage in an interactive process to find an accommodation. The court rejected this contention, explaining that "the ADA imposes no liability for an employer's failure to explore alternative accommodations when the accommodations provided to the employee were plainly reasonable."

EEOC v. Picture People, Inc., 684 F.3d 981 (10th Cir. 2012). Affirming summary judgment for the employer, the court held that a photography studio did not fail to provide reasonable accommodation when it rejected requests for a sign language interpreter for staff meetings and training sessions. The court already had concluded that a deaf employee was unable to engage in verbal communication with customers, an essential function of her job. Providing an interpreter for staff meetings or training sessions would not have addressed the employee's inability to perform an essential function of her position. The court distinguished EEOC v. UPS Supply Chain Solutions (summarized below) and other cases holding that provision of an interpreter for staff meetings or training is a reasonable accommodation, because in those cases the employees could perform their essential functions without the need for an accommodation.

K. Miscellaneous

Gleed v. AT & T Mobility Services, LLC, No. 14–2088, 2015 WL 3505399 (6th Cir. June 4, 2015). Plaintiff has chronic cellulitis, "a leg condition that causes him great pain and increases his risk of skin infections when he stands for prolonged periods." When Plaintiff was hired as a retail salesperson for AT&T, he worked at a desk. The following year, AT&T moved Plaintiff's store to a new location, which included standing terminals in place of desks. Plaintiff asked for permission to use a chair on the sales floor, noting that a pregnant coworker had gotten permission to sit. AT&T refused. Seven months later, Plaintiff contracted a bad skin infection and asked for a schedule adjustment to receive treatments without missing work. AT&T responded that his "only option was to take unpaid leave and apply for back-pay later." Plaintiff resigned and sued for sex discrimination, failure to accommodate and constructive discharge. The Sixth Circuit affirmed the district court's grant of summary judgment on all claims except the claim that AT&T failed to accommodate his disability by refusing to allow him to sit during his shift. The court noted that AT&T did not contend that prolonged standing was an essential part of Plaintiff's job or that allowing him to sit would have imposed an undue hardship on them. Instead, AT&T relied on the Sixth Circuit's holdings in Gaines v. Runyon, 107 F.3d 1171 (6th Cir. 1997), and Landefeld v. Marion General Hospital, 994 F.2d 1178 (6th Cir. 1993), to argue that "if [Plaintiff] was physically capable of doing his job—no matter the pain or risk to his health—then it had no obligation to provide him with any accommodation, reasonable or not." The Sixth Circuit rejected this argument, distinguishing Gaines and Landefeld on the grounds that these cases arose under the Rehabilitation Act, and "the ADA sometimes "raises the employer's standard of care" beyond that required by the Rehabilitation Act." "Moreover," the court stated, "the ADA's implementing regulations require employers to provide reasonable accommodations not only to enable an employee to perform his job, but also to allow the

employee to 'enjoy equal benefits and privileges of employment as are enjoyed by ... similarly situated employees without disabilities.'"

Hill v. Clayton County School Dist., No. 13–14951, 2015 WL 4663755 (11th Cir. Aug. 7, 2015). The plaintiff was a bus driver for Clayton County. After they assigned her to drive the bus for special-needs students, which lacked air conditioning, she began suffering breathing problems in the 100-degree Fahrenheit heat of Atlanta. She subsequently discovered that she had a breathing impairment, which her doctors stated would not prevent her from performing the essential functions of her job with the accommodation of an air-conditioned vehicle. The County placed the plaintiff on two months of unpaid leave while it sought to accommodate her before finally terminating her. The court found that there were fact disputes as to whether the plaintiff could perform her job with the air conditioned bus and whether making the plaintiff wait two months was unreasonable. The court distinguished cases where the employee was on paid leave or worked from home for various lengths of time, as well as a case in which the employee was on unpaid leave for a mere fifteen days, which the court stated was a short enough period of time to be attributed to "simple administrative reality." Thus, the court concluded, summary judgment was improper on the plaintiff's failure-to-accommodate claim.

