PUBLIC EDUCATION AND THE AMERICANS WITH DISABILITIES ACT

Schools Legal Service
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This workbook attempts to organize, in a comprehensive manner, the body of law encompassing the ADA that has developed so rapidly in the last few years. It is our hope that this workbook will be of benefit as a reference for all educators.

Ronald D. Wenkart

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EXECUTIVE SUMMARY OF THE ADA WORKBOOK

I. INTRODUCTION

The Americans with Disabilities Act (ADA) is a comprehensive set of laws passed by Congress and signed into law on July 16, 1990, to prohibit discrimination against the disabled in a wide range of activities conducted by both public and private entities, including employment, public services, public accommodations and services. The ADA is patterned after Section 504 of the Rehabilitation Act.

II. THE STATUTORY PROVISIONS OF THE ADA

Under the ADA, an employer or public agency is prohibited from discriminating against a qualified individual with a disability due to the disability of such individual in regard to job application procedures, hiring, advancement, discharge, compensation, job training, other terms and conditions and privileges of employment or in the provision of services. A qualified individual with a disability is an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or is applying for. Reasonable accommodation includes making existing facilities used by employees readily accessible to and useable by individuals with disabilities, job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters and other similar accommodations for individuals with disabilities.

An employer is not required to provide reasonable accommodation to a qualified individual with a disability if it would be an undue hardship.

The ADA prohibits discrimination by use of medical examinations and inquiries. The ADA prohibits an employer from conducting a medical examination or making inquiries of a job applicant as to whether the applicant is an individual with a disability. The ADA does allow employers to make preemployment inquiries into the ability of an applicant to perform job-related functions.

The ADA allows employers to require a medical examination only after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant if all entering employees are subjected to such an examination regardless of disability. The information obtained from the medical examination of the applicant must be maintained in a separate medical file that is kept confidential.

Title V of the ADA authorizes awards of attorney fees to a prevailing party, prohibits retaliation against anyone exercising their rights under the ADA and authorizes states to establish higher standards for protecting the disabled. Title V excludes from the definition of disabled transvestites, homosexuals, bisexuals, transsexuals, specified sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs. However, persons who have successfully completed a supervised drug rehabilitation program and are no longer engaging in illegal use of drugs or who

have otherwise been rehabilitated successfully may be considered disabled. Also, persons participating in supervised rehabilitation programs and are no longer engaging in the use of drugs or persons erroneously perceived as having engaged in drug use, but who have not in fact engaged in such use, fall within the definition of disabled.

In Southeastern Community College v. Davis, the United States Supreme Court defined otherwise qualified handicapped individuals under Section 504. This definition is utilized under the ADA as well. The court in Davis indicated that Section 504 by its terms does not compel educational institutions to disregard the disabilities of disabled individuals or to make substantial modifications in their programs to allow disabled persons to participate. Rather, it requires only that an otherwise qualified disabled individual not be excluded from participating on the assumption of the inability to participate. An otherwise qualified individual with a disability is one who is able to meet all of the program's requirements despite their disability. This definition has been applied under the ADA as well.

III. FEDERAL REGULATIONS

Both the Department of Justice and the Equal Employment Opportunity Commission have enacted regulations under the ADA. These regulations clarify the definitions set forth in the ADA. For example, an individual with a disability must have a physical or mental impairment that substantially limits one or more of the major life activities of such individuals to be considered disabled under the ADA. Major life activities include such things as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

The Department of Justice regulations noted that "substantially limits" means that an individual's important major life activities are restricted as to the condition, manner or duration under which they can be performed in comparison to most people. Minor trivial impairments do not impair a major life activity and, therefore, are not a disability.

The EEOC's regulations contain a similar definition. The EEOC states that an impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population's ability to perform that same major life activity. Thus, a major league pitcher who can no longer pitch, but who can continue to work, is not considered to have a substantially limiting condition. An individual who is unable to read because he or she was never taught to read would not be an individual with a disability because lack of education is not an impairment. However, an individual who was unable to read because of dyslexia would be an individual with a disability because dyslexia, a learning disability, is an impairment.

The EEOC regulations note that the determination of which job functions are essential may be critical to the determination of whether or not an individual with a disability is qualified. The essential functions are those functions that the individual who holds the position must be able to perform unaided or with the assistance of a reasonable accommodation. The EEOC defines a reasonable accommodation as any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities. As a reasonable accommodation, an employer is not required to reallocate

essential job functions, but may be required to reallocate or redistribute nonessential or marginal job functions.

The EEOC regulations indicate that employers would not be required to provide a reasonable accommodation that would impose an undue hardship on the operation of the employer's business. The term "undue hardship" means significant difficulty or expense in or resulting from the provision of the accommodation. The concept of undue hardship can mean more than financial difficulty and may also refer to extensive, substantial or disruptive alterations which would fundamentally alter the nature or operation of the business.

As a qualification standard for employment, the EEOC notes that an employer may require an individual not to pose a direct threat to the health or safety of himself, herself or others. Such a standard must apply to all applicants or employees and not just to individuals with disabilities. If an individual poses a direct threat as a result of a disability, the employer must determine whether reasonable accommodation would either eliminate the risk or reduce it to an acceptable level. If no accommodation exists that would either eliminate or reduce the risk, the employer may refuse to hire an applicant or may discharge an employee who poses a direct threat.

Employers are prohibited from restricting the employment opportunities of qualified individuals with disabilities on the basis of stereotypes and myths about the individual's disability. The capabilities of qualified individuals with disabilities must be determined on an individualized case-by-case basis. Employers may not segregate qualified individuals with disabilities into separate work areas or into separate lines of advancement.

Under the ADA, employers are required to make reasonable accommodation only to the physical or mental limitations resulting from the disability of a qualified individual with a disability that is known to the employer. In most cases, it is the responsibility of the individual with the disability to inform the employer that an accommodation is needed. An employer may require an individual with a disability to provide documentation of the need for accommodation.

The employer must make a reasonable effort to determine the appropriate accommodation for the employee. The appropriate reasonable accommodation is determined through a flexible interactive process that involves both the employer and the qualified individual with a disability. When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer should:

1. Analyze the particular job involved and determine its purpose and essential functions.

2. Consult with the individual with the disability to ascertain the precise job related limitations imposed by the individual's disabilities and how those limitations could be overcome with a reasonable accommodation.

3. In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would

have in enabling the individual to perform the essential functions of the position.

4. Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employer and the employee. The ADA prohibits employers from making inquiries as to whether an individual has a disability at the preoffer stage of the selection process. Employers may ask questions that relate to the applicant's ability to perform job related functions.

IV. JUDICIAL DECISIONS

The courts have interpreted the ADA to provide general protection to persons with disabilities. Congress enacted the ADA to level the playing field for disabled people and to prohibit employers from basing employment decisions on unfounded stereotypes of the disabled.

A number of court decisions have interpreted the ADA in conjunction with other laws. These court decisions have generally indicated that the definition of disability under the ADA may differ from the definition under social security law and workers compensation laws. For example, an employee may apply for social security or workers compensation benefits and certify that he or she is totally disabled and unable to work with or without reasonable accommodation. If the application is granted, the employee may no longer be disabled under the ADA because he or she has certified that they are no longer able to perform the essential functions of the job with or without reasonable accommodation. The courts are split as to whether such a certification acts as a legal bar to claims under the ADA or should be considered as evidence as to whether the employee is a qualified individual with a disability under the ADA.

The courts have generally followed the EEOC's lead in defining what constitutes a disability. In Abbott v. Bragdon,[1] the United States Supreme Court expanded somewhat the definition by including the ability to reproduce as a major life activity whose impairment would qualify an individual as disabled. The inability to perform a particular job, as opposed to a class of jobs, is generally insufficient to establish a disability. In addition, the mental or physical impairment which affects a major life activity must be substantially limiting or it will not qualify an individual as disabled. Temporary impairments of short duration with little or no long term impact do not qualify as disabilities under the ADA.

The ADA also prohibits discrimination against individuals who are regarded as having an impairment or disability. An individual may be protected under this prong of the ADA even though they do not have a disability if the employer regarded or perceived the employee as having a substantially limiting impairment.

To establish a prima facie (i.e., basis) case of discrimination in violation of the ADA, the employee must prove:

[1] 118 S.Ct. 2196 (1998).

1. He or she is disabled within the meaning of the ADA.

2. He or she is otherwise qualified to perform the essential functions of the job with or without reasonable accommodation.

3. He or she has suffered an adverse action under circumstances which infer unlawful discrimination based upon disability.

Most of the circuits have adopted this standard. Once the employee sets forth the elements of a prima facie case, the burden then shifts to the employer to set forth a legitimate, nondiscriminatory reason for the employment action it took against the employee. If the employer sets forth its nondiscriminatory reasons, the employee must then show by a preponderance of the evidence that the employee's proffered reasons were a pretext for illegal discrimination.

The ADA does not insulate an employee from routine discipline in the workplace. To prove discrimination under the ADA, the employee must show that an adverse employment decision was made because of the employee's disability. An employer may terminate an employee who is excessively absent (even if due to illness), abandons the job, is abusive to other employees, is a threat to themselves or others or for other work related reasons without violating the ADA.

The courts have interpreted the requirement that a qualified individual with a disability is an individual who is able to perform the essential functions of the job to encompass a number of different aspects of workplace behavior and skills. An employee who threatens other employees cannot perform one of the essential functions of the job (i.e., to satisfactorily interact with other employees). An employee who is not able to regularly report to work due to illness is not able to perform one of the essential functions of the job (i.e., to regularly physically report to work). An employee who cannot obtain an appropriate drivers license, for example, may not be able to perform the functions of a driver position. A teacher who, due to psychiatric difficulties, is unable to care for her own children, who is hospitalized in a psychiatric hospital and who refuses to provide the employing school district with medical documentation of her ability to return to work, has not shown that she is able to perform the essential functions of her teaching position and could be terminated without violating the ADA.

While the concept of reasonable accommodation has been defined by statute and regulation in the employment context, the courts have applied the principle of reasonable accommodation to education programs. In the educational context, the courts have examined whether graduation requirements, testing requirements, instructional methods, and school assignments must be modified to reasonably accommodate disabled individuals. Generally, the courts have held that educational institutions are not required to fundamentally alter the nature of their programs to accommodate the disabled. The courts have held that the educational institutions have the right to establish the basic structure and requirements of their program (e.g. academic standards, testing standards, location of special programs, graduation requirements). In the employment context, the concept of reasonable accommodation is probably one of the most contentious. The federal regulations require the reasonable accommodation to be effective, to ensure equal opportunity for disabled employees, to allow disabled employees to perform the

essential functions of the job and to enjoy the equal benefits of employment. The courts have incorporated into the concept of reasonableness the element of likelihood of success. Many courts have balanced the costs of providing the accommodation against the benefits of the accommodation.

Unpaid leave is one form of reasonable accommodation set forth in the regulations. The courts have generally held that employers are not required to grant indefinite leaves of absence or grant leaves of absence to employees whose attendance is erratic, unreliable or unpredictable.

Modification of nonessential job functions or altering when or how a function is performed is a form of reasonable accommodation. An employer is not required to reallocate or modify essential job functions or create a new permanent position which eliminates essential job functions (e.g., a light duty position).

Reassignment to a vacant position is a form of reasonable accommodation. However, the employee must be qualified for the vacant position and the employer is not required to modify its legitimate, nondiscriminatory policies defining qualifications and transfer procedures to accommodate a disabled employee. An employer is not required to disregard seniority rules or collective bargaining agreements.

In some cases, the courts have held that allowing an employee to work at home can be a reasonable accommodation. The courts will look at the actual job duties to determine whether the particular job can be performed at home. However, where the job duties involve personal contact, coordination and interaction with other employees, allowing an employee to work at home is not a reasonable accommodation.

The courts have held that employers are not required to create permanent part-time positions, restructure job positions or make supervisory changes when the employer does not normally do so. Where an employee has an infectious disease and there is a danger of transmission in the course and scope of the employee's performance of his or her job duties and no reasonable accommodation is possible, the employer may terminate the employee.

An employer is not required to provide reasonable accommodation if it is an undue hardship. Several courts have ruled that accommodations which adversely affect other employees (e.g., increasing their workload, violation of seniority rights), or require an employer to violate a collective bargaining agreement, are an undue hardship on the employer.

Several courts have held that the ADA does not require employees to offer medical plans or disability plans which treat mental illnesses and physical illnesses the same. The courts have held that so long as the plans do not impose differential treatment on disabled employees similarly situated, they do not violate the ADA.

THE AMERICANS WITH DISABILITIES ACT

INTRODUCTION

The Americans with Disabilities Act ("ADA"),[2] was signed into law on July 16, 1990. It is a comprehensive statutory scheme designed to prohibit discrimination against the disabled in a wide range of activities conducted by both public and private entities, including employment, public services, public accommodations and services.

The ADA is patterned after the provisions of Section 504 of the Rehabilitation Act of 1973 which prohibits discrimination against the disabled by agencies receiving federal financial assistance.

The introduction to the ADA contains Congressional findings that 43 million Americans have one or more physical or mental disabilities and that the number is increasing as the population as a whole is growing older. Congress made further findings that discrimination against individuals with disabilities persists in employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting and access to public services.[3] Congress outlined the purpose of the ADA as follows:

1. To provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

2. To provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

3. To ensure that the federal government plays a central role in enforcing the standards established in the ADA on behalf of individuals with disabilities; and

4. To invoke the sweep of Congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day to day by people with disabilities.[4]

THE STATUTORY PROVISIONS OF THE ADA

The ADA defines "disability" as a physical or mental impairment that substantially limits one or more of the major life activities of such individual, an individual with a record of such an impairment or an individual being regarded as having such an impairment.[5] This definition is virtually identical to the definition in Section 504 of the Rehabilitation Act.[6] The term "auxiliary

[2] 42 U.S.C. section 12010 et seq.
[3] 42 U.S.C. section 12101.
[4] 42 U.S.C. section 12101.
[5] 42 U.S.C. section 12102.
[6] 29 U.S.C. section 794.

aids and services" is defined as including qualified interpreters, qualified readers, taped texts, acquisition or modification of equipment or devices, and other similar services and actions.[7]

On September 25, 2008, President Bush signed legislation amending the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.[8] The legislation took effect January 1, 2009.

The legislation also amends Section 504 of the Rehabilitation Act by indicating that Section 504 applies to any person who has a disability as defined under the Americans with Disabilities Act. It is likely that more individuals will qualify as disabled under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act under this new language.

The purpose of the legislation is to broaden the scope of Section 504 and the Americans with Disabilities Act. Congress made specific findings that it disagreed with rulings of the United States Supreme Court narrowly defining the provisions of the Americans with Disabilities Act.[9] Congress redefined the purposes of the Americans with Disabilities Act and stated that the definition of disability in the ADA shall be construed in favor of broad coverage of individuals under the ADA, to the maximum extent permitted by the terms of the Act.

Congress stated that an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability. Congress also stated that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. In addition, Congress stated that the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as medication, medical supplies, equipment, or other devices.[10]

Previously, no examples of major life activities were found in the Americans with Disabilities Act or Section 504. However, the new amendments include examples of major life activities including, "caring for oneself, performing manual tasks, walking, singing, hearing, speaking, breathing, learning, and working."[11] Also included are eating, sleeping, standing, lifting, bending, reading, concentrating, thinking and communicating. The term also includes the operation of major bodily function, including functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.[12]

The legislation also sets forth a broad view of the definition of regarded as a disability. An individual is regarded as having such an impairment if the individual establishes that he or she has been subjected to an action prohibited by the ADA or Section 504 because of an actual or perceived impairment whether or not the impairment limits or is perceived to limit a major life

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[7] 42 U.S.C. section 12102.
[8] S.3406.
[9] See, Section 2 of S.3406, citing Congress' differences with U.S. Supreme Court decisions in Sutton v. United Airlines, Inc., 527 U.S. 471 (1999); Toyota Motor Mfg. v. Williams, 534 U.S. 184 (2002).
[10] The definition excludes ordinary eyeglasses or contact lenses.
[11] See Section 4 of S. 3406 amending 42 U.S.C. section 12102.
[12] Ibid.

activity.[13] The regarded as having an impairment definition does not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of six months or less.[14]

The effect of these amendments is to broaden the scope of Section 504 and the definition of disability under Section 504. For example, if a student is learning satisfactorily but has trouble concentrating, the student may be disabled under Section 504. If a student's Attention Deficit Hyperactivity Disorder (ADHD) is completely controlled by medication, the student may still be considered disabled under Section 504.

As required by the legislation, the Equal Employment Opportunities Commission (EEOC) issued new regulations defining the term "substantially limits" in a manner that is consistent with the broad definitions contained in the legislation. The EEOC also issued new regulations defining "regarded as" and other key terms in the legislation. These definitions may also apply to Section 504 of the Rehabilitation Act.

A. Employment

Title I outlines the provisions of the ADA with regard to employment.[15]

The term "qualified individual with a disability" is defined as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.[16] The ADA goes on to state:

> "For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."[17]

The ADA defines the term "reasonable accommodation" to include making existing facilities used by employees readily accessible to and usable by individuals with disabilities, job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[18]

Under the ADA, an employer is not required to provide reasonable accommodation to a qualified individual with a disability if it would be an undue hardship.[19] In addition, the ADA prohibits an employer from discriminating against a qualified individual with a disability because

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[13] Ibid.
[14] Ibid; see, also, School Board of Nassau County v. Arline, 408 U.S. 273 (1987).
[15] 42 U.S.C. section 12111 et seq.
[16] 42 U.S.C. section 12111(8).
[17] 42 U.S.C. section 12111(8).
[18] 42 U.S.C. section 12111(9).
[19] 42 U.S.C. section 12111(10).

of the disability of such individual in regard to job application procedures, hiring, advancement, discharge, compensation, job training, or other terms and conditions and privileges of employment.[20]

One key area where the ADA has specified employment procedures is in the area of medical examinations and inquiries. The ADA prohibits discrimination by use of medical examinations and inquiries. Specifically, the ADA prohibits an employer from conducting a medical examination or making inquiries of a job applicant as to whether the applicant is an individual with a disability. The ADA, however, does allow preemployment inquiries into the ability of an applicant to perform job-related functions.[21]

The ADA allows employers to require a medical examination only after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant if all entering employees are subjected to such an examination regardless of disability. The information obtained from the medical examination of the applicant must be maintained in a separate medical file that is kept confidential. The medical file may only be made available to supervisors and managers for the purpose of determining necessary restrictions on the work or duties of the employee, for determining any reasonable accommodations, for purposes of first aid or emergency treatment and for investigating compliance with the ADA by appropriate government officials.[22]

The ADA also prohibits an employer from requiring a medical examination or inquiring of the employee as to the nature or severity of a disability unless the examination or inquiry is shown to be job related and consistent with business necessity. Voluntary medical examinations are permissible as part of an employee health program and an employer may make inquiries into the ability of an employee to perform job related functions.[23]

B. Public Services

The ADA defines "public entity" to include any state or local government or department, agency, special purpose district, or other instrumentality or a state or local government.[24] This definition would include school districts.

Under Title II relating to public services, a "qualified individual with a disability" is an individual with a disability who, with or without reasonable modifications to rules, policies or practices, the removal of architectural, communication or transportation barriers or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by the public entity.[25]

Under the provisions of Title II, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services,

[20] 42 U.S.C. section 12112(a).
[21] 42 U.S.C. section 12112(d).
[22] 42 U.S.C. section 12112(d).
[23] 42 U.S.C. section 12112(d).
[24] 42 U.S.C. section 12131(1).
[25] 42 U.S.C. section 12131(2).

programs, or activities of a public entity or be subjected to discrimination by any such entity. As indicated above, this prohibition would apply to students, parents and independent contractors as well as employees.[26]

C. Miscellaneous Provisions

The remedies for a violation of Title II include the remedies, procedures and rights set forth in Section 504 of the Rehabilitation Act of 1973. These remedies include reinstatement with back pay, civil action by the Attorney General or Equal Employment Opportunity Commission, injunctive relief and attorney fees.[27]

Title V of the ADA contains a number of miscellaneous provisions.[28] Title V authorizes awards of attorney fees to a prevailing party, prohibits retaliation against anyone exercising their rights under the ADA, authorizes states to establish higher standards for protecting the disabled, and abrogates state immunity from damages under the ADA.[29]

From the definition of "disabled," Title V excludes transvestites and persons who engage in homosexuality and bisexuality. Transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs are also excluded.[30]

D. Qualified Individual with Disabilities

Also excluded from the term "individual with a disability" are individuals who are currently engaging in the illegal use of drugs when the employer acts on the basis of such use.[31] However, included within the definition of "individual with disability" are the following:

1. Persons who have successfully completed a supervised drug rehabilitation program and are no longer engaging in illegal use of drugs or who have otherwise been rehabilitated successfully and are no longer using drugs;

2. Persons participating in a supervised rehabilitation program and no longer engaging in the use of drugs; or

3. Persons erroneously regarded as having engaged in drug use but who have not in fact engaged in such use.[32]

The ADA definition of a qualified individual with a disability is derived from case law defining an otherwise qualified handicapped individual under Section 504. In Southeastern

[26] 42 U.S.C. section 12132.
[27] 42 U.S.C. section 12133.
[28] 42 U.S.C. section 12201 et seq.
[29] 42 U.S.C. section 12202.
[30] 42 U.S.C. section 12211.
[31] 42 U.S.C. section 12210.
[32] 42 U.S.C. section 12210(b).

Community College v. Davis,[33] the United States Supreme Court held that Davis was not an otherwise qualified handicapped individual under Section 504.

Davis had been denied admission to the community college nursing program. Davis was unable to understand speech except through lip reading. The community college rejected her application for admission to the program because it believed that her hearing disability made it impossible for her to participate safely in the normal clinical training program or to care safely for patients.

The United States Supreme Court held that the decision to exclude Davis from the community college nursing program was not discriminatory within the meaning of Section 504 of the Rehabilitation Act of 1973. The United States Supreme Court stated:

> "Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modification in their programs to allow disabled persons to participate. Instead, it requires only that an otherwise qualified handicapped individual not be excluded from participation in a federally funded program solely by reason of his handicap, indicating only that mere possession of a handicap is not a permissible ground for 'assuming' an inability to function in a particular context . . .
>
> An otherwise qualified person is one who is able to meet all of the program's requirements in spite of his handicap."[34]

The United States Supreme Court noted that legitimate physical qualifications may be essential to participation in particular programs and found that the ability to understand speech without reliance on lip reading is necessary for patients' safety during the clinical phase of the program and is indispensable for many of the functions that a registered nurse must perform.[35]

The United States Supreme Court rejected Davis' contention that Section 504 required the community college to undertake affirmative action that would dispense with the need for effective oral communication. The Supreme Court also rejected Davis' suggestions that Davis could be given individual supervision by faculty members whenever she attends patients or that certain required courses might be dispensed with.

The Supreme Court held that Section 504 does not require such a fundamental alteration in the nature of a program. The United States Supreme Court stated:

> "Moreover, an interpretation of the regulations that required the extensive modifications necessary to include Respondent in the nursing program would raise grave doubts about their validity. If these regulations were to require substantial adjustments in

[33] 442 U.S. 397, 99 S.Ct. 2361 (1979).
[34] Id. at 2366-67.
[35] Id. at 2368.

> existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of Section 504. Instead, they would constitute an unauthorized extension of the obligations imposed by that statute. . .
>
> Neither the language, purpose, nor history of Section 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds. . . ."[36]

The Court acknowledged that the difference between illegal discrimination and affirmative action will not always be clear, particularly in light of the rapid technological advances which are taking place. The Court concluded that whether a particular refusal to accommodate the needs of a disabled person constitutes discrimination will have to be determined on a case-by-case basis. However, the Court clearly ruled out major modifications to programs:

> "In this case, however, it is clear that Southeastern's unwillingness to make major adjustments in its nursing program does not constitute such discrimination . . .Section 504 imposes no requirement upon an education institution to lower or to effect substantial modifications of standards to accommodate a handicapped person."[37]

FEDERAL REGULATIONS

A. Department of Justice Regulations

Both the Department of Justice and the Equal Employment Opportunity Commission ("EEOC") have promulgated regulations under the ADA. The Department of Justice regulations[38] discuss the definition of physical or mental impairments that substantially limit one or more major life activities. The Department of Justice noted that to be an individual with a disability, the individual must have a physical or mental impairment that substantially limits one or more of the major life activities of such individual. Major life activities include such things as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

The regulations state that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations and whether discrimination has occurred.[39] The definition of disability has been expanded to include rules of construction that require broad coverage of ADA protections.[40] An impairment that substantially limits one major life activity does not need to limit other major life activities in

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[36] Id. at 2369-70.
[37] Id. at 2370-71.
[38] 28 C.F.R. Part 36, Appendix B, Pages 583-585.
[39] 28 C.F.R. section 35.101(d).
[40] 28 C.F.R. section 35.108(a)(2)(i).

order to be considered a substantially limiting impairment.[41] An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.[42] An impairment is a disability within the meaning of the ADA if it substantially limits the ability of an individual to perform major life activity as compared to most people in the general population. An impairment does not need to prevent or severely restrict the individual from performing a major life activity in order to be considered substantially limiting.[43] The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical or statistical evidence.[44]

A public entity is not required to provide a reasonable modification to an individual who meets the definition of disability solely under the "regarded as" prong of the definition of disability.[45]

State law may be less restrictive in defining physical or mental disability. In California, a physical disability is defined as any physiological disease, disorder, condition, cosmetic disfigurement or anatomical loss that "limits" a major life activity.[46] Similarly, a mental disability is defined as any mental or psychological disorder or condition that "limits" a major life activity.[47] The California Legislature has stated that the distinction between "limits" and "substantially limits" is intended to result in broader coverage under the law of California than under the ADA.[48] As the United States District Court observed in Diaz v. Federal Express Corporation:[49] "Unfortunately, there is a dearth of case law exploring the contours of the FEHA's 'limitation' standard for disability."[50] Nevertheless, California law provides that a physical or mental disability "limits" a major life activity if it merely makes the achievement of the major life activity "difficult."[51]

The Department of Justice noted that a person is considered an individual with a disability:

> "When the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. A person with a minor trivial impairment, such as a simple infected finger, is not impaired in a major life activity. A person who can walk for ten miles continuously is not substantially limited in walking merely because, on the eleventh mile, he or she begins to experience pain,

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[41] 28 C.F.R. section 35.108(b)(2)(d)(iii).
[42] 28 C.F.R. section 35.108(b)(2)(d)(iv).
[43] 28 C.F.R. section 35.108(b)(2)(d)(v).
[44] 28 C.F.R. section 35.108(b)(2)(d)(vi).
[45] 28 C.F.R. section 35.108(a)(1)(iii); 28 C.F.R. section 35.130(b)(7)(ii).
[46] Government Code section 12926(k).
[47] Government Code section 12926(i).
[48] Government Code section 12926.1.
[49] 373 F.Supp.2d 1034(C.D. Cal. 2005).
[50] Id. at 1049-1050.
[51] Government Code section 12926(i) and (k).

> because most people would not be able to walk eleven miles without experiencing some discomfort."[52] [Emphasis added]

The Department of Justice regulations further prohibit discrimination against an individual on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation.[53] A public agency is required to provide goods, services, facilities, privileges, advantages and accommodations to an individual with a disability in the most integrated setting appropriate to the needs of the individual.[54]

Appendix B of the Department of Justice regulations states that including the term "a record of such an impairment" in the definition of disability was designed to protect individuals who have recovered from a physical or mental impairment that previously substantially limited them in a major life activity. Discrimination on the basis of such a past impairment is prohibited. The term "being regarded as having such an impairment" is intended to cover persons who are treated by a public or private agency as having a physical or mental impairment that substantially limits a major life activity. It applies when a person is treated as if he or she has an impairment and substantially limits a major life activity, regardless of whether that person has an impairment.

The perception of the agency is a key element in determining "regarded as having such an impairment." A person who perceives himself or herself to have an impairment but does not have an impairment and is not treated as if he or she has an impairment is not protected under the ADA. For example, a person would be covered if a restaurant refused to serve that person because of a fear of "negative reactions" of others to that person. A person would also be covered if the person was refused service because it was perceived that they had an impairment that limited his or her enjoyment of the goods or services being offered.[55]

The Department of Justice states, for example, that persons with severe burns often encounter discrimination in community activities resulting in substantial limitations of major life activities. These persons would be covered under the ADA based on the attitudes of others toward the impairment even if they did not view themselves as impaired.[56]

Thus, the Department of Justice stated that if a person is not allowed into a public accommodation because of the myths, fears and stereotypes associated with disabilities, they would be covered under the ADA. If a person is refused admittance on the basis of an actual or perceived physical or mental condition, and the public accommodation can set forth no legitimate reason for the refusal (such as failure to meet eligibility criteria), a perceived concern about admitting persons with disabilities could be inferred and the individual would qualify for coverage under the ADA. A person who is covered because of being regarded as having an impairment is not required to show that the public accommodation perception is inaccurate in

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[52] 28 C.F.R. Part 36, Appendix B, pages 584-585.
[53] 28 C.F.R. section 36.201, 36.202.
[54] 28 C.F.R. section 26.203.
[55] Appendix B, pages 585-586.
[56] Id. at 586.

order to be admitted to the public accommodation. A similar test would apply to public services and public programs.[57]

B. The Equal Employment Opportunity Commission Regulations

The regulations drafted by the EEOC prohibit discrimination on the basis of disability against a qualified individual in employment.[58]

The EEOC went on to state that the determination of whether an individual is substantially limited in a major life activity must be made on a basis without regard to mitigating measures, such as medicines or assistive or prosthetic case-by-case devices. The EEOC noted that if an individual is not limited in a major life activity, if the limitation does not amount to a significant restriction when compared with the abilities of the average person, then there is no substantial limitation on a major life activity. The EEOC stated, for example, an individual who had once been able to walk at an extraordinary speed would not be substantially limited in the major life activity of walking if, as a result of a physical impairment, he or she was only able to walk at an average speed or even at a moderately below average speed.[59]

The EEOC noted that an individual who is unable to read because he or she was never taught to read would not be an individual with a disability because lack of education is not an impairment. However, an individual who is unable to read because of dyslexia would be an individual with a disability because dyslexia, a learning disability, is an impairment. An individual is not substantially limited in working, for example, just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent. For example, a professional baseball pitcher who injures his elbow and can no longer throw a baseball, would not be considered substantially limited in the major life activity of working.[60]

State law may be less restrictive with regard to the definition of the major life activity of "working." In California, working is a major life activity regardless of whether the actual or perceived working limitation implicates a particular employment, or a class or broad range of employments.[61] In E.E.O.C. v. United Parcel Service,[62] plaintiffs were package car drivers who suffered from the disability of monocularity. The court held that the drivers were limited in the major life activity of working, because they were excluded from any commercial driving position that requires Federal Department of Transportation or California certification, even though they were eligible for other driving positions requiring lesser certification.[63]

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[57] Id. at 586.
[58] 29 C.F.R. section 1630.4.
[59] 29 C.F.R. section 1630, Appendix Page 396.
[60] 29 C.F.R., Part 1630, Appendix Page 397.
[61] Government Code section 12926.1.
[62] 424 F.3d 1060 (9th Cir. 2005).
[63] Id. at 1073.

C. Essential Functions

The EEOC noted that the determination of which functions are essential may be critical to the determination of whether or not the individual with a disability is qualified. The essential functions are those functions that the individual who holds the position must be able to perform unaided or with the assistance of a reasonable accommodation.[64]

Whether a particular duty or function is essential depends on whether the employer actually requires employees in the position to perform the functions that the employer asserts are essential. For example, an employer may require lifting 50 pounds as an essential function of the job. If, however, the employer has never required any employee in that particular position to lift 50 pounds, this would be evidence that lifting 50 pounds is not actually an essential function for this particular job. However, if the individual who holds the position is actually required to perform the function of lifting 50 pounds, the inquiry will then center around whether removing the function would fundamentally alter that position. In determining whether or not a function is essential, the following factors will be considered:

1. Whether the position exists to perform a particular function. For example, an individual may be hired to proofread documents. The ability to proofread the documents would then be an essential function since this is the only reason the position exists.

2. Whether there are other employees available to perform that job function and whether the performance of that job function can be distributed to other employees.

3. The degree of expertise or skill required to perform the function. In certain professions and highly skilled positions, the employee is hired for his or her expertise or ability to perform the particular function. In such a situation, the performance of that specialized task would be an essential function. Whether a particular function is essential is a factual determination that must be made on a case-by-case basis. Written job descriptions prepared before advertising or interviewing applicants for the job as well as the employer's judgment as to what functions are essential are among the relevant factors to be considered in determining whether a particular function is essential. The terms of a collective bargaining agreement are also relevant to the determination of whether a particular function is essential. The work experience of past employees in the job or current employees in similar jobs is

[64] 29 C.F.R., Part 1630, Appendix, Pages 399-400.

> likewise relevant to the determination of whether a particular function is essential.[65]

The amount of time spent performing the particular function may also assist in the determination of whether that function is essential. For example, if an employee spends the vast majority of his or her time working at a cash register, this would be evidence that operating a cash register is an essential function of the job.[66]

D. Reasonable Accommodation

The EEOC defines a "qualified individual with a disability" as an individual who can perform the essential functions of the job with or without reasonable accommodation. An accommodation is defined as any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities. The EEOC has indicated that there are three categories of reasonable accommodation:

1. Accommodations that are required to ensure equal opportunity in the application process;

2. Accommodations that enable the employers' employees with disabilities to perform the essential functions of the position held or desired; and

3. Accommodations that enable the employers' employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities.[67]

An employer, as a reasonable accommodation, may be required to permit an individual with a disability the opportunity to provide and utilize equipment, aids or services that an employer is not required to provide as a reasonable accommodation. For example, an employer may be required to permit an individual who is blind to bring a guide dog to work, even though the employer would not be required to provide a guide dog for the employee.[68]

Another potential accommodation is job restructuring. An employer may restructure a job by reallocating or redistributing nonessential or marginal job functions. As an accommodation, an employer may redistribute the nonessential functions so that all of the nonessential functions that the qualified individual with a disability can perform are made a part of the position that an individual with a disability is able to perform. Other nonessential functions that the individual with a disability cannot perform would be transferred to another position.[69]

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[65] Id. at 400.
[66] Id. at 400.
[67] 29 C.F.R., Part 1630, Appendix, Page 401.
[68] Id. at 401.
[69] Id.

An employer is not required to reallocate essential functions. The essential functions are defined as those that the individual who holds the job must perform with or without reasonable accommodation in order to be considered qualified for the position. The EEOC cites as an example that of a security guard position that requires the individual who holds the job to inspect identification cards. An employer would not have to provide an individual who is legally blind with an assistant to look at the identification cards for the legally blind employee since this would mean that the assistant was performing the job for the individual with the disability rather than assisting the individual to perform the job.[70]

An employer may restructure a position by changing the time when an essential function of the job is performed. An example of this would be when an essential function customarily performed in the early morning hours is rescheduled to later in the day as a reasonable accommodation to a disability that does not allow performance of the function at the customary time. Reassignment to a vacant position is also considered a potential reasonable accommodation. Reassignment generally will be considered only when accommodation within the individual's current position would pose an undue hardship. Reassignment is not available to applicants. An applicant for a job must be qualified for and be able to perform the essential functions of the position sought with or without reasonable accommodation.[71]

Reassignment should not be used to limit, segregate or otherwise discriminate against employees with disabilities by requiring reassignments to undesirable positions or undesirable locations. Employers should reassign a disabled individual to an equivalent position in terms of pay and status, if the individual is qualified and if the position is vacant within a reasonable amount of time.[72]

An employer may reassign an individual to a lower grade position if there are no accommodations that would enable the employee to remain in the current position and there are not vacant equivalent positions which the disabled individual is qualified for. An employee is not required to promote an individual with a disability as an accommodation.[73]

E. Undue Hardship

The EEOC noted that employers will not be required to provide a reasonable accommodation that would impose an undue hardship on the operation of the employer's business. The term "undue hardship" means significant difficulty or expense in, or resulting from, the provision of the accommodation. The concept of undue hardship applies to more than financial difficulty. It also refers to extensive, substantial or disruptive alterations which would fundamentally alter the nature or operation of the business.

The EEOC gives an example of an individual with a disabling visual impairment that makes it extremely difficult to see in dim lighting. The individual applies for a position as a waiter in a nightclub and requests that the nightclub be brightly lit as a reasonable accommodation. Although the individual may be able to perform the job in bright lighting, the

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[70] See, Coleman v. Darden, 595 F.2d 533 (10th Cir. 1979); Id.
[71] Id.
[72] Id.
[73] Id.

nightclub will probably be able to demonstrate that the particular accommodation, though inexpensive, would impose an undue hardship if bright lighting would destroy the ambience of the nightclub and/or make it difficult for the customers to see the stage show. However, if there is another accommodation that would not create an undue hardship, the employer would be required to provide the alternative accommodation.[74]

F. Direct Threat

As a qualification standard for employment, an employer may require that an individual not pose a direct threat to the health or safety of himself, herself or others. Such a standard must apply to all applicants or employees and not just to individuals with disabilities. If an individual poses a direct threat as a result of a disability, the employer must determine whether a reasonable accommodation would either eliminate the risk or reduce it to an acceptable level. If no accommodation exists that would either eliminate or reduce the risk, the employer may refuse to hire an applicant or may discharge an employee who poses a direct threat.[75]

An employer, however, is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk (i.e., high probability of substantial harm). A speculative or remote risk is insufficient.

