# Maintaining An ADA Compliant Workplace In Light Of The New Regulations

# American Petroleum Labor Lawyers Association

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# AMERICANS WITH DISABILITIES ACT

## I. SCOPE OF DISCUSSION

To date, the U.S. Supreme Court has decided seven cases under the substantive employment provisions of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 et seq. The U.S. Fifth Circuit Court of Appeals has decided approximately fifty five published cases under the ADA's substantive requirements. This paper considers the impact of those cases on the practical advice lawyers should give their clients on ADA compliance, with a focus on areas of the ADA that still present danger to employers – and opportunity for plaintiffs' lawyers, most especially the interactive process and reasonable accommodation issues. This paper also summarizes some of the most significant Texas state court disability law decisions under Chapter 21 of the Texas Labor Code. In addition, this paper considers the impact of the Americans with Disabilities Amendments Act of 2008, and the regulations promulgated under that act in March 2011.

Before turning to the substantive portion of this paper, it is worth noting that the U.S. Supreme Court has held that the Eleventh Amendment provides states with sovereign immunity from suit by private individuals for money damages. See Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001). However, states may still be sued under the ADA for money damages by the federal government and by private individuals for injunctive relief (but not monetary) damages. Id. at n. 9. See also United States v. Mississippi Dept. of Public Safety, 321 F.3d 495 (5th Cir. 2003). In addition, the entire federal government is excluded from the ADA's coverage. See Washburn v. Harvey, 504 F.3d 505, 508 (5th Cir. 2007) (Washburn's ADA claim fails because USACE is a federal government employer, which the ADA specifically excepts from its purview. *See* 42 U.S.C. § 12111(5)(B)(i) ("The term 'employer' does not include the United States [or] a corporation wholly owned by the government of the United States ....")); Henrickson v. Potter, 327 F.3d 444, 447 (5th Cir.), cert. denied, (2003).

## II. WHO IS ACTUALLY "DISABLED"?

### A. Americans with Disabilities Act Amendments Act of 2008

On September 25, 2008, the President signed the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA" or "the Act"). The Act makes important changes to the definition of the term "disability" by rejecting the holdings in several Supreme Court decisions and portions of EEOC's ADA regulations. The Act retains the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, it changes the way that these statutory terms should be interpreted in several ways. Most significantly, the Act:

- directs EEOC to revise that portion of its regulations defining the term "substantially limits;"
- expands the definition of "major life activities" by including two non-exhaustive lists:

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- the first list includes many activities that the EEOC has recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating);

- the second list includes major bodily functions (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions");

- states that mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability;

- clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

The major goal of the ADAAA is to undo current case law that creates a restrictive interpretation of the statute's definition of disability. The amendments specifically direct courts to instead construe the law in favor of "broad coverage of individuals under the ADA." The ADAAA overturns the Supreme Court decisions in Sutton v. United Air Lines, 527 U.S. 184 (1999), Murphy v. United Parcel Service, Inc., 527 U.S. 516, and Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999), in which the Court held that consideration must be given to mitigating measures that help individuals control impairments when determining whether persons are disabled under the ADA. This means that people who have successfully managed their impairments will still be covered by the ADA.

For example, in the Murphy case, Murphy had severe high blood pressure, but with medication, he could function normally and engage in a full range of activities. Before the ADAAA, the law did not consider him to be disabled under the ADA because the use of medication controlled the effects of his high blood pressure. Murphy was prevented from pursuing an ADA claim after UPS found him unfit for his driver position because of his high blood pressure. The ADAAA now mandates that in determining whether an individual is disabled under the ADA, the person must be evaluated as if untreated, without considering the ameliorative effects of high blood pressure medication.

As a result of this change, the ADA will protect people whose cancer is in remission, whose diabetes is controlled by medication, whose seizures are prevented by medication, and who can function at a high level with learning disabilities. Employers will need to concentrate less on the threshold issue of disability, and focus more on their duty to provide reasonable accommodations. The ADAAA makes an exception for those who wear ordinary eyeglasses or contact lenses to correct vision to full acuity. These devices are not to be ignored in considering whether a person is disabled. Rather, they are to be taken into account in all but rare cases. The purpose is to exclude from the definition of disability persons who simply need ordinary glasses to read or drive. The ADAAA specifically adds a nonexclusive list of examples of major life activities to the language of the statute. In addition to the activities recognized in the regulations promulgated by the EEOC, it adds the following: eating, sleeping, bending, reading, concentrating, thinking, and communicating. The ADA is also amended to now include a listing of examples of major bodily functions, which are considered major life activities. The ADAAA

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specifically rejects the restrictive interpretation of major life activity used by the U.S. Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002).

The ADAAA specifically includes as disabled those persons who have an impairment that is episodic or in remission if the impairment would substantially limit a major life activity when active.

The ADAAA rejects the definition of "substantially limits" in the Williams case, and in the EEOC regulations that define "substantially limits" as "significantly restricted," and directs the agency to revise its regulations to be consistent with the amendment's goal of broadening the class of persons covered by the ADA. However, unlike some initial proposals regarding the amendments and at least two current state laws, the ADA does not apply to persons who are simply "limited" due to a major life activity.

The ADAAA clarifies that an impairment that substantially limits one major life activity is enough. It need not limit more than one.

The Fifth Circuit has held that the ADAAA is not retroactive and does not apply to factual situations that occurred before January 1, 2009. See Carmona v. Southwest Airlines Co., 604 F.3d 848, 857 (5th Cir. 2010); E.E.O.C. v. Agro Distribution LLC, 555 F.3d 462, 469, at fn. 8 (5th Cir. 2009). Note that the Texas Labor Code, explained herein, also adopted the same changes as in the ADAAA, effective September 1, 2009.

In one of the few cases applying the ADAAA in Texas thus far, a court addressed the situation of a diabetic employee whose diabetes was generally under control through the use of mediation. The court noted the dramatic change in the law, in holding that:

> Accordingly, if Toyota Motor and Sutton are not applicable to this case, Munoz's diabetes and diabetic complications may constitute a disability under the ADA. Even if Munoz's diabetes only temporarily limited her ability to work, the stringent requirements of Toyota Motor may be rejected by the amended statute in favor of a more inclusive standard. *See* Sec. 2(b) (4), 122 Stat. at 3554. Further, if ameliorative effects, like insulin shots, are not to be considered, then Munoz's disability may not be temporary at all. While her diabetes is currently controlled by insulin, it stands to reason that, without her medication, Munoz's diabetes would substantially impair her ability to work. See Munoz Dep. 37:15-19. Prior to beginning her insulin regiment, Munoz's blood sugar varied widely, such that she had a diabetic stroke, was unable to walk, had difficulty concentrating, and was not certified to work by her physician. *See* Resp. 10. Accordingly, if Toyota Motor and Sutton do not control this case, Munoz could likely establish that she is disabled.

Munoz v. Echosphere, L.L.C., No. 09-CV-0308-KC, 2010 WL 2838356, at *12 (W.D. Tex., July 15, 2010).

Other post-ADAAA cases have similarly repeatedly found plaintiffs "disabled" under the new, far more lenient, standard. See Feldman v. Law Enforcement Assocs. Corp., No. 5: 10–cv–

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08–BR, 2011 WL 891446 (E.D.N.C. Mar. 10, 2011) (holding that employee who suffered from episodic flare ups of multiple sclerosis (MS) had plausible claim of disability under the ADA as amended because when active, the MS substantially limited the employee's normal neurological functions, which is a major life activity under the amended Act); Chalfont v. U.S. Electrodes, No. 10–2929, 2010 WL 5341846 (E.D. Pa. Dec.28, 2010) (holding that employee with leukemia, heart disease and remissive cancer had plausible claim of disability under the ADA as amended because his maladies substantially limited his normal cell growth and circulatory functions, both of which are major life activities under the amended Act); Horgan v. Simmons, 704 F. Supp. 2d 814 (N.D. Ill. 2010) (holding that employee with HIV positive status had plausible claim of disability under the ADA as amended because the normal functioning of his immune system, a major life activity under the amended Act, was substantially limited).

## B. The EEOC's March 24, 2011 Supporting Regulations

### 1. Many of the EEOC's New Regulations Track The Amended ADA

On September 23, 2009, the EEOC published proposed regulations under the ADAAA. On March 24, 2011, those regulations became final. Many of the EEOC's new rules track the ADAAA's statutory mandates and express purposes. Like the ADAAA, the new regulations provide that "[t]he definition of disability . . . shall be construed broadly, to the maximum extent permitted by the terms of the ADA." New sections 1630.1(c)(4) and 1630.2(j)(1)(iii) describe the ADAAA as shifting the focus of an ADA case to the question of "whether discrimination occurred, not on whether" an individual meets the definition of disability.

Prior to the ADAAA, the term "substantially limits" previously had been interpreted as "significantly restricts," which resulted in many ADA claims being dismissed for failure to show a qualifying disability. Consistent with ADAAA, new section 1630.2(j)(1)(iii) states that the question of whether an individual is "substantially limited" in a major life activity "should not demand extensive analysis," and section 1630.2(j)(1)(v) provides that comparing 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 analysis."

Additionally, new section 1630.2(i)(2) provides that whether an activity is a "major life activity" is not determined by reference to whether it is of "central importance to daily life." Further consistent with ADAAA, the new regulations add several new activities to the non-exhaustive list of major life activities covered by the ADA, including "sleeping, . . . concentrating, thinking, [and] communicating." The regulations likewise expand the concept of "major life activities" to include "the operation of major bodily functions" such as the "immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." The new regulations go further, however, in adding three more major life activities – sitting, reaching and interacting with others – plus the "major bodily functions" of the special sense organs, skin, genitourinary, cardiovascular, hemic, lymphatic and musculoskeletal systems as "further illustrative examples."

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**2. But Some Of The EEOC's New Regulations Arguably Go Beyond The Amended ADA's Mandate**

**a. A New And Expansive Approach To "Substantially Limits"**

The ADAAA extends coverage to individuals with episodic impairments or conditions in remission, if the impairment would substantially limit a major life activity in its active state. New section 1630.2(j)(1)(vii) addresses episodic impairments, while new rule 1630.2(j)(3)(iii) provides a non-exhaustive list of examples, including epilepsy, multiple sclerosis, cancer, and psychiatric disabilities such as major depressive disorder, bipolar disorder, and post-traumatic stress disorder. In the Appendix "Interpretive Guidance," other examples of episodic impairments are provided, such as hypertension and asthma, with remarks that "[t]he fact that the periods during which an episodic impairment is active and substantially limits a major life activity may be brief or occur infrequently is no longer relevant to determining whether the impairment substantially limits a major life activity."

**b. The EEOC Lists Conditions That Essentially Amount To *Per Se* Disabilities**

In section 1630.2(j)(3)(i) through (iii), the EEOC lists various conditions that "in virtually all cases" meet the definition of disability based on certain characteristics associated with these impairments. The list includes autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. Commenters to the proposed rules objected that this contravenes the original ADA's rejection of any *per se* disability. The EEOC's new regulations say that remains the law. But, by providing a list of conditions that are now substantially limiting by regulatory definition, the EEOC arguably has, as a practical matter, abandoned that case-by-case approach, at least as to the conditions it identified as almost always meeting the definition of disability.

In Norton v. Assisted Living Concepts, Inc., No. 4:10–cv–00091, 2011 WL 1832952, at *8 (E.D. Tex. May 13, 2011), the court relied on this regulation in finding that the employee's renal cancer was a disability, even if it was in remission. In doing so, the court stated:

> The court's conclusion that Norton's renal cancer is capable of qualifying as a disability under the ADA is bolstered by the EEOC's interpretation and implementation of the ADAAA. The EEOC's final regulations implementing the amendments provide a list of impairments that, because they substantially limit a major life activity, will "in virtually all cases, result in a determination of coverage under [the actual disability prong]." 29 C.F.R. § 1630.2(j)(3)(ii) (effective May 24, 2011). One of the impairments listed is "cancer" because it "substantially limits [the major life activity] of normal cell growth." Id. at § 1630.2(j)(3) (iii). See also the EEOC's interpretive guidance accompanying its final regulations, 76 FR 16978–01, 2011 WL 1060575, at ——17007, 17011, & 17012 (citing examples in the legislative history of the ADAAA where Congress named cancer as the kind of impairment that would qualify as a disability under the amended Act).