Hurtt v. International Services, Inc., No. 14–18242015, 2015 WL 5332531 (6th Cir. Sept. 14, 2015). Reversing summary judgment for the employer, the court held that the plaintiff alleged sufficient facts to support his use of a constructive discharge claim as a means to show an adverse employment action. "To demonstrate a constructive discharge, the plaintiff must show that (1) the employer deliberately created intolerable working conditions, as perceived by a reasonable person; (2) the employer did so with the intention of forcing the employee to quit; and (3) the employee actually quit." The third prong was undisputed. As to the first prong, the court found Plaintiff's working conditions were intolerable because "(1) [Plaintiff's] $70,000 draw was terminated; (2) he was placed on a commission-only pay scale, made retroactive to September 1, resulting in an approximately $22,000 deficit owed to [the defendant]; and (3) [Plaintiff's] prepaid expenses were terminated." As to the second prong, the court found that the defendant's complete failure to accommodate the plaintiff, despite his repeated requests, sufficed "as evidence to show the deliberateness necessary for constructive discharge" (citing Talley v. Family Dollar Stores of Ohio, Inc., 542 F.3d 1099, 1109-10(6th Cir. 2008)). Plaintiff had made it clear to the defendant that he would not be able to survive on the commission-only pay; therefore, assuming the plaintiff's draw was wrongly terminated, "a jury could reasonably infer that [the defendant] knew that [the plaintiff's] working conditions would become so intolerable as to force [the plaintiff] to quit." The court also found that Plaintiff engaged in a protected activity by requesting a reasonable accommodation, which was sufficient to form the basis for his retaliation claim. Though he did not explicitly request an accommodation, he verbally sought sleep accommodations during his travels, his doctor's notes "specifically corroborated [his] verbal requests that he be given sufficient time to sleep during his travels to accommodate his medical conditions," and his FMLA leave request notified the defendant that he sought accommodation in the form of time off work. These acts were sufficient, good-faith requests for accommodation.

L. Academic

V. Drug and Alcohol Use

Lopreato v. Select Specialty Hosp.-N. Ky., 2016 WL 374086 (6th Cir. Jan. 29, 2016). Defendant Select took over parts of St. Elizabeth Hospital, and terminated plaintiff nurses. Plaintiffs filed suit alleging disparate treatment because they are in recovery from drug addiction. Plaintiff nurses had previously been caught stealing narcotic drugs, entered the Kentucky Alternative Recovery Effort for Nurses program ("KARE"), and agreed to restrictions on their nursing licenses. At some point later, plaintiffs' license restrictions were removed. Plaintiffs' supervisor recommended them to Select, but Select applied its policy of not employing any nurses with current or previous restrictions on their licenses. The court held that summary judgment for defendant was appropriate because applying a neutral policy of not employing nurses with current or previous license restrictions is a legitimate, nondiscriminatory explanation for the adverse employment action, and this policy was not a pretext for unlawful discrimination. The policy applied to all nurses who had or did have license restrictions for any reason, and Select reasonably viewed past misconduct as suggesting a greater risk for future misconduct. Plaintiff's contention that Select's policy disproportionately impacts people in recovery from drug addiction was irrelevant because plaintiffs proceeded on a disparate treatment theory, not a disparate impact theory.

Jarvela v. Crete Carrier Corp., 776 F.3d 822 (11th Cir. 2015). Plaintiff sought reinstatement to his commercial motor vehicle driver position after being released from his alcohol treatment program without work restrictions. Because the plaintiff's job description required him to meet DOT medical requirements, he met with a DOT examiner who determined that he did meet the requirements, which included the requirement not to have a "current clinical diagnosis of alcoholism," and cleared him to work for six months. The employer nevertheless terminated him for having a "current clinical diagnosis of alcoholism," based on the fact that his treatment discharge papers, issued seven days prior, listed his diagnosis as "alcohol dependence" and described its probable duration as "chronic." The fact that he was cleared to work by the DOT examiner did not show that he met all DOT medical standards because the examiner never explicitly stated that the plaintiff did not have a "current clinical diagnosis of alcoholism," and, in any case, the seven-day-old diagnosis of chronic alcohol dependence demonstrated that plaintiff had a "current clinical diagnosis of alcoholism" under the plain meaning of those terms.