In considering whether an individual poses a significant risk of substantial harm to others, four factors must be considered:

1. The duration of the risk;

2. The nature and severity of the potential harm;

3. The likelihood that the potential harm will occur; and

4. The imminence of the potential harm.

Consideration of the seriousness of the direct threat must rely on objective, factual evidence, not on subjective perceptions, irrational fears, patronizing attitudes or stereotypes about the nature or effect of a particular disability, or of disabilities in general. Relevant evidence may include input from the individual with a disability, the experience of the individual with a disability in previous similar positions, and opinions of medical doctors, rehabilitation counselors or physical therapists who have expertise in the disability involved and/or direct knowledge of the individual with the disability.[76]

An employer may also require that an individual not pose a direct threat of harm to his or her own safety or health. If performing the functions of the job would result in the high probability of substantial harm to the individual, the employer could reject or discharge the individual unless a reasonable accommodation that would not cause an undue hardship would

[74] Id. at 402.
[75] Id. at 402-403.
[76] Id. at 403.

avert the harm. For example, an employer would not be required to hire an individual, disabled by narcolepsy, who frequently and unexpectedly loses consciousness, for a carpentry job where the essential functions of the job require the use of power saws and other dangerous equipment, where no accommodation exists that would reduce or eliminate the risk.

The determination that there exists a high probability of substantial harm to the individual must be strictly based on valid medical analysis and/or other objective evidence. The assessment must be based on individualized factual data, not on stereotypic or patronizing assumptions, and must consider potential reasonable accommodations.[77]

G. Current Use of Illegal Drugs

As the EEOC regulations point out, an individual currently engaging in the illegal use of drugs is not an individual with a disability for purposes of the ADA. Illegal use of drugs refers to both the use of unlawful drugs, such as marijuana or cocaine, and to the unlawful use of prescription drugs.[78]

Employers may discharge or deny employment to persons who illegally use drugs, on the basis of such use, without fear of being held liable for discrimination. The term "currently engaging" is not intended to be limited to the use of drugs on the day of, or within a matter of days or weeks before, the employment action is taken. The provision is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct. Individuals who are mistakenly perceived as engaging in the illegal use of drugs, are not excluded from the definition of the term "disability." Individuals who are no longer illegally using drugs and who have either been rehabilitated successfully or are in the process of completing a rehabilitation program are, likewise, not excluded from the definition of disabled. An individual erroneously regarded as illegally using drugs would have to show that he or she was regarded as a drug addict in order to demonstrate that he or she meets the definition of disability as defined in ADA.[79]

H. Types of Prohibited Discrimination

Employers are prohibited from restricting the employment opportunities of qualified individuals with disabilities on the basis of stereotypes and myths about the individual's disability. The capabilities of qualified individuals with disabilities must be determined on an individualized case-by-case basis. In addition, employers are also prohibited from segregating qualified employees with disabilities into separate work areas or into separate lines of advancement.[80]

It would also be in violation of the ADA to deny employment to an applicant or employee with a disability based upon generalized fears about the safety of an individual with such a disability or based on generalized assumptions about the absenteeism rate of an individual

[77] Id. at 402-403.
[78] Id. at 403.
[79] Id. at 403-404.
[80] Id. at 404.

with such a disability. In addition, disabled employees are required to be accorded equal access to health insurance coverage the employer provides to other employees.[81]

However, preexisting condition clauses included in health insurance policies offered by employees are not affected by the ADA. It would be permissible for an employer to offer an insurance policy that limits coverage of certain procedures or treatments to a specified number per year. Leave policies or benefit plans that are uniformly applied do not violate the ADA simply because they do not address the special needs of every individual with a disability. Thus, for example, an employer that reduces the number of paid sick leave days that it will provide to all employees is not in violation of the ADA even if the benefit reduction has an impact on employees with disabilities in need of greater sick leave and medical coverage. Benefits reductions adopted for discriminatory reasons violate the ADA.[82]

I. Failure to Make Reasonable Accommodation

The EEOC regulations state that the requirement to make reasonable accommodation is a form of nondiscrimination. The obligation applies to all employment decisions and to the job application process. The reasonable accommodation requirement does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with the disability. Therefore, if the adjustment or modification assists the individual throughout his or her daily activities on and off the job, it will be considered a personal item that the employer is not required to provide. Accordingly, an employer would generally not be required to provide an employee with a disability with a prosthetic limb, wheelchair or eyeglasses, nor would an employer have to provide as an accommodation any amenity or convenience that is not job related such as a private hot plate, hot pot or refrigerator that is not provided to employees without disabilities. However, if these items are required to meet job related needs rather than personal needs, then the provision of such items may be required as a reasonable accommodation. An employer is not required to restructure the essential functions of a position to fit the skills of an individual with a disability who is not otherwise qualified to perform the job.[83]

The EEOC regulations state that the reasonable accommodation requirement should be viewed as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated. These barriers may, for example, be physical or structural obstacles that inhibit or prevent the access of an individual with a disability to job sites, facilities or equipment. These barriers may also be rigid work schedules that permit no flexibility as to when work is performed, when breaks may be taken, inflexible job procedures that unduly limit the modes of communication that are used on the job or the way in which particular tasks are accomplished.[84]

The term "otherwise qualified" is intended to clarify that the requirement to make reasonable accommodation is owed only to an individual with a disability who is qualified within the meaning of Section 1630.2(m) in that he or she satisfies all the skill, experience, education

[81] Id. at 404-405.
[82] Id.
[83] Id. at 406-407.
[84] Id. at 407.

and other job-related selection criteria. An individual with a disability is "otherwise qualified" if he or she is qualified for a job, except that, because of the disability, he or she needs a reasonable accommodation to be able to perform the job's essential functions.[85]

State law may be less restrictive with regard to an employer's duty to make reasonable accommodation. In Bagatti v. Dept. of Rehabilitation,[86] the California Court of Appeal addressed whether the employer was required to provide requested accommodations to an employee who was unable to walk long distances as a result of severe polio. The court found that, unlike the federal ADA statutes, California Government Code section 12940(m) does not require that reasonable accommodation be made only where the person is a "qualified individual" able to perform the essential functions of the job, nor does Section 12940(m) provide that the employee has a right to assert the duty of reasonable accommodation only where some kind of adverse employment action is taken against the employee.[87] Notwithstanding the Bagatti decision, there is a split among California appellate districts with regard to this issue, and subsequent decisions have not consistently followed Bagatti. For example, in Diaz v. Federal Express Corporation, supra, the court held that in order to succeed on a FEHA claim for failure to accommodate, a plaintiff must show that he (1) has a disability of which the employer is aware, and (2) is a qualified individual. The court disagreed with Bagatti, reading Government Code section 12940(m) as clearly instituting a requirement that a plaintiff be "qualified."[88]

Employers are required to make reasonable accommodation only to the physical or mental limitations resulting from the disability of a qualified individual with a disability that is known to the employer. Therefore, an employer would not be required to accommodate disabilities when the employer is unaware of such disabilities. If an employee with a known disability is having difficulty performing his or her job, an employer may inquire as to whether the employee is in need of a reasonable accommodation. However, it is in most cases the responsibility of the individual with a disability to inform the employer that an accommodation is needed. When the need for an accommodation is not obvious, an employer, before providing a reasonable accommodation, may require that the individual with a disability provide documentation of the need for accommodation.[89]

Although state law generally follows the ADA with regard to the employer's duty to make reasonable accommodation, a plaintiff may have a greater likelihood of success under state law in establishing that an employer failed in discharging this duty. In California, it is an unlawful employment practice for an employer "to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee."[90] For example, in Prilliman v. United Air Lines,[91] the employer was aware that the plaintiff was disqualified from performing his job as a pilot because his diagnosis of AIDS precluded him from obtaining FAA certification. Even though the plaintiff did not actually request the accommodation of alternative job placement, the court reversed the trial court's grant of summary judgment, finding that there

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[85] Id. at 407.
[86] 97 Cal.App.4th 344 (2002).
[87] Id. at 361.
[88] Diaz at 1054.
[89] 29 C.F.R., Part 1630, Appendix, Page 407.
[90] Government Code section 12940(k).
[91] 53 Cal.App.4th 935 (1997).

was a triable issue of fact as to whether the employer could have accommodated the plaintiff with an alternative position.[92] In short, in California the salient question is whether the employer knows of the employee's disability, not whether the employee has explicitly requested accommodation.

When a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability. When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer should:

1. Analyze the particular job involved and determine its purpose and essential functions.

2. Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation.

3. In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position.

4. Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.[93]

After assessing the job functions in question, the employer, in consultation with the individual requesting the accommodation, should make an assessment of the specific limitations imposed by the disability on the individual's performance of the job's essential functions. This assessment will make it possible to ascertain the precise barrier to the employment opportunity which, in turn, will make it possible to determine the accommodations that could alleviate or remove that barrier.[94]

When potential accommodations have been identified, the employer should review the effectiveness of each potential accommodation in assisting the individual in need of the accommodation in the performance of the essential functions of the position. If more than one of these accommodations will enable the individual to perform the essential functions or if the individual would prefer to provide his or her own accommodation, the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective

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[92] Id. at 954-955.
[93] 29 C.F.R., Part 1630, Appendix, Pages 407-408.
[94] Id. at 408.

accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.[95]

J. Preemployment Inquiries

Section 1630.13(a) makes clear that an employer cannot inquire as to whether an individual has a disability at the preoffer stage of the selection process, nor can an employer inquire at the preoffer stage about an applicant's workers' compensation history.[96]

Employers may ask questions that relate to the applicant's ability to perform job related functions. However, these questions may not be phrased in terms of disability. For example, an employer may ask whether the applicant has a driver's license, if driving is a job function, but may not ask whether the applicant has a visual disability. Employers may ask about an applicant's ability to perform both essential and marginal job functions. Employers, though, may not refuse to hire an applicant with a disability because the applicant's disability prevents him or her from performing marginal functions.[97]

The purpose of Section 1630.13(b) is to prohibit the administration of medical tests or inquiries to employees that do not serve a legitimate business purpose. For example, if an employee suddenly starts to use an increased amount of sick leave or starts to appear in poor health, an employer may not require that employee to be tested for AIDS, HIV infection, or cancer unless the employer can demonstrate that such testing is job related and consistent with business necessity.[98]

Pursuant to Section 1630.14, employers are permitted to make preemployment inquiries into the ability of an applicant to perform job related functions. The inquiry must be narrowly tailored. The employer may describe or demonstrate the job function and inquire whether or not the applicant can perform that function with or without reasonable accommodation.[99]

An employer may also ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions. Such a request may be made of all applicants in the same job category regardless of disability. Such a request may also be made of an applicant whose known disability may interfere with or prevent the performance of a job-related function, whether or not the employer routinely makes such a request of all applicants in the job category. However, the employer may not inquire as to the nature or severity of the disability.[100]

On an examination announcement or application form, an employer may request that individuals with disabilities who will require a reasonable accommodation in order to take the exam to inform the employer within a reasonable established time period prior to the administration of the exam. The employer may also request that documentation of the need for

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[95] Id.
[96] 29 C.F.R. section 1630.13(a).
[97] Id. at 411.
[98] Id.
[99] Id.
[100] Id.

the accommodation accompany the request. Requested accommodations may include accessible testing sites, modified testing conditions and accessible test formats.[101]

Physical agility tests are not medical examinations and may be given at any point in the application or employment process. Such tests must be given to all similarly situated applicants or employees regardless of disability. If such tests screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, the employer would have to demonstrate that the test is job related, consistent with business necessity, and that performance cannot be achieved with reasonable accommodation.[102]

Pursuant to Section 1630.14(b), an employer may require post offer medical examinations before the employee begins working. The employer may condition the offer of employment on the results of the examination, provided that all entering employees in the same job category are subjected to such an examination, regardless of disability, and the information is kept confidential.[103]

Medical examinations permitted by this section are not required to be job related and consistent with business necessity. However, if an employer withdraws an offer of employment because the medical examination reveals that the employee does not satisfy certain employment criteria, either the exclusionary criteria must not screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, or they must be job related and consistent with business necessity. In showing that an exclusionary criterion is job related and consistent with business necessity, the employer must also demonstrate that there is no reasonable accommodation that will enable the individual with a disability to perform the essential functions of the job.[104]

For example, an employer makes a conditional offer of employment to an applicant, and it is an essential function of the job that the applicant be available to work every day for the next three months. An employment entrance examination then reveals that the applicant has a disabling impairment that, according to reasonable medical judgment that relies on the most current medical knowledge, will require treatment that will render the applicant unable to work for a portion of the three month period. Under these circumstances, the employer would be able to withdraw the employment offer without violating the ADA.[105]

The information obtained from an entrance examination or inquiry is to be treated as a confidential medical record and may only be used in a manner consistent with the ADA and EEOC regulations. State workers' compensation laws are not preempted by the ADA or the EEOC regulations. These laws require the collection of information from individuals for state administrative purposes that do not conflict with the ADA or the regulations. Consequently, employers or other covered entities may submit information to state workers' compensation

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[101] Id. at 412.
[102] Id.
[103] Id.
[104] Id.
[105] Id.

offices or second injury funds in accordance with state workers' compensation laws without violating the ADA.[106]

K. Fitness for Duty

Pursuant to Section 1630.14(c), employers may make inquiries or require medical examinations (fitness for duty exams) when there is a need to determine whether an employee is still able to perform the essential functions of his or her job. Employers or other covered entities may make inquiries or require medical examinations necessary to the reasonable accommodation process. Employers may require periodic physicals to determine fitness for duty or other medical monitoring if such physicals or monitoring are required by medical standards or requirements established by federal, state, or local law that are consistent with the ADA in that they are job related and consistent with business necessity.[107]

These standards may include federal safety regulations that regulate bus and truck driver qualifications, as well as laws establishing medical requirements for pilots or other air transportation personnel. These standards also include health standards promulgated pursuant to the Occupational Safety and Health Act of 1970, the Federal Coal Mine Health and Safety Act of 1969, or other similar statutes that require that employees exposed to certain toxic and hazardous substances be medically monitored at specific intervals.[108]

The information obtained from such examinations or inquiries is to be treated as a confidential medical record and may only be used in a manner consistent with the ADA.[109]

Section 1630.14(d) authorizes voluntary medical examinations, including voluntary medical histories, as part of employee health programs. These programs may include medical screening for high blood pressure, weight control counseling, and cancer detection. Voluntary activities, such as blood pressure monitoring and the administering of prescription drugs, such as insulin, are also permitted. It should be noted, however, that the medical records developed in the course of such activities must be maintained in the confidential manner required by the ADA and must not be used for any purpose in violation of the ADA, such as limiting health insurance eligibility.[110]

L. Employer Defenses

Section 1630.15(a) indicates that the "traditional" defense to a charge of disparate treatment under Title VII, as expressed in McDonnell Douglas Corp. v. Green,[111] Texas Department of Community Affairs v. Burdine,[112] and their progeny, may be applicable to charges of disparate treatment brought under the ADA.[113] Disparate treatment, with respect to

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[106] Id.
[107] Id. at 412-413.
[108] See, House Labor Report at 74-75. Id. at 413.
[109] Id.
[110] House Labor Report at 75; House Judiciary Report at 43-44. Id. at 413.
[111] 411 U.S. 792 (1973).
[112] 450 U.S. 248 (1981).
[113] See, Prewitt v. U.S Postal Service, 662 F.2d 292 (5th Cir. 1981).

Title I of the ADA, would mean that an individual was treated differently on the basis of his or her disability. For example, disparate treatment would have occurred where an employer excludes an employee with a severe facial disfigurement from staff meetings because the employer does not like to look at the employee. The individual is being treated differently because of the employer's attitude toward his or her perceived disability. Disparate treatment has also occurred where an employer has a policy of not hiring individuals with AIDS regardless of the individuals' qualifications.[114] In order to prevail, the employer must show that the individual was treated differently, not because of his or her disability but for a legitimate nondiscriminatory reason such as poor performance unrelated to the individual's disability. The fact that the individual's disability is not covered by the employer's current insurance plan or would cause the employer's insurance premiums or workers' compensation costs to increase, would not be a legitimate nondiscriminatory reason justifying disparate treatment of an individual with a disability.[115] The defense of a legitimate nondiscriminatory reason is rebutted if the alleged nondiscriminatory reason is shown to be false or pretextual. Documentation of poor performance or other nondiscriminatory reasons for the employee's actions is essential to maintaining a defense.[116]

Under Section 1630.15(b) disparate impact is defined, with respect to Title I of the ADA, as uniformly applied criteria that have an adverse impact on an individual with a disability or a disproportionately negative impact on a class of individuals with disabilities. Section 1630.15(b) states that an employer may use selection criteria that have such a disparate impact, and that may screen out or tend to screen out an individual with a disability or a class of individuals with disabilities only when they are job related and consistent with business necessity.[117]

For example, an employer interviews a blind candidate and a nonblind candidate for a position. Both candidates are equally qualified. The employer decides that while it is not essential to the job it would be convenient to have an employee who has a driver's license and so could occasionally be asked to run errands by car. The employer hires the individual who is not blind because this individual has a driver's license. This is an example of a uniformly applied criterion, having a driver's license, that screens out an individual who has a disability that makes it impossible to obtain a driver's license. The employer would, thus, have to show that this criterion is job related and consistent with business necessity.[118]

However, even if the criterion is job related and consistent with business necessity, an employer could not exclude an individual with a disability if the criterion could be met or job performance accomplished with a reasonable accommodation. For example, if an employer requires, as part of its application process, an interview that is job related and consistent with business necessity, the employer would not be able to refuse to hire a hearing impaired applicant because he or she could not be interviewed. Since an interpreter could be provided as a

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[114] Id.
[115] See, Prewitt v. U.S Postal Service, 662 F.2d 292 (5th Cir. 1981).
[116] Id. at 413.
[117] Id.
[118] See, House Labor Report at 55. Id. at 413-414.

reasonable accommodation that would allow the individual to be interviewed, the selection criterion would thus be satisfied.[119]

With regard to safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement, as applied to the individual, satisfies the "direct threat" standard in Section 1630.2(r) in order to show that the requirement is job related and consistent with business necessity.[120]

Section 1630.15(c) makes clear that there may be uniformly applied standards, criteria and policies not relating to selection that may also screen out or tend to screen out an individual with a disability or a class of individuals with disabilities. As with selection criteria that have a disparate impact, nonselection criteria having such an impact may also have to be job related and consistent with business necessity, subject to consideration of reasonable accommodation.[121]

Some uniformly applied employment policies or practices, such as leave policies, are not subject to challenge under the adverse impact theory. "No-leave" policies (e.g., no leave during the first six months of employment) are likewise not subject to challenge under the adverse impact theory. However, an employer, in spite of its "no-leave" policy, may, in appropriate circumstances, have to consider granting a leave to an employee with a disability as a reasonable accommodation, unless the provision of a leave would impose an undue hardship.[122]

Section 1630.15(d) indicates that an employer alleged to have discriminated because it did not make a reasonable accommodation may offer as a defense that it would have been an undue hardship to make the accommodation. However, an employer may not simply assert that a proposed accommodation will cause it undue hardship and be relieved of the duty to provide accommodation. An employer will be required to present evidence and demonstrate that the accommodation will, in fact, cause it undue hardship. Whether a particular accommodation will impose an undue hardship for a particular employer is determined on a case-by-case basis. Consequently, an accommodation that poses an undue hardship for one employer at a particular time may not pose an undue hardship for another employer, or even for the same employer at another time. In a similar manner, an accommodation that poses an undue hardship for one employer in a particular job setting, such as a temporary construction work site, may not pose an undue hardship for another employer, or even for the same employer at a permanent work site.[123]

Excessive financial burden is only one possible basis upon which an employer might be able to demonstrate undue hardship. An employer could also demonstrate that the provision of a particular accommodation would be unduly disruptive to its other employees or to the functioning of its business. The terms of a collective bargaining agreement may be relevant to this determination. By way of illustration, an employer would likely be able to show undue hardship if the employer could show that the requested accommodation of the upward adjustment of the business' thermostat would result in it becoming unduly hot for its other

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[119] Id. at 414.
[120] Id.
[121] Id.
[122] Id.
[123] See, House Judiciary Report at 42. Id. at 414.

employees, or for its patrons or customers. The employer would thus not have to provide this accommodation. However, if there was an alternate accommodation that would not result in undue hardship, the employer would have to provide that accommodation.[124]

Section 1630.16(e) applies the "direct threat" analysis to the particular situation of accommodating individuals with infectious or communicable diseases that are transmitted through the handling of food. The Department of Health and Human Services is required to prepare a list of infectious and communicable diseases that are transmitted through the handling of food. If an individual with a disability has one of the listed diseases and works in or applies for a position in food handling, the employer must determine whether there is a reasonable accommodation that will eliminate the risk of transmitting the disease through the handling of food. If there is an accommodation that will not pose an undue hardship, and that will prevent the transmission of the disease through the handling of food, the employer must provide the accommodation to the individual. The employer, under these circumstances, would not be permitted to discriminate against the individual because of the need to provide the reasonable accommodation and would be required to maintain the individual in the food handling job.[125]

JUDICIAL DECISIONS

A. Purpose of the Law

The Americans with Disabilities Act was not intended to provide general protection for persons suffering from illnesses, but was designed to protect people who are discriminated against either because they are disabled or because their employer mistakenly believes them to be disabled. There is no violation of the ADA if the employer discriminates against employees due to their being ill or because the employer believes them to be ill, even permanently ill if they are not also disabled.[126]

In Christian, the plaintiff alleged that she was fired from St. Anthony's Medical Center in violation of the ADA because she had a condition known as hyper cholesterolemia, which meant that she had an excessive amount of cholesterol in her blood. The district court dismissed the plaintiff's claim as failing to state a cause of action under the ADA and the Court of Appeals affirmed. The plaintiff alleged that she was fired because of the stigma of having a serious medical condition or because of the cost of the treatment to the employer's health plan. The Court of Appeals stated, "She believes in other words that the Americans with Disabilities Act protects an employee from being fired because of illness. It does not."[127]

In Siefken v. The Village of Arlington Heights,[128] the Court of Appeals held that Congress enacted the ADA to level the playing field for disabled people. The court held that Congress perceived that employers were basing employment decisions on unfounded stereotypes. However, the court held that the ADA does not erect an impenetrable barrier around

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[124] Id.
[125] Id. at 415.
[126] Christian v. St. Anthony Medical Center, 117 F.3d 1051, 1053 (7th Cir. 1997).
[127] Id. at 1052-53.
[128] 65 F.3d 664 (7th Cir. 1995).

the disabled employee, preventing the employer from taking any employment action against the employee.[129]

In McDonald v. Commonwealth of Pennsylvania,[130] the Court of Appeals held that in enacting the ADA, Congress intended to broaden coverage beyond the coverage of the Rehabilitation Act of 1973. The court noted that the case law under Section 504 of the Rehabilitation Act was an important and helpful source for interpreting the ADA, and substantive standards for determining liability under both acts were the same.[131] The court also noted that the legislative history of the ADA demonstrated that Congressional committees drafting the ADA were very familiar with regulations previously adopted to implement Section 504 and that certain aspects of the committee reports used language from the 504 regulations in explaining the meaning of the ADA.[132]

B. Definition of Disability

The precise definition of disability under the ADA has been litigated in a number of cases. The courts have generally followed the EEOC's regulatory definitions of what constitutes a disability. The United States Supreme Court expanded somewhat the definition of major life activity by including the ability to reproduce. In Abbott v. Bragdon,[133] the United States Supreme Court held that a person who was HIV-positive was disabled under the ADA. The Court held that persons whose ability to reproduce has been impaired, have had a major life activity affected and are disabled under the ADA.[134]

The inability to perform a particular job, as opposed to a class of jobs, is generally insufficient to establish a disability. In Thompson v. Holy Family Hospital,[135] the Court of Appeals held that a nurse who suffered a work related injury and could not lift more than twenty-five pounds was not disabled since the restriction did not substantially limit her ability to work. In McKay v. Toyota Manufacturing USA,[136] the Court of Appeals held that a ten pound lifting restriction which only disqualified the plaintiff from a narrow range of jobs did not substantially limit the plaintiff's ability to work. In Price v. Marathon Cheese Corporation,[137] the Court of Appeals held that a plaintiff's carpal tunnel syndrome did not substantially limit the plaintiff in a major life activity such as work.

State law may be less restrictive concerning the major life activity of "working." As discussed above, California law provides that "working" is a major life activity regardless of

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[129] Id. at 666.
[130] 62 F.3d 92 (3rd Cir. 1995).
[131] Id. at 94.
[132] Id. at 95.
[133] 118 S.Ct.2196 (1998).
[134] See, Runnebaum v. Nations Bank of Maryland, 123 F.3d 156 (4th Cir. 1997) (a person who is HIV-positive but asymptomatic was disabled within the meaning of the ADA on the grounds that their status as HIV-positive was an impairment which substantially limits the major life activity of reproduction).
[135] 121 F.3d 35-37 (9th Cir. 1997).
[136] 110 F.3d 369 (6th Cir. 1997).
[137] 119 F.3d 330 (5th Cir. 1997).

whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments.[138]

C. Major Life Activities

The ADA provides protection for those who have a physical or mental impairment that substantially limits one or more of their major life activities. Such individuals qualify as disabled under the ADA, and are, therefore, entitled to invoke the Act's protective measures. Though the ADA does not define "major life activities," the U.S. Equal Employment Opportunity Commission ("EEOC") defines major life activities as including "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." The EEOC notes that this list is not inclusive, and provides further examples of possible major life activities such as sitting, standing, lifting, and reaching.

While many mental and physical impairments may affect one's ability to participate in a major life activity, an impairment will not qualify an individual as disabled as defined by the ADA unless the impairment is substantially limiting. An impairment may be described as "substantially limiting" if the impairment leaves an individual "unable to perform, or significantly restricted as to the condition, manner or duration under which the individual can perform, a major life activity as compared to an average person in the general population." Davidson v. Midelfort Clinic, Ltd.[139]

State law may be less restrictive in allowing an individual to qualify as disabled. As discussed above, California law defines a physical or mental disability as one that "limits" a major life activity, in contrast to the "substantially limits" standard of the ADA.[140] This distinction is intended to result in broader coverage under the law of California than under the ADA.[141] California law provides that a physical or mental disability "limits" a major life activity if it makes the achievement of the major life activity "difficult."[142]

In Davidson, the Court of Appeals held that "not every impairment that affects a major life activity will be considered disabling; only if the resulting limitation is significant will it meet the ADA's test."[143] While the court agreed with Davidson that Attention Deficit Hyperactivity Disorder ("ADD") was an impairment for purposes of the ADA, it found that ADD only constitutes a disability with regard to the major life activity of learning, yet did not substantially limit her ability to work. The court found that Davidson's ADD did affect some aspects of her job performance, but this alone did not prevent Davidson from performing the major life activity of working. To prove her ADD limited her ability to work, Davidson would have to prove that she was "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having completed comparable training,

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[138] Government Code section 12926.1(c).
[139] 133 F.3d 499 (7th Cir. 1998).
[140] Government Code section 12926(i) and (k).
[141] Government Code section 12926.1.
[142] Government Code section 12926(i) and (k).
[143] Davidson at 505.

skills and abilities."[144] The court held that her ADD did not limit her ability to work in such a way.

In Bragdon v. Abbott,[145] the U.S. Supreme Court held that a person who was HIV-positive, but did not currently manifest symptoms of AIDS, was qualified as disabled under the ADA. In Bragdon, Abbott went to Bragdon's office for a dental appointment. Abbott disclosed her HIV-positive status on her patient registration form. Although Bragdon completed the dental exam, he told Abbott he would not be able to fill her cavity due to her HIV status unless he performed the procedure in a hospital at her additional expense. Abbott declined his offer and in turn filed this discrimination suit under the ADA. The Supreme Court held that Abbott was protected by the ADA because HIV, even when asymptomatic, "substantially limits the major life activity of reproduction."[146]

In contrast to Bragdon, the Court of Appeals in Krauel v. Iowa Methodist Medical Center,[147] held that to treat reproduction as a major life activity under the ADA would be inconsistent with the intent of the Act. In 1992, Krauel was diagnosed with endometriosis. Following surgery to correct her condition, Krauel unsuccessfully attempted to become pregnant. Krauel then sought the help of a fertility clinic, and sued Iowa Methodist Medical Center for not covering infertility treatment. The court ruled against Krauel's discrimination claim, holding that to define reproduction and caring for others as major life activities would be a "considerable stretch of federal law."[148]

In Holihan v. Lucky Stores, Inc.,[149] the Court of Appeals held that Holihan's mental problems, including depression and anxiety, did not substantially limit any of his major life activities. After successfully managing eight different stores over a span of sixteen years, Holihan suddenly became the subject of numerous employee complaints. He was soon diagnosed with "stress related problems precipitated by work" and received several months paid leave to recover. During this time off, Holihan pursued other business activities and worked up to eighty hours per week. When Lucky did not rehire him to his previous position as manager upon his return, Holihan filed this discrimination suit based upon his alleged mental disabilities. The court held that Holihan was not disabled as his impairments did not substantially limit his ability to perform any of his major life activities, including working.[150]

In Sutton and Hinton v. United Air Lines, Inc.,[151] the Court of Appeals held that the plaintiffs' poor vision did not qualify them as disabled under the ADA. The plaintiffs argued that United's hiring policies were discriminatory because they were denied pilot positions based upon their uncorrected vision, even though their corrected vision was 20/20. The court held that "the

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144 Id. at 506.
145 118 S.Ct. 2196 (1998).
146 Id. at 2205.
147 95 F.3d 674 (8th Cir. 1996).
148 Id. at 677.
149 87 F.3d 362 (9th Cir. 1996).
150 See, Zirpel v. Toshiba America Information Systems, Inc., 111 F.3d 80 (8th Cir. 1997). (Zirpel's panic disorder did not substantially limit any of her major life activities); Witter v. Delta Air Lines, Inc., 138 F.3d 1366 (11th Cir. 1998) (Narcissistic Personality Disorder and Cyclothymia did not constitute a disability and did not substantially limit Witter's ability to work).
151 130 F.3d 893 (10th Cir. 1997).

determination of whether an individual's impairment substantially limits a major life activity should take into consideration mitigating or corrective measures utilized by the individual."[152] Because millions of Americans suffer visual impairments just as serious as those of the plaintiffs, the court refused to define the plaintiffs as "disabled." Under such an expansive reading, the court held "the term 'disabled' would become a meaningless phrase, subverting the policies and purposes of the ADA and distorting the class the ADA was meant to protect."[153]

State law may be less restrictive with regard to the impact of mitigating or corrective measures. In California, the Legislature departed from Sutton and its companion decisions, establishing a different standard for determining whether an individual is disabled. Under California law, whether a condition limits an individual's ability to participate in a major life activity, is determined without regard to mitigating measures, unless a mitigating measure itself limits an individual's ability to participate in a major life activity.[154]

Despite an employee's kidney condition which required two corrective surgeries, the Court of Appeals in Roush v. Weastec, Inc.,[155] held that "generally, short-term, temporary restrictions are not substantially limiting" with regard to major life activities.[156] The court held that although Roush's kidney condition did not constitute a disability within the meaning of the ADA, her recurring bladder inflammation could be found as a physical condition which substantially limited her ability to work. Because her bladder condition caused her substantial pain and would not allow her to participate in the major life activity of work without medication, the court recognized it as a potentially limiting impairment.

State law may be less restrictive with regard to whether a temporary impairment may be a qualifying disability. In Diaz v. Federal Express Corporation, supra, the United States District Court for the Central District of California addressed the claim of a plaintiff whose workers' compensation physician had determined him to be "temporarily totally disabled" due to an "adjustment disorder with mixed anxiety and depressed mood." The employer argued that because the plaintiff's disability was only temporary, the plaintiff did not suffer from a disability cognizable under the FEHA. The court noted that the ADA criterion of the "duration or expected duration of the impairment" is noticeably absent from the FEHA's definition of physical and mental disability. The court noted further that the FEHA defines a disabled person as one regarded as having or "having had" a condition or disorder that makes achievement of a major life activity difficult. The court concluded that the California Legislature did not categorically exclude temporary disabilities but, to the contrary, appears to have included temporary disabilities within its broad definitions of "disability."[157]

In Dutcher v. Ingalls Shipbuilding,[158] the Court of Appeals held that Dutcher's arm injury did not restrict her from working. The court held that "the inability to perform one aspect of a job while retaining the ability to perform the work in general does not amount to substantial

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[152] Id. at 901.
[153] Id. at 893.
[154] Government Code section 12926.1.
[155] 96 F.3d 840 (6th Cir. 1996).
[156] Id. at 843.
[157] Diaz. at 1047-1049.
[158] 53 F.3d 723 (5th Cir. 1995).

limitation of the activity of working."[159] The Court of Appeals in Bolton v. Scrivner, Inc.,[160] held preemption from employment in one's chosen field did not establish a substantial limitation on working. In Bridges v. City of Bossier,[161] the Court of Appeals held that Bridges' hemophilia did not substantially limit him from performing a class of jobs or the major life activity of working. In Talanda v. KFC National Management Company,[162] the Court of Appeals held that an employee's missing teeth did not constitute a disability under the ADA and did not limit her performance in any major life activity.

The Court of Appeals in Reeves v. Johnson Controls World Services, Inc.,[163] held that Reeves was not disabled within the meaning of the ADA despite his diagnosed condition of "panic disorder with agoraphobia." Reeves argued that his major life activity of "everyday mobility" was substantially limited due to his mental impairment as he experienced panic when alone or when traveling in an automobile or over a bridge. The court held that every day mobility is not a major life activity, and Reeves, therefore, was not protected by the ADA.

In Robinson v. Global Marine Drilling Company,[164] the Court of Appeals held that although Robinson did suffer from asbestosis, his condition did not substantially limit any of his major life activities. Though asbestosis is a progressive and often fatal condition of the lungs, the court found that this impairment did not limit his ability to breathe or work. Similarly, the Court of Appeals in Ryan v. Grae & Rybicki, P.C.,[165] held that colitis was an impairment, but did not constitute a disability because it did not substantially limit one's major life activity of caring for oneself.

In Williams v. Channel Master Satellite Systems, Inc.,[166] the Court of Appeals held that, despite her neck and back injuries, Williams was not disabled under the ADA. Although her injuries prevented Williams from working for several months and did not allow her to lift heavy objects, the court found that she was not restricted from lifting, working, or performing any other major life activity.[167]

In Kelly v. Drexel University,[168] the Court of Appeals held that Kelly was not disabled under the ADA, and that his impairment did not substantially limit his major life activities of walking and working. In 1987, Kelly fractured his hip leaving him with a noticeable limp. Kelly's job was eliminated in 1993. Kelly sued Drexel under the ADA claiming he was discriminated against based upon his impairment. The court held that although Kelly's bad hip

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[159] Id. at 726.
[160] 36 F.3d 939 (10th Cir. 1994).
[161] 92 F.3d 329 (5th Cir. 1996).
[162] No. 97-2025 (7th Cir. 1998).
[163] 7 Am. Disabilities Cas. (BNA) 1675 (2nd Cir. 1998).
[164] 101 F.3d 35 (5th Cir. 1996).
[165] 135 F.3d 867 (2nd Cir. 1998).
[166] 101 F.3d 346 (4th Cir. 1996).
[167] See, Ray v. Glidden Company, 85 F.3d 227 (5th Cir. 1996) (although a vascular necrosis was an impairment which prevented him from lifting heavy objects, it did not substantially limit his ability to work); Wooten v. Farmland Foods, 58 F.3d 382 (8th Cir. 1995) (restrictions against working with meat products in a cold environment did not substantially limit the major life activity of working); Robinson v. Neodata Services, Inc., 94 F.3d 499 (8th Cir. 1996) (work-related injury did not substantially limit her ability to work).
[168] 94 F.3d 102 (3rd Cir. 1996).

forced him to hold handrails while climbing stairs and to walk slower, his impairment did not substantially limit his ability to walk or work. In Aucutt v. Six Flags Over Mid-America, Inc.,[169] the Court of Appeals similarly held that Aucutt's heart problems, including high blood pressure and coronary artery disease, did not qualify him as disabled and did not prevent him from working.