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#### c. Temporary Impairments May Be Protected

The EEOC rejected the argument that temporary impairments are not substantially limiting, and thus not disabling. New section 1630.2(j)(1)(ix) rejects any durational minimum. It provides that "[t]he effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section." This regulation is arguably at odds with Congress's intent in amending the statute. In passing the ADAAA Congress said nothing about short-term impairments being substantially limiting. Thus, this regulation may be challenged in the courts, particularly as applied to persons whose impairments undisputedly lasted only a few months.

### C. Cases Decided Based On The ADA As It Existed Prior To The Americans with Disabilities Act Amendments Act of 2008

The ADA prohibits discrimination against a qualified individual with a disability. The ADA defines actual disability, in relevant part, as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual." 42 U.S.C. § 12102 (2)(A).

Under the pre-amendment ADA, whether an impairment is "substantially limiting" was determined in light of: (1) the nature and severity of the impairment; (2) its duration or expected duration; (3) its permanent or expected permanent or long-term impact. 29 C.F.R. § 1630.2(j). "Major life activities" include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i). Other activities such as standing, sitting, lifting, or reading are also considered major life activities, at least by the EEOC.

In the Supreme Court's Murphy and Sutton decisions, it concluded that the determination of whether an employee's impairment "substantially limits" one or more of the major life activities is made with reference to the mitigating measures the individual employs. Murphy v. United Parcel Service, Inc., 119 S. Ct. 2133 (1999); Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999). For example, in Murphy, the employee's high blood pressure did not substantially limit his major life activities when he was medicated, and consequently, he was not disabled under the ADA. The ADAAA overruled Murphy and Sutton.

Listed below are Supreme Court and Fifth Circuit decisions that have addressed whether a specific impairment constituted a "disability" under the ADA, before it was amended by the ADAAA. These cases should not be relied on as to any factual situation that occurred after the effective date of the ADAA, in January 2009.

#### 1. Toyota Motor Mfg., Inc. v. Williams, 122 S. Ct. 681 (2002)

Williams, a former Toyota employee, claimed that she had a disability under the Americans With Disabilities Act because of the work-related limitations caused by her carpal tunnel syndrome and related impairments. Williams claimed that Toyota violated the ADA by failing to reasonably accommodate her disability and by terminating her employment.

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The district court granted summary judgment in favor of Toyota, finding that Williams' impairment did not substantially limit a major life activity, and therefore, she was not a person with a disability under the ADA. The U.S. Circuit Court of Appeals reversed the district court, finding that Williams was substantially limited in performing "manual tasks" and was a person with a disability under the ADA. The U.S. Circuit Court of Appeals did not reach the question of whether Williams was substantially limited in the major life activities of lifting or working because it held that she was substantially limited in performing "manual tasks."

The U.S. Supreme Court reversed the U.S. Court of Appeals decision. Initially, the Supreme Court noted that in order for an impairment to constitute a disability, it must "substantially limit a major life activity." With respect to performing "manual tasks," "***an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives.***" (emphasis added).

The Supreme Court focused on whether Williams' impairments prevented or severely restricted her from performing a variety of tasks central to most people's daily lives, not whether she was unable to perform tasks associated with her job. The Supreme Court specifically rejected the Court of Appeals' contention that Williams' inability to do manual work in her specialized assembly line jobs was sufficient proof that she had a disability. Instead, the Court focused on activities that are of central importance to most people's daily lives, such as the ability to perform household chores, bathe, or tend to your personal hygiene. Williams' impairments, by her own account, did not severely restrict her ability to bathe, do household chores or care for herself. Outside of the workplace, Williams contended that she had to avoid sweeping, to quit dancing, to occasionally seek help in dressing and to reduce how often she played with her children, gardened, or drove long distances. The Supreme Court found that these limited impairments did not amount to such severe restrictions as to establish a substantial limitation on activities of major importance to most people's daily lives.

The ADAAA overruled this case.

### 2. Albertsons, Inc. v. Kirkingburg, 119 S. Ct. 2162 (1999)

Kirkingburg had amblyopia ("lazy eye"), an uncorrectable condition leaving him with essentially monocular vision. The Ninth Circuit Court of Appeals reasoned that the plaintiff's vision problem amounted to a per se disability protected by the ADA.

The Supreme Court reversed the Ninth Circuit. The court noted that while people with monocular vision ordinarily will meet the ADA's definition of disability, they must nonetheless prove a disability by offering evidence that the extent of the limitation, *in terms of their own experience*, as in loss of depth perception and visual field, is "substantial."

### 3. Bragdon v. Abbott, 118 S. Ct. 2196 (1998)

In the Supreme Court's first ADA decision, it confronted the question of whether an asymptomatic HIV-positive patient was substantially limited in the major life activity of reproduction. The court held that reproduction is a major life activity, and that it is substantially limited by HIV. Consequently, an asymptomatic HIV-positive patient is disabled. This was an

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ADA Title III case, but its ruling regarding disability applies with equal force in the employment context.

**4. Kemp v. Holder, 610 F.3d 231 (5th Cir. 2010)**

The Fifth Circuit affirmed a summary judgment finding that a court security officer's hearing impairment did not substantially limit any life activity when the officer wore his hearing aids, such that he did not have a disability.

**5. Carmona v. Southwest Airlines Co., 604 F.3d 848 (5th Cir. 2010)**

The Fifth Circuit ruled for the plaintiff, finding sufficient evidence established that his psoriatic arthritis, which caused swelling and stiffness in joints three to four times a month, substantially limited his major life activity of walking, and thus he was an individual with a disability under the ADA, as required to support his discrimination claim against Southwest Airlines. The court thus reinstated a jury verdict in the plaintiff's favor under the ADA. The plaintiff flight attendant spent one-third to one-half of each month unable to walk without excruciating pain, his physician stated he could be incapacitated three to four times every month for three to four days at a time, and his subsequent job was performed entirely while seated at a desk.

**6. E.E.O.C. v. Chevron Phillips Chemical Co., LP, 570 F.3d 606 (5th Cir. 2009)**

The Fifth Circuit reversed the district court and found that there was sufficient evidence that an employee with chronic fatigue syndrome was substantially limited in the three major life activities of thinking, sleeping and caring for herself. The court noted that in an ADA case, the relevant time for assessing the existence of a disability is the time of the adverse employment action. Id. at 618.

**7. E.E.O.C. v. Agro Distribution, LLC, 555 F.3d 462 (5th Cir. 2009)**

In this case, the Fifth Circuit found that the employee's anhidrotic ectodermal dysplasia, a condition which made him unable to perspire, did not substantially limit him in major life activity of working, and thus was not a disability under the ADA, where the employee was able to regulate his body temperature without significant side effects and in essentially the same manner as the average person by using ordinary methods to cool himself, such as drinking cold liquids, sitting in front of a fan, spraying himself with water, resting when laboring on hot days, and using air conditioning.

**8. Jenkins v. Cleco Power, LLC, 487 F.3d 309 (5th Cir. 2007)**

The plaintiff in this case fractured his left femur. The injury resulted in a permanent deformity to his leg and difficulty with motion and weight bearing. As a result, the plaintiff could not sit for extended periods of time and was limited in other ways. The district court found that the plaintiff was not disabled as a matter of law. On appeal, the Fifth Circuit found that the

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district court had "incorrectly concluded that Jenkins was not substantially limited in sitting." The Fifth Circuit found that, "[b]ecause over the course of the day Jenkins' ability to sit is significantly more restricted than the average person, *see* 29 C.F.R. § 1630.2(j)(1)(ii), the court clearly erred in finding that Jenkins is not disabled within the meaning of the ADA."

### 9. Cutrera v. Board of Supervisors of Louisiana State Univ., 429 F.3d 108 (5th Cir. 2005)

In this case, the Fifth Circuit held that the plaintiff's Stargardt's disease (which is a form of macular degeneration) may be a disability under the ADA. Thus, the court reversed summary judgment and remanded the case to the district court. Macular degeneration is a vision impairment. Seeing is a major life activity. Cutrera presented evidence that her macular degeneration substantially limited her ability to see. Specifically, Cutrera presented evidence from her expert doctor and her own testimony that she: (a) has virtually no central vision in her left eye; (b) only little central vision in her right eye; (c) is legally blind in her left eye; (d) her condition is likely to get worse and there is no cure; (e) cannot drive safely; (f) has significant difficulty reading small type, handwriting, or any writing with poor contrast; and (g) cannot mitigate her condition with glasses, contact lenses, or surgery.

### 10. Waldrip v. General Electric Co., 325 F.3d 652 (5th Cir. 2003)

In this case the Fifth Circuit held that the plaintiff's chronic pancreatitis constituted a "physical impairment," and that "eating" is a "major life activity." However, the Court found that as a matter of law the plaintiff's chronic pancreatitis did not substantially limit him in the major life activity of eating. The plaintiff apparently failed to tender any evidence regarding how the disease actually impaired his ability to eat. Accordingly, the Fifth Circuit affirmed summary judgment on the grounds that the plaintiff was not disabled.

### 11. Blanks v. Southwestern Bell Communications, 310 F.3d 398 (5th Cir. 2002)

The plaintiff in this case suffered from HIV, just as the plaintiff in *Bragdon.* However, the Fifth Circuit affirmed summary judgment for the defendant on the grounds that the plaintiff in this case – unlike the plaintiff in *Bragdon* – failed to create a fact issue as to his "disabled" status. The plaintiff had alleged that his HIV status substantially limited his ability to reproduce. The Fifth Circuit rejected this argument primarily because the plaintiff admitted that he did not want any more children and his wife had already been sterilized.

The court also rejected the plaintiff's argument that he was disabled on the basis of his inability to work a single job. The Court emphasized that to be substantially limited in the major life activity of working, an impairment must significantly restrict one from being able to perform either a class of jobs or a broad range of jobs as compared to the average person having comparable training, skills, and abilities.

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### 12. Aldrup v. Caldera, 274 F.3d 282 (5th Cir. 2001)

Aldrup claimed that he was disabled based on alleged depression. The only evidence he offered in support of his allegation was a letter from his physician stating that Aldrup "has a medical condition that substantially limits one or more of his major life activities . . . ." The district court determined that such unsupported conclusive statements are not entitled to evidentiary weight. The Fifth Circuit agreed, and accordingly, found that there was no evidence at all to support his claim that he suffered from an actual disability.

### 13. Dupre v. Charter Behavioral Health Sys. of Lafayette, Inc., 242 F.3d 610 (5th Cir. 2001)

Dupre suffered from a degenerative back condition known as "degenerative facet joint disease." As a result of her disease, Dupre could not sit or stand in one place for more than one hour, before she had to get up and walk around. She also could not perform jobs that required heavy physical work, prolonged sitting or standing, heavy lifting, or prolonged walking. The trial court granted summary judgment for Charter, on the ground that Dupre was not disabled as a matter of law. The Fifth Circuit affirmed, finding that her limitations were not severe enough to constitute "substantial limitations" on her ability to perform any major life activity, including sitting, standing, or working.

### 14. E.E.O.C. v. R.J. Gallagher Co., 181 F.3d 645 (5th Cir. 1999)

In late 1993, the plaintiff, Boyle, was diagnosed with myelodysplastic syndrome ("MDS"), a form of blood cancer. He underwent chemotherapy to treat the condition. During the chemotherapy sessions, his doctor declared his cancer to be in "complete remission" and advised that Boyle could return to work without limitation, other than six monthly three-to-five day chemotherapy sessions. Two weeks later, Boyle was demoted and had his pay cut in half.

In addressing whether Boyle's MDS constituted a "disability" under the ADA, the court quickly concluded that the MDS qualified as a physical "impairment" that limited a "major life activity," which in Boyle's case, was the major life activity of working. However, the court concluded that the limitation was not "substantial," because the condition did not preclude Boyle from working his regular full workload and performing all his professional obligations. As a result, the court found that Boyle was not actually "disabled" under the ADA.

### 15. Talk v. Delta Airlines, Inc., 165 F.3d 1021 (5th Cir. 1999)

Talk was in a childhood vehicle-pedestrian accident. As a result of the accident, her right leg is shorter than her left, and her foot is in a permanently flexed, or "equine" position. She walks on the ball of her right foot and must wear a built-up shoe. Despite her deformity, she walks with only a slight limp and has undergone no physical therapy or surgery in the last 20 years.

The Fifth Circuit affirmed summary judgment in favor of Delta on the ground that Talk was not disabled under the ADA. It found that her limp did not constitute a "substantial

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limitation" on her ability to walk. In addition, it did not preclude her from performing a class or broad range of jobs.