Jones v. City of Boston, 752 F.3d 38 (1st Cir. 2014). In this class action, a police officer, a cadet, and an applicant were terminated or denied employment after testing positive for cocaine. In addition to other allegations, plaintiffs alleged that the adverse actions were based on a perceived disability of drug addiction. Upholding summary judgment for the defendant on the ADA claim, the court held that the plaintiffs had failed to offer evidence that the adverse actions were "actually motivated by" the belief that they were addicted to drugs, rather than the belief that they were currently using illegal drugs. Actions taken on the basis of the latter belief are expressly permited under the ADA.

VI. Defenses

A. Direct Threat

Michael v. City of Troy Police Dep't., 808 F.3d 304 (6th Cir. 2015). Plaintiff, a patrol officer, had a history of aberrant behavior, including trying to have his ex-wife charged with perjury, suing the police chief to return possession of a collection of empty steroid vials, serving the police chief withprocess at his retirement party, and being seen in the company of drug dealers. Plaintiff took a medical leave for surgery to remove a non-cancerous tumor. Because of his behavioral history, the police department would not let Michael return to work unless he passed a psychological evaluation. Defendant referred Michael to a neuropsychologist, who concluded that he "may be a threat to himself or others." Michael sought a second opinion, and that doctor concluded Michael was fit for duty. Defendant City referred Michael to another neuropsychologist, who also concluded that he may be a threat. Two doctors hired by Michael's disability insurance company concluded from his file that Michael could return to work. The Sixth Circuit affirmed summary judgment for the defendant City. The City's doctor's opinions were sufficient because "the law requires only that the employer rely on an 'objectively reasonable' opinion, rather than an opinion that is correct." Evidence of direct threat need not come from a medical opinion, and testimonial evidence of Michael's conduct also supported the City's determination. A dissenting judge argued that Michael's doctor criticized the City's doctor's opinions as unreasonable and not simply incorrect. Therefore, whether the City relied on objectively reasonable medical opinions was a disputed fact that should have been found by the jury.

EEOC v. Beverage Distributors Co., L.L.C., 780 F.3d 1018 (10th Cir. 2015). The plaintiff, who has significant visual impairments, was conditionally offered a night warehouse position after his previous position within the company was eliminated. The offer was rescinded when the examining doctor said that accommodations would be necessary to mitigate safety risks, and the empoloyer determined that no accommodation was possible. The district court instructed the jury that, to establish the direct threat defense, the plaintiff must prove by a preponderance of the evidence that (a) the plaintiff's employment in the warehouse would pose a significant risk of substantial harm to the health or safety of self or others, and (b) such risk could not have been eliminated or reduced by reasonable accommodation. Citing Jarvis v. Potter, 500 F.3d 1113, 1122 (10th Cir. 2007), the court held that the instruction constituted reversible error because it required the defendant to prove that the plaintiff's employment would pose a direct threat, rather than proving that it reasonably believed that the plaintiff's employment would pose a direct threat. The fact that the lower court instructed the jury to "consider the reasonableness" of the defendant's belief did not cure the error, according to the court, because the jury was never told why it was supposed to consider the reasonableness of the belief.

Coleman v. Pa. State Police, 561 Fed. Appx. 138 (3d Cir. Mar. 20, 2014). Plaintiff was discharged from his position as a state trooper while still a probationary employee after he experienced two seizures related to a head injury sustained in an automobile accident. The employer had a protocol prohibiting a trooper from performing full duty following a seizure until the trooper remained seizure-free for five years. The court held that the possibility that a trooper

would experience a seizure while performing his duties constituted a direct threat, as it could endanger the trooper's own safety and the safety of colleagues and the public. The seizure protocol, which required a five-year seizure-free period because that was the point at which the risk of future seizures would be consistent with that of the general public, was a justifiable response to a direct threat.