The Court of Appeals in Lowe v. Angelo's Italian Foods,[170] held that Lowe's multiple sclerosis ("MS") may substantially limit her major life activity of lifting. The court held that because MS is a disease for which there is no cure and because the long term impact of the disease will vary depending on the form the MS takes, Lowe created a genuine issue of material fact with regard to her ability to lift.[171]

D. Illness and Physical Impairments

Discrimination against those with illnesses and physical impairments is prohibited by the ADA. Congress attempted to provide an equal opportunity for those with illnesses and impairments to secure employment by enacting the ADA whose provisions are "intended to combat the effects of archaic attitudes, erroneous perceptions, and myths that have the effect of disadvantaging" those with disabilities. Gordon v. E.L. Hamm & Associates, Inc.[172]

What constitutes an illness or physical impairment may sometimes vary from court to court. Some courts broadly construe these terms, finding that "it seems more consistent with Congress' broad remedial goals in enacting the ADA . . . to interpret the words 'individual with a disability' broadly, so the Act's coverage protects more types of people against discrimination." Arnold v. United Parcel Service, Inc.[173] Other courts apply a more narrow interpretation of illness and physical impairment to ensure that only those for whom the Act was truly intended can invoke its protection. Despite these differences, most courts agree that insulin-dependent diabetics, epileptics, and HIV carriers will always be regarded as disabled under the ADA. The following cases demonstrate the most recent interpretations of the terms illness and physical impairment in the context of employment discrimination.

In Matczak v. Frankford Candy and Chocolate Company,[174] the Court of Appeals held that "disabled individuals who control their disability with medication may still invoke the protections of the ADA."[175] Despite controlling his epilepsy for over thirty years with medication, Matczak suffered a seizure at work. The district court granted summary judgment for Matczak's employer, holding that Matczak can engage in most life activities and was thereby precluded from ADA protection. The Court of Appeals reversed this decision, holding that

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[169] 85 F.3d 1311 (8th Cir. 1996).
[170] 87 F.3d 1170 (10th Cir. 1996).
[171] See, Best v. Shell Oil Company, 107 F.3d 544 (7th Cir. 1997) (Best's knee injury raised an issue of fact as to whether he was substantially limited in the major life activity of working).
[172] 100 F.3d 907 (11th Cir. 1996).
[173] 136 F.3d 854 (1st Cir. 1998).
[174] 136 F.3d 933 (3rd Cir. 1997).
[175] Id. at 937.

Matczak's epilepsy does constitute a disability under the ADA as his participation in most life activities is contingent upon use of medication.[176]

In Doane v. City of Omaha,[177] the Court of Appeals held that Doane's blindness in one eye did qualify as a disability under the ADA, and that failing to rehire him based upon that disability constituted discrimination by his employer. Despite corrected overall vision of 20/20 and more than ten years of service, Omaha advised Doane his career as a police officer was over after undergoing an eye examination. Doane requested reemployment several times, but was denied due to his blindness in one eye. The district court ordered the city to rehire Doane and to allow him to participate in police recruit training. The Court of Appeals affirmed this decision and held that Doane had successfully performed his job despite his disability for years before his discharge, and to terminate him based upon that disability would violate the ADA.

The Court of Appeals in Katz v. City Metal Co., Inc.,[178] held that Katz was disabled as a result of his heart attack, and that City Metal's termination of Katz was in violation of the ADA. Katz, a scrap metal salesman, never received any negative reports about the quality of his job performance prior to his heart attack. Despite this, City Metal fired Katz five weeks after his heart attack on the pretext of failing to submit a weekly travel schedule. The Court of Appeals reversed the district court's finding of summary judgment for City Metal, holding that Katz proved a prima facie case of discrimination under the ADA. Though the Court of Appeals held that Katz was disabled under the ADA, it explained that "the determination of whether an individual has a disability is . . . based . . . on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others."[179]

Many courts have recently held that although an employees' disability may qualify them for protection under the ADA, their disability did not entitle them to immunity from termination. In Matthews v. Commonwealth Edison Company,[180] the Court of Appeals held that despite the employee's disabilities resulting from a recent heart attack, his employer was justified in firing him due to extensive absences from work. As a result of Matthews' heart attack, he missed work for several months, only to return on a part-time basis. The court held Matthews was fired not for his disability, but for the consequences of his disability. The court explained that "the employer who fires a worker because the worker is a diabetic violates the Act; but if he fires him because he is unable to do his job, there is no violation, even though the diabetes is the cause of the workers' inability to do his job."[181] In Matthews, the court provides further examples of when one with an illness or physical impairment will not be protected from termination under the ADA. The court explains that a blind person will not be able to sue a prison which refuses to hire him as a guard, while an alcoholic will not be able to sue a trucking company that will not hire him because as a consequence of his alcoholism his driving license has been revoked. Following

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[176] See, Arnold v. United Parcel Service, Inc., 136 F.3d 854 (1st Cir. 1998) (insulin dependent diabetic is disabled under the ADA even if medication is necessary to perform most major life activities; underlying medical condition is a disability).

[177] 115 F.3d 624 (8th Cir. 1997).

[178] 87 F.3d 26 (1st Cir. 1996).

[179] Id. at 32.

[180] 128 F.3d 1194 (7th Cir. 1997).

[181] Id. at 1196; See, Myers v. Hose, 50 F.3d 278 (4th Cir. 1995) (bus driver unable to drive safely as a result of diabetes may be terminated).

such logic, if two workers are vying for the same promotion to a job which requires a lot of reading, and one is dyslexic and as a result reads very slowly, it is not disability discrimination for the employer to give the promotion to the worker who can do the job better. However, it would violate the ADA if the employer refused to consider the dyslexic worker for the promotion due to his disability.

In Mararri v. WCI Steel, Inc.,[182] Mararri sued WCI under the ADA for wrongful termination due to his illness. Mararri argued that although he failed the company's sobriety tests, he was protected as an alcoholic by the ADA due to his disability. The court held that "while the ADA protects an individual's status as an alcoholic, merely being an alcoholic does not insulate one from the consequences of one's actions."[183] In Collings v. Longview Fibre Co.,[184] the Court of Appeals held that the ADA does not exempt alcoholics from reasonable rules of conduct, "and employers must be allowed to terminate their employees on account of misconduct, irrespective of whether the employee is handicapped."[185]

Similarly, the Court of Appeals in Ellison v. Software Spectrum, Inc.,[186] held that although Ellison's breast cancer was an impairment, the ADA did not shield her from termination based upon that impairment. Instead, the court held that Ellison was fired for reasons other than her impairment. Her employer did not discriminate against her based upon her impairment as they later hired her in another department.[187]

In McKay v. Toyota Motor Manufacturing, U.S.A., Inc.,[188] the Court of Appeals held that McKay's physical disability caused by carpal tunnel syndrome did not entitle her to ADA protection because her impairment disqualified her from only a narrow range of jobs. The Court of Appeals in Bridges v. City of Bossier,[189] similarly held that Bridges, a hemophiliac seeking employment as a firefighter, could not invoke ADA protection against the city for not hiring him due to his condition because his impairment prevented him from such a small range of job opportunities.

In Christian v. St. Anthony Medical Center, Inc.,[190] the Court of Appeals held that Christian, a hyper cholesterolemic suffering from excessive amounts of cholesterol in her blood, was not terminated in violation of the ADA. The ADA was designed to protect those who are discriminated against by their employer because they are disabled, or because they are perceived to be disabled. In Christian, the court held that "if the employer discriminates against them on

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[182] 130 F.3d 1180 (6th Cir. 1997).
[183] Id. at 1182.
[184] 63 F.3d 828 (9th Cir. 1995).
[185] Id. at 832.
[186] 85 F.3d 187 (5th Cir. 1996).
[187] See, Gordon v. E.L. Hamm & Associates, Inc., 100 F.3d 907 (11th Cir. 1996) (though employee's side effects due to chemotherapy are impairments under the ADA, his claim of discrimination failed as the court found he was fired for reasons other than his impairments).
[188] 110 F.3d 369 (6th Cir. 1997).
[189] 92 F.3d 329 (5th Cir. 1996).
[190] 117 F.3d. 1051 (7th Cir. 1997).

account of their being ill (or being believed by him to be ill), even permanently ill, but not disabled, there is no violation of the ADA."[191]

E. Mental Impairments

In Soileau v. Guilford of Maine,[192] the Court of Appeals held that the ability to get along with others is not a major life activity. The plaintiff had claimed that he could not get along with his co-workers because of periodic episodes of depression and, therefore, he was disabled. The court rejected the plaintiff's contention and held that "inability to interact with others came and went and was triggered by vicissitudes of life which are normally stressful for ordinary people -- losing a girlfriend or being criticized by a supervisor. Soileau's last depressive episode was four years earlier, and he had no apparent difficulties in the interim. To impose legally enforceable duties on an employer based on such an amorphous concept would be problematic."[193]

In Soileau, the Court of Appeals further found that there was not evidence to show any substantial limitation on the employee's ability to perform a major life activity (i.e., work). The court noted that one factor to be considered in determining whether an individual is substantially limited in a major life activity is the nature and severity of the impairment. Here, the court found that the evidence did not establish that Soileau had particular difficulty in interacting with others except for his supervisor. The court found that Soileau was able to perform his normal daily chores and that there was a lack of evidence to show substantial impairment.[194]

In Webb v. Mercy Hospital,[195] the Court of Appeals rejected an employee's claim of mental impairment. The employee claimed that she suffered from depression and that her employer discriminated against her because of it. However, the court held that there was insufficient evidence to show that the employer had knowledge of her diagnosis of depression and, therefore, regarded her as being mentally impaired. The court held that a person is regarded as having an impairment that substantially limits major life activities when others treat that person as having a substantially limiting impairment. An employer's knowledge that an employee exhibits symptoms which may be associated with an impairment does not necessarily show that the employer regarded the employee as disabled. The court held that the employee failed to make a sufficient showing that she was disabled within the meaning of the ADA. The court held that without evidence that the employer had knowledge of the prior diagnosis, that diagnosis cannot be the basis for inferring that she was regarded as mentally impaired.[196]

In Olsen v. General Electric Astrospace,[197] the Court of Appeals held that an employee had stated a prima facie case that he was not hired by the employer because the employer regarded him as disabled. The court based its decision on evidence that the employer spent approximately one third of the interview asking the employee about his health. The employee had previously worked for the company and was supervised by the person conducting the

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[191] Id. at 1053.
[192] 105 F.3d 12 (1st Cir. 1997).
[193] Id. at 15.
[194] Id.
[195] 102 F.3d 958 (8th Cir. 1996).
[196] Id. at 959.
[197] 101 F.3d 947 (3d Cir. 1996).

interview. The employee had told the supervisor that he had been hospitalized for tests to diagnose a possible sleep disorder and that all of the tests had been negative. The employee was later diagnosed as having a multiple personality disorder in addition to post-traumatic stress disorder. The Court of Appeals remanded the matter back to the district court.

In Palmer v. Circuit Court of Cook County,[198] the Court of Appeals held that a diagnosis of major depression and delusional (paranoid) disorder qualified as a disability. However, the individual was not otherwise qualified for a position where the employee threatened other employees. In Palmer, the employee had threatened her supervisor and co-workers on numerous occasions. The court held that a personality conflict with the supervisor or co-worker does not establish a disability within the meaning of the ADA even if it produces anxiety and depression.

However, if a personality conflict triggers a serious mental illness that in turn is disabling, the fact that the trigger was not itself a disabling illness is no defense. Schizophrenia and other psychosis are frequently triggered by minor accidents or other sources of normal stress. The court held that there was no evidence that Palmer was fired because of her mental illness. She was fired because she threatened to kill another employee. The cause of the threat may have been her mental illness, but regardless, an employer may fire an employee because of the employee's unacceptable behavior. The fact that the unacceptable behavior was precipitated by a mental illness does not present an issue under the ADA. The ADA does not require an employer to retain a potentially violent employee. The Act protects only qualified employees, that is, employees qualified to do the job for which they were hired, and threatening other employees disqualifies an individual from employment.[199]

In Wills v. Superior Court,[200] the Court of Appeal held that the Superior Court of Orange County did not violate state law when it terminated a mentally disabled employee for making threats of violence against coworkers. The Court of Appeal held that the Superior Court's action did not violate state law prohibiting discrimination based upon mental disability.

The employee was employed as a court clerk by the Orange County Superior Court. The employee was diagnosed with bipolar disorder. Bipolar disorder is a mental disability characterized by mood swings between depressive and manic episodes. The parties did not dispute that the employee's mental disability caused the employee to make the threats. The employee handbook for the Orange County Superior Court prohibits employees from making threats against fellow employees.

The Court of Appeal noted that the Fair Employment and Housing Act (FEHA)[201] protects employees from discrimination based on mental disability. The Court of Appeal reviewed federal case law under the Americans with Disabilities Act (ADA), and concluded that the ADA does not require an employer to retain an employee who threatens or commits acts of violence against coworkers, even if the employee's disability caused the misconduct.[202] The court concluded that under the federal cases, the ADA does not require an employer to retain a

[198] 17 F.3d 351 (7th Cir. 1997).
[199] Id. at 352
[200] 195 Cal.App.4th 143 (2011).
[201] Id. at 159-160; see, also, Government Code section 12940 et seq.
[202] Id. at 164; citing, Palmer v. Circuit Court of Cook County, Illinois, 117 F.3d 351, 352 (7th Cir. 1997).

potentially violent employee and noted that employers have a duty to maintain a safe workplace.[203] The Court of Appeal stated:

> "Accordingly, consistent with the federal courts' interpretation of the ADA, we interpret FEHA as authorizing an employer to distinguish between disability-caused misconduct and the disability itself in the narrow context of threats or violence against coworkers. If employers are not permitted to make this distinction, they are caught on the horns of a dilemma. They may not discriminate against an employee based on a disability, but, at the same time, must provide all employees with a safe work environment free from threats and violence."[204]

The Court of Appeal went on to state that it believed that its interpretation of FEHA strikes an appropriate balance between protecting employees suffering from a disability and allowing employers to protect their employees and others from threats of violence and the fear that a hostile or potentially violent employee will act on those threats. This decision should be helpful to districts when faced with an employee who makes threats against other employees.

F. Temporary Injuries

Most courts have ruled that temporary impairments of short duration, with little or no long term permanent impact, do not qualify as disabilities under the ADA.

In Rogers v. International Marine Terminals, Inc.,[205] the Court of Appeals held that an injury to a worker's ankle, which under workers' compensation laws was rated as a 13 percent permanent partial disability, did not qualify as a disability under the ADA. The court held that the ankle injuries were temporary and did not constitute a permanent disability. The Court of Appeals stated:

> "When Rogers was terminated effective January 6, 1993, he acknowledges that he was unavailable for work, recuperating from elective ankle surgery performed a month earlier. In fact, Rogers remained unavailable for work until released by his physician in December, 1993. Because Rogers could not attend work, he is not a 'qualified individual with a disability' under the ADA. As several courts have recognized, 'an essential element of any...job is an ability to appear for work...and to complete assigned tasks within a reasonable period of time.'"[206]

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[203] See, also, EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (March 25, 1997).
[204] Id. at 165-66.
[205] 87 F.3d 755 (5th Cir. 1996).
[206] Id. at 759.

The court upheld Rogers' layoff and held that nothing in the reasonable accommodation provisions of the ADA requires an employer to wait an indefinite period for an employee's medical condition to be corrected.

In Burch v. Coca Cola Company,[207] the Court of Appeals held that an employee's drunkenness or inebriation was a temporary disability. The court held that the employee produced no evidence that the effects of his alcohol induced inebriation was more than a temporary impairment of the senses. The court held that although alcoholism affected how the employee lived and worked, it was insufficient to trigger coverage under the IDEA. The Court of Appeals stated:

> "Burch's testimony that his inebriation was frequent does not make it a permanent impairment. Permanency, not frequency, is the touchstone of a substantially limiting impairment. Although Burch's alcoholism may have been permanent, he offered no evidence that he suffered from any substantially limiting impairment of any significant duration."[208]

The court in Burch noted that Burch was able to perform the functions of his job and sought reinstatement to his position without modification.

In Sanders v. Arneson Products, Inc.,[209] the Court of Appeals held that a cancer related psychological disorder of temporary duration did not qualify as a disability under the ADA. The court noted that the psychological impairment lasted from December 19, 1992, to April 5, 1993, and had no long term residual effects beyond April 5, 1993. Sanders requested leave for the entire period of his psychological impairment. The court held that a temporary injury with minimal residual effects cannot be the basis for a claim under the ADA.[210] The court distinguished Kimbro v. Atlantic Richfield Company,[211] since that case involved a chronic sufferer of acute cluster migraines. In Kimbro, the court held that a reasonable accommodation required that an employer grant leaves of absence during episodes of migraines so that the employee could seek medical treatment. The court noted that Kimbro involved temporary periods of leave for episodic outbreaks of an underlying permanent condition. In Sanders, Sanders suffered a single episode of a temporary condition and the leave was requested for the entire duration of the condition.[212]

A plaintiff may be more likely to succeed under state law in establishing that a temporary impairment is a qualifying disability. As discussed above, a United States District Court has determined that a temporary disability may constitute a disability for purposes of the California Fair Employment and Housing Act.[213]

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[207] 119 F.3d 305 (5th Cir. 1997).
[208] Id. at 316.
[209] 91 F.3d 1351 (9th Cir. 1996).
[210] Id. at 1354.
[211] 889 F.2d 869, 878-879 (9th Cir. 1989).
[212] Id. at 1354.
[213] Diaz v. Federal Express Corporation, 373 F.Supp.2d 1034 (C.D. Cal. 2005).

G. Record of Impairment or Perception of Having an Impairment

The ADA also prohibits discrimination against individuals who are regarded as having an impairment or disability. To establish a claim of discrimination under this prong of the ADA, an employee must introduce evidence that the employer regarded the employee as having a physical or mental impairment which substantially limited one or more of their major life activities (e.g. work). An individual may be protected under this prong of the ADA even though they do not have a disability if the employer regarded or perceived the employee as having a substantially limiting impairment. In Francis v. City of Meriden,[214] the Court of Appeals held that a claim of discrimination based upon a perception of having an impairment "turns on the employer's perception of the employee, a question of intent, not whether the employee has a disability."[215] Many courts have recently addressed this issue in the employer/employee context.[216]

In Gordon, the Court of Appeals held that an employee failed to prove his employer regarded him as having an impairment. The court based its decision on the fact that Gordon himself conceded he was fully capable of working, despite his recent chemotherapy treatments. Gordon alleged that Hamm unlawfully discriminated against him based upon his disability and a perception of impairment. Though Gordon did suffer some side effects from the chemotherapy which may qualify as physical impairments under the ADA, the court held Hamm did not perceive Gordon as having an impairment which substantially limited any of his major life activities, such as his ability to work and to care for himself. Because Gordon failed to prove he had a disability as defined by the ADA and failed to prove his employer regarded him as having an impairment, the court held he was not entitled to the ADA's protections.

In Francis, the Court of Appeals held that physical characteristics, such as weight, which are not the result of a physiological disorder are not considered "impairments" under the ADA "for the purposes of determining either actual or perceived disability."[217] For this reason, the court held Francis was not protected by the ADA for his claim that Meriden discriminated against him based upon his weight. As a member of a firefighters union, Francis was suspended for one day without pay because he exceeded the maximum acceptable weight for his height. Francis argued that Meriden discriminated against him by perceiving him as having a physical impairment due to his weight. Because Francis claims he was disciplined for a physical characteristic not covered by the ADA, the court dismissed Francis' claim. The court noted that to hold otherwise "would debase this high purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared."[218]

In Olson, the Court of Appeals held that an employer's awareness of an employee's disability does not constitute a perception of impairment. Olson, who had a history of depression, informed Dubuque of her condition upon commencement of her employment. The court held

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[214] 129 F.3d 281 (2nd Cir. 1997).

[215] Id. at 284.

[216] See, Gordon v. E.L. Hamm & Associates, Inc., 100 F.3d 907 (11th Cir. 1996); Francis v. City of Meriden, 129 F.3d 281 (2nd Cir. 1997); Olson v. Dubuque Community School District, 137 F.3d 609 (8th Cir. 1998)

[217] Id. at 286.

[218] Id.; See, Andrews v. State of Ohio, 104 F.3d 803 (6th Cir. 1997) (mandated weight limits for police officers not a violation of ADA).

Olson failed to prove Dubuque terminated her employment due to a perception of impairment, but rather for poor job evaluations.[219]

H. Prima Facie Case

To establish a prima facie (i.e. basic) case of discrimination in violation of the ADA, the employee must prove:

1. He or she is disabled within the meaning of the ADA.

2. He or she is otherwise qualified to perform the essential functions of the job with or without reasonable accommodation.

3. He or she has suffered an adverse action under circumstances which infer unlawful discrimination based upon disability.

The above standard has been adopted in most federal circuits.[220] If the plaintiff establishes the elements for a prima facie case, the burden then shifts to the defendant to set forth a legitimate, nondiscriminatory reason for the adverse employment action it took against the employee.[221]

If the defendant sets forth its nondiscriminatory reasons, the plaintiff must show by a preponderance of the evidence that the defendant's proffered reasons were not its true reasons, but merely a pretext for illegal discrimination.[222] Specifically, the plaintiff must produce enough evidence to convince a jury to reasonably reject the employer's explanations for its decisions.[223]

In Equal Employment Opportunity Commission v. Amego, Inc.,[224] the Court of Appeals held that an employer was not required to modify job duties to accommodate an employee's disability when such an accommodation was impossible or imposes "undue hardship" upon the employer. Ann Marie Guglielmi, as represented by the EEOC, was employed as a Team Leader at Amego, a facility which provides care for those with autism and behavioral disorders. Administering vital medications to Amego's patients was one of the essential job functions of a Team Leader. After learning that Guglielmi had twice attempted to commit suicide by overdosing on medications, Amego fired her. Amego argued that Guglielmi could not safely dispense medications, an essential job function, and was thereby no longer qualified for her position.

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[219] See, Ellison v. Software Spectrum, Inc., 85 F.3d 187 (5th Cir. 1996); MacDonald v. Delta Air Lines, Inc., 94 F.3d 1437 (10th Cir. 1996) (airline mechanic failed to meet flight as required).

[220] See, Holbrook v. City of Alpharetta, 112 F.3d 1522 (11th Cir. 1997); Kocsis v. Multi-Care Management, Inc., 97 F.3d 876 (6th Cir. 1996); Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311 (8th Cir. 1996); Rizzo v. Children's World Learning Centers, Inc., 84 F.3d 758 (5th Cir. 1996); Daigle v. Liberty Life Insurance Co., 70 F.3d 394 (5th Cir. 1995); Lyons v. Legal Aid Society, 68 F.3d 1512 (2nd Cir. 1995); White v. York Intern. Corp., 45 F.3d 357 (10th Cir. 1995); Newman v. GHS Osteopathic, Inc., 60 F.3d 153 (3rd Cir. 1995).

[221] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973); Kocsis v. Multi-Care Management, Inc., 97 F.3d 876, 882 (6th Cir. 1996).

[222] Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089 (1981).

[223] Manzer v. Diamond Shamrock Chemicals, Co., 29 F.3d 1078, 1083 (6th Cir. 1994).

[224] 110 F.3d 135 (1st Cir. 1997).

The court held that Amego did not discriminate against Guglielmi because she could not safely perform her job duties and because there was no position available that could be modified to accommodate her.[225]

In School Board of Nassau County v. Arline,[226] the Supreme Court held that "even though a disabled employee is unable to perform the essential functions of an employment position, his termination may nevertheless be unlawful if the employer has failed to reasonably accommodate the employee's disability."[227]

In Myers v. Hose,[228] the Court of Appeals held that there was no way to reasonably accommodate an insulin-dependent diabetic bus driver. The court found that because Myers could no longer perform the essential function of his job (i.e., not threatening the safety of his passengers or other motorists), no accommodation was possible.[229]

In Schmidt v. Methodist Hospital of Indiana,[230] the Court of Appeals held that "employers cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies, but they are not required to find another job for an employee who is not qualified for the job he or she was doing."[231]

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[225] See, Holbrook v. City of Alpharetta, Georgia, 112 F.3d 1522 (11th Cir. 1997) (employee's visual problems could not be reasonably accommodated by a modification of job duties without sacrificing the essential functions of his job); Miller v. Illinois Department of Corrections, 107 F.3d 483 (7th Cir. 1997) (prison guard's loss of vision could not be reasonably accommodated); Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997) (police officer's blindness in one eye due to glaucoma could be corrected to 20/20 with glasses, thereby enabling him to perform all functions of the job); Cochrum v. Old Ben Coal Company, 102 F.3d 908 (7th Cir. 1996) (an employee is not a "qualified individual with a disability" because no reasonable accommodation would render him able to perform his job); Yin v. State of California, 95 F.3d 864 (9th Cir. 1996) (employee with egregious history of absenteeism must submit to a medical examination to prove her ability to perform her job); Foreman v. The Babcock & Wilcox Company, 117 F.3d 800 (5th Cir. 1997) (it is not a reasonable accommodation to require an employer to eliminate an essential function of the job and in effect create a new job for the disabled employee).

[226] 480 U.S. 273 (1987).

[227] Id. at 287.

[228] 50 F.3d 278 (4th Cir. 1995).

[229] Siefken v. Village of Arlington Heights, 65 F.3d 664 (7th Cir. 1995) (a diabetic police officer is not entitled to a second chance as a reasonable accommodation under the ADA); Schmidt v. Methodist Hospital of Indiana, 89 F.3d 342 (7th Cir. 1996) ("employers cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies, but they are not required to find another job for an employee who is not qualified for the job he or she was doing."); Moore v. The Board of Education of the Johnson City Schools, 134 F.3d 781 (6th Cir. 1998) (teacher is not "otherwise qualified" to teach after being arrested for drunk driving and undergoing rehabilitation).

[230] 89 F.3d 342 (7th Cir. 1996).

[231] See, Moore v. The Board of Education of the Johnson City Schools, 134 F.3d 781 (6th Cir. 1998) (teacher is not "otherwise qualified" to teach after being arrested for drunk driving and undergoing rehabilitation); Turco v. Hoechst Celanese Corporation, 101 F.3d 1090 (5th Cir. 1996) (diabetic chemical process operator was not "otherwise qualified" because he could not perform the essential functions of his job without putting himself or others in dangers way); Martinson v. Kinney Shoe Corporation, 104 F.3d 683 (4th Cir. 1997) (epileptic employee could not perform the essential job function of security due to his disability); Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560 (7th Cir. 1996) (employee's mental disability rendered him unable to perform essential functions of the job); Grenier v. Cynamid Plastics, Inc., 70 F.3d 667 (1st Cir. 1995) (despite efforts to accommodate employee's mental disabilities, employee could not perform the essential functions of the job).

In Webster v. Methodist Occupational Health Centers, Inc.,[232] the Court of Appeals held that an industrial nurse who suffered a stroke could not return to her previous job because the effects of the stroke left her unqualified to perform her job unsupervised. The job required the ability to work alone and unsupervised and the plaintiff was unable to work unsupervised. Therefore, she was not able to perform the essential functions and was not a qualified person with a disability. In addition, the court held, "An employee cannot refuse reasonable accommodations during the interactive process the statute contemplates, and then after dismissal suggest something different and claim that the employer still has a duty to consider further accommodations."[233]

To establish a prima facie case of discrimination under the ADA, the plaintiff must prove that the defendant-employer had knowledge of his or her disability before terminating their employment.

In Morisky v. Broward County,[234] the Court of Appeals held that an employer cannot be guilty of discriminating against a disabled employee if the employer had no knowledge of the employee's disability. Morisky applied for a custodial job which required a written test as part of the application process. Though she was illiterate and could not take the test, Morisky never informed anyone that she had a mental or developmental disability. The County believed the ability to read was an essential function of the job of custodian and refused to administer the test orally. She then sued Broward County for not providing her with a reasonable accommodation (i.e., an oral examination).

Though Morisky argued Broward County should have known of her disability because she mentioned that she had once been enrolled in special education classes, the court held she failed to prove they had actual knowledge of her disability. The court held that the knowledge that a job applicant cannot read or write and had taken special education courses was insufficient to impute knowledge of her disability to the employer. The court held that the employer must have actual or constructive knowledge of the applicant's disability in order for the employee to establish a prima-facie case.[235] The court stated, "There is no evidence in this case that the defendant knew that the plaintiff's inability to read was a result of an organic dysfunction rather than a lack of education."[236]

In Bombard v. Fort Wayne Newspapers, Inc.,[237] the Court of Appeals held that an employer cannot be held liable for failing to provide reasonable accommodation without first having knowledge of the employee's disability. In the year prior to March, 1994, Bombard began suffering from serious illnesses, including severe depression with psychotic features. Bombard requested a leave of absence for several weeks. The requested leave was granted and he was scheduled to return to work on March 23, 1994. On the morning of March 23, he experienced a suicidal episode and was unable to call his supervisor and inform her that he would not be returning to work as scheduled. On March 25, 1994, Bombard called his supervisor and told her

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[232] 141 F.3d 1236 (7th Cir. 1998).
[233] Id. at 1238.
[234] 80 F.3d 445 (11th Cir. 1996).
[235] Id. at 447-448.
[236] Id. at 448.
[237] 92 F.3d 560 (7th Cir. 1996).

that his physician had released him to return to work part-time. Bombard's supervisor responded that they had already made their decision and called Bombard back ten minutes later and told him he was terminated and would be receiving a termination letter. Bombard had previously received written warnings regarding his failure to report to work.[238]

The Court of Appeals held that Bombard failed to establish (i.e., prima facie case) that he was a qualified individual with a disability because he had not informed his employer of his disability. The court went on to state that because he had failed to show that he was a qualified individual with a disability, he was not entitled to the reasonable accommodation he requested, nor was he protected from discharge.[239]

I. Pretext

Employees' assertion that their employers' reason for termination was a pretext to mask their discriminatory motives is the basis for many lawsuits brought under the ADA.

In Miners v. Cargill Communications, Inc.,[240] the Court of Appeals held that summary judgment was inappropriate for Cargill because Miners presented evidence from which one could conclude that her employer's proffered reason for termination was a pretext for unlawful discrimination. Because Cargill suspected Miners was operating a company vehicle under the influence of alcohol, Cargill hired a private investigator to follow her. The investigator observed Miners consuming several alcoholic beverages before entering the vehicle. The next day at work, Cargill insisted Miners either enter an alcohol rehabilitation program or be fired. Miners refused to enter the program and was fired. Miners argued that Cargill's reason for firing her was a pretext for its discriminatory perception that she was an alcoholic. The court held that Miners made a prima facie case of discrimination and proved Cargill may have used its reason of operating a company vehicle under the influence of alcohol as a pretext for its true discriminatory motive.

In Leffel v. Valley Financial Services,[241] Leffel, who suffered from multiple sclerosis, claimed that her employer wrongfully terminated her based upon her disability. Valley Financial Services maintained that it fired Leffel because she failed to meet its performance expectations (e.g., returning phone calls in a timely manner, poor communication with staff). The Court of Appeals found that Valley Financial Services' stated reason for firing Leffel was not a pretext for intentional discrimination, but was instead based on legitimate reasons.[242]

J. Adverse Employment Action and Retaliation

In order to establish a prima facie case that an employee has suffered an adverse employment action under the ADA, an employee must demonstrate that a reasonable person in

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[238] Id. at 561.

[239] Id. at 563-564; See, also, Kocsis v. Multi-Care Management, Inc., 97 F.3d 876 (6th Cir. 1996) (employer cannot be liable for retaliation against an employee because it had no knowledge of her multiple sclerosis).

[240] 113 F.3d 820 (8th Cir. 1997).

[241] 113 F.3d 787 (7th Cir. 1997).

[242] See, Price v. S-B Power Tool, 75 F.3d 362 (8th Cir. 1996) (employer's nondiscriminatory reason for employee's termination was not pretextual, but was instead based upon employee's poor attendance).

his or her position would view the employment action as adverse. One court has adopted an objective test to make this determination. Doe v. DeKalb County School District.[243]

In Doe, the Court of Appeals remanded a case back to the district court to make a factual determination as to whether a reasonable person would consider the transfer of a teacher infected with the HIV virus from a classroom for children with severe behavioral disorders to another type of classroom, an adverse employment action. The teacher was transferred because children with severe behavior disorders frequently bite, hit, scratch and kick others and a teacher must physically restrain these students. As a result, the school district felt there was a greater risk of blood-to-blood transmission of the HIV virus so they decided to transfer the teacher. The Court of Appeals held that whether the transfer was to a comparable program or was to an inferior assignment and thus, a subterfuge for an adverse or discriminatory employment action, was a factual issue to be decided by the trial court.

The ADA has established protective measures to shield disabled employees from retaliatory acts by their employers. In Kiel v. Select Artificials, Inc.,[244] the Court of Appeals held that Kiel established a prima facie case of retaliation against his employer. Kiel, who had been deaf since birth, repeatedly requested that Select provide him with a specialized telecommunications device which would allow him to make and receive telephone calls. Kiel argued that he was fired because he requested this accommodation and protested when his request was denied. The court held Kiel successfully established a prima facie case because he demonstrated that he engaged in a statutorily protected activity, an adverse employment action was taken against him, and there was a causal connection between the adverse employment action and the protected activity.

In Hamilton v. Southwestern Bell Telephone Company,[245] the Court of Appeals held that "the ADA does not insulate emotional or violent outbursts blamed on an impairment." Hamilton, who verbally abused and struck a co-worker, claimed Southwestern Bell fired him due to his Post Traumatic Stress Disorder. The court found that his termination was due to his egregious behavior, and not his disability. The court held that "rights afforded to the employee are a shield against employer retaliation, not a sword with which one may threaten or curse supervisors."[246]

In Kocsis v. Multi-Care Management, Inc.,[247] the Court of Appeals held that Multi-Care did not retaliate against Kocsis because of her arthritis and multiple sclerosis by refusing to promote her. Instead, the court found that Kocsis did not receive her promotion because she did not have the necessary certification for the position.

K. Burden of Proof

In Andrews v. State of Ohio,[248] the Court of Appeals held that the plaintiff had the burden to establish the existence of an impairment that substantially limits a major life activity as an

[243] 145 F.3d 1441 (11th Cir. 1998).
[244] 169 F.3d 1131 (8th Cir.1998).
[245] 136 F.3d 1047 (5th Cir. 1998).
[246] Id. at 1052.
[247] 97 F.3d 876 (6th Cir. 1996).
[248] 104 F.3d 803 (6th Cir. 1997).

element of their prima facie case. Once the plaintiff presents a prima facie case, the burden of proof shifts to the defendant employer to prove that the "challenged criteria are job related and required by business necessity, and that reasonable accommodation is not possible."[249] In this case, the plaintiffs could not establish a prima facie case that their inability to meet the Ohio State Highway Patrol's fitness standards constitutes an impairment under the ADA.

In Diagle v. Liberty Life Insurance Company,[250] the Court of Appeals held that "a plaintiff may establish a claim of disability discrimination by presenting direct evidence of discrimination," or through an indirect method of proof set forth in McDonnell Douglas v. Green.[251] Once the plaintiff has established a prima facie case, the defendant must "articulate some legitimate nondiscriminatory reason" for its action that adversely affected the plaintiff. If the defendant meets its burden of proof, the McDonnell Douglas burden shifting scheme is abandoned and becomes irrelevant. The Court of Appeals in Aka v. Washington Hospital Center,[252] similarly held that the McDonnell Douglas framework was appropriately applied in deciding an ADA dispute in which an employer asserted that an employee's disability was not a factor in challenged hiring decisions.[253]

In McNely v. Ocala Star-Banner Corporation,[254] the Court of Appeals held that an employer can be liable for discrimination under the ADA even if the employee's disability was not the sole cause for termination. As long as the discrimination was but one factor in an employer's decision to take an adverse employment action against a disabled employee, the court ruled an employee is entitled to invoke ADA protection. After undergoing brain surgery, McNely began experiencing vision problems. These visual problems made it difficult for McNely to perform his job as night supervisor of the camera department of the Ocala Star-Banner newspaper. On one occasion, McNely's visual problems led to a forty-minute press delay for which McNely was reassigned to the building maintenance department. Although the court did not find discrimination was the sole cause of Ocala's adverse employment action against McNely, it did find that discrimination based upon his disability was one reason he was demoted, which is sufficient to establish potential liability under the ADA and to remand the matter to the district court for trial. At trial, the jury will decide what was the motivating or predominant factor in the decision to terminate.

In Green v. State of California,[255] the California Supreme Court held that under California's Fair Employment and Housing Act,[256] the employee has the burden of proof to show that he or she was qualified for the position sought or held by showing that he or she is able to perform the essential duties of the position with or without reasonable accommodation. The California Supreme Court overturned a lower court decision holding that the employer had the burden of proof.

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[249] Id. at 807.
[250] 70 F.3d 394 (5th Cir. 1995).
[251] 411 U.S. 792; Id. at 395.
[252] 116 F.3d 876 (U.S. App. D.C. 1997).
[253] See, Kocsis v. Multi-Care Management, 97 F.3d 876 (6th Cir. 1996) (burden of proof shifts to employer to articulate a legitimate, nondiscriminatory reason for adverse employment action once employee establishes a prima facie case of discrimination under the ADA).
[254] 99 F.3d 1068 (11th Cir. 1996).
[255] 42 Cal.4th 254 (2007).
[256] Government Code section 12900 et seq.