### 16. Pryor v. Trane Co., 138 F.3d 1024 (5th Cir. 1998)

Pryor underwent a fusion of the cervical vertebrae in her neck as a result of an automobile accident. She was given medical restrictions limiting her repetitive and constant lifting and prohibiting overhead lifting. The Fifth Circuit found that her condition did not substantially limit her major life activity of lifting, citing cases from other courts that held that lifting limitations of 20-25 pounds do not constitute a significant restriction on any major life activity.

### 17. Hamilton v. Southwestern Bell Telephone Co., 136 F.3d 1047 (5th Cir. 1998)

Hamilton was diagnosed with post-traumatic stress disorder (PTSD). The Fifth Circuit held that the plaintiff was not disabled because his condition was temporary and because it did not substantially limit the major life activity of working. As to the latter issue, the court noted that the plaintiff ran his own software distribution business for almost a year after his discharge, then became a senior consultant with another firm.

### 18. Sherrod v. American Airlines, Inc., 132 F.3d 1112 (5th Cir. 1998)

Sherrod had an on-the-job injury to her neck which required surgery. She had a second injury that required surgery to correct a cervical fusion that was attempted in the first surgery. She was given lifting restrictions stating that she could only lift 45 pounds occasionally and 25 pounds frequently. The court noted that this evidence only proved that she was limited from *heavy* lifting, not the "routine duties of daily living." Consequently, she was not substantially limited in the major life activity of lifting.

### 19. Still v. Freeport-McMoran, Inc., 120 F.3d 50 (5th Cir. 1997)

In this case, the Fifth Circuit held that an employee was not "disabled" because of blindness in one eye. The court noted that although "seeing" is a major life activity, Still was able to perform normal daily activities that required seeing, such as driving cars and working as a certified marksman. The record also showed that throughout his life, Still had worked in a variety of jobs, and consequently, he was not substantially limited in the major life activity of "working."

### 20. Price v. Marathon Cheese Corp., 119 F.3d 330 (5th Cir. 1997)

In this case, the Fifth Circuit, without extended analysis, affirmed judgment as a matter of law against an employee with carpal tunnel syndrome, finding that she did not suffer from a "disability" under the ADA.

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### 21. Burch v. Coca-Cola Co., 119 F.3d 305 (5th Cir. 1997), cert. denied, 118 S. Ct. 871 (1998)

In this case, the Fifth Circuit held that alcoholism is not a disability per se. Rather, as with any other case, the particular effects of the alleged impairment on the plaintiff must be considered on a case-by-case basis. In Burch, the evidence established that his alcoholism did not substantially limit his ability to work, his ability to speak, or any other major life activity. The court noted that despite his alcoholism, Burch was able to maintain a rigorous biking schedule of 100-200 miles per week.

### 22. Foreman v. Babcock & Wilcox Co., 117 F.3d 800 (5th Cir. 1997), cert. denied, 118 S. Ct. 1050 (1998)

Foreman had a heart condition that required the installation of a pacemaker. He contended that his heart condition, which required the pacemaker, substantially limited his ability to work. The court concluded that the evidence overwhelmingly indicated that it substantially limited only his ability to perform a single, particular job. Therefore, as a matter of law, he was not substantially limited in the major life activity of working, as contemplated by the ADA. As a result, the court affirmed summary judgment.

### 23. Robinson v. Global Marine Drilling Co., 101 F.3d 35 (5th Cir. 1996), cert. denied, 117 S. Ct. 1820 (1997)

In this case, Robinson had asbestosis, a progressive and often fatal condition of the lungs. Due to his asbestosis, his lung capacity was 50% less than normal, and he had shortness of breath while climbing ladders at work. He sued and won under the ADA.

On appeal, the Fifth Circuit reversed and rendered judgment against Robinson. The court noted that although breathing is a major life activity, the fact that Robinson had a lower lung capacity was not evidence of a disability. Moreover, shortness of breath while climbing stairs or a ladder does not *substantially* limit the major life activity of breathing. Consequently, there was insufficient evidence to support the finding that Robinson was actually disabled.

### 24. Rogers v. International Terminals, Inc., 87 F.3d 755 (5th Cir. 1996)

In this case, the Fifth Circuit found that an employee's temporary and surgically correctable ankle difficulties did not substantially limit the major life activities of standing, walking, and working and, therefore, did not constitute a disability within the meaning of the ADA. The court made this conclusion as a matter of law, even though the employee continued to suffer from a 13% permanent partial disability to his entire body.

### 25. Ray v. Glidden Co., 85 F.3d 227 (5th Cir. 1996)

Ray had avascular necrosis and went on leave from work for over one year to undergo surgeries for replacement of his hips and shoulders. Upon his return to work, he was provided with medical restrictions limiting his ability to lift containers weighing in excess of 44 pounds.

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The Fifth Circuit affirmed summary judgment, concluding that Ray was not substantially limited in the major life activity of lifting, since he was only prohibited from *heavy* lifting.

### 26. Ellison v. Software Spectrum, Inc., 85 F.3d 187 (5th Cir. 1996)

Ellison had breast cancer which made her nauseated and tired and required her to miss partial days of work in order to obtain radiation treatment over a three or four month period. Ellison contended that her breast cancer substantially limited her major life activity of working. The Fifth Circuit disagreed, affirming summary judgment. The court stated that these minor limitations on her ability to work over a three or four month period did not "substantially limit" her major life activity of working.

### 27. Dutcher v. Ingalls Shipbuilding, 53 F.3d 723 (5th Cir. 1995)

Dutcher was a welder who injured her arm in a gun accident. Her arm injury prevented her from climbing, but it did not prevent her from performing a class of jobs or from driving a car, eating, washing dishes, picking up trash, or any other basic life function. Consequently, she was not "substantially limited" in any major life activity.

### 28. Oswalt v. Sara Lee Corp., 73 F.3d 91 (5th Cir. 1996)

In this case, the Fifth Circuit held that an employee's high blood pressure or alleged side effects from his medication were insufficiently serious to be substantially limiting of any major life activity, and, therefore, the plaintiff was not disabled under the ADA.

## D. Texas State Court Decisions Under Chapter 21

The ADAAA's amendments to the ADA were also made to the Texas Labor Code, effective September 1, 2009. See H.B. 978, 81 Leg., Reg. Sess. (Tex. 2009). Thus, the Texas Labor Code cases cited in this paper regarding actual or "regarded as" disabilities should not be relied on as to any factual situation that occurred after September 1, 2009.

### 1. Haggar Apparel Co. v. Leal, 154 S.W.3d 98 (Tex. 2004)

Leal suffered from lower back pain and carpal tunnel syndrome. She was terminated and sued Haggar for disability discrimination under Chapter 21 of the Texas Labor Code. She won at trial and the Corpus Christi Court of Appeals affirmed the judgment. The Texas Supreme Court reversed the case on the grounds that Leal presented no evidence that her lower back pain and carpal tunnel syndrome substantially limited any of her major life activities. Although Leal asserted that her impairments substantially limited her ability to work, the Texas Supreme Court disagreed, noting that there was no evidence that Leal was unable to work in a broad class of jobs. In fact, the Court observed, Leal continued to work for Haggar until her termination, and obtained another job shortly after her termination. See also Pegram v. Honeywell Inc., 361 F.3d 272 (5th Cir. 2004) (Former employee with degenerative disk disease was not disabled under Texas Commission on Human Rights Act, despite contention that his back condition was painful and impaired his balance and ability to climb stairs, walk, sit and stand for longer than five minutes, where he worked until he was discharged, he was not absent from work due to his

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condition, he was able to sit and stand for hours while working, and he did not show that he was substantially limited in his ability to work or perform other major life activities).

### 2. <u>Little v. Texas Dept. of Criminal Justice</u>, 148 S.W.3d 374 (Tex. 2004)

Little's left leg has been amputated at the knee. She wears a prosthesis and walks with a noticeable limp. She repeatedly applied for and was rejected for a Food Service Manager job with the Texas Department of Criminal Justice ("TDCJ"). Eventually, Little sued under Chapter 21 of the Texas Labor Code, asserting that she was rejected for the job because of her alleged disability. The TDCJ asserted that Little had no "physical impairment that substantially limit[ed] at least one major life activity." Thus, according to the TDCJ, Little was not disabled and had no claim for disability discrimination. The trial court agreed, and dismissed Little's suit on summary judgment. The court of appeals affirmed. The Texas Supreme Court reversed, holding that there was at least a fact issue over whether or not Little's condition "substantially limit[ed] at least one major life activity."

The Texas Supreme Court noted that walking is a major life activity. To analyze whether Little was substantially limited in walking, the court focused on a part of the ADA's regulatory definition of "substantially limits" that rarely receives attention from the Fifth Circuit. Namely, the section that states that the term "substantially limits means: . . . (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j).

Under this oft-neglected definition, the Court observed that Little's evidence demonstrated that she may be significantly restricted in her ability to walk when compared to the average person in the general population. Little's evidence was that: (1) when she walks, her left leg remains stiff, and, with each step, she must swing it out away from her body to clear the floor; (2) she walks with a noticeable limp; (3) she cannot walk or sit like other people; (4) she cannot walk quickly; and (5) cannot run at all.

### 3. <u>Davis v. City of Grapevine</u>, 188 S.W.3d 748 (Tex. App.–Fort Worth 2006, pet. denied)

Davis was a firefighter/paramedic for the city. He was diagnosed with multiple sclerosis. Doctor Susan Blue, a neurologist, treated Davis. Doctor Blue sent a letter to the City describing Davis' condition. The letter stated that Davis had a mild difficulty with balance, he would not consistently be able to climb ladders, and he could not consistently be required to drive emergency vehicles. She sent another letter to the City regarding Davis' condition, explaining that although he is able to perform well on many occasions, there could be instances where he would be limited in terms of balance, rapid response ability, and coordination, and therefore, he should be considered disabled in performing his duties as a firefighter and paramedic.

Davis eventually resigned and sued the city, alleging that he was constructively discharged because of his alleged disability, in violation of Chapter 21 of the Texas Labor Code. The city won a summary judgment and Davis appealed. On appeal, the city asserted (among

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other arguments) that Davis was not disabled. Davis claimed that he was disabled because he was substantially limited in his ability to walk because he cannot walk fast without falling down or at least losing his balance. The court of appeals held that this was insufficient to establish a substantial limitation on Davis's ability to walk to constitute a disability. *Id*. at 76-61.

The court, however, still found for Davis on this issue. The court did so by holding that running is also a major life activity, and finding that there was a fact issue over whether Davis was substantially limited in his ability to run. *Id*. at 761. The court noted that there is a split of authority over whether running is a major life activity, with the majority of courts holding that it is not a major life activity. *Id*.

**4. Thomann v. Lakes Regional MHMR Ctr., 162 S.W.3d 788 (Tex. App.–Dallas 2005, no pet.)**

Thomann's job as a "house parent" at a home for the disabled required her to lift at least 44 pounds. Thomann suffered from back problems that resulted in her receiving a long-term restriction against lifting more than 20 pounds. Her employer offered her another job at the same pay, but Thomann refused. She was then terminated because she was unable to fulfill the 44 pound lifting requirement. Thomann sued under Chapter 21 for alleged disability discrimination. She lost on summary judgment, and appealed.

The Dallas Court of Appeals found that Thomann was not disabled as a matter of law. The court held as follows:

> Thomann first argues that her inability to lift more than twenty pounds makes her disabled. But many courts have held that a lifting restriction alone does not rise to the level of a protected disability. See, e.g., Sherrod, 132 F.3d at 1120; Ray v. Glidden Co., 85 F.3d 227, 229 (5th Cir. 1996); Richards v. Seariver Maritime Financial Holdings, Inc., 59 F. Supp. 2d 616, 627-28 (S.D. Tex. 1998), aff'd, 189 F.3d 467 (5th Cir. 1999); but see Primeaux v. Conoco, Inc., 961 S.W.2d 401, 405 (Tex. App.–Houston [1st Dist.] 1997, no writ) (holding that plaintiff raised fact question whether lifting restriction substantially limited at least the major life activity of working).
>
> Thomann offered no evidence that her lifting restriction substantially limited her from engaging in any of the activities of daily living. She admitted that her lifting restriction does not substantially limit her ability to care for herself, perform manual tasks, walk, see, hear, speak, breathe, learn, or work. And the lifting restriction does not prevent her from all lifting, only heavy lifting. Thomann offered no evidence that her lifting restriction substantially limits her ability to use public facilities, use common carriers, obtain housing, cross the street, achieve independence, become gainfully employed, or participate in the social or economic life of the state without the protections of chapter 21. See Chevron, 745 S.W.2d at 317 (interpreting the predecessor to chapter 21).
>
> Thomann offered no evidence of other jobs utilizing similar training, knowledge, skills or abilities within her geographical area from which she is disqualified. See

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> Primeaux, 961 S.W.2d at 406 (a factor to consider under ADA regulations in determining whether an employee is substantially limited in the major life activity of working). Additionally, Thomann offered no evidence that she is disqualified from a broad range of jobs because of her lifting restriction. Id.
>
> We conclude Thomann failed to produce more than a scintilla of evidence that she has an impairment that substantially limits a major life activity.