Curley v. City of N. Las Vegas, 772 F.3d 629 (9th Cir. 2014). The plaintiff, a sewer cleaner who has a hearing impairment, was investigated after he had numerous verbal altercations with coworkers. Because the investigation revealed that he repeatedly threatened coworkers, for example by threatening to put a bomb in a coworker's car, throw a blanket over a coworker's head and beat him, kick in a coworker's teeth, and shoot his supervisor's children in the kneecaps, he was required to undergo a fitness-for-duty examination. Even though he was determined to be fit for duty and not dangerous, he was terminated on the basis of the threats. Affirming summary judgment for the employer, the court held that the fitness-for-duty determination did not create a genuine issue of material fact as to whether the employer's proffered reason for termination was pretext for discrimination, because the determination was that he was unlikely to commit future violence, not that his past misconduct should be excused. Further, even if the fitness-for-duty determination did somehow cast doubt on whether the termination had been based on the history of threats, the employer had offered additional reasons for the termination that were not called into question, including nonperformance of duty, conducting personal business at work, and disparaging remarks made about a supervisor and the employer.

B. Undue Hardship

Reyazuddin v. Montgomery County, Maryland, 789 F.3d 407 (4th Cir. 2015).Defendant reassigned plaintiff, who is blind, to alternative work because new technology the defendant chose to provide at its call center was inaccessible. The Fourth Circuit reversed summary judgment in favor of the defendant, finding there was evidence that the alternative work was not a reasonable accommodation and that accommodating the plaintiff in her current job would not have been an undue hardship. On the issue of undue hardship … The Fourth Circuit then attacked the reasons the district court had given for concluding that making accommodations to enable the employee to use the new software would have constituted an "undue burden." First, the district court had criticized the estimated cost of $129,000 proffered by plaintiff's expert as "unsupported" because "it [did] not take into account increased costs for maintenance and upkeep." Second, the district court claimed that, as a result of plaintiff's proposed accommodation, the new software "would be altered and would result in increased maintenance and more downtime, which could spill over into the customer service realm." Based on these judgments of the district court, the Fourth Circuit concluded that "the district court's analysis improperly weighed conflicting evidence, did not view the evidence in the light most favorable to [the plaintiff], and overemphasized one factor while overlooking the others." Lastly, the Fourth Circuit criticized the district court for relying on the County's small budget for reasonable accommodations in concluding that the proposed accommodations would create an undue burden. Though the County's overall budget may be relevant, relying upon the employer's line-

item budget for reasonable accommodations could, taken to its extreme, allow an employer to "budget $0 for reasonable accommodations and thereby always avoid liability."

C. No Knowledge of Disability

Surtain v. Hamlin Terrace Foundation, 789 F.3d 1239 (11th Cir. 2015). Along with race discrimination and FMLA claims, the plaintiff alleged that her employer discriminated against her on the basis of her disability when he terminated her. The Eleventh Circuit found that the plaintiff's complaint was insufficient because the employer did not have proper knowledge that plaintiff suffered from a disability that substantially limited a major life activity, where the employer knew only that the plaintiff had visited a doctor and that the doctor had concluded that the plaintiff could not return to work until further notice.

D. Employee Misconduct

Yarberry v. Gregg Appliances, Inc., No. 14–3960, 2015 WL 5155553 (6th Cir. Sept. 3, 2015). In this case, the plaintiff had not yet been diagnosed with bipolar disorder when he experienced a manic episode that resulted in conduct that violated company policies regarding safety and security. The plaintiff entered the defendant's store after hours, opened a safe, roamed around the store and used store equipment, and left the store without setting the alarm. Soon after the defendant was hospitalized, the employer fired him for his conduct. Although the plaintiff's conduct resulted from his disability, bipolar disorder, the court held that his conduct was a "legitimate, nondiscriminatory reason for [his] termination." Though the court found that this was a "close case" and that the employer's "decision to terminate a previously successful employee so quickly after such an isolated event [was] concerning," it concluded that the plaintiff's conduct was sufficiently egregious to fall under EEOC 2008 Guidance and Sixth Circuit case law that suggests that "where there has been employee misconduct – including nonviolent disruptive misconduct – the employer may terminate the employee for that behavior even if it is related to his disability."