In Green, the plaintiff worked for the state of California, Department of Corrections at the California Institute for Men in Chino as a stationary engineer. The employee's duties included maintenance and repair of equipment and mechanical systems and supervision and instruction of a crew of inmates. In 1990, the employee was diagnosed with Hepatitis C. The employee contracted the disease while working on sewer pipes at his job. From 1990 until 1997 the employee did not have any work restrictions because of the illness, nor did he lose any time from work.

In 1997, the employee's physician began treating the employee with the drug interferon. As a result of these treatments, the employee felt fatigued, had trouble sleeping and suffered headaches and body aches. The employee's physician requested that the employee be placed on light duty until May or June 1997. The Department of Corrections accommodated the employee and allowed him to arrive at work late on the days he received his treatments and assigned the employee to positions that did not require heavy labor. However, the Department of Corrections had a policy that employees could be on light duty for a limited time only.

In October 2000, the employee was informed that he could not return to work unless he was cleared for full duty as a stationary engineer. The employee then filed a disability discrimination complaint with the Department of Fair Employment and Housing and then filed a complaint for damages in Superior Court. After trial, the jury returned a general verdict for the employee, awarding him $597,088.00 in economic damages and $2,000,000.00 in non-economic damages. The Department of Corrections moved for a new trial and the trial court ruled that a motion for a new trial would be granted, unless the employee accepted a smaller award, which the employee did. The Department of Corrections appealed the jury's verdict on a number of grounds including that the trial court erred in failing to instruct the jury that the employee had the burden of proof to show that he is a qualified individual who can perform the essential functions of the job, with or without reasonable accommodation.

The Court of Appeal affirmed the judgment in the employee's favor, holding that state law does not require the employee to prove that he is a qualified individual and that the burden of proof is on the employer. The California Supreme Court granted the Department of Correction's petition for review and reversed the decision of the Court of Appeal.

The California Supreme Court reviewed the legislative history of the Fair Employment and Housing Act (FEHA) and observed that state law was patterned after federal law, specifically, the Americans with Disabilities Act.[257] Under federal law, the Court found, the employee bears the burden of proving that he or she meets the definition of a qualified individual with a disability in order to establish a violation of the ADA and showing that with or without reasonable accommodation, the individual can perform the essential functions of the job. The California Supreme Court noted that the employee also had the burden of proof under the Rehabilitation Act of 1973.[258] The Court observed that under federal law:

[257] See 42 U.S.C. section 12101 et seq.
[258] See 29 U.S.C. section 794.

> "The reason is clear; it is not unlawful under federal law to draw a distinction on the basis of the disability if that disability renders an employee unqualified, with or without reasonable accommodation, to perform the essential functions of a position."[259]

The Court went on to note that state law also prohibits discrimination on the basis of an employee's disability and noted that Government Code section 12940 states, in part:

> "This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability… where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others, even with reasonable accommodations."[260]

The California Supreme Court citing this language concluded that state law is strikingly similar to the Americans with Disabilities Act. The court concluded it was not a coincidence that state law and federal law are very similar, but that it reflected the California Legislature's deliberate effort in 1992 to conform state law to federal law. The court also noted that under general state law, the party who brings an action in court has the burden of proof as to each fact that is essential to the claim for relief.[261] Therefore, the California Supreme Court concluded that under state law, the employee has the burden of proof of showing that he is a qualified individual, and that he or she can perform the essential functions of the job with or without reasonable accommodation.

L. Discipline of a Disabled Employee

The ADA does not insulate an employee from routine discipline in the workplace. The employee, to prove discrimination under the ADA, must show that an adverse employment decision was made because of the employee's disability. In Brendage v. Hahn,[262] the California Court of Appeal held that an employer does not violate the ADA when the employer terminates an employee who abandons her job, even if the job abandonment may have been the result of a previously undisclosed manic depressive disorder. In Brendage, when the plaintiff failed to report to work following an emergency vacation, the employer was unaware that the plaintiff suffered from bipolar disorder and believed that the employee had resigned her position. The employer subsequently denied the employee reinstatement. The court held that since the employer was unaware of the plaintiff's mental disability, he could not have discriminated against the employee for that reason. The court held that the employer properly denied reinstatement because he believed the employee had resigned her position and that her six-week absence was not caused by her disability.

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[259] Id. at 261-62.
[260] Id. at 260. See Government Code section 12940(a)(1).
[261] See Evidence Code section 500.
[262] 57 Cal.App. 4th 228 (1997).

The courts have held that reasonable accommodation does not include rescinding discipline. Discipline, uniformly applied to disabled and nondisabled employees, has been upheld by the courts. Employment standards, including both performance and conduct when applied to all employees both disabled and nondisabled, have been upheld by the courts. In Siefken v. Village of Arlington Heights,[263] the Court of Appeals held that where a police officer with insulin dependent diabetes improperly monitored his insulin and, as a result, became disoriented while driving his police car, he was not immune from discipline. The police officer was stopped by other officers while driving at a high speed through a residential area 40 miles outside of his jurisdiction. The Court of Appeals rejected the employee's assertion that reasonable accommodation included giving the employee a second chance after the employee had broken the safety rules.

In Christian v. St. Anthony Medical Center,[264] the Court of Appeals held that the ADA does not protect the employee from dismissal due to illness. The court held that the employer does not violate the ADA by discharging an employee because she is ill, even if permanently ill but not disabled.

In Mararri v. W.C.I. Steele,[265] the Court of Appeals held that where an employer has entered into a last chance agreement with an employee and the employee violates that last chance agreement, the employer may terminate the employee without violating the ADA.

Although the ADA does provide extensive protection for qualified disabled employees, it does not serve as an impenetrable barrier around the employee, shielding the individual from termination.

In Palmer v. Circuit Court of Cook County, Illinois,[266] the Court of Appeals held that a diagnosis of mental illness did not shield an abusive or potentially violent employee from termination. Palmer, who suffered from depression and a delusional disorder, verbally abused and threatened to kill a co-worker. After being fired for her actions, she sued her employer under the ADA for discriminating against her based upon her mental disabilities. The court held that Palmer was not entitled to ADA protection, stating that "if a personality conflict triggers a serious mental illness that is in turn disabling, the fact that the trigger was not itself a disabling illness is no defense."[267]

In Tyndall v. National Education Centers, Incorporated of California,[268] the Court of Appeals held that the termination of an employee who was frequently absent from work due to her own disability and a need to care for a disabled relative was not discriminatory. Tyndall, a college instructor, often missed work due to her auto-immune system disorder and due to her son's disability. Despite numerous attempts to accommodate her difficult situation, the National Education Center terminated Tyndall's employment. The court held that such a termination was justified because Tyndall missed so much work that she was no longer a qualified employee, and

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[263] 65 F.3d 64 (7th Cir. 1995).
[264] 117 F.3d 1051 (7th Cir. 1997).
[265] 130 F.3d 1180 (6th Cir. 1997).
[266] 117 F.3d 351 (7th Cir. 1997).
[267] Id. at 352.
[268] 31 F.3d 209 (4th Cir. 1994).

because an employer is not obligated to modify an employee's schedule to enable the employee to care for a family member with a disability.[269]

In Martinson v. Kinney Shoe Corporation,[270] the Court of Appeals held that although Kinney fired Martinson because of his epilepsy, an illness covered by the ADA, Kinney was not liable for discrimination. As an epileptic, Martinson failed to provide the security Kinney employees are required to provide. The court held that "Martinson's disability left him unable to perform the essential security function of his position," and Kinney was, therefore, justified in terminating his employment.[271]

In Equal Employment Opportunity Commission v. Amego, Inc.,[272] the Court of Appeals held that a suicidal employee was no longer qualified for her position as a team leader responsible for the care of severely disabled clients because she posed a threat to others in the workplace. The employer, Amego, Inc., is a small nonprofit organization which cares for severely disabled people suffering from autism, retardation and behavior disorders. The team leader position required the employee to be responsible for the care of these disabled clients, including the responsibility of administering vital medications to them. The employee had twice attempted to commit suicide within a six week period by overdosing on medications. Amego decided that, therefore, the employee could not safely dispense medications, an essential function of the job, and that there was no other position reasonably available. As a result, the employee was terminated.

The EEOC sued Amego on behalf of the employee. The district court entered summary judgment against the EEOC, holding that the EEOC had failed to establish a prima facie case that the employee was an otherwise qualified individual, that an accommodation could reasonably be made and that the employee had been discriminated against because of her disability. The Court of Appeals affirmed.[273]

The Court of Appeals noted that the essential functions of the position of team leader included supervision of individual clinical, educational and vocational programs and collection for all programs, serving as a role model for staff, evaluating staff, training staff, enforcing Amego's policies and administering medications.[274]

Amego felt that the employee's abuse of prescription drugs served as a poor role model for staff and endangered Amego's clients whose parents might feel that the employee would not

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[269] See, Wooten v. Farmland Foods, 58 F.3d 382 (8th Cir. 1995) (employer did not violate the ADA for firing an employee with shoulder problems because he falsified portions of his employment application, could no longer adequately perform the job, and because they were not willing to fire another employee to accommodate him); Price v. S-B Power Tool, 75 F.3d 362 (8th Cir. 1996) (employer's reason for firing an epileptic employee was nondiscriminatory because employee had a poor attendance record); DeLuca v. Winer Industries, Inc., 53 F.3d 793 (7th Cir. 1995) (discharged employee with multiple sclerosis failed to prove he was fired for discriminatory reasons; rather, he was fired due to a reduction in force).

[270] 104 F.3d 683 (4th Cir. 1997).

[271] Id. at 687; See, Moses v. American Nonwovens, Inc., 97 F.3d 446 (11th Cir. 1996) (employer did not err in firing epileptic employee who posed a threat to himself and others due to his disability and the nature of his job).

[272] 110 F.3d 135 (1st Cir. 1997).

[273] Id. at 136-137.

[274] Id. at 137-138.

or could not properly administer their medications.[275] The court held that the employee has the burden of proving she is qualified where there is a threat to the safety of others.[276] The court held there was no reasonable accommodation Amego could make short of hiring additional staff which the court held would be an undue hardship of Amego.[277]

The court upheld the discharge of the employee. The rationale in Amego could apply as well to teachers who are required to supervise children.

M. Inability to Perform the Essential Functions of the Job

The courts have interpreted the requirement that a qualified individual with a disability is an individual who is able to perform the essential functions of the job to encompass a number of different aspects of workplace behavior and skills. An employee who threatens other employees cannot perform one of the essential functions of the job (i.e., to satisfactorily interact with other employees). An employee who is not able to regularly report to work due to illness is not able to perform one of the essential functions of the job (i.e., to regularly physically report to work). An employee who cannot obtain an appropriate drivers license, for example, may not be able to perform the functions of a driver position. A teacher who, due to psychiatric difficulties, is unable to care for her own children, who is hospitalized in a psychiatric hospital and who refuses to provide the employing school district with medical documentation of her ability to return to work, has not shown that she is able to perform the essential functions of her teaching position and could be terminated without violating the ADA.

In Equal Employment Opportunity Commission v. Yellow Freight System, Inc.,[278] the Court of Appeals held that regular job attendance was an essential function of the employee's job and the employee's excessive absences evidenced an inability to perform the essential functions of the job and thus warranted termination. The Court of Appeals held that the employee's request of unlimited sick leave without penalty does not constitute a reasonable accommodation.

In Yellow Freight System, the court held that, in most instances, the ADA does not protect employees who have erratic, unexplained absences, even when those absences are a result of a disability. The Court held that attendance at the job site is a basic requirement of most jobs, except in the unusual case where an employee can effectively perform all work related duties at home, an employee who does not come to work cannot perform any of his job functions, essential or otherwise.[279]

In Moore v. Board of Education,[280] the Court of Appeals upheld the termination of a public school teacher by finding that she was not able to perform the essential functions of her job. In Moore, the teacher was experiencing personal difficulties, including the arrest of her husband, an alleged rape by her ex-husband and the loss of custody of her children. She voluntarily entered a psychiatric facility in late November, 1993. Rather than informing school

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[275] Id. at 140.
[276] Id. at 144.
[277] Id. at 148.
[278] 253 F.3d 943 (7th Cir. 2001).
[279] Id. at 951.
[280] 134 F.3d 781 (6th Cir. 1998).

administrators of her voluntary admission to the psychiatric facility, she told school officials that she needed to undergo a blood test. While driving herself to the facility, she was under the influence of alcohol and was involved in an automobile accident that was reported by local news stations.

Learning of the accident and Moore's psychiatric difficulties, the school district suspended Moore with pay and requested that she provide medical documentation indicating her ability to continue to perform the essential job functions of a classroom teacher. Despite receiving this request, Moore did not respond and remained a patient of the psychiatric facility until January 5, 1994.

The school district then sent Moore a letter changing her suspension to one without pay and directing her to notify the school district of her willingness to cooperate with its investigation by submitting her medical records to the school district and undergoing an independent psychiatric evaluation regarding her ability to perform her classroom duties. Moore's attorney responded in writing that Moore was ready to return to work at the earliest possible time and that she would submit a letter from Dr. Janet Lewis, her physician, regarding her ability to function as a teacher, but that she would not submit to an independent psychiatric evaluation or produce her medical and psychiatric records. No letter from Dr. Lewis was ever produced.

On March 3, 1994, Moore's attorney requested that Moore be reinstated. In response, the district superintendent sent Moore a letter on March 4, 1994, stating that her contract would not be renewed for the 1994-95 school year. In a second letter dated March 4, 1994, the superintendent stated that he was initiating dismissal procedures against Moore for improper conduct which stemmed from her drunk driving accident on November 22, 1993. The grounds for dismissal were insubordination, failure to provide requested documentation concerning her psychiatric condition and abandonment of her teaching duties without leave. On March 28, 1994, the district superintendent charged Moore with conduct unbecoming a member of the teaching profession.

On April 27, 1994, a hearing was held at which the district superintendent presented evidence against Moore and presided over the hearing. Moore's attorney requested that the superintendent step down or recuse himself from acting as a hearing officer, but the superintendent declined.

At the hearing, Moore and five other witnesses testified on her behalf. None of the witnesses revealed any of Dr. Lewis' psychiatric diagnosis or that Moore had a substance abuse problem. On May 13,1994, the district superintendent issued an opinion upholding the dismissal of Moore. The grounds for dismissal were insubordination and improper conduct. The issue of abandonment of teaching duties was dropped. The superintendent's decision indicated that the school district was not able to consider whether or not Moore was fit to return to the classroom due to the refusal of Moore to provide any information regarding her medical condition.

Moore filed suit in federal court alleging violation of the Americans with Disabilities Act, the Rehabilitation Act of 1973, the Due Process Clause of the United States Constitution and state teacher tenure laws.

The district court found that Moore had failed to prove that she was otherwise qualified to teach. The district court noted that prior to November 27, 1993, Moore was able to perform all of her professional duties and keep her emotional problems and chaotic personal life separated from her job duties. However, upon her release from the hospital on January 5, 1994, or at any time prior to the expiration of her 1993-94 contract, Moore did not prove that she was able to resume her teaching duties. The court noted that before her hearing in April, Moore had two additional hospitalizations. In the absence of the letter from Dr. Lewis or any medical records or report of an independent psychiatric examination, the district court was unable to find that she was otherwise qualified.

Additional evidence was presented at trial concerning Moore's ability to perform as a second grade teacher. On May 25, 1994, she was arrested for public intoxication and disorderly conduct. In August and September, 1994, she was admitted to the detoxification rehabilitation institute in Knoxville, Tennessee. In February, 1995, she admitted her drug use to her therapist, who stated that in 1993, Moore began experimenting with demerol, opium and cocaine. During this time, Moore lost custody of her children after a psychologist determined that she was incapable of caring for them. The Court of Appeals affirmed and held that the district court, in view of the evidence of Moore's emotional, legal and psychological difficulties, correctly determined that she was not otherwise qualified to teach and could not perform the essential functions of her teaching position.

In Nowak v. St. Rita High School,[281] the Court of Appeals held that a private school did not violate the ADA when it terminated a teacher for excessive absences. In Nowak, for a period of 18 months, the teacher had suffered from a series of health problems. During this period of time, the private school provided a substitute teacher, maintained Nowak's medical insurance coverage and continued to pay him a partial salary.

In March, 1993, Nowak attempted to return to work at St. Rita. Nowak and his therapist met with the assistant principal at St. Rita to discuss accommodations for Nowak's return to the classroom. As a result of that meeting, St. Rita made the following accommodations:

1. Nowak was assigned to a classroom in close proximity to the faculty lounge and restrooms;

2. Nowak was assigned a room with elevated seating so he could observe and better control his class while he remained seated;

3. Nowak was assigned a parking space in close proximity to his classroom; and

4. Nowak was allowed to teach half days and St. Rita agreed to provide a substitute for the classes he did not teach.

Nowak returned for four days and was readmitted to the hospital on March 24, 1993, and remained in the hospital until June 21, 1993. During this hospital stay, Nowak underwent

[281] 142 F.3d 999 (7th Cir. 1998).

operations on both his hands and had an above the knee amputation of his left leg. While hospitalized, Nowak applied to the social security administration for social security disability benefits and completed a disability report form in which he certified that he was unable to perform the duties of his job. On June 21, 1993, Nowak was transferred to another treatment facility for additional physical therapy. On July 28, 1993, Nowak was moved to a nursing home until his discharge to his home on October 1, 1993, where he received an additional five months of in-home therapy.

Nowak began receiving social security benefits effective March,1993. While receiving these total disability benefits, Nowak neither informed St. Rita that he intended to return to the classroom nor did he request a leave of absence.

Due to his extended illness and continued absence from the classroom, St. Rita administrators decided to terminate Nowak's faculty status. On October 7, 1994, Nowak was notified of his termination. On August 9, 1995, Nowak filed suit in federal district court and contended that he would have been able to return to the classroom in January, 1995, if St. Rita had installed an access ramp. However, Nowak neither contacted nor requested any accommodations from St. Rita administrators between September, 1993, and October, 1994.

The district court granted summary judgment in favor of St. Rita and the Court of Appeals affirmed. The Court of Appeals found that Nowak was not a qualified individual with a disability under the ADA because he was not an individual who, with or without reasonable accommodation, could perform the essential functions of his employment position. The court noted:

> "The regulations present two prongs to the definition of 'qualified individual'... First, the disabled individual 'satisfies the requisite skill, experience, education and other job related requirements of the employment position he holds or desires'... Second, he 'can perform the essential functions of such position' with or without accommodation... Obviously, an employee who does not come to work cannot perform the essential functions of his job.... The determination as to whether an individual is a qualified individual with a disability must be made as of the time of the employment decision.... The plaintiff bears the burden on the issue of whether he is a 'qualified individual' under the ADA.... Thus, Nowak had to present evidence that on October 7, 1994, he possessed the necessary skills to perform his job, and that he was 'willing and able to demonstrate these skills by coming to work on a regular basis....' The district court ruled that Nowak failed to provide any evidence, medical or otherwise, that on October 7, 1994, he was able to perform the essential functions of his position as a teacher at St. Rita."[282]

[282] Id. at 1002-1003.

The Court of Appeals affirmed the ruling of the district court and went on to state that the ADA does not require an employer to accommodate an employee who suffers a prolonged illness by allowing him an indefinite leave of absence and further held that it was not a violation of the ADA to terminate an employee who is unable to work due to illness or is unable to maintain regular work attendance.

N. Neutral, Nondiscriminatory Policies

In Lopez v. Pacific Maritime Association,[283] the Ninth Circuit Court of Appeals rejected the appeal of a job applicant who sued the Pacific Maritime Association alleging violations of the Americans with Disabilities Act and California Fair Employment and Housing Act.

The Court of Appeals held that the employer's one-strike rule did not facially discriminate against recovering or recovered drug addicts and did not have a disparate impact on recovered drug addicts.

The defendant, Pacific Maritime Association, represented the shipping lines that run the ports along the west coast of the United States. The defendant enforced policies that govern the hiring of longshore workers who work along the west coast. One of those policies is a "one-strike rule" which eliminates from consideration any applicant who tests positive for drug or alcohol use during the preemployment screening process. Defendant notifies its applicants at least seven days in advance of administering the drug test. Failing the drug test, even once, disqualifies an applicant permanently from future employment.[284]

Plaintiff first applied in 1997 at the port in Long Beach, California. At that time, plaintiff suffered from an addiction to drugs and alcohol. When defendant administered its standard drug test, plaintiff tested positive for marijuana. Defendant, therefore, disqualified plaintiff from further consideration under the one-strike rule.[285]

Plaintiff became clean and sober and in 2004 reapplied to be a longshoreman. Because of the one-strike rule, defendant rejected plaintiff's application. Plaintiff then filed a lawsuit under the Americans with Disabilities Act (ADA) and California Fair Employment and Housing Act (FEHA). The district court granted summary judgment to defendant and plaintiff appealed.[286]

The Court of Appeals affirmed the district court's decision, citing the Supreme Court's opinion in Raytheon Co. v. Hernandez.[287] The Court of Appeals held that the Raytheon decision supported its view that when an employer's policy, such as the one-strike rule, constituted a neutral, legitimate, and nondiscriminatory reason for refusing to rehire or hire, the policy did not violate the ADA. The Court of Appeals held that the ADA prohibits employment decisions made because of a person's qualifying disability and not decisions made because of factors merely related to a person's disability.[288]

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[283] 657 F.3d 762 (9th Cir. 2011).
[284] Id. at 763.
[285] Id. at 764.
[286] Id. at 764.
[287] 540 U.S. 44, 124 S.Ct. 513 (2003).
[288] 657 F.3d 762, 764 (2011).

The Court of Appeals noted that the defendant decided to make disqualification of applicants who tested positive permanent because it thought that applicants who could not abstain from using an illegal drug, even after receiving advance notice of an upcoming drug test, showed less responsibility and less interest in the job than applicants who passed the drug test. Thus, the defendant's reasons for rejecting applicants who test positive did not include a calculation that an applicant might test positive because of a drug addiction, rather than because of recreational use.[289]

The Court of Appeals held that it was lawful for the defendant to eliminate applicants who were using drugs when they applied to be longshore workers. It was likewise lawful for defendant to disqualify those applicants permanently. The Court of Appeals concluded:

> "We recognize that the one-strike rule imposes a harsh penalty on applicants who test positive for drug use. As defendant candidly concedes, many people question the rule's reasonableness in light of the fact that many people who use drugs later rehabilitate themselves, as plaintiff exemplifies. But unreasonable rules do not necessarily violate the ADA or the FEHA. Because plaintiff failed to establish that defendant intentionally discriminated against him on the basis of his protected status or that the one-strike rule disparately affects recovered drug addicts, we affirm the summary judgment in favor of defendant."[290]

O. Fitness for Duty Medical Examinations

In Indergard v. Georgia-Pacific Corporation,[291] the Ninth Circuit Court of Appeal held that the physical capacity evaluation given to an employee upon her return from medical leave was a "medical examination" under the Americans with Disabilities Act (ADA). The Court of Appeals held that under the IDEA, a medical examination must be job related and consistent with business necessity.[292]

The Court of Appeals noted that neither the ADA nor the implementing regulations define the term "medical examination" and the case law is limited. The Court of Appeals reviewed the EEOC Enforcement Guidance, which draws a distinction between medical examinations and physical agility tests. The Guidance defines a medical examination as a procedure or test that seeks information about an individual's physical or mental impairments or health. The Guidance provides the following seven factors to be considered in determining whether a test is a medical examination:

1. Whether the test is administered by a health care professional.

2. Whether the test is interpreted by a health care professional.

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[289] Id. at 764.
[290] Id. at 768.
[291] 582 F.3d 1049 (9th Cir. 2009).
[292] 42 U.S.C. section 12112(b)(4)(A).

3. Whether the test is designed to reveal an impairment of physical or mental health.

4. Whether the test is invasive.

5. Whether the test measures an employee's performance of a task or measures his or her physiological responses to performing the task.

6. Whether the test normally is given in a medical setting.

7. Whether medical equipment is used.

The Guidance notes that physical agility tests are not medical examinations if they measure an employee's ability to perform actual or simulated job tasks and physical fitness tests, which measure an employee's performance on physical tasks, such as running or lifting, as long as these tests do not include examinations that could be considered medical (e.g. measuring heart rate or blood pressure).[293]

The Court of Appeals remanded the matter back to the district court, since the physical capacity evaluation conducted by Georgia-Pacific included range of motion and muscle strength tests, heart rate following a treadmill test, observations about the employee's breathing and aerobic fitness and was conducted by a medical professional (e.g. occupational therapist). The Court of Appeals concluded that the purpose of the physical capacity examination may very well have been to determine whether the employee was capable of returning to work. However, the substance of the physical capacity exam clearly sought information about the employee's physical or mental impairments or health and involved tests and inquiries capable of revealing to Georgia-Pacific whether the employee suffered from a disability. Therefore, the court concluded that the physical capacity examination was a medical examination under the ADA.

In Brownfield v. City of Yakima,[294] the Ninth Circuit Court of Appeals held that the City of Yakima did not violate the Americans with Disabilities Act (ADA) by requiring a fitness for duty examination for a police officer after the police officer repeatedly exhibited emotionally volatile behavior.

Brownfield began as a police officer for the City of Yakima Police Department in November 1999. Approximately one year later, Brownfield suffered a head injury in an off-duty car accident. After recovering from symptoms, including reduced self-awareness, Brownfield returned to full duty in July 2001. He received positive performance evaluations and was awarded several accommodations over the next three years.[295]

In June 2004, Brownfield complained to his superiors about another police officer, claiming that police officer neglected his duties, forcing Brownfield to complete tasks assigned

[293] Enforcement Guidance on Disability Related Inquiries and Medical Examinations, available at http://www.eeoc.gov/policy/docx/guidance-inquiries.html.
[294] 612 F.3d 1140 (9th Cir. 2010).
[295] Id. at 1142.

to the other police officer. In May 2005, Brownfield was reprimanded for failing to schedule an event. On May 11, 2005, Brownfield used an expletive midway through a meeting. Despite an order from his superior to remain in the room, Brownfield stood up and left the room in the middle of the meeting. When another police officer found Brownfield, Brownfield swore at him and demanded he leave the room. Brownfield was temporarily suspended for insubordination as a result of this incident.[296]

In September 2005, four incidents occurred. First, Brownfield engaged in a disruptive argument with another officer. Second, Brownfield reported that he felt himself losing control during a traffic stop. According to a police sergeant, Brownfield reported that a young child riding in a vehicle he pulled over began taunting him during the stop. Brownfield became upset, his legs began shaking, and he was not sure what he was going to do. Brownfield calmed down when a back-up officer arrived.[297]

Third, the police department received a domestic violence call from Brownfield's estranged wife. Brownfield's wife reported that she and Brownfield began arguing when she stopped at his apartment to see his children. As she was backing out of a doorway, Brownfield allegedly struck her by slamming the door. Brownfield disputed this version of events and no charges were filed.[298]

Fourth, a police officer reported that Brownfield made several statements that caused him concern about things not mattering as to how they end. Brownfield was placed on administrative leave and ordered to undergo a fitness for duty examination.[299]

The fitness for duty examination was conducted on October 19, 2005. Dr. Decker diagnosed Brownfield as suffering from mood disorder due to a general medical condition which manifested itself in poor judgment, emotional volatility and irritability, and which could be related to Brownfield's 2000 head injury. The physician concluded that Brownfield was unfit for police duty and that his disability was permanent.[300]

In May 2006, the city informed Brownfield that it would hold a pre-termination hearing with respect to his employment with the police department. Prior to the hearing, Brownfield obtained a second opinion from Dr. Mar stating that Brownfield was unfit for duty due to his emotional, cognitive, behavioral, and physical problems, but that Brownfield's problems might be amenable to treatment. The city continued Brownfield's pre-termination hearing pending treatment and further evaluation.[301]

In December 2006, Dr. Mar reported that Brownfield was progressing well and would be able to return to duty at an unspecified date with continued treatment. The police department sent Brownfield to Dr. Ekemo after he refused to return to Dr. Decker. Brownfield attended an

[296] Id. at 1142.
[297] Id. at 1143.
[298] Id. at 1143.
[299] Id. at 1143.
[300] Id. at 1143-44.
[301] Id. at 1144.

initial exam in February 2007 and Dr. Ekemo scheduled a second visit with Brownfield to complete his evaluation. However, Brownfield refused to attend the follow-up session.[302]

The city informed Brownfield that he would likely be terminated unless he cooperated in the fitness for duty examination, but Brownfield again refused. A pre-termination hearing was held on March 19, 2007. The city manager determined that Brownfield was insubordinate and unfit for duty. Brownfield was terminated on April 10, 2007.[303]

On January 8, 2008, Brownfield filed suit in federal court alleging violations of the ADA, the Family Medical Leave Act, and First Amendment retaliation.[304]

Brownfield alleges that the city violated the ADA by requiring him to submit to a fitness for duty examination. Under 42 U.S.C. Section 12112(d)(4)(A), an employer may not require a medical examination to determine whether an employee is disabled unless such examination or inquiry is shown to be job-related and consistent with business necessity.[305]

The Court of Appeals held that "business necessity" should not be confused with mere expediency.[306] However, the Court of Appeals held that when an employer is faced with an employee who has repeatedly acted erratically, the employer may require a fitness for duty examination. The Court of Appeals held that an employer may preemptively require a medical examination when there is evidence of irrational behavior.[307]

The Court of Appeals noted that prophylactic psychological examinations can sometimes satisfy the business necessity standard, particularly when the employer is engaged in dangerous work. The court held that the business necessity standard may be met even before an employee's work performance declines if the employer is faced with significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job. There must be genuine reasons to doubt whether that employee can perform job-related functions.[308]

The Court of Appeals found that the undisputed facts showed that Brownfield exhibited highly emotional responses on numerous occasions in 2005. He swore at his superior after abruptly leaving a meeting despite a direct order to the contrary, he engaged in a loud argument with a coworker and became extremely angry when he learned the incident would be investigated, he reported that his legs began shaking and he felt himself losing control during a traffic stop, his wife called police to report a domestic altercation with Brownfield, and he made

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[302] Id. at 1144.
[303] Id. at 1144.
[304] Id. at 1144.
[305] Id. at 1145.
[306] Cripe v. City of San Jose, 261 F.3d 877, 890 (9th Cir. 2001).
[307] Id. at 1145; see, also, Watson v. City of Miami Beach, 177 F.3d 932 (11th Cir. 1999); Cody v. CIGNA Healthcare of St. Louis, Inc., 139 F.3d 595, 599 (8th Cir. 1998); Mickens v. Polk County School Board, 430 F.Supp.2d 1265 (M.D. Fla. 2006); Miller v. Champagne Community Unit School District No. 4, 983 F.Supp. 1201 (C.D. Ill. 1997).
[308] Id. at 1145; citing, Sullivan v. River Valley School District, 197 F.3d 804, 811 (6th Cir. 1999); see, also, Conroy v. New York State Department of Corrective Services, 333 F.3d 88, 98 (2nd Cir. 2003).

several comments to a coworker that it does not matter how things end.[309] The Court of Appeals stated:

> "When a police department has good reason to doubt an officer's ability to respond to these situations in an appropriate manner, an FFDE (fitness for duty examination) is consistent with the ADA. Reasonable cause to question Brownfield's ability to serve as a police officer was present here."[310]

In summary, the Court of Appeals held that if a public employer has significant evidence that could cause a reasonable person to question whether an employee is still capable of performing his or her job, the public employer may require the employee to undergo a fitness for duty examination. If there is genuine doubt as to whether the employee can perform job-related functions, even before an employee's work performance actually declines, then the employer may require a fitness for duty examination.

P. Punitive and Compensatory Damages for ADA Retaliation Claims

In Alvarado v. Cajun Operating Company,[311] the Ninth Circuit Court of Appeals held that punitive and compensatory damages were not available for Americans with Disabilities (ADA) retaliation claims.

The underlying facts were that Alvarado was hired by the store manager of a Church's Chicken in Tucson, Arizona, to perform part-time maintenance work. Alvarado eventually became a cook at Church's. The cook position required the performance of various duties, including cleaning the walk-in refrigerator.

For approximately three and a half years, Alvarado performed satisfactorily according to job evaluations by his supervisors. When Alvarado called Church's hotline to complain that his supervisor had made inappropriate comments about his age, Alvarado began receiving negative evaluations.[312]

Alvarado called the hotline a second time, accusing his supervisor of retaliation against him for making the first hotline call. Alvarado also complained to his supervisor about the pain in his hand when he worked in the walk-in refrigerator. Alvarado was then terminated and filed a lawsuit alleging employment discrimination in violation of the ADA, age discrimination, race and national origin discrimination and employment discrimination. The district court barred Alvarado from seeking punitive and compensatory damages for his ADA retaliation claim. The Court of Appeals affirmed.[313]

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[309] Id. at 1146.
[310] Id. at 1147.
[311] 588 F.3d 1261 (9th Cir. 2009).
[312] Id. at 1263.
[313] Id. at 1263.

The Court of Appeals cited a Seventh Circuit decision and held that punitive and compensatory damages are not available for ADA retaliation claims.[314] The Court of Appeals held that the plain and unambiguous language of 42 U.S.C. Section 1981(a) limits the availability of compensatory and punitive damages to those specific ADA claims listed. ADA retaliation is not on the list. The Court of Appeals also held that ADA retaliation claims are redressable only by equitable relief and, therefore, no jury trial is available.[315]

In Stanek v. St. Charles Community Unit School District # 303,[316] the Seventh Circuit Court of Appeals held that a student stated a plausible claim that the school district discriminated against him in violation of the Rehabilitation Act and the Americans with Disabilities Act.

Matthew Stanek was a high school student who received special education services. Matthew was an A and B honors student through his sophomore year in the District. He achieved these grades with the help of the accommodations specified in his IEP, which provided for a variety of services to address his social and communicative deficits. He was allowed extra time to complete tests and homework and required teachers to provide him with study guides. But when Matthew entered his junior year of high school, several of his teachers stopped giving him study guides or extra time. The teachers justified this action with the argument that it was wrong to provide study guides in advanced classes and that the extra time hurt rather than helped the student. At the same time, the teachers pressured him to drop his advanced placement and honors courses, asserting that these classes would be too difficult.

As a result, some of Matthew's teachers began neglecting to record good grades he had earned and recording grades lower than those he actually had earned. These teachers also refused to give Matthew credit for completed work and ignored his questions about his assignments. As a result, it is alleged that Matthew became distressed and anxious, and he began to suffer headaches and nausea and to miss school. His parents were forced to hire a tutor to compensate for the periods when he was out of school or too distraught to learn.

Based on these alleged facts, the Seventh Circuit Court of Appeals held that the student sufficiently alleged a violation of the Rehabilitation Act (Section 504) and the ADA.[317] The court concluded that the student had stated a cause of action under Section 504 and the ADA.

In B.C. v. Mount Vernon School District,[318] the Second Circuit Court of Appeals held that statistical evidence comparing courses available to students with and without a disability under the IDEA did not support Section 504 and ADA discrimination claims under a disparate impact theory.

In B.C., the student's complaint alleges that statistics show that the district's academic intervention services, including non-credit bearing courses intended for students at risk of not

[314] Id. at 1265, citing Kramer v. Banc of America Securities, 355 F.3d 961 (7th Cir. 2004).
[315] Id. at 1270.
[316] 783 F.3d 634 (7th Cir. 2015).
[317] Id. at 643. See, also, A.C. v. Shelby County Board of Education, 711 F.3d 687, 698 (6th Cir. 2013; Blanchard v. Morton School District, 509 F.3d 934, 938 (9th Cir. 2007).
[318] 837 F.3d 152 (2nd Cir. 2016).

meeting state performance standards, were offered to children with a disability under the IDEA at a greater rate than to children without such a disability. Because the ADA and Section 504 define disability differently than does the IDEA, the court noted that the parents presented a question of first impression in the Second Circuit as to whether an individual with a disability under the IDEA categorically qualifies as an individual with a disability under the ADA and Section 504, and therefore their data relating to children with a disability under the IDEA can establish a prima facie case with respect to a claim predicated on the student having a disability under the ADA and Section 504. The court held that the parents failed to establish a prima facie case.[319]

In Weixel v. Board of Education of the City of New York,[320] the Second Circuit Court of Appeals held that the parents stated a prima facie case under the ADA. The parents alleged that the school district prevented a disabled student from taking advanced classes in mathematics and science based on the student's absence from school while disabled by chronic fatigue syndrome and fibromyalgia. The court concluded that sufficient facts were alleged to support a cause of action under Section 504 and the ADA.[321]

In Thompson v. Board of Special School District No. 1,[322] the Eighth Circuit held that in a school case, in order to make out a prima facie case under the ADA and Section 504, the student must show bad faith or an exercise of gross misjudgment by the school district.[323]

JUDICIAL DECISIONS - REASONABLE ACCOMMODATION

A. In General

One of the most contentious areas of dispute under the ADA is reasonable accommodation. There is a great deal of controversy over what is meant by "reasonable" and "reasonable accommodation." The regulatory definition, as discussed earlier, requires the proposed accommodation to be effective, to ensure equal opportunity for disabled employees, to enable employees with disabilities to perform the essential functions of the position held or desired and to enable employees with disabilities to enjoy equal benefits and privileges of employment.[324] The courts have interpreted these regulations as meaning that one element of reasonableness encompasses the likelihood of success.[325] In Evans v. Federal Express Corporation, the Court of Appeals stated:

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[319] Id. at 155.
[320] 287 F.3d 138 (2nd Cir. 2002).
[321] Id. at 152.
[322] 144 F.3d 574 (8th Cir. 1998).
[323] Id. at 580. See, also, Hoekstra v. Independent School District, No. 283, 103 F.3d 624, 626-627 (8th Cir. 1996).
[324] See, 29 C.F.R., Part 1630, Appendix, Page 401. See, also, Wong v. The Regents of the University of California, 192 F.3d 807 (9th Cir. 1999) (Court of Appeals would not defer to medical school's determination that accommodations requested by disabled student were not reasonable and held it was an issue of fact).
[325] See, Evans v. Federal Express Corporation, 133 F.3d 137, 140 (1st Cir. 1998).