Id. at 798.

### 5. Union Carbide Corp. v. Mayfield, 66 S.W.3d 354 (Tex. App.–Corpus Christi 2001, pet. denied)

Mayfield's flat-footedness caused medical problems that eventually resulted in medical restrictions being given to Mayfield that restricted him from doing his operator's job. The restrictions prohibited Mayfield from climbing ladders, scaffolds, and frequent stair climbing. Accordingly, Union Carbide removed him from his operator's job (which paid about $18 per hour) and offered him a safety clerk's job (which paid about $12 per hour). Mayfield refused the job because he wanted to work as an operator, and he did not like the reduced pay. Upon refusing the clerk's job Carbide terminated him. Mayfield sued for disability discrimination and won a jury verdict of approximately one million dollars. Union Carbide appealed. The Corpus Christi Court of Appeals reversed the judgment and rendered judgment for Union Carbide. The court held that Mayfield was not disabled, stating:

> We believe the reasoning in Garcia applies to this case. We do not find that Mayfield's flat-footedness is the type of disability the TCHRA was intended to address. The inability to perform frequent stair climbing or climbing of ladders and scaffolds does not significantly restrict Mayfield in his ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. See Sutton, 119 S.Ct. at 2142. Mayfield's flat-footedness does not severely restrict or foreclose his ability to work in general. Dr. Hansen based his analysis on no stair climbing rather than no frequent stair climbing. He did not know if other employers would agree with Carbide's restrictions, and he did not interview other employers to determine how they would treat Mayfield's flat-footedness. He also did not take into account that Mayfield had received a commercial driver's license and that he had worked as a truck driver after Carbide terminated him. Dr. Hansen's analysis did not show that Mayfield could not work in general. See Sutton v. United Airlines, Inc., 527 U.S. 471, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999).
>
> Further Mayfield testified that he held jobs as a safety coordinator, a paramedic, and a truck driver. He is not prevented from holding positions similar to those because of his foot condition. He also testified that he declined to accept a job as a safety clerk at Union Carbide because of the inferior pay scale. This is indirect proof that his foot condition does not render him incapable of performing this type of position as well. The mere fact that Mayfield is no longer qualified to

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> perform a job with superior pay does not create a right of action under the TCHRA.
>
> Moreover, frequent stair climbing and climbing of ladders and scaffolds are not the kind of major life activities that were envisioned by the Act. Certainly, Mayfield's foot condition is not serious enough to affect his use of public facilities and common carriers, his ability to obtain housing, or his ability to cross the street. See Redmon, 745 S.W.2d at 318. While true that Mayfield is restricted in the range of jobs he can perform by his unfortunate physical limitations, he is not impaired to the point that he "might not be able to participate in the social or economic life of the state, achieve independence, or become gainfully employed," without the protection of the TCHRA. See id. We believe this is the type of "minor physical or mental defect" that falls outside the scope of the Act. See Garcia, 28 S.W.3d at 599-600; see also Deas v. River West, L.P., 152 F.3d 471, 481-82 (5th Cir. 1998) (hospital employee's termination due to two minor seizures and employer's unwillingness to employ her anywhere in the hospital held not sufficient to cover a broad class of jobs).

Id. at 366-67.

#### 6. Kiser v. Original, Inc., 32 S.W.3d 449 (Tex. App.–Houston [14th Dist.] 2000, no pet.)

Kiser was a waiter at Carrabbas restaurant. He worked at the Sugar Land location for approximately one-and-a-half years. In August 1996, he went to work for a Carrabbas in Houston, which is under separate ownership. Kiser has "a complex partial seizure disorder" and suffered from occasional seizures during and away from work.

According to Kiser and his physician, his seizures are generally controlled by medication and avoiding sleep deprivation. Despite these mitigating measures, appellant occasionally suffers from seizures he characterizes as "mild to moderate." Kiser is often able to predict about ten to fifteen minutes prior to a seizure that a seizure is likely to occur. However, he has also experienced seizures without warning. Kiser's physician placed few if any restrictions on him and did not restrict him from working around sharp objects or heavy equipment. At times, appellant states he was limited in the number of hours and consecutive days he could work. After a seizure, Carrabbas required that Kiser obtain a physician's release before he could return to work.

Kiser had two or three seizures while working as a waiter at the Houston Carrabbas location. On June 3, 1997, one occurred. He reported back to work on June 9. However, his supervisor, Spencer Moore, told him he was being terminated and could no longer work in his job as a waiter at the restaurant because of his seizure disorder. Kiser asked Moore if he might work in the restaurant at the hostess stand, bus tables, or replace the woman working on the nearby computer. Moore refused the offer.

Kiser sued Carrabbas and lost on summary judgment. On appeal, Kiser argued he was disabled based on being substantially limited in the major life activity of working. The court

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disagreed, stating, "appellant argues that because three particular jobs were not available to him at the restaurant, he was precluded from working in a broad class of jobs. We disagree. Carrabbas points out that appellant admitted his seizures are generally controlled by medication and rest, and that any seizures he did have were only occasional and, at worst, moderate. Further, appellant's proof that he was denied a waiter or busing job and another person's computer job at a particular restaurant cannot reasonable infer he is unable to work in a broad class of jobs. . . . There was neither proof appellant was computer literate (comparable skill, training and ability) nor that there even existed such an opportunity to continue employment as a bus or computer person. Proof of the appellant's inability to work in a broad class of jobs was lacking. We therefore hold Carrabbas negated appellant's claim that he has an impairment substantially limiting him in the major life activity of work." Id. at 453.

### 7. Garcia v. Allen, 28 S.W.3d 587 (Tex. App.–Corpus Christi 2000, pet. denied)

In this case, the court of appeals held as a matter of law that Garcia's loss of a kneecap did not qualify as disability. Garcia argued that he was substantially limited from climbing ladders, squatting, kneeling and crawling. The court of appeals disagreed, stating, "[w]hile loss of a kneecap is a serious impediment, we do not believe it rises to the level of the type of "disability" contemplated by the anti-discrimination act. Crawling, squatting, climbing ladders and kneeling are not the same type of 'major life activities' as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." (citations omitted). Id. at 599.

### 8. Morrison v. Pinkerton Inc., 7 S.W.3d 851 (Tex. App.–Houston [1st Dist.] 1999, no pet.)

Morrison is six feet, four inches tall and weighed 340 pounds when his employment ended. Morrison sued for alleged disability discrimination, and claimed that his physical impairment was morbid obesity. As such, he maintained he was substantially limited in the major life activities of running and climbing stairs. Morrison further stated that while he can run and climb stairs, he is often winded and tired after engaging is such activities. The trial court granted summary judgment against Morrison, and the appellate court affirmed, stating:

> Morrison has not offered any evidence suggesting that his condition substantially limits him in a major life activity. Unfortunately, being out of breath or tired after walking, running, or climbing stairs does not distinguish Morrison from most of the population. Without exigent circumstances, merely being tired or out of breath cannot be characterized as "incapacitating." See Redmon, 745 S.W.2d at 317-18. Morrison's condition, as he describes it, is not "considerable" or "specified to a large degree." See Sutton, 119 S.Ct. at 2150. Finding Morrison's obesity to be a disability would thus trivialize the impairments of those who are truly disabled and suffering discrimination. See Forrisi, 794 F.2d at 934.

Id. at 857.

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**9. Hartis v. Mason & Hanger Corp., 7 S.W.3d 700 (Tex. App.–Amarillo 1999, no pet.)**

In this case, the court held that the plaintiff failed to present any evidence that his "major depression" constituted a disability under the Texas Labor Code. Therefore, summary judgment was properly entered against his disability discrimination claim.

**10. Azubuike v. Fiesta Mart, Inc., 970 S.W.2d 60 (Tex. App.–Houston [14th Dist.] 1998, no pet.)**

Azubuike claimed that his back, leg, and knee problems substantially limited his performance of: (1) any job involving bending and heavy lifting, (2) many day-to-day tasks around his house, (3) playing with or lifting his children, and (4) sexual relations with his wife. The court of appeals still affirmed summary judgment against his disability discrimination claim on the ground that his physical problems did not substantially limit any major life activity, including working.

**11. Norwood v. Litwin Engineers & Constructors, Inc., 962 S.W.2d 220 (Tex. App.–Houston [1st Dist.] 1998, pet. denied)**

Norwood has been an insulin-dependent diabetic since 1966. Litwin employed Norwood as a senior electrical designer from September 1991 to August 1993. On July 27, 1993, Norwood fainted at work due to an insulin reaction. Litwin's on-site paramedics helped Norwood at the scene. After eating, he returned to work. On August 11, 1993, Litwin terminated Norwood's employment pursuant to an alleged workforce reduction. Norwood sued Litwin, alleging discrimination due to his "disability" (his diabetes) in violation of section 21.051 of the Texas Labor Code. Litwin was granted summary judgment, and Norwood appealed.

On appeal, the court observed that Norwood presented evidence that his diabetes caused him to lose consciousness, appear inebriated, become incoherent, and act belligerently. Moreover, his vision is impaired, he has circulatory problems, and he lacks feeling in his extremities. Based on this evidence, the court held that Norwood raised "an issue of material fact as to whether his diabetes substantially limits a major life activity. Thus, Litwin did not prove, as a matter of law, that Norwood was not "disabled" within the meaning of the TCHRA, and summary judgment on that ground was not proper."

**12. Hearne v. Amwest Sav. Ass'n, 951 S.W.2d 365 (Tex. App.–Fort Worth 1997, no pet.)**

The court affirmed summary judgment against the plaintiff's disability discrimination claim, holding that she failed to present any evidence that her diabetes substantially limited any of her major life activities. The court reached this conclusion despite the fact that the plaintiff was insulin-dependent and suffered "mini-comas."

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## E. Advice For Employers.

- Employers confronted with a request for an accommodation should usually request proof of the disability, its limitations, and how, if at all, it can reasonably be accommodated. As the EEOC Guidance states, "[t]he employer is entitled to know that the individual has a covered disability for which he/she needs a reasonable accommodation." EEOC Guidance at 6. An employer may require that the documentation and the functional limitations of the disability come from an appropriate healthcare or rehabilitation professional.

- In requesting documentation, employers should specify what types of information they are seeking regarding the disability, its functional limitations, and the need for reasonable accommodation.

- The EEOC's position is that an employer cannot ask for documentation that is unrelated to determining the existence of a disability and necessity for an accommodation. This means that, in most situations, an employer cannot request a person's complete medical records because they are likely to contain information unrelated to the disability at issue and the need for an accommodation. The individual can be asked to sign a limited release allowing the employer to obtain records relevant to the disability determination.

- Employers should tell an employee requesting the reasonable accommodation why they are requesting such records. Employers should state in writing that they are seeking the records so that they can determine whether the person has a disability, whether the person has disability-related limitations, and ways the limitations could be reasonably accommodated.

- The EEOC's position is that an employer may require an individual to go to an appropriate healthcare professional of the employer's choice if the individual provides insufficient information from his or her treating physician or other healthcare professional to substantiate that he or she has an ADA disability and needs a reasonable accommodation. If that is the case, the employer should explain why the employee's documentation is insufficient and allow the individual an opportunity to provide the missing information in a timely manner.

- Any medical examination conducted by the employer's healthcare professional must be job-related and consistent with business necessity. This means that the examination must be limited to determining the existence of an ADA disability and the functional limitations that require reasonable accommodation. If the employer requires an employee to go to a healthcare professional of the employer's choice, the employer must pay all costs associated with the visit.

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- Employers should train persons in the company or organization who will be involved in the interactive discussions with employees potentially covered by the ADA. Those persons need to understand the comparative ease under which many additional people may now be covered by the law as modified by the ADAAA. They also need to know more about reasonable accommodations as many additional employees and applicants will have to be accommodated due to the amendments.