Jennings v. Cnty. of Monroe, 2015 WL 7253009 (6th Cir. Nov. 16, 2015). Plaintiff, an Assistant Director of Monroe County's 911 Central Dispatch, was fired for off-duty conduct. Jennings admitted to drinking tequila and taking unprescribed Xanax, but could not remember if he drove while intoxicated or made statements threatening suicide because he had blacked out for a night. Jennings complained that he was discriminated against because of his PTSD. The Sixth Circuit upheld summary judgment for defendant employer because, without more, "simply knowing of his history of PTSD and knowing of his [aberrant] actions" is not enough to show that the employer's proffered reason for termination was a pretext for discrimination. Even if Jennings' misconduct was caused by his disability, he was appropriately fired because the misconduct disqualified him from the job, which required him to be on call for emergency situations.

VII. Exams and Inquiries

Coursey v. Univ. of Md. Eastern Shore, 577 Fed. Appx. 167 (4th Cir. July 1, 2014). Defendant was justified in requiring a professor to undergo a mental health evaluation following numerous student complaints in 2009 that he was "erratic and verbally abusive," "unstable," "had lost it," and "went berserk" on students in class. These complaints followed student complaints in 2004 that plaintiff had made inappropriate sexual comments in class, belittled students, graded arbitrarily, and favored certain students over others, and complaints from other faculty members in 2007 about plaintiff's "erratic and unprofessional behavior" that included disparaging colleagues in the presence of students. "Given the plethora of complaints about Coursey's violent outbursts, erratic and inappropriate behavior, as well as his disregard for UMES policies, UMES has shown that it had valid concerns about Coursey's ability to perform his duties."

Bates v. Dura Automotive Systems, Inc., 767 F.3d 566 (6th Cir. 2014). A manufacturer of windows for cars, trucks, and buses required employees to undergo urine testing for 12 different types of drugs, some of which were contained in prescription medications. Employees who were found to be taking medications that contained a machine operation warning and who refused to stop taking the medications were terminated. The district court found that the testing program was a medical examination and a disability-related inquiry within the meaning of the ADA and submitted to the jury only the question of whether the testing was job-related and consistent with business necessity. The Court of Appeals disagreed, finding that the question of whether the testing constituted a medical examination or disability-related inquiry should have been submitted to the jury. The court found that several factors EEOC has identified as relevant in determining whether a test or procedure is a medical examination weighed in favor of the conclusion that defendant's testing program was a medical examination – such as the equipment used, the setting in which the test was administered, and the persons who interpreted the test results. The court was not convinced, however, that the test was "invasive," even though EEOC guidance said that tests that require the drawing of blood, breath, or urine are examples of tests that are invasive. Most importantly, the court said there were disputed facts about whether the test, which defendant claimed only indicated that employees were using medications with a machine operation warning, revealed the actual medical conditions of employees. A dissenting judge took issue with the majority's interpretation of EEOC's definition of a medical examination, noting that the fact that defendant considered anyone using medications with a machine operation warning to be "impaired" was enough to make the test a medical examination, in combination with the other factors that the majority acknowledged to weigh in favor of that conclusion; it was not necessary for the test to reveal employees' specific impairments.

Kroll v. White Lake Ambulance Auth., 763 F.3d 619 (6th Cir. 2014). Reversing summary judgment in favor of the employer, the Court of Appeals held that a reasonable jury could have found that defendant's requirement that plaintiff undergo psychological counseling (which constituted a medical examination within the meaning of the ADA) after she became involved in a tumultuous relationship with a married co-worker was not job-related and consistent with business necessity. The defendant's director (Binns), who had ordered the counseling, was aware of only two occasions on which plaintiff's job performance may have been compromised: once when she reportedly was using a cell phone while driving an ambulance, and when she

reportedly refused to assistant another EMT by providing oxygen to a patient. "Kroll's isolated moments of unprofessional conduct might reasonably have prompted Binns to begin internal disciplinary procedures or to provide Kroll with additional training, but they could not support the conclusion that Kroll was experiencing an emotional or psychological problem that interfered with her ability to perform her job functions." Binns' deposition testimony also indicates that he was prompted to require the counseling because of personal concerns about Kroll's sexual behavior rather than by concerns with her job performance. Finally, a reasonable jury could find that Kroll's emotional outbursts while off duty and outside the presence of patients did not impair her ability to perform her essential functions. See also Kroll v. White Lake Ambulance Auth., 691 F.3d 809 (6th Cir. 2012) (finding that a reasonable jury could conclude that "psychological counseling" constituted a medical examination within the meaning of the ADA).