> "One element in the reasonableness equation is likelihood of success; and recoveries from substance abuse or addiction on one try are notoriously chancy."[326]

In Evans, the Court of Appeals held that the employer was not required to grant Evans a second leave of absence to deal with a substance abuse problem after having granted a month's leave to deal with cocaine addiction and alcoholism. The Court noted:

> "It is one thing to say that further treatment made medical sense, and quite another to say that the law required the company to retain Evans through a succession of efforts."[327]

A number of courts have indicated that in determining whether a proposed accommodation is reasonable, the issue of the cost of providing the accommodation must be weighed against the benefits of the accommodation.[328]

In Vande Zande, the Court of Appeals stated:

> "So it seems that costs enter at two points in the analysis of claims to an accommodation to a disability. The employee must show that the accommodation is reasonable in the sense both of efficaciousness and of proportional to costs. Even if this prima facie showing is made, the employer has an opportunity to prove that upon more careful consideration the costs are excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health."[329]

In Monette, for example, the court stated that whether a proposed accommodation is objectively reasonable entails a factual determination of the reasonableness, including a cost benefit analysis or examination of accommodations undertaken by other employers.[330] In Borkowski, the court held that the employee bears the burden of production on whether an accommodation is reasonable utilizing a cost benefit analysis.[331] In Borkowski, the Court of Appeals held that the provision of an aide for a tenured library teacher with disabilities may be a reasonable accommodation and remanded the matter back to the trial court for a factual determination. In essence, the courts have indicated that an accommodation must be both effective and cost efficient.

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[326] Id. at 140.
[327] Id. at 140
[328] See, Vande Zande v. Wisconsin Department of Administration, 44 F.3d 538 (7th Cir. 1995); Monette v. Electronic Data Systems, 90 F.3d 1173 (6th Cir. 1996); Borkowski v. Valley Central School District, 63 F.3d 131 (2d Cir. 1995).
[329] Id. at 543
[330] Id. at 1183-1184.
[331] Id. at 137.

B. Duty to Request Accommodation

The case law makes it clear that an individual must request accommodation. The EEOC regulations indicate that it is the responsibility of the individual with the disability to inform the employer that he is in need of an accommodation.[332] For example, in Taylor v. Principal Financial Group, Inc.,[333] the Court of Appeals rejected the plaintiff's ADA claim due to the employee's failure to formally request an accommodation.[334] In Hunt-Golliday v. Metropolitan Water Reclamation District,[335] the Court of Appeals held that the employer must be aware of the employee's disability before the employer may be held liable for failing to provide a reasonable accommodation to the employee.[336]

The courts have indicated that employers are not expected to be clairvoyant regarding the need for accommodation and that the employer's duty to accommodate arises only when it knows of a disability.[337]

However, the employee is not required to use the magic words, "I want a reasonable accommodation," if the employee provides sufficient information to the employer for the employer to conclude that a reasonable accommodation is necessary. For example, when a custodian in a public school with a mental disability came to the employer and indicated that work at his assigned school was too stressful, the court held that the school district was on notice that an accommodation might be necessary. The court indicated that the employer has to meet the employee half way and if it appears that the employee may need an accommodation but does not know how to ask for it, the employer should do what it can to help.[338] In a similar case, if the Court of Appeals held that the nature of the disability limits the ability of the employee to communicate his or her need for reasonable accommodation, the employer has to make a reasonable effort to understand what those needs are even if they are not clearly communicated.[339]

C. Duty to Engage In Interactive Process

When a request for reasonable accommodation has been made by the employee in an appropriate manner, the employer then has a duty to engage in an interactive process with the employee to determine the appropriate accommodation under the circumstances.[340] One function of the interactive process is to identify whether the accommodation is truly needed because of the disability. For example, where an employee requested reassignment to a particular shift and it was discovered after reviewing the employee's medical records that it was not needed as a result

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[332] 29 C.F.R. section 1630.9, Appendix, Pages 407-409.
[333] 93 F.3d 155 (5th Cir. 1996).
[334] See, also, Gantt v. Wilson Sporting Goods, 143 F.3d 1042 (6th Cir. 1988).
[335] 104 F.3d 1004 (7th Cir. 1997).
[336] Id. at 1012 See, also, Miller v. National Casualty Company, 61 F.3d 627, 629 (8th Cir. 1995); Morisky v. Broward County, 80 F.3d 445, 448 (11th Cir. 1996); Hedberg v. Indiana Bell Telephone Company, 47 F.3d 928, 931 (7th Cir. 1995).
[337] See, Hedberg v. Indiana Bell Telephone Company, 47 F.3d 928, 931-932 (7th Cir. 1995).
[338] See, Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281, 1285 (7th Cir. 1996).
[339] See, Miller v. Illinois Department of Corrections, 107 F.3d 483, 486 (7th Cir. 1997).
[340] See, Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560 (7th Cir. 1996).

of his epilepsy, the employer had no duty to provide the accommodation requested.[341] Another reason to engage in the interactive process is for the employer to gain sufficient knowledge to determine whether the accommodation requested will be effective. If the accommodation is not effective, then it will not be an appropriate accommodation, and the employer has a duty to propose a reasonable accommodation that will assist the employee.[342]

As part of the interactive process, the employer should advise an employee of available accommodations. However, the failure of the employer to advise employees of self-evident options, such as paid and unpaid medical leave, voluntary time off, personal and vacation days that would have been evident to the employee, is not a violation of the ADA.[343] The interactive process for determining reasonable accommodations is a means for determining what reasonable accommodations are available.[344] It is not considered an independent legal violation to fail to engage in the interactive process, but it will be considered relevant evidence of the employer's failure to provide a reasonable accommodation.[345]

In engaging in the interactive process, the employer may request documentation from the employee to support the request for reasonable accommodation.[346] The employer may challenge the employee's assertion that a reasonable accommodation is needed. However, the employer should be acting in good faith, as part of the process, to reasonably accommodate the employee. Damages may be awarded where the employer has not acted in good faith. The employee's failure to cooperate in the interactive process can be grounds for dismissal of the employee's complaint or the granting of a motion for summary judgment in favor of the employer.[347]

In Beck v. University of Wisconsin Board of Regents,[348] the Court of Appeals held that an employee who caused a breakdown in the interactive process by failing to respond to the employer's request lost her right to reasonable accommodation. The court held that an employer could not be held liable for failure to provide reasonable accommodations to an employee when the employer was unable to obtain sufficient information to have an adequate understanding of what type of reasonable accommodation was needed.

The courts have held that employers are not required to provide the reasonable accommodation of choice, only a reasonable accommodation. In Hankins v. The Gap, Inc.,[349] the Court of Appeals held that an employer did not have to provide the accommodation that the individual requested as long as the employer made available a reasonable accommodation that was effective. For example, in Gile v. United Airlines, Inc.,[350] the Court of Appeals held that an employer was required to provide some form of reasonable accommodation, not necessarily the accommodation requested or preferred. Therefore, in Gile, the employer was not required to

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341 See, Gaines v. Runyon, 107 F.3d 1171, 1177 (6th Cir. 1997).
342 See, Feliberty v. Kemper Corporation, 98 F.3d 274, 280 (7th Cir. 1996).
343 See, Hankins v. The Gap, Inc., 84 F.3d 797, 801 (6th Cir. 1996).
344 See, Sieberns v. Wal-Mart Stores, Inc., 125 F.3d 1019, 1023 (7th Cir. 1997).
345 See, Willis v. Conopco, 108 F.3d 282, 284 (11th Cir. 1997); Mengine v. Runyon, 114 F.3d 415, 419-420 (3rd Cir. 1997).
346 See, EEOC v. Prevo's Family Market, Inc., 135 F.3d 1089, 1095 (6th Cir. 1998).
347 See, Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1286 (11th Cir. 1997).
348 75 F.3d 1130, 1135-36 (7th Cir. 1996).
349 84 F.3d 797 (6th Cir. 1996).
350 95 F.3d 492, 498 (7th Cir. 1996).

provide the employee with the reassignment requested when the employer offered a reasonable alternative. If the employee refuses the offered reasonable accommodation, the employer cannot be held liable for failing to reasonably accommodate the employee. Id. at 498.

D. Leaves of Absence

The EEOC regulations state that unpaid leave is one form of reasonable accommodation.[351] The courts have also held that unpaid leave is a form of reasonable accommodation in some circumstances. In Criado v. IBM Corporation,[352] the Court of Appeals held that a temporary leave to provide the employee's physician sufficient time to develop an effective program of treatment for depression was a possible accommodation.[353]

Where the employee requests an indefinite leave of absence or the employee is uncertain as to the amount of time needed for the leave of absence, the courts have generally held that an employer is not required to provide an indefinite leave of absence as a reasonable accommodation.[354] In Nowak v. St. Rita High School,[355] the Court of Appeals held that an employer is not required to grant an indefinite leave of absence to accommodate an employee who suffers from a prolonged illness. In Smith v. Blue Cross/Blue Shield of Kansas, Inc.,[356] the Court of Appeals held that an employer is not required by the ADA to wait indefinitely for an employee to return to work. In Smith, the employee suffered from severe panic disorder and the employee presented no evidence of the duration of the disability.

In Myers v. Hose,[357] the Court of Appeals held that an employer was not required to grant an indefinite leave of absence to a bus driver who had diabetes, a heart condition and hypertension.

The courts have held that employers are not required to grant unpaid leaves of absence to employees whose attendance is erratic, unreliable or unpredictable. The courts generally agree that reliable work attendance is required to perform most jobs.

In Gantt v. Wilson Sporting Company,[358] the Court of Appeals upheld limits on unpaid leave policies. The court held that it did not violate the ADA for employers to adopt a maximum limit such as one year on the amount of unpaid leave the employer would grant for any reason. The employer's uniformly applied one year leave policy was held by the court not to be a violation of the ADA.

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[351] 29 C.F.R. section 1630.2(o), Appendix Pages 357-358.
[352] 145 F.3d 437 (1st Cir. 1998).
[353] See, also, Hudson v. MCI Telecommunications Corp., 87 F.3d 1167 (10th Cir. 1996) (court held that a reasonable allowance of time for medical care and treatment in appropriate circumstances may constitute a reasonable accommodation, but an indefinite unpaid leave of absence is not reasonable).
[354] See, for example, Walsh v. United Parcel Service, 201 F.3d 718 (6th Cir. 2000).
[355] 142 F.3d 999 (7th Cir. 1998).
[356] 102 F.3d 1075 (10th Cir. 1996).
[357] 50 F.3d 278, 282 (4th Cir. 1995).
[358] 143 F.3d 1042 (6th Cir. 1998).

E. Modification of Work Environment and Equipment

The EEOC regulations state that modifications or adjustments to the work environment are a form of reasonable accommodation in some circumstances.[359] The courts have also held that modifications to the work environment and equipment are a form of reasonable accommodation in some circumstances.

In Dalton v. Subaru-Isuzu Automotive, Inc.,[360] nine employees filed suit under the ADA for their employer's alleged failure to reasonably accommodate their disabilities. The Court of Appeals held that two of these nine employees, Dalton and Rainwater, survived the district court's grant of summary judgment to Subaru-Isuzu Automotive (SIA), because they both approached SIA officials and suggested possible workplace modifications that they believed would enable them to return to their former jobs.

Dalton, who suffered a neck and shoulder injury, informed the Employment and Staffing Manager that he could return to work if provided with a step stool equipped with a guard rail. Rainwater made a similar request to the SIA Human Resources department to accommodate his carpal tunnel syndrome. Despite their requests, SIA took no action to accommodate either employee's disability. Therefore, the court held there was a triable issue of fact to be resolved by a jury.[361]

In Cassidy v. Detroit Edison Company,[362] the Court of Appeals held that a disabled employee "bears the initial burden of proposing an accommodation and showing that accommodation is objectively reasonable."[363] Cassidy suffered from a breathing condition which required her to work in an allergen free environment.

Edison made many attempts to accommodate Cassidy's condition, such as modifying her work environment and schedule so she could work when the air in her office would comply with the environmental air standards her doctor prescribed. As Cassidy's work restrictions increased, Edison terminated her employment as there were no further modifications of her work environment which could reasonably accommodate her breathing condition.[364]

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[359] 29 C.F.R. section 1630.2(o), Appendix Pages 357-358.

[360] 141 F.3d 667 (7th Cir. 1998).

[361] See, also, Feliberty v. Kemper Corporation, 98 F.3d 274 (7th Cir. 1996) ("reasonable accommodation is a cooperative process in which the employer and the employee must make reasonable efforts and exercise good faith").

[362] 138 F.3d 629 (8th Cir. 1998).

[363] Id. at 645.

[364] See, also, Vande Zande v. State of Wisconsin Department of Administration, 44 F.3d 538 (7th Cir. 1995) (because employer made a good faith effort to assist employee, employer did not violate the ADA by not making every accommodation requested by partially paralyzed employee); Stewart v. County of Brown, 86 F.3d 107, 111 (7th Cir. 1996) (reasonable accommodation does not mean a "perfect cure for the problem"); Kornblau v. Dade County, 86 F.3d 193 (11th Cir. 1996) (a disabled employee is not entitled to a private parking space as a reasonable accommodation for her arthritis because she was not denied a public benefit as a result of not receiving the parking space).

F. Modification of Job Duties

The ADA and the EEOC regulations both list job restructuring or the modification of job duties as a reasonable accommodation.[365] Restructuring usually involves the reallocation of nonessential job functions or altering when and/or how a function is performed. It may also involve shifting or "trading" nonessential job functions with other employees. However, an employer is not required to reallocate essential job functions.

In Holbrook v. City of Alpharetta,[366] the Court of Appeals held that even though the employer had not required a police detective with a vision impairment to perform an essential function of his job, which included collecting evidence at a crime scene, the employer was not required to continue to excuse the performance of these essential job functions. The court noted where the employer had gone beyond the requirements of the ADA, the employer is not required to continue to do so since this would discourage other employers from undertaking the kind of accommodations undertaken by the City of Alpharetta. The courts have also held that an employer is not required to restructure an employee's job to create a work environment free of stress and criticism.[367]

As discussed, the courts have held that an employer is not required to reallocate essential job functions. Therefore, an employer would not be required to create a light duty job which, in effect, would be the creation of a new job which eliminated some of the essential functions of the original position.

In Bratten v. S.S.I. Services, Inc.,[368] the Court of Appeals held that an employee was not otherwise qualified to perform the essential functions of the job, with or without reasonable accommodation, where the employee admitted that he could not perform up to 20 percent of the duties of the position of automotive mechanic and the only reasonable accommodation identified by the employee was allowing coworkers to perform those duties when the employee needed assistance. The Court of Appeals held that the ADA did not require an employer to modify job duties to remove essential functions of the employment position that the individual holds or desires. The court held that where there were no special tools or similar accommodations which would enable the employee to perform the essential functions of the job the employer was not required to assign another employee to perform those job duties. The court held that job restructuring within the meaning of the ADA only pertains to the restructuring of non-essential duties or marginal functions of the job.

In Shiring v. Runyon,[369] the Court of Appeals held that the postal service was not required to create a permanent light duty job for an injured mail carrier. The postal service had created a temporary job for the injured mail carrier which involved simply sorting the mail but not delivering it. When it became clear that the employee would be unable to return to delivering mail, the employee demanded that the employer allow him to continue permanently performing the light duty job. The Court of Appeals held that the postal service was not required to create a

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[365] 29 C.F.R. section 1630.2(o).
[366] 112 F.3d 1522 (11th Cir. 1997).
[367] See, Gonzagowski v. Widnall, 115 F.3d 744, 747 (10th Cir. 1997).
[368] 185 F.3d 625 (6th Cir. 1999).
[369] 90 F.3d 827 (3rd Cir. 1996).

permanent light duty position simply to give the employee a job to do. The employee has the burden of showing that a vacant position exists. A similar ruling was made in Mengine v. Runyon,[370] in which the Court of Appeals held that the postal service "was not required to transform its temporary light duty jobs into permanent jobs" to reasonably accommodate an employee.[371] A number of employers reserve light duty jobs for employees who are injured on the job and receiving workers' compensation benefits. It could be argued that such a policy discriminates on the basis of whether the employee was injured on the job or off the job rather than on the basis of disability. However, the EEOC believes such policies violate the ADA. In Dalton v. Subaru-Isuzu,[372] the Court of Appeals held that an employer could designate light duty positions for employees injured on the job and who had temporary disabilities. The Court of Appeals held that the ADA does not require an employer to abandon such policies and held that such policies were nondiscriminatory. In Willis v. Pacific Maritime Association,[373] the Court of Appeals held that the ADA did not require an employer to violate the bona fide seniority provisions of the collective bargaining agreement to accommodate employees who sought to be assigned to light duty which pursuant to the collective bargaining agreement went to workers with the greatest seniority. The employees did not request accommodations to allow them to continue performing their existing duties and the positions the employees requested were not vacant within the meaning of the ADA because those positions were assigned to other employees based on the seniority provisions of the collective bargaining agreement.[374]

The ADA and EEOC regulations list the provision of qualified readers and interpreters as a form of reasonable accommodation.[375] However, in Sieberns v. Wal-Mart Stores, Inc.,[376] the Court of Appeals held that the employer was not required to hire an additional employee to perform some of the essential job functions of the disabled employee. In Sieberns, the disabled employee was unable to stock merchandise and price certain merchandise. The Court of Appeals held that the employer was not required to hire someone to perform these functions. The EEOC has taken the position that the employer may be required to provide a temporary job coach as a reasonable accommodation to assist in the training of a qualified individual with a disability. [377]

G. Reassignment to a Vacant Position

Reassignment to a vacant position is listed as a form of reasonable accommodation in the ADA.[378] The courts have also held that reassignment is a form of reasonable accommodation.

In Boykin v. ATC/Vancom of Colorado,[379] the Court of Appeals held that the employer did not violate the ADA by not offering the employee a newly created dispatcher position when

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370 114 F.3d 415 (3rd. Cir.1997).
371 Id. at 418.
372 141 F.3d 667 (7th Cir. 1998).
373 162 F.3d 561 (9th Cir. 1998).
374 See, also, Aldrich v. Boeing Company, 146 F.3d 1265, 1272 n.5 (10th Cir. 1998); Kralik v. Durbin, 130 F.3d 76 (3rd Cir. 1997); Foreman v. Babcock & Wilcox Company, 117 F.3d 800 (5th Cir. 1997); Benson v. Northwest Airline, Inc. 62 F.3d 1108, 1114 (8th Cir. 1995).
375 42 U.S.C. section 12111(9); 29 C.F.R. section 1630-2(o)(2)(ii).
376 125 F.3d 1019, 1022 (7th Cir. 1997).
377 EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities (3-25-97), at Page 27.
378 42 U.S.C. section 12111(9)(B).
379 247 F.3d 1061 (10th Cir. 2001).

it became available six months after the employee's termination. The employee began working for the employer as a part-time bus driver in 1997. During the time he was employed, he was also a full-time college student. The employee had a history of suffering many mini-strokes. In 1998, he suffered a third mini-stroke while driving a bus for Vancom. After the third mini-stroke, his personal physician released him to return to work. The employer, however, required that he be examined by one of its physicians. That physician revoked the employee's medical certification for commercial driving. The employee's certification was to be reinstated in one year if he experienced no further mini-strokes during that time and was medically cleared by a neurologist. This action complied with the United States Department of Transportation's guidelines. In the interim period the employee was disqualified only from driving commercial vehicles.

The employee requested that the employer accommodate his disability by placing him as a dispatch operator or data entry clerk. The only position the employer had open at that time was that of a bus cleaner. The employee declined the position because it conflicted with his school schedule. The employee was then terminated.

Six months later, the employer entered into a new contract with the regional transportation district and as a result, new positions became available and the employer had hired new personnel including a dispatch operator. The employer notified the employee of the opening but required that he apply and interview for the job. He was interviewed but not hired.

The employee then filed suit alleging that under the ADA he had a right to the position despite the six month interval between his termination and the job's availability. The Court of Appeals concluded that the employer was under no obligation to offer the employee a position six months after his termination. The Court held that the employer was under no obligation to place the employee on an indefinite leave until a position for which he qualified opened up.

In Williams v. United Insurance Company of America,[380] the Court of Appeals held that an employer was not required under the ADA to promote an employee who sold insurance door-to-door to a sales manager position. The Court held that the employer had no duty to retrain the employee to qualify for the sales manager position and that the ADA did not require that a disabled employee be given preferential treatment by providing the disabled employee a sales manager position for which another employee might be better qualified. The Court of Appeals stated:

> "The plaintiff wants training that will equip her with the qualifications for the job of sales manager at present she lacks. If all she wanted was an opportunity to compete for the job by enrolling in a training program offered to applicants for sales manager positions, the employer could not refuse her on the grounds that she was disabled unless her disability prevented her from participating in the program or serving in the job for which it is designed to qualify participants, but our plaintiff is seeking special training, not offered to non-disabled employees, to enable

[380] 253 F.3d 280 (7th Cir. 2001).

> her to qualify. The Americans with Disabilities Act does not require employers to offer special training to disabled employees. It is not an affirmative action statute in the sense of requiring an employer to give preferential treatment to a disabled employee merely on account of the employee's disability. . . it does of course create an entitlement that disabled employees and applicants for employment would not otherwise have to consider ways of enabling them to work despite their disability. The burden that would be placed on employers if disabled persons could demand special training to fit them for new jobs would be excessive and is not envisaged or required by the act. The duty of reasonable accommodation may require the employer to reconfigure the work place to enable a disabled worker to cope with her disability but it does not require the employer to reconfigure the disabled worker."[381]

In Allen v. Rapides Parrish School Board,[382] the Court of Appeals held that the school district had reasonably accommodated its employee and had not discriminated against him in violation of the ADA. The employee, Robert Allen, suffered from tinnitus, a condition causing him to hear a continuous loud ringing in his ears. From 1981 to 1988, Allen held various positions including librarian and teacher. He was promoted to assistant principal at Ball Elementary School in 1988. In 1990, he became assistant principal/librarian at Ball Elementary School. In 1994, Allen was promoted to Coordinator of the Media Center, Testing and Research. After taking this position, Allen's tinnitus condition worsened. The effect of tinnitus can be mitigated by sufficient ambient noise that masks the ringing sound. On December 12, 1994, Allen wrote to the District Superintendent requesting a transfer to the position of principal at an elementary school. Allen stated that when he is in a school setting, the normal noise levels in the school muffle the tinnitus. Allen's doctors submitted letters supporting a change in Allen's environment to provide more background noise.

The district superintendent responded to Allen's concerns by giving him the choices of closing his door and playing music, moving his office to an area close to where videos are recorded, or putting a television in his office. Allen rejected each of these suggestions.

From February 20, 1995, to June 30, 1995, Allen took sick leave from his position as Coordinator because he claimed his tinnitus was aggravated and he was close to suffering a nervous breakdown. Allen's doctor sent additional letters to the district superintendent requesting a lateral transfer to an environment in which a significant amount of noise existed. Allen sought additional sick leave from July 1, 1995, until he could be transferred to an administrative position in a school setting. Instead, the district superintendent granted Allen sabbatical leave from August 17, 1995, through May 31, 1996.

During Allen's sabbatical leave, the school board eliminated several positions including Allen's job as Media Center Coordinator due to significant budget cuts. The board notified Allen

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[381] Id. at 282-83.
[382] 204 F.3d 619 (5th Cir. 2000).

and instructed him to contact the Director of Personnel to determine his new job for the coming year. When his sabbatical concluded in August 1996, Allen became the librarian at Toiga High School.

In February 1997, Allen again complained that his new position failed to produce enough background noise to mitigate the symptoms of his tinnitus. He sought another transfer in August 1997, and ultimately accepted the librarian position at Horseshoe Elementary School. This position, however, resulted in a decrease in his yearly salary to $37,956.00.

Allen admits that his current position at Horseshoe Elementary School satisfies the needs of his tinnitus. Because an elementary school library holds more classes and programs than a high school library, Allen finds his new environment noisier and more accommodating. Allen now also has hearing aids which alleviate his tinnitus condition.

Nevertheless, Allen alleges that the school board denied him promotions and refused his transfer requests to various administrative positions because he suffered from tinnitus. The school board insists that it made reasonable accommodations for Allen and did not hire him as a principal or an assistant principal because he failed to test high enough in the screening process. Although a screening committee recommended Allen for administrative positions, the district superintendent did not support the recommendations because she felt that Allen was neither qualified nor appropriate for the position. The district superintendent felt that Allen was unqualified because he broke down and cried several times in her office and felt it was not appropriate for him to hold a supervisory position at a school where his wife worked.

The Court of Appeals concluded that while Allen may have not received the transfer he sought, Allen failed to demonstrate that the transfers he did receive were not reasonable accommodations. The Court concluded that Allen failed to show that the school board decision not to offer him a position as principal or assistant principal was motivated by discrimination because of his disability. The Court of Appeals stated:

> "Even if his reassignment to the library was unfair, this is not enough. The ADA gives Allen a claim only for discriminatory action and not for unfair treatment. . . . Without evidence to demonstrate that the Board discriminated against Allen by denying his transfer requests on the basis of his disability, Allen fails to satisfy his burden to overcome summary judgment."[383]

In Davoll v. Webb,[384] the Court of Appeals held that where the employees' positions as police officers could not be modified to accommodate their disabilities, consideration of reassignment to a vacant position was appropriate. In Davoll, the City of Denver had a policy which prohibited reassigning police officers into vacant positions in other City agencies. The Court of Appeals found that this policy violated the ADA. The Court of Appeals affirmed a district court jury verdict in favor of the employees.

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[383] Id. at 623.
[384] 194 F.3d 1116 (10th Cir. 1999).

In Rehling v. City of Chicago,[385] the Court of Appeals held that where the employer offered an employee several positions for which the employee was qualified but not the position that the employee requested, the employee bears the burden of proof of showing that there was an available position. In Rehling, the Court of Appeals held that the employee failed to show that there were non-civilian desk positions available when the employee returned to work. The Court in Rehling held that the ADA may require an employer to reassign a disabled employee to a different position as reasonable accommodation where the employee can no longer perform the essential functions of their current position; however, the duty to reassign a disabled employee has limits. The employer is only required to transfer the employee to a position for which the employee is otherwise qualified.[386] The employer is obligated to provide a qualified individual with a reasonable accommodation, not necessarily the accommodation the employee would prefer.[387]

Accordingly, an employee who requests a transfer cannot dictate the employer's choice of alternative positions. In Rehling, the Court held that the employee had failed to show the availability of a position in District 16 where the employee wished to work. The City presented evidence that showed there were no non-civilian desk positions available in District 16 when the employee returned to work in December, 1995. Because the employee failed to identify an available position in District 16 for which he was qualified, the District Court granted the City summary judgment and the Court of Appeals affirmed. The Court noted that the employee did not contest the suitability of the alternative positions offered by the City, but rather only alleged that those accommodations were unreasonable by virtue of the City's failure to engage in a proper interactive exchange. The Court of Appeals rejected this argument and held that the employee must show that the employer's failure to engage in an interactive process resulted in a failure to identify an appropriate accommodation for the qualified individual.[388]

In Pond v. Michelin North America, Inc.,[389] the Court of Appeals held that the ADA did not require an employer to transfer an employee to an occupied position. The court held that the employee had the burden of showing that a vacant position existed and that the employee was qualified for the position. The Court of Appeals held that the reasonable accommodation requirement under the ADA did not require the bumping of a less senior employee from an occupied position. The Court of Appeals held that Congress did not intend that other employees would lose their positions in order to accommodate a disabled co-worker.[390]

In Dalton v. Subaru-Isuzu Automotive, Inc.,[391] the two employees who succeeded in their suit against SIA suggested a reasonable accommodation which would allow them to return to their jobs despite their disabilities. Rather than requesting an accommodation which would enable them to do the same job, the remaining seven employees asked SIA to reassign them to

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[385] 207 F.3d 1009 (7th Cir. 2000).
[386] Id. at 1015.
[387] Id. at 1015; See, also, Malabarba v. Chicago Tribune Company, 149 F.3d 690, 699 (7th Cir. 1998); Smith v. Midland Brake Inc., 180 F.3d 1154 (10th Cir. 1999).
[388] Id. at 1016.
[389] 183 F.3d 592 (7th Cir. 1999).
[390] Id. at 595; See, also, Eckles v. Consolidated Rail Corp., 94 F.3d 1041, (7th Cir. 1996).
[391] 141 F.3d 667 (7th Cir. 1998).

light duty positions. The Court of Appeals held that this request was an unreasonable accommodation under the ADA.

While it is an employer's duty to reasonably accommodate a disabled employee by reassigning an employee to a vacant position for which he or she is qualified, "the duty to reassign does not extend in every ADA case to virtually every other job in a company, from the president to the janitors. Nothing in the ADA requires an employer to abandon its legitimate, nondiscriminatory company policies defining job qualifications, prerequisites, and entitlements to intra-company transfers."[392] The court held that SIA did not have to redesign its light duty program which was reserved for disabled employees recovering from temporary restrictions to accommodate these seven employees.[393]

When an employer has laid off employees or has downsized its operation, disabled employees should be treated in the same manner as nondisabled employees. A disabled employee is not entitled to preferential treatment and may be required to compete for available positions in the same manner as other employees.[394]

H. Modifications of Job Duties

The ADA and the EEOC regulations include modification of job duties in the definition of reasonable accommodation.[395]

In Beck v. University of Wisconsin Board of Regents,[396] the Court of Appeals held that the university had made reasonable efforts to help determine what specific accommodations were necessary for an employee who suffered from severe depression due to job stress. The employee had taken periodic leaves of absence and, as a result, the employer tried to reassign the employee to a less stressful position and tried to obtain more information from her doctor so that the employee's needs could be satisfied. However, the employee continued to suffer from depression

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[392] Id. at 678.

[393] See, also, Smith v. Midland Brake, Inc., 138 F.3d 1304 (10th Cir. 1998); Baulos v. Roadway Express, Inc., 139 F.3d 1147 (7th Cir. 1998) (an employer is not required to accommodate an employee's disability by offering him a new position if doing so would violate the company's seniority scheme); Hankins v. The Gap, Inc., 84 F.3d 797, 801 (6th Cir. 1996) ("plaintiff's refusal to accept available reasonable accommodation precludes her from arguing that other accommodations should also have been provided."); McCreary v. Libbey-Owens-Ford Co., 132 F.3d 1159 (7th Cir. 1997); Depaoli v. Abbott Laboratories, 132 F.3d 621 (7th Cir. 1998) (an employer is not obligated to provide reasonable accommodation by reassignment to a part-time position that does not exist); Gonzagowski v. Widnall, 115 F.3d 744 (10th Cir. 1997) (additional training could be a reasonable accommodation where the employee could no longer perform the essential functions of his job due to a disability); Dougherty v. City of El Paso, 56 F.3d 695 (5th Cir. 1995) (an individual who could no longer perform the essential functions of his job due to his disability could be required to compete with nondisabled employees for vacant positions, but was not entitled to priority in hiring or reassignment over other employees); Turco v. Celanese Chemical Group, Inc., 101 F.3d 1090 (5th Cir. 1996) (an employer was not required to offer an open position to a disabled employee who had less seniority than nondisabled employees and who could not perform the essential functions of the job in a safe manner); Gile v. United Airlines, 95 F.3d 492 (7th Cir. 1996); McCreary v. Libbey-Owens-Ford Company, 132 F.3d 1159 (7th Cir. 1997); Cassidy v. Detroit Edison Company, 138 F.3d 629 (6th Cir. 1998).

[394] Sharp v. AT&T, 66 F.3d 1045, 1048 (9th Cir. 1995).

[395] 42 U.S.C. section 12111(9); 29 C.F.R. section 1630.2(o), Appendix Pages 357-358.

[396] 75 F. 3d 1130 (7th Cir. 1996).

and after a third leave of absence, the employee furnished the university with a letter from her physician requesting appropriate assistance with her workload, an adjustable computer keyboard and the tailoring of the workload as to what she could accomplish.

The university moved the employee's desk and substantially decreased her workload. However, the employee remained depressed. After the employee went on medical leave, she sued under Title I of the ADA, alleging failure to reasonably accommodate her disability. The trial court granted summary judgment to the university. The Court of Appeals affirmed holding that the University had made reasonable efforts to provide reasonable accommodations to the employee.

In Keever v. City of Middletown,[397] the Court of Appeals held that the City had complied with the ADA requirement of reasonable accommodation by offering the employee a desk job. The employee was a police officer who suffered on the job injuries to his neck, shoulders, back and legs and as a result, missed an excessive amount of work. The employer offered a desk job to the employee in the belief that the reduced activity might reduce the employee's stress and physical symptoms so that his attendance would improve. The employee claimed the desk job was used as a punishment tool. The Court of Appeals held that the employee was unable to perform the essential functions of the position of a police officer due to his frequent absences. The Court of Appeals held that offering the employee a desk job was a reasonable accommodation since the employee needed a job where frequent absences would not adversely affect the operation of the police department.

In Hansen v. Henderson,[398] the Court of Appeals held that the employer was not required to create a new position or fire someone already in a more sedentary job to create a vacancy for an employee. The Court held that while modification of job duties is a possible accommodation under the ADA, the Court found that all "light duty" jobs were filled. The court found that the employer was not required to displace or terminate one of the incumbents in the light duty jobs. The court stated:

> "Firing a worker to make a place for a disabled worker is not a reasonable accommodation of the workers' disability . . . Nor must the employer manufacture a job that will enable the disabled employee to work despite his disability. . .That is, redundant staffing is not a reasonable accommodation. . . .
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> The job that Hansen would like would be a job in which another worker does the sorting, then gives Hansen the mail to case, then when Hansen has done that, carries the cases to the truck and Hansen then makes just curbside deliveries. . . . Two new jobs would have to be manufactured, one for Hansen and one for his helper. The Act does not require that. All it requires, so far as bears on this case . . . is that the employer either clear away obstacles to the disabled worker doing his job or provide facilities . . . that

[397] 145 F.3d 809 (6th Cir. 1998).
[398] 233 F.3d 521 (7th Cir. 2000).

> enables the worker to do the job. When thus accommodated the worker must be able to do the job as configured by the employer, not his own conception of the job. . . . The design of the job is a prerogative of management; the law does not require a lowering of standards."[399]

I. Work at Home

In some cases, the courts have held that allowing an employee to work at home can be a reasonable accommodation. The courts will look at the actual job duties to determine whether the particular job can be performed at home. While many jobs can only be performed at the work site, other jobs (e.g. telemarketing) can be performed at home.[400]

However, other courts have ruled out work at home as a reasonable accommodation. In Vande Zande v. Wisconsin Department of Administration,[401] the Court of Appeals held that an essential function of many jobs was personal contact, interaction, coordination with other employees and, therefore, allowing an employee to work at home was not a reasonable accommodation. In Hypes v. First Commerce Corporation,[402] the Court of Appeals held that the position of a bank loan review analyst could not be performed at home because the job required the employee to review confidential loan documents which could not be taken home. In addition, the analyst was required to work as part of a team with other employees. In Smith v. Ameritech,[403] the Court of Appeals held that an employer did not have to allow a collections agent to work at home if the employee's productivity would be greatly reduced.

J. Part-time or Modified Work Schedules

The Court of Appeals in Terrell v. U.S. Air[404] held that an employer was not required to provide part-time work as a reasonable accommodation to a disabled employee. To accommodate Terrell's carpal tunnel syndrome, U.S. Air modified Terrell's work schedule several times pursuant to her medical restrictions. While on medical leave, Terrell requested a part-time position even though U.S. Air did not presently offer any part-time employment at her office. Although the ADA does list part-time work as a potential reasonable accommodation, the court held that an employer is not required to provide part-time work as an accommodation when they do not normally do so.

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399 Id. at 523.

400 See, Langon v. Department of Health and Human Services, 959 F.2d 1053, 1060 (D.C. Cir. 1992).

401 44 F.3d 538 (7th Cir. 1995); See, also, Humphrey v. Memorial Hospitals Association, 239 F.3d 1128 (9th Cir. 2001) (working at home is a reasonable accommodation if the essential functions of the job can be performed at home without causing an undue hardship on the employer).

402 134 F.3d 721, 726 (5th Cir. 1998).