## III. THE "REGARDED AS DISABLED" PROBLEM

The ADA prohibits discrimination not only against employees who are actually disabled, but also against employees whom the employer "regards as" or "perceives as" being disabled. Under this "regarded as" or "perceived as" provision of the ADA, a person will be treated as having a "substantially limiting impairment" if he shows that he:

(1) has an impairment that is not substantially limiting but that the employer perceives as constituting a substantially limiting impairment;

(2) has an impairment that is substantially limiting only because of the attitudes of others toward such an impairment; or

(3) has no impairment at all but is regarded by the employer as having a substantially limiting impairment.

Deas v. Riverwest, L.P., 152 F.3d 471, 475 (5th Cir. 1998), cert. denied, 119 S. Ct. 471 (1999); Bridges v. City of Bossier, 92 F.3d 329, 332 (5th Cir. 1996), cert. denied, 117 S. Ct. 770 (1997).

### A. The Americans with Disabilities Act Amendments Act of 2008, And Supporting Regulations Of March 24, 2011

The ADAAA expands the ADA's definition of disability, specifically the "regarded as" prong of that definition, by now including persons that have been discriminated against because of an actual impairment or a perceived impairment "whether or not the impairment limits or is perceived to limit a major life activity." This is in clear contrast to the previous requirement expressed in the U.S. Supreme Court's opinion in Sutton that the perceived impairment must, like any actual impairment, substantially limit a major life activity. If a person is treated adversely (in regard to job application procedures, hiring, advancement, discharge, compensation, job training, and other terms, conditions, and privileges of employment) because of an actual or perceived impairment, that is a violation of the law, irrespective of whether the impairment actually limits or is perceived to limit a major life activity. Indeed, under new regulation 1630.2(l), proof that an individual was denied employment because of an impairment suffices to establish coverage under the ADA, "whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity."

This means, for example, that a minor lifting restriction which might not rise to the level of an actual disability (under the major life activity of working or otherwise) could nonetheless be the basis of a "regarded as" claim. The new regulations further provide that an employer

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"regards" someone as disabled by taking action based on any real or perceived impairment, "even if the entity asserts, or may or does ultimately establish, a defense to such action."

However, the ADAAA excludes from the "regarded as" definition of disability those impairments that are transitory and minor. Transitory is defined as "an impairment with an actual or expected duration of 6 months or less." The EEOC's regulations do not provide any examples of what it considers to be an impairment that is "transitory and minor."

The ADAAA also limits the application of the ADA by clarifying that an employer's duty to accommodate does not extend to those individuals who make discrimination claims under the "regarded as" prong of the definition of disability. Before the ADAAA, there was a split among the federal courts as to whether the ADA's reasonable accommodation requirement applied to the "regarded as" category of disabled individuals. The ADAAA resolves that point and makes clear that employers have no duty to accommodate these individuals. Like ADAAA itself, the new regulations confirm there is no duty to provide reasonable accommodations to those "regarded as" having a disability. However, the rules go beyond the statute in requiring that employers reasonably accommodate those with a "record of" disability absent undue hardship. It is unclear how or why an employer should accommodate an individual with a record of disability if that individual is not actually, presently disabled. In short, the ADAAA clearly prohibits adverse employment actions based on myths, fears and stereotypes when the person being discriminated against may not actually have an impairment but is simply perceived to have one. As it is logically inconsistent to require reasonable accommodation of a misperceived impairment, the ADAAA clarifies that employers need not engage in the reasonable accommodation process with persons regarded as impaired who are not actually impaired.

In one other pro-business passage, the EEOC decided not to include a provision that had been in the proposed regulations, providing that employers could be liable under a "regarded as" theory merely by virtue of knowing an individual takes medication or has symptoms that *might* be indicative of disability. After receiving comments from the employer community, the EEOC pulled back from the position it had initially taken in the proposed rules.

## B. Cases Decided Prior To The Americans with Disabilities Act Amendments Act of 2008

These cases should not be relied on as to any factual situation that arose after the ADAAA took effect, in January 2009.

### 1. Murphy v. United Parcel Service, Inc., 119 S. Ct. 2133 (1999)

In Murphy, the plaintiff was a mechanic who was fired because he had hypertension that prevented him from obtaining DOT health certification for the operation of commercial vehicles, which was an essential function of the job. The Supreme Court held that Murphy was not "regarded as" disabled. Murphy argued that UPS regarded him as being substantially limited in the major life activity of working. However, the evidence showed that UPS only regarded Murphy as being unable to work in a job that required DOT certification. To be regarded as substantially limited in the major life activity of working, the evidence would have to show that UPS mistakenly believed that he was "significantly restricted in the ability to perform either a

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class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities." 29 C.F.R. § 1630.2(j)(3)(i). Since UPS only regarded Murphy as being precluded from a particular job, rather than a class or broad range of jobs, it did not regard him as substantially limited in the major life activity of working. Therefore, the Supreme Court affirmed summary judgment against Murphy.

### 2. Sutton v. United Airlines, Inc., 119 S. Ct. 2139 (1999)

In Sutton, the Supreme Court essentially repeated its holding from Murphy, that an employer does not regard or perceive an employee as being "disabled" under the ADA simply by regarding the employee as being unable to perform a particular job, in this case, the job of a global airline pilot. This case was overruled by the ADAAA.

### 3. Kemp v. Holder, 610 F.3d 231 (5th Cir. 2010)

The court found that there was no evidence that a government security contractor believed a court security officer was significantly restricted in his ability to hear when he was wearing his hearing aids. Thus, he could not demonstrate that he was regarded as being substantially limited in the life activity of hearing, for purposes of his ADA claim against the contractor arising out of his termination for failing to meet United States Marshals Service's (USMS) unaided hearing requirement. The contractor was aware of the plaintiff's hearing impairment and his use of hearing aids when it initially offered him the position, and even after he failed the unaided hearing test, the contractor considered him fully capable of hearing on a functional basis as it wrote to USMS on his behalf to request reconsideration of disqualification decision.

### 4. E.E.O.C. v. E.I. Du Pont de Nemours & Co., 480 F.3d 724 (5th Cir. 2007)

Laura Barrios, the employee on whose behalf the EEOC sued, was a lab operator. A DuPont plant physician restricted Barrios from walking more than 100 feet without resting. Later, after a further evaluation, DuPont concluded that Barrios would be unable to evacuate the plant safely. They restricted her from walking anywhere in the plant and placed Barrios on permanent disability. DuPont refused to return Barrios to work even after she demonstrated that she could walk an evacuation route without assistance. The district court held as a matter of law that DuPont had regarded Barrios as being disabled in the major life activity of walking. The Fifth Circuit affirmed this ruling because DuPont's own doctors and discovery responses established that DuPont believed that Barrios was substantially limited from walking at "home, at work, wherever." The court affirmed an award of $300,000.00 to the plaintiff in punitive damages.

### 5. Rodriguez v. ConAgra Grocery Products Co., 436 F.3d 468 (5th Cir. 2006)

In this case, the Fifth Circuit not only reversed a summary judgment that the employer had obtained, but also rendered judgment for the employee on his claim that the employer had regarded him to be disabled and discriminated against him on that basis. Rodriguez had worked

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a little over a month at ConAgra as a laborer performing heavy lifting and the like. Because he did good work, he was offered a permanent position in the plant's production area. First, however, ConAgra required Rodriguez to be examined by a doctor for a "fitness for duty" analysis. The doctor did not know the qualifications for the job Rodriguez had been offered. Nonetheless, the doctor concluded that Rodriguez was unfit because he had Type II diabetes, which the doctor claimed was "uncontrolled." Based on the doctor's conclusion, ConAgra refused to hire Rodriguez. Rodriguez sued under the TCHRA for disability discrimination, and the district court granted summary judgment for the employer.

On appeal, the Fifth Circuit observed that ConAgra (through its reliance on the doctor's unjustifiable conclusion) failed to do an "individualized assessment" to determine if, in fact, Rodriguez's condition actually rendered him unqualified for the specific job at issue. In addition, the court held that Rodriguez proved that ConAgra regarded him as being disabled. The court concluded that ConAgra regarded Rodriguez as being substantially limited in the major life activity of working (and not just a single job as so often is the case) because, in its discovery responses, ConAgra conceded that it believed that Rodriguez's diabetes rendered him unfit for any job in its plant. There are many types of jobs in the plant. This admission thus confirmed that ConAgra regarded Rodriguez to be "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities." 29 C.F.R. § 1630.2(j)(3)(i). Since ConAgra's belief was medically unjustified, its admission proved as a matter of law that it had rejected Rodriguez based on his perceived disability.

### 6. Fuzy v. S&B Engineers & Constructors, Ltd., 332 F.3d 301 (5th Cir. 2003)

Fuzy is not technically a "regarded as" or "perceived as" ADA case. However, it deals with a closely related topic. Specifically, can a non-disabled person who has been screened out of a potential job because of an unlawful pre-employment medical inquiry or test still sue under the ADA? Or, must the plaintiff be "disabled" to sue under the ADA? The Fifth Circuit refused to answer this question in a case decided in 1998 named Armstrong v. Turner Indus., 141 F.3d 554 (5th Cir. 1998). In Fuzy, the Fifth Circuit once again reserved judgment on that particular issue. Rather, the Court found that the pre-employment medical inquiry (whether Fuzy could lift 100 pounds, which he could not) was not unlawful under the ADA because it was, "job-related and consistent with business necessity." Therefore, even assuming Fuzy had standing to sue, his case failed. Accordingly, the Court affirmed summary judgment in the defendant's favor.

### 7. Waldrip v. General Electric Co., 325 F.3d 652 (5th Cir. 2003)

In this case, the Fifth Circuit held that the plaintiff's chronic pancreatitis constituted a "physical impairment," and that "eating" is a "major life activity." However, the Court found that as a matter of law the plaintiff's chronic pancreatitis did not substantially limit him in the major life activity of eating. The Fifth Circuit also rejected the plaintiff's "regarded as" ADA claim, despite the fact that General Electric paid him "disability" benefits and (rightly) expressed concern about his taking central nervous system depressants while operating heavy machinery at work.

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### 8. Gowesky v. Singing River Hospital Sys., 321 F.3d 503 (5th Cir.), cert. denied (2003).

The Fifth Circuit affirmed summary judgment against an emergency room physician who had contracted hepatitis C at work. A hospital administrator subsequently made remarks to the plaintiff along the lines that she should not work in the emergency room and that he would not let her suture his child. The Fifth Circuit held that the administrators remarks, no matter how unfounded, at most showed that the defendant regarded the plaintiff as being unable to perform a single job (that of an emergency room physician), which is insufficient to support a "regarded as" ADA claim. The Court also observed that despite these remarks, the hospital continued to reassign the plaintiff to the emergency room, which further refuted the plaintiff's "regarded as" ADA claim.

### 9. Blanks v. Southwestern Bell Communications, 310 F.3d 398 (5th Cir. 2002)

The plaintiff in this case suffered from HIV, just as the plaintiff in *Bragdon.* However, the Fifth Circuit affirmed summary judgment for the defendant on the grounds that the plaintiff in this case – unlike the plaintiff in *Bragdon* – failed to create a fact issue as to his "disabled" status. The plaintiff had alleged that his HIV status substantially limited his ability to reproduce. The Fifth Circuit rejected this argument primarily because the plaintiff admitted that he did not want any more children and his wife had already been sterilized.

The court also rejected as a matter of law the plaintiff's argument that he was "regarded as" being disabled. A coordinator at Southwestern Bell had said that the plaintiff, "had a permanent disability that would never allow him to work as a customer service representative at Southwestern Bell." The Court found this evidence merely showed that the defendant regarded the plaintiff as being unable to perform a single job, which is insufficient to support a "regarded as" ADA claim. The Court also observed that the same coordinator tried to place the plaintiff in several other alternate positions with Southwestern Bell, which further refuted the plaintiff's "regarded as" ADA claim.

### 10. Mason v. United Air Lines, Inc., 274 F.3d 314 (5th Cir. 2001)

Mason worked as a customer service representative for United Air Lines in Dallas. After several back surgeries, his doctor issued permanent restrictions on Mason that precluded him from lifting more than twenty pounds. Mason's supervisors concluded that, given that restriction, there was no job available for him that he could perform in Dallas, but offered him the opportunity to apply for jobs elsewhere. Mason did not find a job consistent with his medical restrictions, and thus United Air Lines eventually placed him on an unpaid leave of absence. Mason sued contending that United Air Lines discriminated against him based upon a perception that he was disabled.