Wetherbee v. The Southern Co., 754 F.3d 901 (11th Cir. 2014). Plaintiff was conditionally offered a job as a systems engineer with one of defendant's nuclear power plants. The employer learned post-offer that plaintiff had bipolar disorder, had experienced no episodes in the last six or seven years, had only experienced episodes when doctors attempted to take him off his medication, had recently attempted to alter his medication regimen, and, contrary to the recommendation of his health care professional, was not under the care of a psychiatrist. Defendant determined plaintiff could only be employed if he met several specific conditions, including compliance with his medication regimen and a restriction from working on any "safety sensitive systems and equipment" for a year while compliance with his medication regimen could be assessed. Because the systems engineer position required working with safety-sensitive systems and equipment, defendant withdrew the offer. Upholding the district Court's grant of summary judgment in defendant's favor, the court held, as a matter of first impression in the circuit, that an individual claiming a violation of 42 U.S.C. § 12112(d)(3)(C), which prohibits use of medical information obtained after a conditional offer of employment has been made in violation of the ADA, must establish that he or she has a disability. The court distinguished § 12112(3)(C) from those sections of the ADA that limit the gathering of medical information and its disclosure, which apply to applicants and employees with and without disabilities. Whether the results of an examination are "used" in a way that violates the ADA turns on whether there is discrimination on the basis of disability within the meaning of § 12112(a), which cannot occur unless an applicant has a disability. In this case, plaintiff conceded that he could not establish that he has a disability within the meaning of the ADA, making summary judgment for the employer appropriate.

Russell v. City of Mobile Police Dept., 552 Fed. Appx. 905 (11th Cir. Jan. 14, 2014). A police dispatcher alleged that she became faint and had to seek medical attention as the result of impermissible disability-related inquiries made of her by a supervisor. The court first held that, like applicants alleging violations of the ADA rules concerning unlawful pre-offer disability-related inquiries, plaintiffs alleging violations of the rules prohibiting disability-related inquiries and medical examinations of employees except where they are job-related and consistent with business necessity must show damages resulting from the allegedly unlawful conduct. The court found that plaintiff could not show that her faintness and her subsequent need for medical attention were related to any allegedly unlawful inquiry.

EEOC v. Grane Healthcare Co., 2 F.Supp.3d 667 (W.D. Pa. Mar. 6, 2014). During the process of recruiting and hiring more than 300 employees for a nursing and rehabilitation center, the defendant required applicants to complete a form that asked about their medications and to submit to a medical examination. In response to the defendant's argument that EEOC lacked standing to bring a claim because the applicants were not "injured" by the alleged unlawful disability-related inquiries and medical examinations, the court held that unlike a private party, the United States sustains injuries to its sovereignty from the mere violation of its laws. Because it was undisputed that the defendant violated the ADA 300 times, it was "obvious" that the EEOC had standing to bring an action to vindicate the statutory rights of the aggrieved individuals. With respect to the defendant's argument that its violation of the ADA was "merely technical," the court noted that this case did not involve misplaced medical files or fleeting questions technically constituting medical inquiries. Rather, the record indicated that applicants "were subjected to a formalized process consisting of unlawful pre-offer medical examinations and illicit solicitations of detailed medical information." These unlawful inquiries deprived applicants of the "prophylactic protection from discrimination that §12112(d) was designed to create." Accordingly, the court granted EEOC's motion to enjoin defendant from violating §12112(d)'s prohibitions against pre-offer medical examinations and inquiries.

VIII. Confidentiality of Medical Information

EEOC v. Thrivent Fin. for Lutherans, 700 F.3d 1044 (7th Cir. 2012). In response to an email from his supervisor about why he was absent from work, a temporary programmer replied that he had been in bed all day with a severe migraine and explained that he had a history of migraines stemming from head trauma. When he had difficulty finding a new job, he discovered that the defendant was revealing his migraine condition to prospective employers. EEOC filed suit alleging that this disclosure violated the ADA's confidentiality requirement. Affirming summary judgment to the employer, the court held that because the defendant did not learn of the programmer's medical condition through a medical examination or inquiry, it was not obligated to treat the information as a confidential medical record.