403 129 F.3d 857, 867 (6th Cir. 1997).

404 132 F.3d 621, 627 (11th Cir. 1998).

In Burch v. Coca Cola,[405] the Court of Appeals held that the employer was not required to create a part-time position if the essential functions of the position required a full-time manager. In Burch, the employee sought to create a part-time area services manager position.

K. Job Restructuring; Supervisory Changes

In Gaul v. Lucent Technologies, Inc.,[406] the Court of Appeals held that an employer does not violate the ADA by refusing to transfer an employee to another supervisor. Although Gaul suffered from depression and anxiety-related disorders, the court found that his request to be transferred away from all those who caused him "prolonged and inordinate stress" was unreasonable. The court stated that nothing in the ADA "leads us to conclude that in enacting the disability acts, Congress intended to interfere with personnel decisions within an organizational hierarchy. Congress intended simply that disabled persons have the same opportunities available to them as are available to nondisabled persons."[407]

L. Direct Threat

The EEOC regulations define direct threat as a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The regulations require that the determination of a direct threat be made on the basis of an individual's ability to safely perform the essential functions of the job. In determining whether an individual poses a direct threat, the factors to be considered are:

1. The duration of the risk.

2. The nature and duration of the potential harm.

3. The likelihood that the potential harm will occur.

4. The imminence of the potential harm.[408]

In Bragdon v. Abbott,[409] the United States Supreme Court held that "because few, if any, activities in life are risk free, Arline and the ADA do not ask whether a risk exists, but whether it is significant." In Bragdon, the Supreme Court found that although Abbott was HIV-positive, she did not pose a direct threat of infecting her dentist with the disease. The Court further held that "as a health care professional, petitioner had the duty to assess the risk of infection based on the objective, scientific information available to him and others in his profession. His belief that a significant risk existed, even if maintained in good faith, would not relieve him from liability." The Court remanded the matter back to the lower court to resolve the factual issues.

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[405] 119 F.3d 305 (5th Cir. 1997); See, also, Stewart v. Happy Herman's Chesire Bridge, Inc., 117 F.3d 1278 (11th Cir.1997) (employee not entitled to the accommodation of her choice, but only a reasonable accommodation; employer allowed employee to take as many breaks as she needed rather than extended lunch).

[406] 134 F.3d 576 (3rd. Cir. 1998).

[407] Id. at 580-581; See, also, Weiler v. Household Finance Corporation, 101 F.3d 519 (7th Cir. 1996) (an employee's ability to work "is not 'substantially limited' if a plaintiff merely cannot work under a certain supervisor." Id. at 526).

[408] 29 C.F.R. section 1630.2(r).

[409] 524 U.S. 624, 118 S.Ct. 2196 (1998).

In Mauro v. Borgess Medical Center,[410] the Court of Appeals followed the Supreme Court's ruling in School Board of Nassau County v. Arline,[411] which stated that a person with an infectious disease "who poses a significant risk of communicating an infectious disease to others in the workplace," is not qualified to perform his or her job. As a surgical technician, Mauro's job required him to assist with treating open wounds. The hospital feared Mauro may be a direct threat to the patients as they were at a greater risk of exposure to the HIV-virus during surgery. The court held that because of the increased risk of transmittance of the virus posed by the nature of Mauro's job, the hospital did not err in firing him because there was no reasonable accommodation by which to eliminate the threat Mauro posed to patients' health and safety.[412]

In Chevron U.S.A., Inc. v. Echazabal,[413] the United States Supreme Court upheld a regulation of the Equal Employment Opportunity Commission allowing an employer to refuse to hire an individual whose health would be endangered by the conditions on the job site.[414]

Beginning in 1972, Mario Echazabal worked for an independent contractor at an oil refinery owned by Chevron. Twice he applied for a job directly with Chevron which offered to hire him if he could pass the company's physical examination. Each time, the physical examination showed liver abnormality or damage which was eventually diagnosed as Hepatitis C. Chevron's doctors believed that Mr. Echazabal's condition would be aggravated by continued exposure to toxins at Chevron's refinery. In each instance, the company withdrew its job offer and the second time it asked the independent contractor employing Echazabal to either reassign him to a job without exposure to harmful chemicals or to remove him from the refinery altogether. The independent contractor laid him off in early 1996.[415]

Mr. Echazabal then filed suit, claiming a violation of the Americans with Disabilities Act in refusing to hire him, or to even let him continue working in the plant because of his disability, his liver condition. Chevron defended its actions under a regulation of the Equal Employment Opportunity Commission permitting the defense that a worker's disability on the job would pose a "direct threat" to his health.[416] The regulation states:

> "The term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the work place."[417]

The term "direct threat" is defined in the federal regulations as, "...a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."[418] The regulation requires that the determination that an

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410 321 137 F.3d 398 (6th Cir. 1998).
411 480 U.S. 273 (1987).
412 See, Equal Employment Opportunity Commission v. Prevo's Family Market, Inc., 135 F.3d. 1098 (6th Cir. 1998) (Prevo's did not violate the ADA by firing an HIV-positive produce clerk who often suffered knife cuts and nicks when preparing produce for display). See, also, 29 C.F.R. Part 1630, Appendix, Pages 402-403.
413 122 S.Ct. 2045, 536 U.S. 73 (2002).
414 29 C.F.R. section 1630.15(b)(2).
415 Id. at 2047-2048.
416 See, 29 C.F.R. section 1630.15(b)(2)..
417 Ibid
418 29 C.F.R. section 1630.2(r).

individual poses a "direct threat" be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. The assessment must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. The United States District Court granted summary judgment for Chevron. On appeal, the United States Court of Appeals for the Ninth Circuit reversed the summary judgment and declared the regulation void as exceeding its statutory authority.[419]

The Americans with Disabilities Act provision states:

> "(a) In general
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> "It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.
>
> "(b) Qualification standards
>
> "The term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."[420]

The United States Supreme Court reversed the decision of the U.S. Court of Appeals for the Ninth Circuit, indicating that it conflicted with decisions from the Eleventh Circuit[421] and the Seventh Circuit.[422]

The United States Supreme Court held that the statute, Section 12113(a), broadly allows the defense of direct threat based on an application of qualifications, standards, tests, or selection of criteria that have been shown to be job-related and consistent with business necessity. The statutory language in subsection (b) defining qualification standards states that qualification standards may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace. The United States Supreme Court held that subsection (b) was not an exhaustive list, but an example of qualification standards and rejected the employee's argument that Congress intended to limit the scope of qualification standards and the defense of business necessity. The Court stated in a unanimous decision:

> "It is simply that there is no apparent stopping point to the argument that by specifying a threat to others defense, Congress intended a negative implication about those whose safety could be

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[419] Id. at 2048.
[420] 42 U.S.C. section 12113.
[421] Moses v. American Nonwovens, Inc., 97 F.3d 446, 447 (1996).
[422] Koshinski v. Decatur Foundry, Inc., 177 F.3d 599, 603 (1999).

> considered. When Congress specified threats to others in the work place, for example, could it possibly have meant that an employer could not defend a refusal to hire when a worker's disability would threaten others outside the work place?"[423]

The Court went on to state that since Congress had not spoken exhaustively on threats to a worker's own health, the EEOC regulation was reasonable. The Court balanced the public policy behind the Americans with Disabilities Act with that of other statutory provisions enacted by Congress including the Occupational Safety and Health Act of 1970 (OSHA), which guarantees every working man and woman in the nation safe and healthful working conditions.[424] The Court held that the EEOC's regulation fairly resolved the tension between the Americans with Disabilities Act and OSHA since the direct threat defense must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence upon an expressly individualized assessment of the individual's present ability to safely perform the essential functions of the job reached after considering, among other things, the imminence of the risk and the severity of the harm.[425]

The Court concluded that the EEOC regulation was reasonable and remanded the case back to the Court of Appeals for further proceedings.[426]

In Rizzo v. Childrens World Learning Centers, Inc.,[427] the Court of Appeals held that the defendant private school had the burden of proving that a hearing impaired teacher's aide/bus driver was a direct threat to her passengers and therefore, not qualified to perform the essential functions of her job. The Court of Appeals affirmed the jury verdict that the employee was not a direct threat to her passengers and that she adequately communicated the effect of her impairment on her driving ability.

In Palmer v. Circuit Court of Cook County, Illinois,[428] the Court of Appeals held that "if an employer fires an employee because of the employee's unacceptable behavior, the fact that that behavior was precipitated by a mental illness does not present an issue under the Americans with Disabilities Act."[429] Palmer, an employee of the circuit court, verbally abused and threatened to kill a co-worker on numerous occasions. Upon her termination for such acts, Palmer sought ADA protection, claiming her behavior was due to depression and a delusional disorder. The court found that Palmer was fired for her unacceptable behavior, not her disability, and held that the ADA "does not require an employer to retain a potentially violent employee," regardless of their disabilities.[430]

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[423] 122 S.Ct. 2045, 2051 (2002).
[424] See, 29 U.S.C. section 651 et seq.
[425] 122 S.Ct. 2045, 2052-2053 (2002).
[426] Id. at 2053.
[427] 213 F.3d 209 (5th Cir. 2000).
[428] 117 F.3d 351 (7th Cir. 1997).
[429] Id. at 352.
[430] Id. at 352; See, Duda v. Board of Education of Franklin Park Public School District, 133 F.3d 1054 (7th Cir. 1998) (bipolar employee whose threat to kill his supervisor was discovered in his diary raised an issue of fact regarding his employer's response to his disability and perceived direct threat).

M. Undue Hardship

An employer is not required to provide reasonable accommodation if it is an undue hardship. Several courts have ruled that accommodations which adversely affect other employees are an undue hardship on the employer.[431]

In Turco v. Hoechst Celanese Chemical Corp.,[432] the Court of Appeals rejected an accommodation that would result in other employees having to work harder or longer.[433] In Mears v. Gulfstream Aerospace Corp.,[434] the court held that an accommodation was an undue burden on the employer if it adversely impacts other employees' ability to do their job.[435]

The burden of proof is upon the employer to show undue hardship. The statute and the regulations indicate that in determining whether a reasonable accommodation would be an undue hardship upon the employer, the courts should look at the overall financial resources of the business or agency.[436] However, several courts have employed a cost benefit determination in determining whether a particular reasonable accommodation is an undue hardship.[437] In Borkowski v. Valley Central School District, the Court of Appeals held that an employer may show an accommodation was not reasonable by presenting evidence as to the cost of providing the accommodation in relation to the benefits to be received by the employee.[438]

In another line of cases, the courts have held that an employer was not required to violate a collective bargaining agreement to accommodate an employee. Employers may raise the defense of the provision of the collective bargaining agreement as an undue hardship.

In U.S. Airways, Inc. v. Barnett,[439] the United States Supreme Court held that a requested accommodation pursuant to the ADA that conflicts with an employer's seniority rules is ordinarily, as a matter of law, not a reasonable accommodation. The court also held that the employee may present evidence of special circumstances that make a seniority rule exception reasonable in that particular case. The overall impact of the decision is that, in most cases, the employer's seniority system will prevail over an employee's request for reasonable accommodation under the ADA if the request conflicts with the provisions of the seniority system.[440]

In 1990, plaintiff Robert Barnett injured his back while working in a cargo handling position for U.S. Airways, Inc. Mr. Barnett invoked his seniority rights and transferred to a less physically demanding mailroom position. Under the U.S. Airways seniority system, that position, like others, periodically became open to seniority-based employee bidding. In 1992,

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431 See, 29 C.F.R. Part 1630, Appendix, Pages 358-359.
432 101 F.3d 1090 (5th Cir. 1996).
433 Id. at 1094.
434 905 F.Supp. 1075, 1080 (S.D.Ga. 1995), affirmed 87 F.3d 1331 (11th Cir. 1996).
435 Id. at 1081.
436 42 U.S.C. section 12111(10); 29 C.F.R. section 1630.2(p).
437 See, Vande Zande v. Wisconsin Department of Administration, 44 F.3d 538 (7th Cir. 1995); Borkowski v. Valley Central School District, 63 F.3d 131 (2nd Cir. 1995).
438 Id. at 142.
439 122 S.Ct. 1516, 535 U.S. 391 (2002).
440 Id. at 1519.

Barnett learned that at least two employees, senior to him, intended to bid for the mailroom job. Barnett asked U.S. Airways to accommodate his disability imposed limitations by making an exception that would allow him to remain in the mailroom. U.S. Airways eventually decided not to make an exception and Barnett lost his job.[441]

The United States District Court found that the undisputed facts showed that there was a seniority system in place and granted summary judgment in favor of U.S. Airways. The U.S. District Court held that U.S. Airways had shown that it would be an undue hardship on the operation of its business if it was required to accommodate Barnett by altering its seniority policy.[442]

The United States Court of Appeals for the Ninth Circuit reversed and held that the presence of a seniority system is merely a factor in the undue hardship analysis. The Court of Appeal held that a case-by-case fact-intensive analysis was required to determine whether any particular reassignment would constitute an undue hardship to the employer.[443]

The United States Supreme Court agreed to hear the matter noting that there was a split among the appellate courts with regard to the legal significance of a seniority system. The Supreme Court noted that employers may not discriminate against a qualified individual with a disability, and that the ADA defines a qualified individual as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the relevant employment position (42 U.S.C. section 12111(a) and 42 U.S.C. section 12112(a)). The court noted that the ADA states that discrimination includes an employer not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business (42 U.S.C. section 12112(b)(5)(A)). In addition, the ADA states that the term "reasonable accommodation" may include reassignment to a vacant position (42 U.S.C. section 12111(9)(B)).[444]

U.S. Airways argued that an accommodation that would violate the rules of a seniority system is by definition not a reasonable accommodation. In Barnett's view, a seniority system violation never indicates that a requested accommodation is not a reasonable one. The majority opinion of the court rejected both views and held that in most cases, an established seniority system will ordinarily prevail over a requested accommodation that conflicts with the seniority system, but left open the possibility that an employee could present evidence of special circumstances that make a seniority rule exception reasonable in a particular case. For example, the Supreme Court indicated that the plaintiff might show that the employer had frequently made exceptions to the seniority system for other reasons.

The Supreme Court noted that a number of lower court decisions had unanimously found that collectively bargained seniority systems trump the need for reasonable accommodation under Section 504 of the Rehabilitation Act, which has similar language to the ADA. The court

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[441] Id. at 1519.
[442] Id. at 1519-1520.
[443] Id. at 1520.
[444] Id. at 1520-1521.

noted that in Trans World Airlines, Inc. v. Hardison,[445] the Supreme Court held that in a Title VII religious discrimination case, an employer was not required to accommodate an employee's special worship schedule as a reasonable accommodation, where doing so would conflict with the seniority rights of other employees. The court went on to state that although the prior cases discussed religious discrimination and collectively bargained seniority systems, not systems unilaterally established by management, the court held that the same reasoning would apply to such seniority systems. The Supreme Court concluded:

> "...A showing that the assignment would violate the rules of a seniority system warrants summary judgment for the employer - unless there is more. The plaintiff must present evidence that 'more,' namely, special circumstances surrounding the particular case demonstrate the assignment is nonetheless reasonable."[446]

In summary, the United States Supreme Court in Barnett held that employers, both public and private, are not required, in most circumstances, to reasonably accommodate disabled employees in violation of seniority provisions in a collective bargaining agreement or an employer's policy.

In Cassidy v. Detroit Edison Company,[447] the Court of Appeals held "reassignment will not require . . .violating another employee's rights under a collective bargaining agreement."[448]

In Kralik v. Durbin,[449] the Court of Appeals held that an accommodation to one employee which violates the seniority rights of other employees in a collective bargaining agreement simply is not reasonable.[450] The court in Kralik noted that an accommodation which violates the collective bargaining agreement would expose the employer to potential union grievances, potential liability and costly remedies.[451] A number of appellate courts have held that an accommodation that contravenes the seniority rights of other employees under a collective bargaining agreement is an unreasonable accommodation under the ADA as a matter of law.[452]

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[445] 432 U.S. 63, 79-80 (1977).

[446] Id. at 1525.

[447] 138 F.3d 629 (6th Cir. 1998).

[448] Id. at 634.

[449] 130 F.3d 76 (3rd Cir. 1997).

[450] Id. at 83.

[451] See, Foreman v. Babcock and Wilcox Company, 117 F.3d 800, 809 (5th Cir. 1997) (the ADA does not require an employer to take action inconsistent with the contractual rights of other workers under a collective bargaining agreement); Wooten v. Farmland Foods, 58 F.3d 382, 386 (8th Cir. 1995) (employer has no obligation to violate a collective bargaining agreement by reassigning a disabled employee); Eckles v. Consolidated Rail Corp., 94 F.3d 1041, 1045-1052 (7th Cir. 1996) (a position is not a vacant position if it is not available to a less senior disabled employee and a nondisabled employee with more seniority is entitled to the position under a collective bargaining agreement); Cochrum v. Old Ben Coal Company, 102 F.3d 908, 912-913 (7th Cir. 1996) (disabled employee has no right to supersede seniority; employer is not required to violate the provisions of a collective bargaining agreement to give a disabled employee additional seniority.)

[452] See, Davis v. Florida Power and Light Co., 205 F.3d 1301 (11th Cir. 2000); Willis v. Pacific Maritime Association, 162 F.3d 561, 566-68, (9th Cir. 1998); Feliciano v. Rhode Island, 160 F.3d 780, 786–87 (1st Cir. 1998); Aldrich v. Boeing Company, 146 F.3d 1265, 1271, n.5 (10th Cir. 1998); Cassidy v. Detroit Edison Company, 138 F.3d 629, 634 (6th Cir. 1998); Kralik v. Durban, 130 F.3d 76, 83 (3rd Cir. 1997); Foreman v.

The Court of Appeals in Davis v. Florida Power & Light Co., stated:

> "That agreement [collective bargaining agreement] expressly distributes mandatory overtime by seniority, so that those with the least seniority are compelled to work overtime first. If Davis were given the accommodation of no overtime or selective overtime, depending on Davis' personal assessment of his back condition at the end of each shift, then more senior employees, who otherwise would not have to work overtime, would be required to do so, and that is not required by the ADA."[453]

N. Temporary Injury

Most courts have ruled that temporary impairments of short duration, with little or no long term permanent impact, do not qualify as disabilities under the ADA. In Sanders v. Arneson Products, Inc.,[454] Sanders suffered a psychological reaction to his recent cancer diagnosis. The Court of Appeals held that a temporary impairment, such as Sander's psychological reaction which lasted four months, was of an insufficient duration to constitute a true disability.

In Rogers v. International Marine Terminals, Inc.,[455] Rogers suffered from a 13 percent permanent, partial disability to his entire body due to ankle difficulties. The Court of Appeals held that Rogers' injury was temporary and did not qualify as a disability because "the mere existence of a 13 percent permanent, partial disability does not demonstrate that Rogers has been substantially impaired from performing a major life activity."[456]

A plaintiff may be more likely to succeed under state law in establishing that a temporary impairment is a qualifying disability. As discussed above, a United States District Court has determined that a temporary disability may constitute a disability for purposes of the California Fair Employment and Housing Act.[457]

O. Testing and Examinations

Several courts have ruled on whether the learning disability of the individual substantially impaired the individual's major life activity of learning so as to require a reasonable accommodation with respect to testing.[458]

In Pazer, the plaintiff graduated from Albany Law School in May, 1993. The plaintiff requested that the New York State Board of Law Examiners (Board) accommodate his visual

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Babcock & Wilcox Company, 117 F.3d 800, 810 (5th Cir. 1997); Eckles v. Consolidated Rail Company, 94 F.3d 1041(7th Cir. 1996); Benson v. Northwest Airlines, Inc. 62 F.3d 1108, 1114, (8th Cir. 1995).

[453] Id. at 1307.

[454] 91 F.3d 1351, 1353-54 (9th Cir. 1996).

[455] 87 F.3d 755 (5th Cir. 1996).

[456] Id. at 759.

[457] Diaz v. Federal Express Corporation, 373 F.Supp.2d 1034 (C.D. Cal. 2005)

[458] See, Pazer v. New York State Board of Law Examiners, 849 F.Supp. 284 (S.D.N.Y. 1994); Argen v. New York State Board of Law Examiners, 960 F.Supp. 84 (W.D.N.Y. 1994); Price v. The National Board of Medical Examiners, 966 F.Supp. 419 (D.W.Va. 1997).

processing disability by extending the time period for the bar exam from two days to four days and allow the plaintiff to use a computer with word processing, spell checking, abbreviation expanding software and a location designed to minimize distractions. The Board turned down his request, alleging that he failed to substantiate that his learning disability substantially impaired his major life activity of learning. The plaintiff alleged that he had failed the bar exam without the requested accommodations, which proved that he had a learning disability. The court held that failure to pass the bar exam alone did not compel the conclusion, as a matter of law, that the plaintiff was not learning disabled since the failure to pass the bar exam could have been due to the result of other factors, such as stress, nervousness, lack of caution or lack of motivation.

In Pazer, the Board presented expert testimony that the plaintiff did not have a learning disability. The Board's expert testified that the plaintiff performed at the 62nd percentile level, which is well within the average adult range, on the timed Woodcock Johnson-Spatial Relations Test. Plaintiff also performed at the 64th percentile on the timed reading comprehension test which is also in the average to superior range for adults. The plaintiff scored in the 84th percentile on the test when it was taken on an untimed basis. The court also noted that the plaintiff did not receive special examination accommodations in high school or through the first two years of college, and that he maintained a grade point average of approximately 2.9 in high school and 3.1 in college. Based on the Board's expert testimony, the court upheld the Board's refusal to provide testing accommodations to the plaintiff.

In Argen, the plaintiff was a 1993 graduate of the State University of New York at Buffalo Law School. The plaintiff also had a Ph.D. in philosophy. The plaintiff's expert testified that the plaintiff's performance was indicative of the profile of individuals with language processing problems. The plaintiff applied to the New York State Board of Law Examiners (Board) for double time on the July, 1993, bar exam, and a separate room for completion of the examination. The parties agreed that the plaintiff would be allowed to take the July, 1993, bar examination with special accommodations with the understanding that, if he passed, his test results would be certified only if he also succeeded in his lawsuit. With the special accommodations, the plaintiff passed the bar exam. However, the court turned down his lawsuit and did not certify his passage of the bar exam.

The court in Argen relied on the Board's expert who testified that the plaintiff did not have a learning disability. The Board's expert testified that, in his opinion, below average subtest scores were in the range of zero to 20 percent, but that it was his practice to give the applicant the benefit of the doubt and, therefore, he utilized the 30th percentile as the benchmark below which he would consider a person learning disabled and, above which, he would consider a person not to be learning disabled. The plaintiff in Argen scored in the 40th percentile for word identification and word attack on the Woodcock Reading Mastery Test - Revised (Form H). On the Woodcock Reading Mastery Test - Revised (Form G), the plaintiff scored in the 26th percentile for word identification and the 29th percentile for word attack. In the Woodcock Johnson Test of Achievement - Revised (Form A), the plaintiff scored in the 50th percentile for word identification and the 57th percentile for word attack. The plaintiff's average scores were 33 percent for word identification and 34 percent for word attack. Based on these test scores, the Board's expert testified that the plaintiff, in his opinion, was not learning disabled. Based on this testimony, the court denied the plaintiff's request to be certified as passing the bar exam.

In Price, the plaintiffs sought to compel the National Board of Medical Examiners (Board) to provide them with additional time for the United States Medical Licensing Examination (examination), and with a separate room to take the examination. The Board denied their request for accommodations.

Each of the plaintiffs claimed to have Attention Deficit Hyperactivity Disorder (ADHD). Two of the three plaintiffs also claimed to have a reading disorder and disorder of written expression. Reading disorder and disorder of written expression are specific learning disabilities. However, the court ruled that persons claiming such specific learning disabilities must show that they are substantially limited in one or more major life activities, such as learning.

With respect to Mr. Price, the first plaintiff, the court noted that without accommodation, Mr. Price graduated from high school with a 3.4 grade point average and from Furman University with a 2.9 grade point average. With respect to the second plaintiff, Mr. Singleton, the court noted that he was in a gifted program from second grade through his high school graduation, graduated from high school with a 4.2 grade point average and was the state debate champion. Mr. Singleton graduated from Vanderbilt University with a degree in physics without any accommodation for his alleged disability.

With respect to the third plaintiff, Mr. Morris, the court ruled that he had not exhibited a pattern of substantial academic difficulties. In high school, Mr. Morris was a national honor student and although his academic performance was very poor during his first year at Virginia Military Institute, his grades improved in the following years and Mr. Morris graduated from Virginia Military Institute with average grades. Mr. Morris then attended Shepard College to earn the necessary science requirements for medical school and maintained a 3.5 grade point average with accommodations for Mr. Morris' alleged disability.

In addition, the Board presented expert testimony that the three plaintiffs did not have learning disabilities which substantially impaired the major life activity of learning. Based on the expert testimony and the academic performance of the plaintiffs, the court ruled that there was no impairment which substantially limited the learning ability of the plaintiffs. The court stated:

> "First, a learning disability does not always qualify as a disability under the ADA. In order to be a person with a disability under the ADA, the individual must have a physical or mental impairment and that impairment must substantially limit a major life activity.... The comparison to most people is required to determine whether a learning disability rises to the level of a disability under the ADA. Second, 28 C.F.R. Section 36.309 does not conflict with this court's understanding that an impairment must limit a person in comparison to most people. The testing regulations only apply to individuals who have disabilities under the ADA. When a person is found to have a disability, Section 36.309 is triggered and examinations must be administered to reflect an individual's aptitude, achievement or whatever else the examination purports to

> test. For persons without disabilities under the ADA, Section 36.309 does not apply."[459] [Emphasis added]

The court in Price noted that numerous cases support the conclusion that it is appropriate to compare an individual's impaired functioning with the functioning of most unimpaired people. Soileau v. Guilford of Maine, Inc.;[460] Roth v. Lutheran General Hospital.[461] The court noted:

> "The 'comparison to most people' approach has practical advantages as well. Courts are ill suited for determining whether a particular medical diagnosis is accurate. Courts are better able to determine whether a disability limits an individual's ability in comparison to most people. Additionally, this functional approach is manageable and, over time, will promote a uniform and predictable application of the ADA.
>
> Accordingly, this court concludes that in order for an individual to establish that he or she is 'substantially limited' in a major life activity, that person must show a limitation in their ability to perform a life function as compared with most people."[462] [Emphasis added]

The court concluded that the plaintiffs had some learning difficulties. However, each of the plaintiffs had a history of significant scholastic achievement reflecting a complete absence of any substantial limitation in learning ability. The record of superior performance was corroborated by standardized test scores measuring cognitive ability and performance. The court ruled that there was a complete lack of evidence suggesting that plaintiffs could not learn at least as well as the average person, and therefore, the plaintiffs did not suffer from an impairment which substantially limited the life activity of learning in comparison with most people.[463] The court held that the plaintiffs were, therefore, not entitled to the accommodations they requested.

P. Licensing and Certification Requirements

In Johnson v. Board of Trustees of the Boundary County School District,[464] the Ninth Circuit Court of Appeals held that the school board was not required by the Americans with Disabilities Act (ADA) to accommodate a teacher's disability by granting her request for provisional authorization to teach without a certificate.

Patricia Johnson was a special education teacher with the Boundary County School District in Idaho for ten years. She suffered from depression and bipolar disorder.[465]

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[459] Id. at 426.
[460] 105 F.3d 12 (1st Cir. 1997).
[461] 57 F.3d 1446, 1454, n. 12 (7th Cir. 1995).
[462] Id. at 427.
[463] Id. at 427-428.
[464] 666 F.3d 561(9th Cir.2011).
[465] Id. at 562.

In May 2007, Johnson entered into a standard teaching contract with the school district requiring her to have and maintain the legal qualifications required to teach special education during the 2007-2008 school year. In Idaho, every person employed to serve in an elementary or secondary school in the capacity of a teacher is required to have and hold a certificate issued by the State Board of Education. The Idaho State Board of Education issued Johnson a teaching certificate valid from September 1, 2002 to September 1, 2007.[466]

To renew her certificate, Johnson was required to complete at least six semester hours of professional development training, at least three of which had to be for college credit during the five year period that her certificate was valid. During this period, Johnson completed a number of courses toward renewal of her certificate. However, by the summer of 2007, Johnson was still short of the required three semester hours of college credit.[467]

During the summer of 2007, Johnson experienced a major depressive episode that rendered her unable to take any college courses. Johnson informed the District Superintendent. The District Superintendent informed Johnson that she would need to petition the District's Board of Trustees to apply for a provisional authorization from the Idaho State Board of Education to teach without a certificate during the upcoming school year.[468]

The Board of Trustees voted to deny Johnson's request for provisional authorization because there were two certificated special education teachers available to teach in the district. One of them was hired to fill in for Johnson.[469]

Johnson alleged that under the ADA, the Board of Trustees was required to accommodate her request for provisional authorization.[470] The courts have held that to prevail on a disability discrimination claim the Plaintiff must first show that she is a qualified individual with a disability.[471] In addition, the Plaintiff must show that he or she was qualified at the time of the alleged discrimination.[472]

The ADA defines a qualified individual as an individual who, with or without reasonable accommodation can perform the essential functions of the employment position that the individual holds or desires.[473] The Equal Employment Opportunity Commission (EEOC) has promulgated regulations that establish a two part test. First, the qualified individual with a disability is one who satisfies the requisite skills, experience, education and other job-related requirements of the employment position that such individual holds or desires. Second, the qualified individual is one who, with or without reasonable accommodation, can perform the

[466] Id. at 562.
[467] Id. at 563.
[468] Id. at 563.
[469] Id. at 563.
[470] 42 U.S.C. section 12112(a).
[471] Fredenburg v. Contra Costa County Department of Health Services, 172 F.3d 1176, 1178 (9th Cir. 1999).
[472] Weyer v. 20th Century Fox Film Corporation, 198 F.3d 1104, 112 (9th Cir. 2000).
[473] 42 U.S.C. section 12111(8).

essential functions of such position.[474] The Ninth Circuit has adopted the EEOC's two step test as the test for whether an individual is qualified within the meaning of the ADA.[475]

The school district contended that Johnson's lack of legal authorization to teach in Idaho rendered her unqualified pursuant to the first step of the two step qualification inquiry. Johnson contends that because the school board could have granted her request for provisional authorization, the board should have granted her request for reasonable accommodation. However, the Court of Appeals held that the first step of the qualification inquiry, unlike the second step, contains no reference to reasonable accommodation. Therefore, the Court of Appeals held that the school district was under no obligation to provide reasonable accommodation (i.e. provisional authorization) to Johnson.[476]

It is unclear whether California courts would rule in the same manner under the California Fair Employment and Housing Act (FEHA). FEHA requires employers to make reasonable accommodations for the known physical or mental disabilities of applicants and employees. In addition, the state courts have historically construed FEHA more broadly than the ADA. Therefore, it cannot be determined with certainty how California courts will rule under state law.

THE ADA, SECTION 504, AND PUBLIC SCHOOL STUDENTS

A. U.S. Supreme Court Decisions

In Smith v. Robinson,[477] the United States Supreme Court concluded that Congress intended the Education of the Handicapped Act (EHA) to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education. The court noted that the EHA was a comprehensive statutory scheme established by Congress to protect the rights of disabled children to a free appropriate public education. The Supreme Court noted that Section 504 and the EHA are different substantive statutes and while the EHA guarantees a right to a free appropriate public education, Section 504 prohibits discrimination on the basis of handicap in a variety of programs and activities receiving federal financial assistance.

The court explained the difference by stating:

> ". . . [A]lthough both statutes begin with an equal protection premise that handicapped children must be given access to public education, it does not follow that the affirmative requirements imposed by the two statutes are the same. The significant difference between the two, as applied to special education claims, is that the substantive and procedural rights assumed to be guaranteed by both statutes are specifically required only by the EHA . . .

[474] 29 C.F.R. section 1630.2(m).
[475] See, Bates v. United Parcel Service, Inc., 511 F.3d 974, 990 (9th Cir. 2007).
[476] 666 F.3d 561, 563 (9th Cir. 2011).
[477] 468 U.S. 992, 104 S.Ct. 3457, 3468, 82 L.Ed.2d 746 (1984).

> "In Southeastern Community College v. Davis, . . . the Court emphasized that Section 504 does not require affirmative action on behalf of handicapped persons, but only the absence of discrimination against those persons. . . .
>
> "In the EHA, on the other hand, Congress specified that affirmative obligations imposed on states to ensure that equal access to a public education is not an empty guarantee, but offers some benefit to a handicapped child . . .
>
> "There is no suggestion that Section 504 adds anything to petitioners' substantive rights to a free appropriate public education. The only elements added by Section 504 are the possibility of circumventing EHA administrative procedure and going straight to court with a Section 504 claim, the possibility of a damages award in cases where no such award is available under the EHA, and attorneys' fees."[478]

The court thus concluded that while the premises of the two statutory schemes are similar, Section 504 does not impose any additional affirmative obligation or set a higher legal standard than does the EHA in the provision of a free appropriate public education to disabled students. The court also went on to conclude that the procedural remedies available under Section 504, such as attorneys' fees and damages, were not available in actions alleging a failure to provide a free appropriate public education.[479]

In response to the decision in Smith v. Robinson, Congress amended the Education of the Handicapped Act (now IDEA) mainly to provide prevailing plaintiffs with attorneys' fees in IDEA civil actions.[480]

There is nothing in the legislative history of the 1986 amendments or the amendments themselves to indicate that Congress intended to enlarge the substantive rights of disabled children under Section 504 of the Rehabilitation Act. Rather, it appears that Congress intended to enlarge the procedural rights of parents to bring an action under Section 504 which Congress believed were limited by the United States Supreme Court in Smith v. Robinson (although administrative remedies under IDEA must be exhausted), to allow an award of attorneys' fees and to allow awards of damages under Section 504 which may not be available under the IDEA.[481]

Similarly, there is nothing in the legislative history of the ADA that indicates a Congressional intent to broaden the substantive rights of disabled children to a free appropriate public education. Had Congress intended the ADA to guarantee a disabled child's right to a free appropriate public education, it would have enacted specific language in the ADA guaranteeing

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[478] Id. at 3472-74.
[479] Id. at 3473-74.
[480] See, 1986 U.S. Code Congressional & Administrative News, at 1798-1811.
[481] See, Smith v. Robinson, 468 U.S. 992, 1020-23 (104 S.Ct. 3457, 3473-74), 82 L.Ed.2d 746, 18 Ed.Law Rep. 148 (1984).

that right. Congress' silence on the issue in light of the United States Supreme Court's decision in Smith v. Robinson indicates that Congress intended the IDEA to be the main vehicle for enforcing the right to a free appropriate education, and intended that Section 504 and the ADA would reach grosser forms of discrimination against the disabled.

The right to a free appropriate public education is set forth only in the IDEA. It is not addressed by Section 504 or the ADA. Case law interpreting the IDEA has developed the Rowley standard for determining whether a free appropriate public education has been provided. Establishing a single legal standard under the IDEA allows for a clearer understanding of the substantive requirements of the law and makes it easier for school districts to understand their obligations to provide special education students with a free appropriate public education.

Since the decision of the United States Supreme Court in Smith v. Robinson[482] and the subsequent amendments to the IDEA, there has been considerable debate as to whether Section 504 of the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities (ADA) impose additional obligations on school districts to provide a free appropriate public education.

A review of the history of Section 504 and the ADA reveal that Section 504 and the ADA were intended to prohibit discriminatory practices in a broad range of programs, but impose no affirmative obligations with respect to specific educational programs. By contrast, the IDEA contains specific requirements for providing a free appropriate public education to disabled children.

The 1986 amendments to the IDEA allowed the awarding of damages under Section 504, if applicable, and attorneys' fees. However, Section 504 was not amended to explicitly provide for a substantive right to a free appropriate public education, nor did Congress include a substantive right to a free appropriate public education when it enacted the ADA. Therefore, it does not appear that the ADA or the language in Smith v. Robinson which states that Section 504 does not add anything to a disabled child's substantive right to a free appropriate public education, has been modified by Congress to provide for a right to a free appropriate public education under these statutes.

The origins of Section 504 of the Rehabilitation Act of 1973 can be traced back to World War I. Proposals were raised in Congress to rehabilitate soldiers who were disabled as a result of injuries sustained during the war. The first legislation addressing the needs of disabled war veterans and industrially disabled civilians was enacted in 1920. Additional programs were enacted in 1943, 1954, 1965, 1967, and 1968, and became part of the Social Security Act in 1935.[483]

Although Congress has estimated that over three million handicapped people were rehabilitated under those programs, many severely handicapped individuals were not being reached.[484] As stated in the legislative history of the Rehabilitation Act of 1973, "The key to the intent of the Bill is the Committee's belief that the basic vocational rehabilitation program must

[482] 468 U.S. 992 (104 S.Ct. 3457), 82 L.Ed.2d 746 (1984).
[483] 1973 U.S. Code Congressional and Administrative News, at 2082.
[484] Id. at 2084-2086.

not only continue to serve more individuals, but place more emphasis on rehabilitating individuals with more severe handicaps."[485]

In School Board of Nassau County v. Arline,[486] the United States Supreme Court noted that the purpose of the Rehabilitation Act was to provide disabled Americans with opportunities for an education, transportation, housing, health care and jobs that other Americans take for granted.