The district court granted summary judgment in United Air Lines' favor, and the Fifth Circuit affirmed. The Fifth Circuit stated "[t]here is no evidence that Mason was not qualified for a broad range of other jobs that did not require the manipulation of weighty objects, or that United incorrectly made broad generalizations regarding his impairments. Rather, the record

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reflects that United encouraged Mason to apply for alternative positions in Dallas and elsewhere." Based on these findings, the Fifth Circuit found that the trial court had properly disposed of Mason's "regarded as" ADA claim.

### 11. Aldrup v. Caldera, 274 F.3d 282 (5th Cir. 2001)

Aldrup claimed that he was "regarded as" disabled by his employer, the United States Army. The background of this case was that Aldrup had refused to report to a new job assignment in his personal vehicle. Rather, he demanded that a government vehicle be provided to transport him. When he refused to report in his private vehicle, his supervisors charged him with insubordination, and he was eventually terminated.

In his subsequent lawsuit, Aldrup claimed that his supervisors misperceived him as having a disability based upon his alleged depression. The district court granted summary judgment, and the Fifth Circuit affirmed, stating "Aldrup has presented no evidence whatsoever to base the slightest inference that defendant believed he was disabled."

### 12. Dupre v. Charter Behavioral Health Sys. of Lafayette, Inc., 242 F.3d 610 (5th Cir. 2001)

Dupre suffered from a degenerative back disease. Charter hired her as a coordinator on July 1, 1997. Over the next two weeks, Dupre was absent two days, tardy two days, and left early three days, often because of medical appointments for her back. Dupre also sought and obtained approval to use a "special" chair at work. However, on July 18, 1997, Dupre was fired. Her boss allegedly told her that her problem with sitting in one place for a long time could render her unqualified to work at Charter. Dupre's boss also allegedly tacitly admitted that Charter was unhappy with the absences from work, and also the fact that she had not informed them of her back problems before she was hired.

The trial court granted summary judgment for Charter. On appeal, the Fifth Circuit held that, even if Dupre's boss said all the things Dupre alleged, this still failed to prove that Charter regarded Dupre as having a disability. Specifically, her boss's alleged comments only showed that she believed Dupre could not do her job at Charter, not necessarily that she could not work in a class of jobs or broad range of jobs.

### 13. McInnis v. Alamo Community College District, 207 F.3d 276 (5th Cir. 2000)

In McInnis, the plaintiff had suffered a severe closed head injury in an automobile accident that caused him slurred speech, a language communication disorder, a limp, and partial paralysis of his right side. He was a member of Palo Alto College's full-time faculty. At some point during his employment as a teacher, a student complained to the school that McInnis was intoxicated in class. He was investigated, and the school concluded that McInnis was not intoxicated, but rather appeared so due to his disability related appearance, such as his unsteady gait and slurred speech. The following year, when his contract came up for renewal, McInnis was informed that the college had decided not to renew his contract. McInnis sued under the ADA. A summary judgment was granted in the college's favor in the district court.

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The Fifth Circuit reversed the summary judgment in the college's favor, and remanded the case for further proceedings. The Fifth Circuit held that there was a fact issue regarding whether the college perceived McInnis as being disabled. The court found that testimony from the college's own ADA compliance coordinator established that the college believed McInnis was disabled and specifically referred to McInnis in a letter as having a "handicap." Based on this evidence, the Fifth Circuit held that a reasonable jury could find that the college perceived McInnis as being disabled.

**14. E.E.O.C. v. R.J. Gallagher Co., 181 F.3d 645 (5th Cir. 1999)**

As previously discussed, Boyle had MDS, a form of blood cancer. After some initial treatment, his doctor concluded that his cancer was in "complete remission" and advised that he could return to work without limitation, other than six monthly three-to-five day chemotherapy sessions. However, the plaintiff's boss immediately demoted him and cut his pay in half, stating that he did not believe the plaintiff could continue working. The district court granted summary judgment against the plaintiff.

On appeal, the Fifth Circuit found that there was a material fact issue as to whether the defendant perceived the plaintiff as being disabled, even though he actually was not. The court focused on the fact that the plaintiff's boss demoted the plaintiff and cut his salary in half, while expressing doubt that the plaintiff could perform any job given his condition. The court found that this evidence raised a fact issue on the "perceived as" disabled theory.

**15. Zenor v. El Paso Healthcare System, Ltd., 176 F.3d 847 (5th Cir. 1999)**

In Zenor, the Fifth Circuit held that the fact a person is perceived to be a drug addict does not necessarily mean that person is perceived to be disabled under the ADA. Rather, the plaintiff must show that the defendant regarded his addiction as substantially limiting one or more of his major life activities, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working. Zenor presented no such proof. Accordingly, the court affirmed judgment as a matter of law against the plaintiff's "perceived as" disabled claim.

**16. Talk v. Delta Airlines, Inc., 165 F.3d 1021 (5th Cir. 1999)**

In this case, the Fifth Circuit affirmed summary judgment against the plaintiff. The court noted that Delta actively sought positions for the plaintiff in other areas of its workforce. This evidence indicated that Delta did not perceive the plaintiff as being substantially limited in her ability to work in a class or broad range of jobs.

**17. Deas v. Riverwest, L.P., 152 F.3d 471 (5th Cir. 1998), cert. denied, 119 S. Ct. 2411 (1999)**

The employer believed that Deas's seizure disorder prohibited her from working as an Addiction Technician in a substance abuse clinic. However, Deas produced no evidence that her

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employer regarded her as being unable to perform any other job. Consequently, the court affirmed summary judgment for the employer.

### 18. **Pryor v. Trane Co., 138 F.3d 1024 (5th Cir. 1998)**

The court affirmed a jury verdict against the plaintiff, holding that, once again, there was no evidence that the employer perceived the employee as substantially limited in her ability to perform a class or broad range of jobs.

### 19. **Hamilton v. Southwestern Bell Telephone Co., 136 F.3d 1047 (5th Cir. 1998)**

In Hamilton, the court affirmed summary judgment against the plaintiff's "perceived as" disability claim. The court did so despite the fact that the employer had referred the plaintiff to its employee assistance program after he verbally abused and struck a co-worker, so that he could be evaluated by a social worker and a psychiatrist. The Fifth Circuit found that since the employer nonetheless allowed the employee to retain his managerial responsibilities following the incident, it did not regard the employee as being substantially limited in his ability to perform his own job, much less a class or broad range of jobs.

### 20. **Burch v. Coca-Cola Co., 119 F.3d 305 (5th Cir. 1997), cert. denied, 118 S. Ct. 871 (1998)**

In Burch, the Fifth Circuit held that alcoholism is not a disability per se under the ADA. Consequently, an employee perceived as an alcoholic is not necessarily perceived as being disabled under the ADA. Burch did not present any evidence that Coca-Cola regarded his alcoholism as substantially limiting his ability to work or his other major life activities. The mere fact that it was concerned about his inappropriate behavior, his short temper, and about a specific instance of off-hour conduct, did not qualify as proof that it misperceived Burch as disabled. Consequently, the court reversed a jury verdict for Burch, and rendered judgment against him.

### 21. **Foreman v. Babcock & Wilcox Co., 117 F.3d 800 (5th Cir. 1997), cert. denied, 118 S. Ct. 1050 (1998)**

Foreman had a pacemaker installed that effectively precluded him from working as an expediter in the defendant's shop. The defendant attempted to find, and ultimately did find, other work for Foreman in its shop. The court held that this evidence showed that it did not perceive Foreman as substantially limited in the major life activity of working or, for that matter, any other major life activity.

### 22. **Bridges v. City of Bossier, 92 F.3d 329 (5th Cir. 1996), cert. denied, 117 S. Ct. 770 (1997)**

Bridges had a mild form of hemophilia known as "Factor IX Deficiency." The defendant rejected his application to be a firefighter because it feared his condition rendered him a danger to himself and others. The plaintiff claimed that the defendant's fears were unjustified, and that

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instead, it acted on "myths, fears, and stereotypes" about hemophilia. In other words, the plaintiff contended that the defendant perceived him as being disabled, although he really was not.

The Fifth Circuit rejected the plaintiff's argument because the evidence simply showed that the City believed his impairment prevented him from being a firefighter. Once again, that evidence was not enough; rather, the plaintiff would have to have shown that the defendant perceived him as being disqualified from a class or broad range of jobs. Consequently, the court affirmed a judgment in the defendant's favor.

### 23. Rogers v. International Terminals, Inc., 87 F.3d 755 (5th Cir. 1996)

The court affirmed summary judgment because there was no evidence that the defendant misperceived the plaintiff as being disabled. The court noted that an employer's legitimate concerns about absenteeism and poor performance are distinct from a misperception that the employee is disabled.

### 24. Ray v. Glidden Co., 85 F.3d 227 (5th Cir. 1996)

The court affirmed summary judgment because the evidence showed that the defendant fired the plaintiff solely because his medical condition prevented him from returning to work in his job as a truck operator. There was no proof that he was denied another job because of a belief that his condition would prevent him from adequately performing a class or broad range of jobs.

### 25. Ellison v. Software Spectrum, Inc., 85 F.3d 187 (5th Cir. 1996)

In 1993, Ellison contracted breast cancer. She underwent daily radiation and worked on a modified schedule. In February 1994, she recovered and returned to work full time. In April, she lost her position as part of a reduction in force. She did, however, obtain a lower-paying position within the company. She sued under the ADA, contending that she lost her higher-paying position due to disability discrimination.

The Fifth Circuit affirmed summary judgment on the ground that she was not "disabled." The court found that the employer did not "perceive" her as being disabled, even though:

- Her boss suggested she have a mastectomy instead of radiation because her breasts were "not worth saving."
- When the lights went out in the building once, her boss laughed and said, "Don't worry about it. Follow Phyllis (the plaintiff). See, look over there. She's glowing."
- During a meeting in which the reduction in force was discussed, a human resources person asked whether any of the potentially affected employees

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> had special circumstances that needed to be considered. Her boss responded, "Phyllis has cancer."

The Fifth Circuit concluded that, "[i]t goes without saying that these comments are beneath contempt . . . but, as stated, they do not create a material fact issue on whether [the defendant] regarded Ellison as having a substantially limiting impairment." Id. at 193.

### 26. Dutcher v. Ingalls Shipbuilding, 53 F.3d 723 (5th Cir. 1995)

The Fifth Circuit affirmed summary judgment against the employee, noting that the defendant continued to employ her after the transfer she contended was discriminatory. This evidence indicated that the employer did not perceive the plaintiff as being disabled.

### 27. E.E.O.C. v. Texas Bus Lines, 923 F. Supp. 965 (S.D. Tex. 1996)

In this case, the defendant refused to hire the plaintiff as a van driver. The defendant believed that the plaintiff was so obese that she would not be able to do the job. Magistrate Judge Stacy found that the defendant perceived the plaintiff as being disabled.

Specifically, the defendant relied on a doctor's opinion that the plaintiff would have been incapable of doing the job due to her weight. However, the doctor's opinion was not based on fact. Instead, it was based solely on his unsupported belief that obese people cannot move around swiftly. Since the employer blindly relied on the doctor's unsupported opinion in refusing to hire the plaintiff, the court found that it too "perceived" her as being disabled. The court stated that Texas Bus Lines "made the decision not to hire [the plaintiff] because of a perception of disability based on 'myth, fear, or stereotype.'"

### 28. McAlpin v. National Semiconductor Corp., 921 F. Supp. 1518 (N.D. Tex. 1996)

In this case, the plaintiff gave her employer a note stating that she could not work around any chemicals. The employer's employee relations manager told the plaintiff that he therefore believed that her condition (sarcoidosis) prevented her from working in virtually any job, allegedly "because even at a McDonald's store, they have chemicals." The court concluded that this evidence showed that the employer believed the plaintiff was substantially limited in her ability to work in a class or broad range of jobs, and therefore, it found that the employer perceived her as being disabled.

### 29. Holihan v. Lucky Stores, Inc., 87 F.3d 362 (9th Cir. 1996), cert. denied, 117 S. Ct. 1349 (1997)

The plaintiff alleged he was discriminated against on the basis of depression. The plaintiff had been placed on a leave of absence to deal with stress-related problems arising from work and was released after he had exceeded the allotted leave time. There had been a number of complaints against the plaintiff that he was abusive toward fellow employees.

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The Ninth Circuit found that his mental problems did not substantially limit any of his major life activities. Nevertheless, it reversed the district court's grant of summary judgment because sufficient evidence existed to show that the defendant regarded him as having a disability and discriminated against him on those grounds, namely: asking plaintiff if he was having any problems, encouraging him to seek EAP counseling, and receiving medical reports regarding his condition.