The court noted:

> "To that end, Congress not only increased federal support for vocational rehabilitation, but also addressed the broader problem of discrimination against the handicapped by including Section 504, an anti-discrimination provision patterned after Title VI of the Civil Rights Act of 1964."[487]

The United States Supreme Court decision in Southeastern Community College v. Davis[488] also supports the thesis that the provisions of Section 504 and the ADA do not set a higher standard than the IDEA in providing a free appropriate public education to disabled students. Davis suffered from a serious hearing disability and sought training as a registered nurse. She was denied admission to the nursing program of Southeastern Community College, a state institution that received federal funds, because the college believed that her hearing disability made it impossible for her to participate safely in the normal clinical training program or to care safely for patients. She could only understand speech directed to her by lip reading.

The United States Supreme Court held that the decision to exclude Davis from the community college's nursing program was not discriminatory within the meaning of Section 504 of the Rehabilitation Act of 1973. The United States Supreme Court stated:

> "Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an otherwise qualified handicapped individual not be excluded from participation in a federally funded program solely by reason of his handicap, indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context . . .
>
> "An otherwise qualified person is one who is able to meet all of the program's requirements in spite of his handicap."[489]

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[485] Id. at 2092.
[486] 480 U.S. 273 (107 S.Ct. 1123), 94 L.Ed.2d 307 (37 Ed.Law Rep. 448) (1987).
[487] Id. at 1126.
[488] 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979).
[489] Id. at 2366-67.

The court noted that legitimate physical qualifications may be essential to participation in particular programs. It found that the ability to understand speech without reliance on lip reading is necessary for patients' safety during the clinical phase of the program and is indispensable for many of the functions that a registered nurse must perform. The court rejected Davis' contention that Section 504 required the community college to undertake affirmative action that would dispense with the need for effective oral communication. She was also not entitled to individual supervision by faculty members whenever she attended patients directly.

The Supreme Court held that Section 504 does not require such a fundamental alteration in the nature of a program, stating:

> "Moreover, an interpretation of the regulations that required the extensive modifications necessary to include Respondent in the nursing program would raise grave doubts about their validity. If these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals they would do more than clarify the meaning of Section 504, instead they would constitute an unauthorized extension of the obligations imposed by that statute. . . .
>
> "Neither the language, purpose, nor history of Section 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds. . . ."[490]

The court acknowledged that the difference between illegal discrimination and affirmative action will not always be clear, particularly in light of the rapid technological advances which are taking place. The court concluded that whether a particular refusal to accommodate the needs of a disabled person constitutes discrimination will have to be determined on a case-by-case basis. However, major modifications to the program are not required:

> "In this case, however, it is clear that Southeastern's unwillingness to make major adjustments in its nursing program does not constitute such discrimination . . . Section 504 imposes no requirement upon an education institution to lower or to effect substantial modifications of standards to accommodate a handicapped person."[491]

B. Court of Appeals Decisions

In Mark H. v. Lemahieu,[492] the Court of Appeals held that the definition of a free appropriate public education under the Section 504 regulations is different than the definition of free appropriate public education under the Individuals with Disabilities Education Act (IDEA).

[490] Id. at 2367-2371.
[491] Id. at 2370-2371.
[492] 513 F.3d 922, 229 Ed.Law Rep. 53 (9th Cir. 2008).

The court held that the free appropriate public education requirements in the IDEA and in Section 504 regulations overlap but are different. The court held that the availability of relief under the IDEA does not limit the availability of the damages remedy under the Section 504 regulations.

The court remanded the matter back to the trial court for further proceedings since the Plaintiffs assumed that alleging a violation of the IDEA free appropriate public education requirements was sufficient to allege a violation of Section 504. The court allowed the Plaintiffs to amend their complaint to allege specific violations of the Section 504 free appropriate public education regulations.[493]

The court noted that the Section 504 regulations define a free appropriate public education as regular or special education and related aids and services that are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons.[494] The court held that Section 504 establishes an implied private right of action allowing victims of prohibited discrimination to seek equitable relief and compensatory damages.[495] Punitive damages are not available under Section 504.[496]

Under Section 504, school districts need only design education programs for disabled persons that are intended to meet their educational needs to the same degree that the needs of nondisabled students are met. Section 504 does not require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, but does require reasonable modifications necessary to correct circumstances in which qualified disabled people are prevented from enjoying meaningful access to program benefits because of their disability.[497]

The court held that to obtain damages, the Plaintiffs must ultimately demonstrate that the school district was deliberately indifferent to the violation of Section 504. On remand, the court held that Plaintiffs should be given an opportunity to amend their complaint to specify which 504 regulations they believe were violated and which support a privately enforceable cause of action.[498]

Following the United States Supreme Court's decision in Davis, several lower courts have examined the extent to which Section 504 imposes affirmative obligations to provide a free appropriate public education, and Section 504's interaction with the IDEA.[499]

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[493] Id. at 925.
[494] Ibid. 34 C.F.R. section 104.33.
[495] Id. at 930. See, Greater L.A. Council on Deafness Inc. v. Zolin, 812 F.2d 1103, 1107 (9th Cir. 1987); Barnes v. Gorman, 536 U.S. 181, 189 (2002).
[496] Ibid. See, Barnes v. Gorman, 536 U.S. 181, 189 (2002). See, also, W.B. v. Matula, 67 F.3d 484, 104 Ed.Law Rep. 28 (3rd Cir. 1995); Sellers v. School Board of the City of Manassas, 141 F.3d 524, 725 Ed.Law Rep. 1078 (4th Cir. 1998).
[497] Id. at 938.
[498] Id. at 938-39.
[499] Phipps v. New Hanover County Board of Education, 551 F.Supp. 732, 8 Ed.Law Rep. 15 (E.D.N.C. 1982); Colin K. by John K. v. Schmidt, 715 F.2d 1, 9, 13 Ed.Law Rep. 221 (1st Cir. 1983); Smith v. Cumberland School Committee, 703 F.2d 4, 10 Ed.Law Rep. 43 (1st Cir. 1983); Stewart v. Salem School District, 65 Or.App. 188,

In Timms v. Metropolitan School District,[500] for example, the Court of Appeals held that an action brought under Section 504 as well as the Education of the Handicapped Act (now IDEA) must be dismissed for failure to exhaust the administrative remedies under the Act.

The court noted that regulations under Section 504 require public schools to provide disabled children with a free appropriate public education and that, therefore, Section 504 and the IDEA have considerable overlap. The Court of Appeals stated:

> "We agree with the Eighth Circuit, however, that the Rehabilitation Act is broader than the EAHCA (now IDEA) in the range of federally funded activities that reach us but narrower in the kind of actions it regulates. . . . As Monahan v. State of Nebraska, 687 F.2d 1164 [6 Ed.Law Rep. 520] (1982)] notes . . . Section 504 is prohibitory, forbidding exclusion from federally-funded programs on the basis of the handicap, rather than mandatory, creating affirmative obligations. See, Southeastern Community College v. Davis . . . The EAHCA, by contrast, because of its focus on appropriate education, imposes affirmative duties regarding the content of the programs that must be provided to the handicapped. Because Section 504 forbids exclusion from programs rather than prescribing the program's content, it reaches grosser kinds of misconduct than the EAHCA."[501]

A number of lower court decisions have held that Section 504 does not require school districts to provide residential placements for disabled students. In Colin K. v. Schmidt,[502] for example, the First Circuit Court of Appeals questioned the 504 regulations which require school districts to provide handicapped students with residential placements. In Turillo v. Tyson,[503] the district court held that Section 504 was not a mandate for affirmative action. The court noted, "While Section 504 might require a school system to modify its schools to accommodate handicapped children, it never compels the school system to finance a private educational placement."[504]

The district court in William S. v. Gill[505] held that Section 504 does not obligate a school district to finance a private placement under any circumstances. The district court noted:

> "In the wake of Davis, all courts save one have concluded Section 504 does not obligate a school system to finance a private placement under any circumstances (though conceding EAHCA may impose such an obligation) . . . Because a residential

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670 P.2d 1048, 14 Ed.Law Rep. 204 (1983); Timms v. Metropolitan School District, 722 F.2d 1310, 1317-19, 15 Ed.Law Rep. 102 (7th Cir. 1983).

[500] 722 F.2d 1310 (7th Cir. 1983).

[501] Id. at 1317-18.

[502] 715 F.2d 1 (1st Cir. 1983).

[503] 535 F.Supp. 577, 3 Ed.Law Rep. 639 (D.R.I. 1982).

[504] Id. at 588.

[505] 572 F.Supp. 509, 14 Ed.Law Rep. 279 (N.D. Ill. 1983).

> placement represents a new service not available to nonhandicapped students (as distinguished from a modification of an existing service available to nonhandicapped students, which was at issue in Davis), it follows a fortiori from Davis that defendants have no financial responsibility under Section 504 for such a program."[506]

In Darlene L. v. Illinois State Board of Education,[507] the district court held that Section 504 does not require a school district to provide disabled students with psychiatric services. The district court noted Section 504 "certainly cannot impose any greater educational requirements on states than does the IDEA."

In D.L. v. Baltimore City Board of School Commissioners,[508] the Fourth Circuit Court of Appeals held that a school district was not required by Section 504 of the Rehabilitation Act to provide services to students enrolled in private school. The Court of Appeals noted that the federal regulations were unclear as to whether the term "education" in 34 C.F.R. Section 104.33(c)(4) encompasses special education services. The court noted that the U.S. Department of Education Office for Civil Rights issued an opinion stating that where a school district has offered an appropriate education, a school district is not responsible under Section 504 for the provision of educational services to students not enrolled in a public education program based on the personal choice of the parent or guardian.[509]

The Court of Appeals noted that Section 504 and its implementing regulations prohibit discrimination on the basis of disability not on the basis of school choice. The court further noted that Section 504 is not intended to impose an affirmative obligation on all recipients of federal funds. Public schools are only required to make a free appropriate public education available on equal terms to all eligible children within their district. Because the school district provided D.L. with access to a free appropriate public education on an equal basis with all other eligible students in the district, the court found that the school district had satisfied Section 504 requirements.[510] The Court of Appeals held, "The school board need not serve up its publicly funded services like a buffet from which Appellants can pick and choose."[511]

C. Accommodation of Deaf Parents

In Rothschild v. Grottenthaler,[512] the Court of Appeals applied the principal of reasonable accommodation to hearing impaired parents of nonhearing impaired children who attended schools in the district. The parents requested that a sign language interpreter be provided at district expense to assist the parents at parent-teacher meetings and the child's graduation ceremony. The Court of Appeals noted there must be a balance between reasonable accommodation to permit access to disabled persons and the financial and administrative burdens

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[506] Id. at 517.
[507] 568 F.Supp. 1340, 13 Ed.Law Rep. 282 (N.D. Ill. 1983).
[508] 706 F.3d 256, 289 Ed.Law Rep. 493 (4th Cir. 2013).
[509] 20 IDELR 864 (1993).
[510] 706 F.3d 256, 260-62 (4th Cir. 2013).
[511] Id. at 264.
[512] 907 F.2d 286, 61 Ed.Law Rep. 490 (2nd Cir. 1990).

of requiring such an accommodation. The court found that the parents were entitled to sign language interpreter services provided at the school district's expense only at those activities directly involving their child's academic and/or disciplinary progress. The parents were not entitled to a sign language interpreter at the child's graduation ceremony.[513]

The Court of Appeals in Rothschild was mindful of the need to strike a balance between the rights of the parents and the legitimate financial and administrative concerns of the school district. The court noted that to the extent that the parents wished to voluntarily participate in extracurricular activities that their children may be involved in, the parents must do so at their own expense.[514]

In our opinion, these activities would include field trips, PTA meetings, open houses, Back to School nights, and other similar activities. When the parents wish to discuss their child's individual academic progress, behavior, or disciplinary issues at a meeting with the teacher, principal, or other staff members, the school district should provide the parents with a sign language interpreter.

D. Outdoor Programs

In Bird v. Lewis and Clark College,[515] the Court of Appeals affirmed the dismissal of an action brought by a college student under the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Section 504), in which the student alleged that the college failed to provide wheelchair access to the student in various outdoor programs. The ruling in the Bird case is applicable to outdoor programs operated by school districts and community college districts.

The college responded that, while not every aspect of the program conformed to Bird's needs, the college offered evidence of having accommodated her disability. The college introduced evidence that it provided alternative modes of transportation by paying for her use of taxis and providing her with an air flight while other class members use buses and trains. The college paid two students enrolled in the program to be her helpers and purchased a sleeping cot manufactured to her specifications, and a special shower head for her use. The college provided a smaller, narrower wheelchair so that Bird could move indoors when door openings were too narrow for the normal wheelchair. On several occasions, the college offered alternative lodgings that were more fully accessible, but Bird refused the alternative accommodations. In addition, the college arranged for a number of outdoor activities with Bird's disability in mind. The college arranged for a raft provided by the contractor so that Bird could float in the water and observe coral reefs. The college conducted a rainforest study at a more accessible location than normally chosen for study, and arranged for a hike at a trail that was wheelchair accessible. In addition, Bird participated in a number of class activities.[516]

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[513] Id. at 289-293.
[514] Id. at 290-294.
[515] 303 F.3d 1015 (9th Cir. 2002).
[516] Id. at 1018.

The Court stated that under Section 504, the college was required to provide Bird with meaningful access to its programs, but not required to make fundamental or substantial modifications to its program. Reasonableness depends on the circumstances of each case and requires a fact specific, individualized analysis of the disabled individual's circumstances and the accommodations that might allow the person to meet the program's standards.[517]

The Court of Appeals rejected Bird's assertion that she should prevail on the ADA or Section 504 claims simply because the college failed to provide her with wheelchair access on a number of occasions. The Court of Appeals held that compliance under the ADA and Section 504 does not depend on the number of locations that are wheelchair accessible, but whether the program, when viewed in its entirety, is readily accessible to and useable by individuals with disabilities.[518]

The Court of Appeals noted that the college provided ample evidence of having accommodated Bird's disability. It hired two helpers, paid for her to fly while others took trains and buses, and paid for a cot, a second wheelchair, and a unique shower head built to her specifications. Almost everywhere the class stayed, Bird was offered alternative lodgings that were wheelchair accessible. In addition, the Court of Appeals found that the record in the trial court indicated that Bird enjoyed many of the benefits offered by the program, and that, in spite of her disability, Bird participated in outdoor activities with her classmates, attended classes, and received full credit for her semester abroad.

The Court of Appeals stated that the trial court did not err in its jury instructions. Ms. Bird requested jury instructions that indicated that carrying a person who has a disability is humiliating and a violation of the ADA and Section 504. The Court of Appeals rejected such a jury instruction as argumentative and misleading. The Court of Appeals concluded:

> "There was ample evidence to support the jury verdict. Because failure to provide wheelchair access does not automatically establish liability under the Rehabilitation Act, the jury was not required to find against the college, even though some aspects of the program were not fully wheelchair accessible. . .."[519]

The holding in Bird clearly indicates that not every aspect of the program must be wheelchair accessible, and that districts are not required to modify or lower the standards of the program to accommodate students who are disabled.

The principle of reasonable accommodation would also apply with respect to severe food allergies. The California School Boards Association has drafted a sample policy to address reasonable accommodation of students with severe food allergies.

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[517] Id. at 1020.
[518] Id. at 1021; see, also, Barden v. City of Sacramento, 29 F.3d 1073, 1075-76 (9th Cir. 2002).
[519] Id. at 1023.

E. Food Allergies

A child with a peanut allergy or other food allergy may qualify as disabled under Section 504 if a licensed physician provides information to the school district that leads the school district to conclude that the food allergy is so severe as to substantially limit one or more major life activities.[520]

Before taking any action, school districts should require the parents of the child to provide the school district with a comprehensive medical report from the child's physician indicating:

- The nature of the allergy.
- The severity of the allergy.
- How the allergy limits the student's ability to learn and participate in school activities.
- What triggers the student's allergic reaction (e.g., ingestion of the food product).
- The physician's recommendations for avoiding an allergic reaction.
- What action should be taken if the student suffers an allergic reaction.

The school district, after reviewing the physician's report, should meet with the parent to determine if the child's disability is so severe as to substantially limit the child's ability to learn or participate in school activities. If the disability is determined to be severe and to substantially limit the child's ability to learn or participate in school activities, then a 504 plan should be drafted to reasonably accommodate the child's disabilities. If the child's disability is determined not to be so severe, then a less formal plan may be drafted if appropriate.

The California School Boards Association Sample Board Policy, BP 5141.27(a), indicates that the U.S. Department of Agriculture guidance indicates that students with food allergies are generally not considered to have a disability under Section 504 or the IDEA. However, if a licensed physician determines that the food allergy is so severe as to substantially limit one or more major life activities, the student may be considered disabled under Section 504 or the Americans with Disabilities Act and should receive reasonable accommodations.

The administrative regulation, AR 5141.27(a), contains recommendations with respect to notification to district staff, food services, class parties and school activities, sanitation and cleaning, professional development, supervision of students, and health education, as follows:

[520] 29 U.S.C. section 794.

When notified by the parent/guardian that a student has a food allergy, the Superintendent or designee shall inform the student's principal, teacher(s), bus driver, school nurse, coach, substitute teacher, and/or any other personnel responsible for supervising the student.

The principal or designee shall notify substitute staff of any students with known food allergies and the school's response plan.

The district's food services program shall make food substitutions in breakfasts, lunches, and after-school snacks when students are considered to have a disability under Section 504 of the federal Rehabilitation Act of 1973 that restricts their diet and when a physician has signed a statement of need that includes recommended alternate foods. (7 CFR 210.10, 220.8)

Substitutions may be made on a case-by-case basis for students who do not have a disability under Section 504 but who cannot consume the regular breakfast, lunch, or after-school snack because of medical or other special dietary needs, when supported by a statement of need signed by a recognized medical authority. (7 CFR 210.10, 220.8, 225.16)

The district's food services staff shall check food labels or specifications to ensure that foods do not contain traces of substances to which the student is allergic. Under no circumstances shall food services staff prescribe nutritional requirements or revise a diet order prescribed by a physician. Food substitutions shall not result in any additional cost to the student.

Without identifying the student, the principal or teacher may notify parents/guardians of other students in the class that a student is allergic to a specific food and may request that the food not be provided at class parties or other school events. Whenever the ingredients in any food served at class parties or other school activities are unknown, the student shall be encouraged to avoid the food.

To avoid spreading allergens, cafeteria tables and classroom surfaces should be cleaned with a fresh cloth or disposable paper towels and cleaning products known to effectively remove food proteins, excluding waterless cleaners or instant hand sanitizers that do not involve a wet-wash step. Cross-contact from a sponge or cloth used to clean allergen-containing tabletops should be avoided.

Staff shall use and promote hand washing using soap and water before and after food handling. Students shall be notified that exchanging meals or utensils is prohibited.

Schoolwide professional development shall be provided to appropriate staff on the identification and management of food allergies, including avoidance measures, typical symptoms, the proper use of epinephrine auto-injectors, documentation and storage of medication, and emergency drills. Staff who are trained and knowledgeable about symptoms of anaphylaxis and actions to take in an emergency shall provide supervision in the classroom and cafeteria and on the playground whenever students known to have a food allergy are on school grounds.

The district's health education curriculum may include instruction on food allergies in order to assist food allergic students in taking responsibility for monitoring their diet and to teach other students about the dangers of sharing foods or utensils with others. The administrative regulation also recommends that epinephrine auto-injectors or other medicine be available for use in the event of an anaphylactic shock reaction.

In summary, if a licensed physician determines that the child's food allergy is so severe as to substantially limit one or more major life activities, the student may be considered disabled under Section 504 of the Rehabilitation Act or the Americans with Disabilities Act and should receive reasonable accommodations. What reasonable accommodations are necessary should be determined on a case-by-case basis and should be based upon a licensed physician's evaluation of the severity of the allergy.

F. The Americans with Disabilities Act and a Free Appropriate Public Education

In K.M. v. Tustin Unified School District,[521] the Ninth Circuit Court of Appeals held that a school district's compliance with the Individuals with Disabilities Education Act (IDEA) in providing a free appropriate public education (FAPE) to a special education student, does not as a matter of law, result in automatic compliance with the Americans with Disabilities Act (ADA). The Court of Appeals held that the IDEA and ADA were two different statutes with two different requirements and that while the school districts complied with the IDEA, the matter should be remanded back to the U.S. District Court to determine whether the school districts complied with the ADA.[522]

The Ninth Circuit ruling came as a surprise to many school attorneys and departs from longstanding precedent in other circuits. The decision imposes new duties and requirements on school districts and could result in requiring school districts to provide auxiliary aids and services that will be more costly than in the past.

K.M. is a student in the Tustin Unified School District (Tustin) who is eligible for special education services under the IDEA. As required by the IDEA, Tustin convened regular meetings to develop an IEP identifying K.M.'s educational goals and laying out which special services Tustin will provide to address those goals in the upcoming academic year.[523]

In Spring 2009, when K.M. was completing the eighth grade, Tustin and her parents began to prepare for her upcoming transition to high school. At a June 2009 meeting of K.M.'s IEP team, K.M.'s mother requested that Tustin provide her with Communication Access Realtime Translation (CART) in the classroom beginning the first day of ninth grade. The IEP team deferred a decision on the CART request and developed an IEP that offered K.M. other accommodations.[524]

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[521] 725 F.3d 1088, 296 Ed.Law Rep. 800 (9th Cir. 2013).

[522] The Ninth Circuit consolidated two lower court cases – K.M. v. Tustin Unified School District and D.H. v. Poway Unified School District.

[523] Id. at 1092-93.

[524] Id. at 1093.

K.M. filed an administrative complaint challenging the June 2009 IEP. During the course of K.M.'s ninth grade year, her parents and Tustin officials met for several IEP meetings but were unable to come up with an agreement that would resolve the complaint. After providing K.M. with trials of both CART and an alternative transcription technology called TypeWell, her IEP team concluded that she did not require transcription services to receive a FAPE under the IDEA and reaffirmed the June 2009 IEP.[525]

A seven-day hearing was held before a California Administrative Law Judge (ALJ). K.M. testified that she could usually hear her teachers but had trouble hearing her classmates and classroom videos. Several of K.M.'s teachers testified that, in their opinion, K.M. could hear and follow the classroom discussions well. The ALJ concluded that Tustin had complied with both procedural and substantive obligations under the IDEA and had provided K.M. with a FAPE. The ALJ observed that K.M.'s mother was requesting CART so that K.M. could maximize her potential but the IDEA does not require schools to provide a potential maximizing education.[526]

K.M. appealed to the U.S. District Court challenging the ALJ's decision on her IDEA claim. K.M. also asserted disability discrimination claims under Section 504 of the Rehabilitation Act, Title II of the ADA, and California's Unruh Civil Rights Act. With respect to her ADA claim, K.M. sought, in addition to other relief, an order compelling defendants to provide CART. K.M. submitted a declaration to the court stating that she could only follow along in the classroom with intense concentration, leaving her exhausted at the end of the day.[527]

The district court granted summary judgment for Tustin. The district court held that K.M. had been provided a FAPE in compliance with the IDEA and held that K.M.'s claims under the ADA and the Rehabilitation Act fail on the merits for the same reason that her claim under the IDEA failed (i.e. the school district provided K.M. with FAPE). Further, the district court held that the Unruh Act liability requires intentional discrimination or an ADA violation, neither of which K.M. had shown.[528]

D.H. is a student of the Poway Unified School District (Poway) and was eligible for and received special educational services under the IDEA. At the IEP meeting held toward the end of D.H.'s seventh grade year, D.H.'s parents agreed that D.H. was making progress but said they believed that she needed CART in order to have equal access in the classroom. The IEP team then decided that CART was not necessary to provide D.H. with a FAPE, noting that D.H. was making good academic progress.[529] D.H. filed an administrative complaint with the Office of Administrative Hearings (OAH) challenging her April 2009 IEP. At the administrative hearing, D.H. testified that she sometimes had trouble following class discussions and teacher instructions. The ALJ concluded, however, that Poway had provided D.H. with a FAPE under the IDEA, finding that D.H. hears enough of what her teachers and fellow pupils say in class to

[525] Ibid.
[526] Ibid. See, Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).
[527] Ibid.
[528] Id. at 1093-94. Under California law, a violation of the ADA is, per se, a violation of the UNRUH Act. See, Lentini v. California Center for the Arts, 370 F.3d 837, 847 (9th Cir. 2004).
[529] Id. at 1094.

allow her to access the general education curriculum and did not need CART services to receive educational benefit.[530]

D.H. filed a complaint in the U.S. District Court appealing the ALJ's decision under the IDEA and also alleged disability discrimination claims under Section 504 of the Rehabilitation Act and Title II of the ADA, seeking, in addition to other relief, an order compelling defendant to provide CART. In her declaration, D.H. stated in support of her motion for summary judgment that she was having difficulty hearing in her classes and that although she could use visual cues to follow conversations, the use of these strategies requires a lot of mental energy and focus, leaving her exhausted at the end of the school day.[531]

The district court granted summary judgment for the school district and held that the IDEA does not require states to maximize each child's potential. The district court granted summary judgment for defendant on the ADA and Section 504 claims, holding that a plaintiff's failure to show a deprivation of a FAPE under the IDEA defeats a claim under Section 504 and the ADA.[532]

Both K.M. and D.H. appealed to the Ninth Circuit Court of Appeals.

The Court of Appeals noted that the IDEA requires schools to make available to children with disabilities a FAPE tailored to their individual needs. States receiving federal funds under the IDEA must show that they have implemented policies and procedures to provide disabled children with a FAPE, including procedures to develop an IEP for each eligible child.[533]

The IDEA states that a child's IEP team must consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child, and the academic, developmental, and functional needs of the child in developing the IEP. For a child who is deaf or hard of hearing, the IEP team is required to consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic levels, and full range of needs, including opportunities for direct instruction in the child's language and communication mode.[534]

The Court of Appeals noted that the IDEA does not specify any substantive standard prescribing the level of education to be accorded handicapped children. Rather, the IDEA primarily provides parents with various procedural safeguards. However, the IDEA does state that the IEP that is developed through the required procedures must be reasonably calculated to enable the child to receive educational benefits, but the IDEA does not require states to provide disabled children with a potential maximizing education.[535]

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[530] Ibid.
[531] Ibid.
[532] Id. at 1094-95.
[533] Id. at 1095.
[534] Ibid. See, also, 20 U.S.C. section 1414(d)(3).
[535] Id. at 1095-96.

In contrast, the Court of Appeals noted that the ADA imposes less elaborate procedural requirements, but that the ADA does establish different substantive requirements that public entities must follow. Title II of the ADA provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of the public entity, or be subjected to discrimination by any such entity and requires the U.S. Department of Justice to promulgate regulations to implement Title II of the ADA.[536]

The U.S. Department of Justice has promulgated implementing regulations with respect to effective communication.[537] The Title II effective communications regulation has two main requirements:

1. Public entities must take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.

2. Public entities must furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.[538]

Title II regulations define the phrase "auxiliary aids and services" as including real time computer-aided transcription services and video text displays.[539] In determining what type of auxiliary aid and service is necessary, a public entity must give primary consideration to the request of the individual with disabilities.[540]

A separate, more general Title II regulation limits the application of the requirements by stating that notwithstanding any other requirements and regulations, a public entity need not, under Title II, take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity, or any action that would be an undue financial and administrative burden.[541] The public entity has the burden to prove that a proposed action would result in an undue burden or fundamental alteration, and the decision must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reason for reaching that conclusion.[542] The public entity must take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.[543]

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[536] Id. at 1096. See, 42 U.S.C. sections 12132, 12134.
[537] See, 28 C.F.R. section 35.160.
[538] 28 C.F.R. section 35.160.
[539] See, 28 C.F.R. section 35.104.
[540] 28 C.F.R. section 35.160(b)(2).
[541] 28 C.F.R. section 35.164.
[542] Id. at 1096-97. See, also, 28 C.F.R. section 35.164.
[543] 28 C.F.R. section 35.164.

The Court of Appeals observed that the IDEA sets only a floor of access to education for children with communications disabilities, but requires school districts to provide the individualized services necessary to get a child to that floor, regardless of the cost, administrative burdens, or program alterations required. Title II and its implementing regulations, taken together, require public entities to take steps toward making existing services not just accessible but equally accessible to people with communications disabilities, but only insofar as doing so does not pose an undue burden or require a fundamental alteration of their programs.[544]

Moreover, the Court of Appeals held that Congress has specifically and clearly provided that the IDEA coexists with the ADA and other federal statutes. The Court of Appeals cited the IDEA's nonexclusivity provision, which states:

> "Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. Section 12101 et seq.], Title V of the Rehabilitation Act of 1973 [29 U.S.C. Section 791 et seq.], or other federal laws protecting the rights of children with disabilities, except that before the filing of a civil rights action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter."[545]

The Court of Appeals rejected the reasoning of the U.S. District Court and held that the IDEA, Section 504, and Title II of the ADA may overlap, but there are material differences between the statutes. The Court of Appeals noted that neither K.M. nor D.H.'s theory of Title II liability is predicated on a denial of a FAPE under the IDEA, but rather K.M. and D.H. based their claims under Title II of the ADA under the effective communications regulations which they argue establishes independent obligations on the part of public schools to students who are deaf or hard of hearing. The Court of Appeals held that if the ADA requirements are sufficiently different from the requirements of the ADA, then compliance with the IDEA's FAPE requirements would not preclude an ADA claim. The Court of Appeals stated:

> "Applying that standard, we conclude from our comparison of the relevant statutory and regulatory text that the IDEA's FAPE requirement and the Title II communications requirements are significantly different. The result is that in some situations, but not others, schools may be required under the ADA to provide services to deaf or hard of hearing students that are different than the services required by the IDEA."[546]

The Court of Appeals held that under the ADA's effective communications regulation, a public entity, in addition to the requirements under the IDEA, is also required to furnish appropriate auxiliary aids and services when necessary, and must give primary consideration to

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[544] Id. at 1097.
[545] Id. at 1097. See, 20 U.S.C. section 1415(l).
[546] Id. at 1100.

the request of the individual with disabilities. The court noted that the provision in the ADA regulations has no direct counterpart in the IDEA. In addition, the court held that Title II provides the public entity additional defenses unavailable under the IDEA if it can demonstrate that providing the services would result in a fundamental alteration in the nature of the programs, services, or activities of the public entity or is an undue financial and administrative burden.[547]

In addition, the Title II effective communications regulations require public schools to communicate as effectively with disabled students as with other students and to provide disabled students the auxiliary aids necessary to afford an equal opportunity to participate in, and to enjoy the benefits of, the school program. The court held that the requirement under the ADA is not relevant to IDEA claims because the IDEA does not require schools to provide equal educational opportunities to all students.[548]

The Court of Appeals held that the district court erred in granting summary judgment on the basis that providing a FAPE under the IDEA, as a matter of law, resulted in the rejection of the ADA claims. The Court of Appeals remanded the matter back to the district court for further proceedings consistent with its opinion.[549] The Court of Appeals stated:

> "Now that we have clarified that the school districts' position is not correct, we expect that the parties may wish to further develop the factual record and, if necessary, revise their legal positions to address the specifics of a Title II, as opposed to an IDEA, claim."[550]

The Ninth Circuit Court of Appeals' decision was appealed to the United States Supreme Court. However, recently, the United States Supreme Court refused to review the Ninth Circuit Court of Appeals' decision. Therefore, the Ninth Circuit Court of Appeals' decision is final.

In summary, the Court of Appeals held that school districts must not only provide a FAPE under the IDEA to deaf and hard of hearing students, but school districts must also meet the requirements of Title II effective communications regulations under the ADA. School districts must furnish appropriate auxiliary aids and services where necessary giving primary consideration to the request of the individual with disabilities. Districts may attempt to show that providing the services to the individual with the disability would result in a fundamental alteration in the nature of the service program or activity or would result in an undue financial and administrative burden on the school district. The ADA regulations also require public schools to communicate as effectively with disabled children as with other students and to provide disabled students with auxiliary aids necessary to afford an equal opportunity to participate in, and to enjoy the benefits of, the school program.

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[547] Id. at 1101. See, 28 C.F.R. section 35.164.
[548] Id. at 1101.
[549] On remand, the U.S. District Court in D.H. v. Poway Unified School District, 2013 WL 6730163 (S.D.Cal. 2013), issued a preliminary injunction ordering the Poway Unified School District to provide the CART program to the student.
[550] Id. at 1103.

It is expected that this decision by the Ninth Circuit Court of Appeals will have a long-term impact on public school programs, particularly with respect to deaf and hard of hearing students. The decision imposes new duties and requirements on school districts and could result in requiring school districts to provide auxiliary aids and services that will be more costly than in the past. Districts should consult with legal counsel when faced with claims for auxiliary aids and services from deaf and hard of hearing students.

In A.G. v. Paradise Valley School District,[551] the Ninth Circuit Court of Appeals held that a student asserted valid claims for damages under Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act. The Ninth Circuit reversed a lower court's dismissal of the claims.

The Ninth Circuit Court of Appeals found that the facts demonstrated that the school district may have denied the student meaningful access to educational benefits and reasonable accommodations to allow the student to remain at a general education school, even though the parent agreed to a change in placement at the school district's alternative school for emotionally disturbed students. The Ninth Circuit held that the claim for meaningful access has been improperly denied under Section 504 and the ADA is not precluded or waived based on a parent's consent to an IEP.[552]

Even though the school district and parents settled all claims under the IDEA, the parents pursued claims under the ADA and Section 504 as well as state tort claims. The U.S. District Court granted summary judgment in favor of the school district and dismissed all claims. However, the Ninth Circuit reversed the district court's dismissal and ordered the district court to determine whether the student's educational needs were met as adequately as those of her non-disabled peers. The court held that the student may show unlawful discrimination under the ADA and Section 504 by proving that the school district denied her a reasonable accommodation necessary to obtain meaningful access to her education by perhaps providing a full-time aide to the student.[553]

G. Service Animals Under the Americans with Disabilities Act

Pursuant to the Americans with Disabilities Act, the Department of Justice recently adopted new regulations[554] for state and local agencies with respect to service animals for individuals with disabilities. The regulations take effect on March 15, 2011.

A service animal is defined as any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual or other disability. The work or tasks must be directly related to the handler's disability. Examples of work or tasks, include, but are not limited to, assisting individuals who are blind or who have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to

[551] 815 F.3d 1195 (9th Cir. 2016).
[552] Id. at 1203-1210.
[553] Id. at 1208-1209.
[554] See, 28 C.F.R. section 35.136.

the presence of allergens, retrieving items such as medicine or a telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects by an animal's presence and the provision of emotional support, well-being, comfort or companionship do not constitute worker tasks for the purpose of the definition of a service animal.[555]

In general, the new regulations state that a public entity shall modify its policies, practices or procedures to permit the use of a service animal by an individual with a disability.[556] The regulations provide for exceptions to this requirement if the animal is out of control and the animal's handler does not take effective action to control it or the animal is not housebroken.[557] If a public entity properly excludes the service animal for these reasons, it shall give the individual with a disability the opportunity to participate in the service, program or activity without having the service animal on the premises.[558]

The regulations require the service animal to be under the control of its handler. The service animal must have a harness, leash or other tether, unless either the handler is unable because of a disability to use a harness, leash or other tether, or the use of a harness, leash or other tether would interfere with the service animal's safe, effective performance of its work or task, in which case the service animal must be otherwise under the handler's control through such things as voice control, signals or other effective means.[559]

The public entity is not responsible for the care or supervision of the service animal.[560] A public entity is prohibited from asking about the nature or extent of a person's disability, but may make two inquiries to determine whether an animal qualifies as a service animal:

1. A public entity may ask if the animal is required because of a disability; and

2. What work or task the animal has been trained to perform.

A public entity is prohibited from requiring documentation, such as proof that the animal has been certified, trained or licensed as a service animal. A public entity may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability, such as when the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability.[561]

Public entities must allow individuals with disabilities to be accompanied by their service animals in all areas of a public entity's facilities where members of the public, participants in

[555] 28 C.F.R. section 35.104.
[556] 28 C.F.R. section 35.136(a).
[557] 28 C.F.R. section 35.136(b).
[558] 28 C.F.R section 35.136(c).
[559] 28 C.F.R. section 35.136(d).
[560] 28 C.F.R. section 35.136(e).
[561] 28 C.F.R. section 35.136(f).

services, programs or activities, or invitees are allowed to go.[562] A public entity is prohibited from requiring an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees or to comply with other requirements generally not applicable to people without pets. If a public entity normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animal.[563]

In some circumstances, a public entity must make reasonable modifications in its policies, practices or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of an individual with a disability. In determining whether reasonable modifications can be made to allow a miniature horse into a specific facility, a public entity shall consider the following:

1. The type, size and weight of the miniature horse and whether the facility can accommodate these features;

2. Whether the handler has sufficient control over the miniature horse;

3. Whether the miniature horse is housebroken; and

4. Whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation.[564]

In National Federation of the Blind of California v. Uber Technologies, Inc.,[565] the federal district court denied a motion to dismiss a lawsuit against Uber Technologies for refusing to transport blind persons with guide dogs. The plaintiffs alleged that Uber's practices violated the Americans with Disabilities Act. The court ruled that the matter presented triable issues of fact and should go to trial.[566]

H. Report Cards, Grades, and Transcripts

The United States Department of Education issued an opinion regarding report cards and transcripts. The opinion is primarily in question and answer format and is the latest in a series of letters and opinions that the U.S. Department of Education, Office for Civil Rights (OCR), has sent out on the topic.[567] While these letters and opinions are not legally binding, the letters offer guidance to state and local agencies and are sometimes adopted as legal requirements by the courts.