### C. Texas State Court Decisions Under Chapter 21

#### 1. Thomann v. Lakes Regional MHMR Ctr., 162 S.W.3d 788 (Tex. App.–Dallas 2005, no pet.)

Thomann's job as a "house parent" at a home for the disabled required her to lift at least 44 pounds. Thomann suffered from back problems that resulted in her receiving a long-term restriction against lifting more than 20 pounds. Her employer offered her another job at the same pay, but Thomann refused. She was then terminated because she was unable to fulfill the 44 pound lifting requirement. Thomann sued under Chapter 21 for alleged disability discrimination. She lost on summary judgment, and appealed.

The Dallas Court of Appeals found that Thomann was not regarded as disabled as a matter of law. The court held as follows:

> Finally, Thomann argues that Lakes Regional regarded her as disabled because its employees knew of her restrictions and accommodated her by transferring her to the night shift at the Park Street home. The primary evidence Thomann offers to support this argument is Doyal's statement that Thomann "is not capable of performing the essential functions of her position." But this statement does not support the conclusion that Lakes Regional regarded Thomann as having an impairment that substantially limits a major life activity. It merely supports the conclusion that Thomann was unable to perform her job as house parent because of the lifting restriction.
>
> The fact that Lakes Regional offered Thomann a different job shows that Lakes Regional believed she was qualified for other positions and that Lakes Regional did not regard her as disabled. See Sherrod, 132 F.3d at 1121. We conclude Thomann failed to produce more than a scintilla of evidence that Lakes Regional regarded her as disabled.

Id. at 799.

#### 2. Columbia Plaza Medical Ctr. of Fort Worth Subsidiary, L.P. v. Szurek, 101 S.W.3d 161 (Tex. App.–Fort Worth 2003, pet. denied)

Szurek alleged that her employer forced her on a leave of absence because it perceived that she suffered from a disability. The EEOC investigated and found cause. Szurek sued and a

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jury found in her favor and awarded her $72,000.00. The court of appeals reversed and rendered judgment against Szurek, stating:

> The evidence in this case shows that Columbia at most perceived that Szureck was recovering from a temporary impairment, which resulted from her surgery for spurs. Columbia officials believed Szurek would be able to return to her normal working routine in approximately three months, or at least when Dr. Warren gave her clearance to return to nonsedentary duties. The fact that Columbia officials perceived that her "recovery plateau" prevented her from doing the physical requirements of her current position and all nonsedentary positions does not show that they regarded her as having a disability as defined under the statute. The evidence shows that Columbia officials saw the "plateau" as temporary, which could be overcome in a matter of months, but could not be overcome if Szurek continued to work in nonsedentary positions against her doctor's advice. Dr. Warren's letter, which Columbia was entitled to rely on in making decisions regarding what Szurek's impairment entailed and whether she could continue to work in certain positions, supported this conclusion. See Rogers, 87 F.3d at 760 n. 3; Rios v. Ind. Bayer Corp., 965 F. Supp. 919, 924 (S.D. Tex. 1997).
>
> Szurek did not introduce or present to this court evidence showing that Columbia perceived her injuries to be anything other than temporary. Further, there is no evidence indicating that Columbia believed there would be any long-term or permanent impact resulting from Szurek's impairment. Because a temporary impairment is not considered a "substantially limiting impairment," and because Columbia perceived Szurek's impairment as temporary, there is no evidence that Columbia placed Szurek on the leave of absence because it regarded her as disabled. See Rinehimer, 292 F.3d at 380-81 (holding employer did not regard employee as disabled where employer thought employee suffered from pneumonia, which is a temporary condition not protected by the ADA); Sutton v. Lader, 185 F.3d 1203, 1209 (11th Cir. 1999) (holding employer that prevented employee from returning to work until physician provided medical release did not regard employee who was recovering from heart surgery as disabled under RHA, stating "employee who is perceived by his employer as having only a temporary incapacity to perform the essential functions of his job is not perceived as 'disabled'"). Thus, we hold the trial court erred in denying Columbia's motion for directed verdict and sustain issue one.

Id. at 168-69.

#### 3. Union Carbide Corp. v. Mayfield, 66 S.W.3d 354 (Tex. App.–Corpus Christi 2001, pet. denied)

Mayfield's flat-footedness caused medical problems that eventually resulted in medical restrictions being given to Mayfield that restricted him from doing his operator's job. Accordingly, Union Carbide removed him from this job (which paid about $18 per hour) and offered him a safety clerk's job (which paid about $12 per hour). Mayfield refused the job

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because he wanted to work as an operator, and he did not like the reduced pay. Upon refusing the clerk's job Carbide terminated him. Mayfield sued for disability discrimination and won a jury verdict of approximately one million dollars. Union Carbide appealed. The Corpus Christi Court of Appeals reversed the judgment and rendered judgment for Union Carbide. The court held that Union Carbide did not regard Mayfield to be disabled, stating:

> Here, while Carbide's restrictions show that it perceived Mayfield as being unable to work at jobs requiring ladder climbing or frequent stair climbing because of his foot condition, we do not view Carbide's restrictions as indicative that it perceived Mayfield as being unable to work to such an extent that would substantially limit a major life activity. We cannot conclude that Carbide regarded Mayfield as being unable to work in a broad class of jobs or a broad range of jobs in various classes. There is undisputed evidence which shows that Carbide attempted to place Mayfield in a safety clerk's job for which it did not deem him disqualified due to his foot condition. This evidence shows that Carbide believed Mayfield to be qualified for other positions. *See Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1122 (5th Cir. 1998). Further Dr. Hansen's testimony showed that even with a restriction of no ladder climbing and no stair climbing Mayfield could still do thirty percent of the jobs at the Seadrift plant. Thus we hold that Carbide did not regard Mayfield as disabled.

Id. at 368. See also Pegram v. Honeywell Inc., 361 F.3d 272 (5th Cir. 2004) (Former employee with back injury was not regarded as disabled, even though he allegedly was demoted after informing employer of his injury and discharged after requesting disability leave, where there was no evidence that his injury was perceived as substantially limiting; supervisor's comment that employee could not handle specific job is insufficient by itself to establish substantial limitation, and there is no evidence that his back injury foreclosed him from performing his assigned positions.).

#### 4. Kiser v. Original, Inc., 32 S.W.3d 449 (Tex. App.–Houston [14th Dist.] 2000, no pet.)

Kiser was a waiter at Carrabbas restaurant. He worked at the Sugar Land location for approximately one-and-a-half years. In August 1996, he went to work for a Carrabbas in Houston, which is under separate ownership. Kiser has "a complex partial seizure disorder" and suffered from occasional seizures during and away from work.

According to Kiser and his physician, his seizures are generally controlled by medication and avoiding sleep deprivation. Despite these mitigating measures, appellant occasionally suffers from seizures he characterizes as "mild to moderate." Kiser is often able to predict about ten to fifteen minutes prior to a seizure that a seizure is likely to occur. However, he has also experienced seizures without warning. Kiser's physician placed few if any restrictions on him and did not restrict him from working around sharp objects or heavy equipment. At times, appellant states he was limited in the number of hours and consecutive days he could work. After a seizure, Carrabbas required that Kiser obtain a physician's release before he could return to work.

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Kiser had two or three seizures while working as a waiter at the Houston Carrabbas location. On June 3, 1997, one occurred. He reported back to work on June 9. However, his supervisor, Spencer Moore, told him he was being terminated and could no longer work in his job as a waiter at the restaurant because of his seizure disorder. Kiser asked Moore if he might work in the restaurant at the hostess stand, bus tables, or replace the woman working on the nearby computer. Moore refused the offer and told Kiser that he would not give him a job busing tables, or operating the restaurant's computer.

Kiser sued Carrabbas and lost on summary judgment. On appeal, Kiser argued he was regarded as being substantially limited in the major life activity of working. The court disagreed, stating:

> This case is similar in material respects to Deas v. River West, L.P., 152 F.3d 471 (5th Cir. 1998). There, the plaintiff, an "addiction technician" at a hospital, also suffered from epilepsy. While at work, she suffered two minor seizures. Her employer discharged her due to her seizures and told her there were no jobs for her in the entire hospital. Deas sued, alleging her employer regarded her as having an impairment because the employer's assertion there were no other jobs she could work in at in the hospital proved they perceived her to be substantially limited in her ability to work in any clinic or hospital setting, including work as a housekeeper, secretary, groundskeeper, and a diverse assortment of other jobs. Id. at 480-81. The Fifth Circuit disagreed, holding that the evidence presented did not warrant the inference her employer regarded her as being unable to work in a broad class of jobs. Id. at 481. Rather, the evidence merely showed that her employer regarded Deas as unable to work in a few highly specialized jobs that required relatively high levels of vigilance or uninterrupted awareness. Id. at 481-82.
>
> Likewise, while Moore's comments perhaps raise a fact issue that Carrabbas perceived appellant as being unable to work at certain specific restaurant jobs because of his seizures, we do not view Moore's comments as indicative that even he perceived appellant as being unable to work to such an extent that would substantially limit a major life activity. We cannot make the inferential leap from Moore's minimal statements to conclude Carrabbas regarded appellant as being unable to work in a broad class of jobs or a broad range of jobs in various classes.

Id. at 454-55.

### D. Advice For Employers

- Employers should not jump to the conclusion that any injury an employee suffers automatically renders them disabled or entitles them to ADA protection. As McAlpin illustrates, such a response may lead a court to conclude that the employer perceived the employee as being disabled, even if they are not.

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- Generally speaking, unless an employee asserts that they are somehow disabled, notifies the employer of the physical or mental limitation resulting from the disability, and seeks an accommodation, employers should not offer a reasonable accommodation. Otherwise, as the Holihan case illustrates, there is a possibility that the employer's unilateral offers of "help" or "accommodation" could provide proof that the employer perceived the employee as being disabled, even though he or she really was not.

- Employers should train their managers not to say things that could lead to a "perceived as" claim. For example, managers should be trained not to tell an employee who has just been injured things like, "well, I certainly don't see how you will be able to walk or perform any job now," or other statements along those lines.

- If an employee seeks a reasonable accommodation for a limitation, and it is a close call as to whether they are actually disabled within the meaning of the ADA, an employer should strongly consider making a reasonable accommodation. At the same time, the employer should note that it is simply honoring the employee's request for accommodation and not necessarily making a determination that the employee is disabled under the ADA.

- Do not rely on a doctor's opinion if the opinion is not based on objective criteria and medical fact. Otherwise, as the ConAgra and Texas Bus Lines cases teach, a doctor's incorrect evaluation can bind the employer to a legally impermissible position.

- Employers should act on medical fact and not on stereotypes, myths, fears, or rumors. For example, an employer should not make an employment decision based upon the rumor that an employee has HIV. This would be probably be illegal under the ADA.

- Employers must make individualized assessments of medical conditions before concluding an employee's condition renders them unfit for a job. The assessment must be made by informed medical professionals, not personal or family experience with a disease or condition. Reliance on such flimsy foundations will get the employer in trouble, as it did in ConAgra.

## IV. THE INTERACTIVE PROCESS

Once an employee has made a request for an accommodation, the ADA's regulations state that "it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation" in order to craft a reasonable accommodation. 29 C.F.R. § 1630.2(o)(3). The EEOC's Interpretative Guidelines not only reinforce this directive but also stress that the interactive process requires the input of

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the employee as well as the employer. See 29 C.F.R. Pt. 1630, App. § 1630.9 at 359 (referring to the requirement as a "flexible, interactive process that involves both the employer and the qualified individual with a disability").

## A. Cases.

### 1. E.E.O.C. v. Chevron Phillips Chemical Co., LP, 570 F.3d 606 (5th Cir. 2009)

Here, the employee allegedly sought an accommodation by presenting a doctors note. Id. at 621. The employer argued that the note was insufficient notice, and the district court agreed. However, the Fifth Circuit rejected that finding based on the fact that the employer had long been on notice of the employee's medical condition (Chronic Fatigue Syndrome), and the note clearly related to that condition. Id. Once an employer receives a request for accommodation, the employer "is required to engage in the interactive process so that *together* they can determine what reasonable accommodations might be available." Id. (italics in original). Here, there was substantial evidence that the employer failed to engage in the interactive process, and instead set about to find a reason to terminate the plaintiff. Id. at 621-32. Accordingly, the district court's summary judgment was reversed and the case was remanded.