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[562] 28 C.F.R. section 35.136(g).
[563] 28 C.F.R. section 35.136(h).
[564] 28 C.F.R. section 35.136(i).
[565] 103 F.Supp.3d 1073 (N.D. Cal. 2015).
[566] Id. at 1084. See, also, Anderson v. City of Blue Ash, 798 F.3d 338 (6th Cir. 2015).
[567] In Re: Report Cards and Transcripts for Students with Disabilities, 51 IDELR 50, 108 LRP 60114 (October 17, 2008). OCR's latest opinion is consistent and similar to earlier letters and opinions.

The federal regulations implementing Section 504 prohibit discrimination in any aid, benefit or service on the basis of handicap.[568] The federal regulations prohibit the provision of different or separate aid, benefits or services to handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits or services that are as effective as those provided to others. In addition, school districts may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different from those provided to non-handicapped persons.

There is no case law interpreting Section 504 and the 504 regulations with respect to transcripts and report cards. The Office for Civil Rights (OCR), which administers Section 504 on behalf of the federal government, has issued several letters interpreting Section 504 with respect to report cards and transcripts.[569] In the OCR letter, OCR stated that a school district may not identify special education classes on a student's transcript in order to indicate that the student has received modifications in the general classroom. However, course designations with more general connotations which do not give rise to a suggestion of special education programs are not violative of Section 504 and Title II of the Americans with Disabilities Act (ADA) (e.g., basic, independent study, modified curriculum, honors, independent learning center). OCR also stated that a school district can use asterisks or other symbols on a transcript to designate a modified curriculum in general education provided the grades and courses of all students are treated in a like manner, and a school district may disclose the fact that a student has taken special education courses to a post-secondary institution if the parent and the student have prior knowledge of what information is on the transcript and have given written consent.

In addition, OCR stated in Letter to Runkel that a student with a disability enrolled in a general education class for reasons other than mastery of the course content may be excluded from the class grading system and evaluated on the goals and objectives of the IEP. OCR indicated that the IEP team may determine that the student may take the class for no credit and may be evaluated based upon criteria outlined in the student's IEP. OCR also stated that a general education teacher and a special education teacher, in a collaborative grading effort, may assign the grade for a student with a disability in a general education classroom. OCR indicated that this issue should be addressed in the IEP.

OCR indicated in Letter to Runkel that grades earned in special education classes or in general education classes with the support of special education services must be included in district wide grade point average standings that lead to a ranking of students by grade point average for honor roll and college scholarship purposes, but that the grades may be weighted based on objective rating criteria. OCR stated that special education students may not be summarily disregarded or excluded but school districts may implement a system of weighted grades. Districts may assign points to a letter grade based on the degree of difficulty of subject matter completed so long as the system is based on objective rating criteria. OCR indicated that advanced courses or honors courses may be worth more points than basic curriculum courses. The criteria should be based on the difficulty of the course content.

[568] 34 C.F.R. section 104.4.
[569] See, for example, Letter to Runkel, 25 IDELR 387 (1996).

In Ann Arbor Public School District,[570] the Office for Civil Rights advised the school district that classes on a transcript which were designated as Independent Learning Center classes due to the difference in content between those classes and regular classes do not violate the ADA or Section 504. OCR found that the Independent Learning Center classes used similar materials but covered less information and focused on different concepts. OCR found that in the independent learning center math course, for example, approximately 30 percent of the material contained in the textbook was covered. In addition, more simple math concepts were covered in the Independent Learning Center math course. In addition, the school district used the terms "AC" and "AP" for accelerated courses and advanced placement courses on its transcripts. OCR concluded, "In such limited circumstances where designation for a special education course is shown to be based on a difference in course content, rather than the manner in which the course is taught, such designations do not arise to the level of a violation of Section 504 and the ADA."

In California Department of Education,[571] OCR answered a number of questions posed by the California Department of Education about report cards and transcripts. In California Department of Education, OCR expressed the opinion that there are differences between report cards, which are sent to parents, and transcripts, which are sent to postsecondary institutions.

With respect to standards-based report cards, OCR stated that it would be permissible under Section 504 for a report card to indicate that a student is receiving special education or related services, to the extent that this information is given as a way of informing parents about their child's progress or level of achievement in specific classes, course content, or curriculum consistent with the underlying purpose of the report card. OCR noted that the school district must provide students with disabilities with report cards that are as meaningful as the report cards provided to students without disabilities.

OCR stated that the report card may reflect grades based on the student's grade level with respect to students who are not participating in grade level classes but are taught different course content using a modified or alternate education curriculum for a portion of the day. OCR stated that it would be up to the state education agency and the local education agency to establish standards to reflect progress or the level of achievement for different course content. The grades of a disabled student's report card for classes with different course content would be based on the state or local standards.

OCR also stated that a local educational agency may distinguish between special education programs and services and general curriculum classes on the report card of a student who has an IEP if the course content or curriculum in the special education programs or services is different from the course content or curriculum contained in the general education curriculum classes. In these circumstances, the LEA may use asterisks, symbols, or other coding to indicate that the course content or curriculum in the special education program is different from the course content or curriculum contained in the general education curriculum classes.

In California Department of Education, with respect to transcripts, OCR stated that a student's transcript may not indicate that a student has been enrolled in a special education

[570] 30 IDELR 405.
[571] 106 LRP 61033 (2006).

program, has received special education and/or related services, or has a disability. OCR stated that notations that are used exclusively to identify programs for students with disabilities unnecessarily provide these students with different educational benefits or services when contained in transcripts sent to postsecondary institutions or prospective employers. OCR stated that identifying programs as being only for students with disabilities singles out students with disabilities with respect to disclosure of their disability and constitutes different treatment on the basis of disability. Therefore, in OCR's opinion, it would be a violation of Section 504 and the Americans with Disabilities Act for a student's transcript to indicate that a student received special education or a related service or that the student has a disability.

OCR went on to state in California Department of Education that while a transcript may not disclose that a student has received special education or a related service or has a disability, a transcript may indicate that a student took classes with a modified or alternate education curriculum. Transcript notations concerning enrollment in different classes, course content, or curriculum by students with disabilities would be consistent with similar transcript designations for classes, such as advanced placement, honors or remedial instruction, in which students without disabilities are enrolled and thus would not violate Section 504 or the Americans with Disabilities Act. Notations about modified or alternate education curriculum are permissible, in OCR's opinion, because they do not disclose that a student has a disability, are not used exclusively to identify programs for students with disabilities, and are consistent with the purpose of a student transcript.

With respect to special notations on transcripts, when a child with a disability receives accommodations in general education classrooms or who has had a modified curriculum in general education, OCR stated, in its opinion, in general, it would be a violation of Section 504 and the Americans with Disabilities Act for a student's transcript to indicate that the student has received accommodations in a general education classroom since accommodations are generally understood to include aids or adjustments that enable the student with a disability to learn and demonstrate what the student knows and does not affect course content or curriculum.

On October 17, 2008, OCR issued an opinion regarding report cards and transcripts. In a letter to colleagues, OCR stated that the general principle is that report cards may contain information about a student's disability, including whether that student received special education or related services, as long as the report card informs parents about their child's progress or level of achievement in specific classes, course content, or curriculum, consistent with the underlying purpose of a report card. However, OCR stated that transcripts may not contain information disclosing students' disabilities.

Transcripts are provided to persons other than the student and the student's parents to convey information about a student's academic credentials and achievements. Information about a student's disability, including whether that student received special education or related services due to having a disability, is not information about a student's academic credentials and achievements. Therefore, OCR concluded, that transcripts may not provide information on a student's disability.

I. Deliberate Indifference, Free Appropriate Public Education, and Attorneys' Fees

In T. B. v. San Diego Unified School District,[572] the Ninth Circuit Court of Appeals reversed the district court's grant of summary judgment on one of the parent's civil rights claims. The Court of Appeals remanded the one claim for further proceedings in the district court. In addition, the Ninth Circuit Court of Appeals reversed the award of attorneys' fees by the district court and remanded the matter back to the district court for further consideration.

T.B. was born January 1994 and his disability requires feeding with a g-tube through which liquid can be poured directly into his stomach.

In 2003, a dispute arose between T.B.'s mother and the school district about his education and she withdrew him from school. From 2003 to 2006, T.B. was educated by external service providers, funded by the school district, and by the mother herself, who was not paid. This program took place in the mother's garage under the terms of the settlement agreement.

In May 2006, the mother filed for a due process hearing, contending that the school district had failed to provide T.B. with a free appropriate public education for the years 2003-06, as required under the Individuals with Disabilities Education Act (IDEA). This case was eventually settled.

The mother then filed a compliance complaint against the school district. The California Department of Education upheld the complaint and ordered compensatory education as a remedy. The amount of fees due to T.B.'s lawyers in connection with this compliance complaint is one of the issues in this appeal.

In August 2006, the school district attempted to create a new IEP for the 2006-07 school year. The school district proposed that T.B. would be placed at Sierra Academy, which served only disabled students. The mother did not want T.B. to attend Sierra, in part because it did not have a nurse's office where he could lie down after g-tube feedings. T.B.'s mother did not agree to the August 2006 IEP and objected to all areas of the assessments on which the IEP was based.

Following discussions between the district and T.B.'s mother from September through December 2006, the district prepared a new IEP in December 2006, under which T.B. would be placed at Wangenheim Middle School. Wangenheim had a nurse's office but the December 2006 IEP in other respects was similar to the August 2006 IEP. T.B.'s mother did not consent to the December 2006 IEP.

From February to May 2007, the parties engaged in settlement discussions. In March 2007, the school district offered to pay T.B.'s mother $75,000 per year to have T.B. educated privately until he reached the age of 18. According to the district, this was considerably more than the $30,000 to $55,000 that it would cost to educate T.B. in private school, but far less than

[572] 806 F.3d 451 (9th Cir. 2015). See, also, Garedakis v. Brentwood Union School District, 183 F.Supp.3d 1032 (N.D. Cal. 2016) (alleged actions of school administrators, if proven, did not constitute discrimination or amount to deliberate indifference under the ADA).

the cost of the existing home school program, which was approximately $157,000. The district also rejected T.B.'s mother's demand of $200,000 per year to educate T.B. privately. T.B.'s mother then rejected the $75,000 offer.

In April 2007, the school district offered T.B.'s mother a one-time payment of $50,000 to settle all of the due process claims T.B. had brought relating to the August 2006 and December 2006 IEPs. In May 2007 the school district made a new long-term settlement proposal for $150,000 per year. It permitted the parents of T.B. to enroll T.B. in public school beginning with the 2009-2010 school year. The offer was rejected and as a counteroffer the parents requested an annual payment of $250,000. The district rejected that offer.

A due process hearing began on May 14, 2007. The Administrative Law Judge addressed eighteen issues. After a 27 day hearing and written closing arguments, the Administrative Law Judge in October 2007 issued a 75-page written decision that found in favor of the school district on 15 issues. The parents won on the remaining three issues, Issues 10, 14 and 15.

Issue 10 was whether the district's education program would provide T.B. with a free appropriate public education designed to meet his unique needs and allow him to benefit from his education. Issue 14 was related to T.B.'s g-tube feeding and whether the district had denied T.B. a free appropriate public education by failing to develop a healthcare plan that would enable T.B. to attend school safely. Issue 15 related to whether the district had denied T.B. a free appropriate public education by failing to develop an appropriate transition plan.

Issue 14 centered around T.B.'s g-tube feeding. The Court of Appeals noted that the IDEA sets out minimum federal standards for school districts that receive federal funding. States may choose to supplement the federal standards with their own standards so long as the state standards are not inconsistent with federal standards.[573] If the state standards are consistent with federal standards they are enforceable in federal court.[574] The Administrative Law Judge ruled that the school district failed to show that its plan met the minimum standards that California had set relating to g-tube feeding to supplement the federal standards.

The Ninth Circuit Court of Appeals noted that the IDEA provides that an IEP shall contain a statement of the special education and related services that will be provided to the child.[575] These related services include school nursing services to enable a child with a disability to receive a free appropriate public education.[576]

California law has adopted a similar definition of related services[577] and has defined specialized physical healthcare services as those services prescribed by the child's licensed physician requiring medically related training for the individual who performs the services and which are necessary during the school day to enable the child to attend school.[578] Under the state

[573] W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23, 960 F.2d 1479, 1483 (9th Cir. 1992).
[574] Id. at 1483.
[575] 20 U.S.C. section 1414(d)(1).
[576] 20 U.S.C. section 1401(26).
[577] Education Code section 56363.
[578] 5 Cal. Code Regs. section 3051.12(b).

regulations, continuing specialized physical health care services that are required in order for the individual to benefit from special education must be included in the IEP.[579]

The Administrative Law Judge held that the district's plan for T.B.'s g-tube feeding was a specialized physical healthcare service and was not sufficiently described in the student's August 2006 IEP that was proposed by the district because it did not describe general procedures for G-tube feeding, where that procedure would take place or identify the category of employee who would assist T.B. with the feedings. Rather, the IEP simply recited that T.B. would receive three hours of nursing services in September 2006 and five hours consultation per year as needed and contained a School Health Management Plan which required supervision of T.B.'s g-tube feedings.

The transition plan section of the IEP stated that the nurse would train school staff in g-tube feeding before T.B. started school but provided no further details. Therefore, the Administrative Law Judge concluded that the August 2006 IEP did not provide T.B. with a free appropriate public education.

The Administrative Law Judge issued a similar ruling for the December 2006 IEP. The December 2006 IEP transition plan provided that all school staff would be trained in T.B.'s dietary requirements and that g-tube feeding would take place in the nurse's office with the staff member assisting T.B. to be determined in collaboration with the school nurse and parent. The Administrative Law Judge ruled that this was insufficient because the district was not permitted to rely on the creation of an Individualized School Healthcare Plan after the event but the IEP itself had to be sufficiently clear, and the December 2006 IEP did not specify which category of district staff would be responsible for the g-tube feeding.

The Ninth Circuit Court of Appeals ruled that under California law, Education Code section 49423.5, only two types of persons were allowed to perform specialized physical healthcare services such as g-tube feedings: qualified persons who possess an appropriate credential and qualified designated school personnel trained in the administration of specialized physical healthcare if they perform those services under the supervision of a credentialed school nurse, public health nurse or a licensed physician. The Administrative Law Judge found that a school nurse would be considered in the first category but a person could be considered qualified designated school personnel only if he or she had received medically related training in standardized procedures provided by a qualified school nurse, qualified public health nurse, qualified licensed physician and surgeon, or other approved programs.[580]

The Administrative Law Judge found the district had two job categories that were intended to cover qualified designated school personnel: Special Education Technician and Special Education Health Technician. The district's job description prescribed a wide range of duties for the Special Education Technician including performing specialized healthcare procedures under the direction of a school nurse. The job description for the Special Education Health Technician was more narrowly focused on health care, and specifically included g-tube feedings.

[579] 5 Cal. Code Regs. Section 3051.12(b)(3)(A).
[580] 5 Cal. Code Regs. section 3051.12(b)(1)(E)(2).

In contrast, the Administrative Law Judge determined that the district provided insufficient evidence that a third job category, Behavioral Support Assistant, was qualified to provide g-tube feedings under California law. The district's job classification stated that Behavior Support Assistants should provide individual or small group support to pupils according to established IEPs but did not specify any medical duties. The IEP was silent about who would be performing the g-tube feeding but there was evidence at the administrative hearing that the feeding would, in fact, be done by a Behavior Support Assistant who would be assigned to assist T.B. throughout the school day. The Administrative Law Judge ruled that the district had not shown that the Behavior Support Assistant would be qualified to provide g-tube feedings. As a result, the Administrative Law Judge ruled in the parents' favor on Issue 14.

The second issue on which the parents prevailed related to the transition plan. Under California law, an IEP had to contain a provision for the transition into the regular class program if the pupil is to be transferred from a special class or nonpublic, nonsectarian school into a regular class in a public school.[581] The transition plan must include a description of activities provided to integrate the pupil into the regular education program and a description of the activities provided to support the transition of students from the special education program into the regular education program.[582] The Administrative Law Judge concluded that the transition plans in both the August 2006 and December 2006 IEPs were defective. Therefore, the parents prevailed on Issue 15.

As relief, the Administrative Law Judge modified the December 2006 IEP by including language to state that a school nurse would personally assist T.B. with his g-tube feeding, and that feeding would occur at the times and in the manner designated in a doctor's order from T.B.'s current physician. The Administrative Law Judge also ruled that nothing in the Administrative Law Judge's Decision was intended to prevent the district from proposing, in a future IEP, that another classification of employee assist T.B. with the feedings, provided that the assistant meets the requirements of Education Code section 49423.5 (i.e. the individual was sufficiently trained). The Administrative Law Judge ruled that in the present case, the district failed to make an evidentiary showing that the three hours of training provided for district staff in the December 2006 IEP would qualify T.B.'s one-to-one behavioral aide to perform specialized physical health care services.

In October 2007, the district proposed a modified IEP. The proposal stated that g-tube feedings will be scheduled to occur daily in the nurse's office. A school nurse will be present and will personally assist the student with the student's g-tube feeding. The district also added language stating that health training would be critical throughout the year, although it provided no more hours of training. The parents rejected this IEP.

On November 29, 2007, the district held a meeting to adopt a new IEP. The IEP provided for health nursing services as follows:

[581] Education Code section 56345(b)
[582] Education Code section 56345(b)(4)(A), (B).

1. Three hours consultation/training to be provided prior to T.B. starting school.

2. Five hours consultation per year as needed.

3. G-tube feeding will be scheduled to occur as prescribed by MD twice daily in nurse's office. (One time daily during Phases I-III of transition plan, then two times daily in Phase IV when T.B. attends school full day).

4. During the first week of T.B.'s school attendance, a school nurse will be present and personally assist him with g-tube feeding.

5. Following training by the school nurse, the Behavior Support Assistant staff will replace the school nurse as staff designated to be present and personally assist T.B. with g-tube feeding.

6. School nurse will supervise the Behavior Support Assistant as well as train and supervise Special Education Health Technician and Special Education Technician to be designated backup staff in case the Behavior Support Assistant is absent or unavailable.

The parents rejected this IEP because it provided a Behavior Support Assistant and not a nurse for T.B.'s feeding. At a December 21, 2007 meeting to discuss the IEP, the district responded by offering to raise the nursing services from 8 hours per year to 12.

On January 4, 2008, the parents filed a complaint in district court to appeal the Administrative Law Judge's determination on the fifteen issues on which they lost. The school district filed its own appeal in district court on the same day to challenge the Administrative Law Judge's determination on the three issues on which the school district lost. In May 2009, the parents filed a Second Amended Complaint which added four new civil rights claims under Section 504 of the Rehabilitation Act (Section 504) and the Americans with Disabilities Act (ADA) as well as attorneys' fees.

In May 2012, the District Court granted the district's summary judgment on the parents' three remaining civil rights claims. The district court also greatly reduced the claim for attorneys' fees. The parents appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit Court of Appeals reversed the district court with respect to the parents' claim regarding g-tube feeding. The parents alleged that the school district denied T.B. a free appropriate public education in the least restrictive environment by failing to provide him with a reasonable accommodation for his g-tube feeding. The only reasonable accommodation, according to the parents, is the one prescribed by California statute and regulations. They further argued that the school district was deliberately indifferent to T.B.'s rights and therefore liable for damages under Section 504 and the ADA by failing to abide by California law. The school district argued that there is no per se reasonable accommodation for g-tube feeding under California law and denied that it was deliberately indifferent to T.B.'s rights.

The Court of Appeals agreed with the parents that California law established a federally enforceable right governing g-tube feeding in schools. The reasonable accommodation that the school district was required to provide under state law was the designation of a qualified employee to administer g-tube feedings: either an employee possessing an appropriate credential or a qualified designated school personnel trained in the administration of specialized physical health care if they perform those services under the supervision of a credentialed school nurse, public health nurse, or licensed physician.[583]

The Court of Appeals held that to succeed on their claim of deliberate indifference, the parents must show intentional discrimination.[584] Deliberate indifference is defined as knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that likelihood.[585] Therefore, the Court of Appeals held that the parents must still prove that the school district was deliberately indifferent to the need to meet state standards for feeding T.B. at school. Therefore, the Court of Appeals affirmed the summary judgment in favor of the school district on this cause of action.

However, with respect to Count V of the Second Amended Complaint, the parents alleged that the school district failed to comply with the Administrative Law Judge's decision and knew it was substantially likely that T.B. would not be able to safely attend public school or be able to obtain educational benefit from his educational program when the school district illegally failed and refused to ensure the presence of a school nurse to personally assist with T.B.'s g-tube feedings. The Court of Appeals ruled that with respect to Count V the matter should be remanded back to the district court for trial.

The Court of Appeals held that a reasonable jury might find that the district was being deliberately indifferent to T.B.'s rights under California law by refusing to specify that a nurse, Special Education Health Technician or a Special Education Technician should carry out the g-tube feeding when the Administrative Law Judge suggested strongly that this was the only way in which the district could fulfill its legal duties. The Court of Appeals also held that the jury might find that the district was simply negligent, not deliberately indifferent when it interpreted the Administrative Law Judge's instruction that the assistant meet the requirements of Education Code section 49423.5. The Court of Appeals ruled:

> "Because there is a genuine dispute of material facts, summary judgment is not appropriate in favor of either party on this claim. We reverse the summary judgment granted in favor of the school district on this claim and remand for further proceedings."

With respect to attorneys' fees, the Ninth Circuit Court of Appeals noted that the district court reduced the claim for attorneys' fees from $1,398,048.70 to $55,433.91. The Court of Appeals ruled that the district court erred by finding that the parents unreasonably rejected the school district's settlement offer and by not sufficiently explaining how it calculated the

[583] Cal. Educ. Code section 49423.5(a).
[584] Duvall v. County of Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001).
[585] Id.

attorneys' fees award. Therefore, the Court of Appeals remanded the issue of attorneys' fees to the district court for further review. The Court of Appeals concluded by stating:

> "We affirm the district court's grant of summary judgment in favor of the school district as to Counts IV and VII of the Second Amended Complaint. We reverse the grant of summary judgment as to Count V. We vacate and remand the award of attorneys' fees and costs. Each party shall bear its own costs on appeal."

In Duvall v. County of Kitsap,[586] the Ninth Circuit Court of Appeals held that genuine issues of material fact exist as to whether the County of Kitsap intentionally discriminated against Duvall in violation of the ADA.

Duvall's complaint alleges that the County court system denied him the use of a video text display at his trial on June 21, 22 and 23, and at his post-trial hearing on August 11, 1995 in violation of the ADA. The court system argued that the video text display was not a reasonable accommodation because it was not available in Kitsap County at the time of Duvall's trial. However, Duvall presented sufficient evidence to create a triable issue of fact as to whether the real-time transcription was a reasonable accommodation in Kitsap County in June, 1995.

The Court of Appeals held that in determining what type of auxiliary aid is necessary, a public entity must give primary consideration to the accommodation requested by the disabled individual.[587]

J. Alteration of Facilities

In Daubert v. Lindsey Unified School District,[588] the Ninth Circuit Court of Appeals held that the requirement under the Americans with Disabilities Act (ADA) that the school district provide access to programs at its football field did not require a school district to provide access to a specific area of the facility.

The issue before the court was whether the ADA required a public entity to structurally alter public seating at a high school football field where the seating was constructed prior to the ADA's enactment and the school district provides alternative access to individuals who use wheelchairs. The Court of Appeals concluded that the ADA does not require alteration of the public seating at the high school and affirmed the district court's grant of summary judgment to the school district.

K. Magnet Schools

In C.O. v. Portland Public Schools,[589] the Ninth Circuit Court of Appeals held that the parent was barred from bringing a claim for damages under the ADA.

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[586] 260 F.3d 1124 (9th Cir. 2001).
[587] 28 C.F.R. section 35.160(b)(2). Id. at 1137.
[588] 760 F.3d 982 (9th Cir. 2014).
[589] 679 F.3d 1162 (9th Cir. 2012).

The parents challenged the school district's admission policies for the district's magnet high schools. Specifically, the parents challenged their minimum entry requirements and their review of applications based primarily on grades. The parents alleged that these facially neutral criteria discriminated against the disabled by ensuring that they are placed in more restrictive environments.[590] The Court of Appeals noted that whether a party may bring a damages action based upon the admissions policies of a magnet school is a question of first impression and stated:

> ". . . We know of no case holding such institutions liable for violations of the ADA or Rehabilitation Act. Nor do we know of any regulation adopted pursuant to the Rehabilitation Act, the ADA or the IDEA that prohibits such practices. Indeed, the burgeoning number of charter and magnet school programs operating without the interference of either Congress or the Department of Education confirms that they are an accepted part of our educational system. As such, we will not impose liability upon them without further indication of Congressional intent."[591]

L. Choice of Signing Systems for Deaf Students

In Petersen v. Hastings Public Schools,[592] the Eighth Circuit Court of Appeals held that the signing system for deaf students used by the school district did not violate the Americans with Disabilities Act and its implementing regulations. The parents argued that the school district ignored their choice of using a strict signing system and therefore violated the ADA's requirement to give their choice primary consideration. The Court of Appeals held that the school district met its burden of proof regarding non-discriminatory, legitimate reasons for using the school district's signing system and that the parents failed to carry their burden of proving the school district's chosen auxiliary aid is not equally effective as their chosen aid.[593] The school district chose a modified signing system, believing that it was a simpler system and worked better with younger students just beginning to learn sign language. The Court of Appeals stated:

> "We conclude that the district court did not err in analyzing the issue or determining that there was no discriminatory effect on the students. . . . [t]here was ample evidence that after the school district had implemented the modified signing system, the children's scholastic performances improved. Therefore the system has proven to be an effective means of communication. The district court did not err when it found the modified signing system was an 'effective means of communication' within the meaning of the Americans with Disabilities Act regulations."[594]

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[590] Id. at 1166.
[591] Id. at 1169-1170.
[592] 31 F.3d 705 (8th Cir. 1994).
[593] Id. at 708.
[594] Id. at 708-709.

M. Mistreatment of Students

In Gohl v. Livonia Public School District,[595] the Court of Appeals held that a student was not denied participation in her benefit of educational programs in violation of the ADA or Rehabilitation Act. The Court of Appeals rejected allegations in the complaint that the teacher had so mistreated a preschool student that it constituted discrimination under the ADA and Section 504.

The facts indicated that the teacher was gruff and abrupt, and was not a touchy-feely teacher. The teacher testified that she had high expectations for her students and wanted them to make gains while in her classroom. However, without testimony from a psychologist that the child had been harmed, the Court of Appeals held that there was insufficient evidence to show a violation of the ADA and Section 504.[596]

N. Misdiagnosis of Student as Disabled - Compensatory Damages

In Durrell v. Lower Marion School District,[597] the Third Circuit Court of Appeals held that the Individuals with Disabilities Education Act (IDEA) did not create a cause of action for children misidentified as being disabled. The court further held that claims for compensatory damages under Section 504 of the Rehabilitation Act or the Americans with Disabilities Act (ADA) required a finding of intentional discrimination and that a showing of deliberate indifference could satisfy the intentional discrimination element of a claim for compensatory damages. The court also held that the plaintiffs failed to establish the school district's deliberate indifference to the student being misidentified as having a learning disability, and therefore, the Court of Appeals affirmed the lower court's summary judgment in favor of the school district.

O. Medical Evaluation of Students

In Doe v. Woodford County Board of Education,[598] the Sixth Circuit Court of Appeals held that the school district did not violate the ADA when it placed a student on hold status as to junior varsity basketball pending receipt of a medical clearance. The Court of Appeals held that the student may not be otherwise qualified under the ADA and may be excluded from participation in a program such as basketball if his or her participation is in direct threat to the health and safety of others.[599]

The Court of Appeals noted that the school district must make an individual assessment based on reasonable judgment relying on current medical knowledge or objective evidence to determine whether the student should be allowed to play junior varsity basketball. The school district did not remove the student from junior varsity basketball, but merely placed him on hold while they waited for medical direction as to how to proceed. The Court of Appeals held that this was entirely reasonable and even though the student was ultimately allowed to participate in

[595] 836 F.3d 672 (6th Cir. 2016).
[596] Id. at 681-682.
[597] 729 F.3d 248 (3rd Cir. 2013).
[598] 213 F.3d 921 (6th Cir. 2000).
[599] Id. at 925. See, also, School Board of Nassau County v. Arline, 480 U.S. 273, 287-288, 107 S.Ct. 1123 (1987).

the basketball program, the school district was justified in waiting for objective medical evidence to support participation.[600]

In a similar manner, in Class v. Towson University,[601] the Fourth Circuit Court of Appeals upheld the university's requirement that student athletes obtain the team physician's clearance before returning from injury to participate in athletic programs. The Court of Appeals held that the physician's judgment not to clear a football player to return to the football program did not constitute a failure to reasonably accommodate the student.

The student collapsed with heat stroke while practicing as a member of the Towson University football team. He was transported to the University of Maryland Medical Center in Baltimore, where he remained in a coma for almost nine days and almost died. The student suffered multi-organ failure requiring a liver transplant and numerous additional surgeries. Following a protracted recovery, the student wanted to return to playing on the football team. However, a board-certified sports medicine doctor concluded that allowing the student to participate in the football program presented an unacceptable risk of serious injury or death.[602]

P. Attorneys' Fees

In C.W. v. Capistrano Unified School District,[603] the Ninth Circuit Court of Appeals amended its opinion issued on March 2, 2015[604] and held that the Capistrano Unified School District was entitled to attorneys' fees against the Plaintiffs for claims filed under the Americans with Disabilities Act (ADA) and 42 USC 1983 as these claims of retaliation were frivolous. However, the Court of Appeals found that the claims under the Individuals with Disabilities in Education Act (IDEA) and Section 504 of the Rehabilitation Act were not frivolous and not brought for an improper purpose and therefore the Court of Appeals reversed the District Court to the extent it awarded attorneys' fees and costs for the IDEA and Section 504 claims.

The Court of Appeals ordered the District Court to determine which fees were attributable solely to litigating the frivolous Section 1983 and ADA claims and to award attorneys' fees against the parents' attorneys in an amount limited to fees generated for work litigating those claims only.

In C.W. v. Capistrano Unified School District,[605] the Ninth Circuit Court of Appeals held that a school district may collect fees against the attorneys for the parents for filing frivolous claims under the Americans with Disabilities Act (ADA) and 42 U.S.C. Section 1983. The Court of Appeals reversed a lower court decision holding that the school district could collect attorneys' fees for plaintiffs' claims under the IDEA and Rehabilitation Act as frivolous or brought for an improper purpose.

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[600] Id. at 925-926.
[601] 806 F.3d 236 (4th Cir. 2015).
[602] Id. at 238-239.
[603] 779 F.3d 956 (9th Cir. 2015). The original opinion was withdrawn.
[604] The amended opinion was issued on April 9, 2015.
[605] 784 F.3d 1237 (9th Cir. 2015).

The underlying facts were the parent requested an independent educational evaluation (IEE) from the Capistrano Unified School District. The Capistrano Unified School District refused and filed a due process claim with the California Office of Administrative Hearings. The district prevailed in the administrative hearing and the parents appealed.[606]

The parents offered to drop their appeal if the school district agreed to pay for the IEE and the parents' attorneys' fees in the amount of $12,500. The district responded by stating that the parents' claim was frivolous and the district reserved the right to seek sanctions against the parent and the attorney if the administrative decision is appealed.[607]

The attorneys for the parents then filed an appeal in federal district court, adding claims for violations of the intimidation clause of the Americans with Disabilities Act and 42 U.S.C. Section 1983 for retaliation in violation of the student's First Amendment rights. The claims were based on the theory that the district's letter was an attempt to intimidate the parent from pursuing her legal right to appeal the ALJ decision.[608]

The Ninth Circuit Court of Appeals cited prior decisions and held the claims under the IDEA and Section 504 were not frivolous, but the claims under the ADA and Section 1983 were.[609] The Court of Appeals referred the case to the Appellate Commissioner for a determination of which fees are attributable solely to litigating the frivolous Section 1983 and ADA claims in the case, subject to reconsideration by the Ninth Circuit Court of Appeals, and affirmed the award of attorneys' fees against the parents' attorneys to that extent.

In K.M. v. Tustin Unified School, the Ninth Circuit Court of Appeals ruled that the attorneys' fees claimed by plaintiffs who were only partially successful in a lawsuit against the school district should be reduced to reflect the degree of success achieved by the plaintiffs.

In K.M., the plaintiffs were unsuccessful in their lawsuit under the Individuals with Disabilities Education Act (IDEA), but were successful in obtaining relief under their Americans with Disabilities (ADA) claim. Following the Ninth Circuit's previous decision in K.M. v. Tustin Unified School District,[610] the parties entered into a settlement agreement and the court entered a consent agreement in the student's favor on the ADA claim.

The plaintiffs then sought attorneys' fees. The Court of Appeals reduced the claim for attorneys' fees in the administrative proceedings by fifty percent and reduced the attorneys' fees claimed in the district court proceeding by twenty-five percent.[611] The Court of Appeals' ruling

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[606] Id. at 1240-1243.
[607] Id. at 1242.
[608] Id. at 1243.
[609] R.P. v. Prescott Unified School District, 631 F.3d 1117, 1125 (9th Cir. 2011); Benton v. Oregon Student Assistance Commission, 421 F.3d 901, 904 (9th Cir. 2005); Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694 (1978); Karam v. City of Burbank, 352 F.3d 1188, 1195 (9th Cir. 2003); Morris v. North Coast Opportunities, Inc., 118 F.3d 1338, 1343 (9th Cir. 1997).
[610] 725 F.3d 1088 (9th Cir. 2013).
[611] The Ninth Circuit Court of Appeals did award 100% of the claimed attorney fees for the appeal.

was consistent with prior case law holding that where plaintiffs are only partially successful the attorneys' fees award should be reduced.[612]

The ruling in K.M. indicates a willingness of courts to reduce large attorneys' fees claims when the plaintiffs are only partially successful.

CONCLUSION

Determining the scope of the ADA is a very difficult process. The regulations and the court cases discussed above give educators some guidance in how to reasonably interpret the ADA and accommodate employees.

The concept of reasonable accommodation is probably one of the most contentious issues in administering the ADA. The federal regulations require that the reasonable accommodation be effective, ensure equal opportunity and ensure equal benefits for disabled employees. The courts have incorporated into the concept of reasonableness the element of likelihood of success. Many courts have balanced the costs of providing the accommodation against the benefits of the accommodation.

Unpaid leave is one form of reasonable accommodation set forth in the regulations. The courts have generally held that employers are not required to grant indefinite leaves of absence to employees whose attendance is erratic, unreliable or unpredictable.

Modification of nonessential job functions or altering when or how a function is performed is a form of reasonable accommodation. An employer is not required to modify its legitimate, nondiscriminatory policies defining qualifications and transfer procedures to accommodate a disabled employee. An employer is also not required to disregard seniority rules or collective bargaining agreements.

In some cases, the courts have held that allowing an employee to work at home can be a reasonable accommodation. The courts will look at the actual job duties to determine whether the particular job can be performed at home. However, where the job duties involve personal contact, coordination and interaction with other employees, allowing an employee to work at home is not a reasonable accommodation.

The courts have held that employers are not required to create permanent part-time positions, restructure job positions or make supervisory changes when the employer does not normally do so. Where an employee has an infectious disease and there is a danger of transmission in the course and scope of the employee's performance of his or her job duties and no reasonable accommodation is possible, the employer may terminate the employee.

An employer is not required to provide reasonable accommodation if it is an undue hardship or the employee poses a direct threat. Several courts have ruled that accommodations which adversely affect other employees (e.g., increasing their workload, violation of seniority

[612] Hensley v. Eckerhart, 461 U.S. 424, 429, 103 S.Ct. 1933 (1983); Barrios v. California Interscholastic Federation, F.3d 1128, 1134 (9th Cir. 2002).

rights or a threat to their safety), or require an employer to violate a collective bargaining agreement, are an undue hardship on the employer.

The number of reported cases continues to grow exponentially and it can be expected that cases further defining reasonable accommodation will continue to be decided by the appellate courts. So far, there have been few conflicts between the circuits and employers have prevailed in most cases. However, it can be expected that conflicts may develop in the future given the voluminous number of reported cases and the rapidity by which decisions are being handed down by the appellate courts.