### 2. E.E.O.C. v. Agro Distribution, LLC, 555 F.3d 462 (5th Cir. 2009)

In this case, the Fifth Circuit held that even if an employee's anhidrotic ectodermal dysplasia, a condition which made him unable to perspire, was a disability under the ADA, a determination as to the reasonableness of accommodations provided by employer was precluded by the employee's failure to show up for work; in the past the employee was allowed to take breaks as necessary to cool himself off and employee stated the only accommodation he needed was air movement and clean water. The court noted that the ADA provides a right to reasonable accommodation, not to the employee's preferred accommodation. Id. at 471 (citing Hedrick v. Western Reserve Care System, 355 F.3d 444, 457 (6th Cir. 2004)). The court took the employee to task for walking off the job, rather than continuing to engage the employer in further discussions about his alleged need for accommodation. This aspect of the case was similar to the Loulseged case, discussed below. The essential message is that an employee may not claim an alleged failure to reasonably accommodate when they failed to engage in the interactive process or give the employer the opportunity to adequately respond.

### 3. Jenkins v. Cleco Power, LLC, 487 F.3d 309 (5th Cir. 2007)

In this case, the district court granted summary judgment for the employer, and the plaintiff appealed. The Fifth Circuit found the district court had erred in holding that the plaintiff was not disabled under the ADA. But, the Fifth Circuit still affirmed the summary judgment, finding that the employer reasonably accommodated the plaintiff's disability, and did not terminate the employee in retaliation for the employee's request of reasonable accommodation. The plaintiff alleged that the employer had failed to engage in the interactive process. The Fifth Circuit rejected the plaintiff's argument because after his injury the employer had placed the plaintiff in several different positions in an effort to find the most optimal accommodation.

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There was no evidence that the employer had failed to engage the plaintiff in an interactive process or that it was responsible for the fact that the plaintiff had rejected a position offered to him based on a mistaken understanding of his medical restrictions.

### 4. Cutrera v. Board of Supervisors of Louisiana State Univ., 429 F.3d 108 (5th Cir. 2005)

In this case, the plaintiff had Stargardt's disease, which is a form of macular degeneration. Her condition substantially limited her ability to see. Because of her condition, Cutrera was having problems performing her job. Cutrera testified that she set up a meeting with the school's ADA Coordinator for August 3, 1998, to discuss possible accommodations for her condition. At the meeting, however, the ADA Coordinator terminated Cutrera and refused to discuss accommodation issues. In reversing the district court's grant of summary judgment, the Fifth Circuit held that "[a]n employer may not stymie the interactive process of identifying a reasonable accommodation for an employee's disability by preemptively terminating the employee before an accommodation can be considered or recommended." Id. at 113.

### 5. Loulseged v. Akzo Nobel Inc., 178 F.3d 731 (5th Cir. 1999)

Loulseged is the Fifth Circuit's most complete discussion of the interactive process requirement. Loulseged was a lab tech in Akzo's Deer Park, Texas chemical facility. As part of her job, she was required to perform certain transport type functions on a rotating basis with the other lab techs at the facility. Specifically, during one week approximately every two months, Loulseged was required to cart 30-50 pound containers of chemical solvents and samples from one area of the facility to another.

After Loulseged injured her back and had surgery, her doctor medically restricted her from lifting more than 10 pounds, repetitive bending or stooping, and pushing or pulling carts. In response, Akzo reassigned her transport type duties to contract workers from Brown & Root. Later, these Brown & Root workers took over the transport responsibilities for all the Akzo lab techs.

In late 1994, Akzo discontinued its use of the Brown & Root contract workers to aid the technicians in their transport tasks. Loulseged asked her supervisor whether the Brown & Root contract workers would still be available when her rotation to perform the transport tasks began, which was still many weeks away at the time. Her supervisor responded that the Brown & Root contract workers would not be available. Her supervisor added that instead, she would be required to perform the transport functions using a one-gallon container, which would weigh 8-10 pounds. Later, at a meeting of lab techs, her supervisor discussed the possibility that they could use a "tricycle" to perform the transport functions. However, one week before her rotational duties were scheduled to begin, Loulseged announced her resignation.

Loulseged filed an ADA suit against Akzo based upon its alleged refusal to provide a reasonable accommodation for her disability. The district court granted Akzo judgment as a matter of law, and Loulseged appealed. On appeal, the Fifth Circuit addressed Loulseged's contention that a jury question existed as to Akzo's failure to initiate and participate in an interactive process with her to develop a reasonable accommodation.

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The court observed that when an employer's unwillingness to engage in a good faith interactive process leads to a failure to reasonably accommodate an employee, the employer violates the ADA. However, the court also noted that the responsibility for fashioning a reasonable accommodation is shared between the employee and the employer, and that an employer cannot be found to have violated the ADA when the responsibility for the breakdown of the "informal, interactive process" is traceable to the employee and not the employer. The court held that Akzo acted reasonably in initially offering Loulseged the opportunity to perform her transport duties using a one gallon container and at least mulling over the possibility that she and the other lab techs could use a tricycle to perform the duties. In contrast, Loulseged acted unreasonably by quitting, and thusly robbing "Akzo of a chance to complete the process and demonstrate its good faith." As a result, the court affirmed the decision to grant Akzo judgment as a matter of law. See also E.E.O.C. v. Agro Distribution LLC, 555 F.3d 462, 471-72 (5th Cir. 2009) (case described above affirming summary judgment against failure to accommodate claim in similar factual context).

**6. Taylor v. Principal Financial Group, Inc., 93 F.3d 155 (5th Cir.), cert. denied, 519 U.S. 1029 (1996)**

Taylor was a sales manager of Principal Financial's El Paso, Texas office. Beginning in June 1992, Taylor's performance began to sag, particularly in the areas of recruitment and production. After a performance appraisal in April 1993, Taylor told his boss that he had been diagnosed with bipolar disorder and depression and asked for a reduction in sales objectives and a "lessening of the pressure." Nonetheless, his boss continued to threaten him with termination if his performance did not improve. Ultimately, Taylor went on medical leave to obtain treatment for his mental health disorders and then sued Principal Financial for failing to reasonably accommodate his condition. The district court granted Principal Financial's motion for summary judgment, and the Fifth Circuit affirmed.

First, the Fifth Circuit rejected Taylor's contention that once he revealed his disability to his boss, Principal Financial had an affirmative obligation to offer a reasonable accommodation. The court rejected this contention because the ADA requires employers to accommodate *limitations* resulting from disabilities, not disabilities themselves. As the court stated:

> [T]he ADA does not require an employer to assume that an employee with a disability suffers from a limitation. In fact, better public policy dictates the opposite presumption: that disabled employees are not limited in their abilities to adequately perform their jobs.

Id. at 164.

Second, the court ruled that even if Taylor had notified Principal Financial of his alleged limitations, he failed to tender evidence showing that Principal Financial neglected to provide a reasonable accommodation. The court concluded that if an employee fails to request an accommodation, the employer cannot be held liable for failing to provide one. Moreover, the court ruled that:

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> Where the disability, resulting limitations, and necessary reasonable accommodations are not open, obvious, and apparent to the employer, as is often the case when mental disabilities are involved, the initial burden rests primarily upon the employee, or his health-care provider, to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations.

Id. at 165.

Because Taylor did not specifically identify any reasonable accommodation, Principal Financial could not be held liable for failing to reasonably accommodate him under the ADA.

#### 7. McAlpin v. National Semiconductor Corp., 921 F. Supp. 1518 (N.D. Tex. 1996)

McAlpin was an operator for National Semiconductor Corp. ("NSC"). Her job caused her to frequently inhale several chemical compounds. In April 1994, McAlpin provided NSC with a note from her physician that stated that she had sarcoidosis and should not be exposed to chemicals of any type in the future.

NSC pressed McAlpin for a more specific statement of the chemicals that she had to avoid because every job at NSC involved at least limited exposure to some chemical. However, McAlpin never provided NSC with any further medical guidance regarding the chemicals that she could be exposed to. Consequently, NSC concluded that McAlpin could no longer perform the essential functions of her job, because she could not work where chemicals were present, and terminated her employment.

Judge McBryde granted NSC's motion for summary judgment, partially on the ground that NSC could not be held liable for failing to reasonably accommodate McAlpin, because it was McAlpin, not NSC, who was at fault for obstructing the interactive process. McAlpin testified that she told NSC that, despite the wording of her doctor's note, her doctor had advised her that she was not required to avoid all chemicals, but only certain gases, acids, solvents, and bases that she used in her particular area. In response, NSC repeatedly asked McAlpin to either provide a list of the specific chemicals to which she could not be exposed from her physician, or execute a medical release, so that it could obtain her records from the physician. McAlpin did neither. In rejecting McAlpin's argument that NSC nonetheless should have contacted her physician by telephone, the court stated:

> Although determining a reasonable accommodation is supposed to be an interactive process, an employer does not have the responsibility to go in search of information, such as medical advice, that is uniquely in the hands of the employee, particularly, when the employee appears not to have been responsive to requests for further information.

Id. at 1525.

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### 8. Beck v. University of Wisconsin Bd. of Regents, 75 F.3d 1130 (7th Cir. 1996)

The aforementioned Loulseged and McAlpin cases both heavily rely upon the Beck decision. Beck is the first published circuit court opinion extensively analyzing the "interactive process" requirement. In this case, the plaintiff claimed that her former employer failed to reasonably accommodate her alleged disability. The evidence showed that the plaintiff never specifically told her former employer what reasonable accommodation she wanted. Moreover, when the employer asked the plaintiff to execute a release so that it could get her medical records, the plaintiff refused to sign the release.

The court concluded that the employer had reasonably attempted to engage in the interactive process but was unable to obtain information necessary to make a reasonable accommodation because the plaintiff refused to provide medical information or specifics regarding the accommodation she desired. As a result, the defendant was never to able to obtain an adequate understanding of what action it should take, and consequently, could not be held liable for failure to make a reasonable accommodation.

## B. Advice For Employers

- In general, employers should require the employee to initially invoke the ADA's "reasonable accommodation" requirement. The Fifth Circuit has held that where the disability, resulting limitations, and necessary reasonable accommodations are not open, obvious, and apparent to the employer, the initial burden primarily rests upon the employee, or his health-care provider, to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations. Taylor, 93 F.3d at 165. See also Loulseged, 178 F.3d at 736, n. 4 ("Accordingly, the burden is on the employee to request an accommodation.").

  Typically, an employer should not unilaterally offer a reasonable accommodation to an employee just because it learns that the employee has a disability or some other impairment. Rather, as the Fifth Circuit has noted, the employer should presume that a disabled or impaired employee is not limited in their abilities to adequately perform their job, unless otherwise specifically notified (or unless the disability, resulting limitations, and necessary reasonable accommodations are open and obvious). Thus, employers generally should not offer a reasonable accommodation to an employee unless and until the employee:

  (1) notifies the employer of their disability;

  (2) notifies the employer of the workplace limitation resulting from their disability and the need for a reasonable accommodation of the limitation; and

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(3) suggests a specific reasonable accommodation the employer could make.

- Once an employee properly invokes the “reasonable accommodation” requirement, an employer should still ask questions. Specifically, an employer should consider:

  (1) asking the employee for medical information, to determine if the employee’s medical condition meets the ADA definition of “disability,” which is a prerequisite for an employee to be entitled to a reasonable accommodation;

  (2) ask for medical information verifying that the employee’s disability has caused a workplace limitation that necessitates a reasonable accommodation;

  (3) require that the employee submit documentation about his disability and functional limitations from an appropriate health care or rehabilitation professional;

  (4) ask the employee to sign a limited release allowing the employer to submit a list of specific questions to the health care or vocational professional, so that the employer can obtain information necessary to verify the disability, its functional limitations, and the need for a reasonable accommodation; and

  (5) if the employee has asserted a mental disability, and the employee’s suggested reasonable accommodation is vague and indefinite, require that suggestions for a reasonable accommodation of the mental disability come from a mental health professional.

- Not only is a unilateral offer of a reasonable accommodation typically not required by the law, but it could actually do more harm than good. For example, in Holihan v. Lucky Stores, Inc., 87 F.3d 362 (9th Cir. 1996), cert. denied, 117 S. Ct. 1349 (1997), the employer dealt with an employee who had been engaging in misconduct by encouraging him to seek assistance through its employee assistance program. Later, when the employee sued under the ADA, the Ninth Circuit Court of Appeals relied upon that proof to conclude that there was a fact issue for the jury to decide regarding whether the employer regarded the employee as being disabled, even if he was not actually disabled under the ADA. On the other hand, in the Hamilton case, the employer referred the plaintiff for EAP assistance, but the Fifth Circuit still rejected his “regarded as disabled” claim. Hamilton, 136 F.3d at 1051.

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- According to the EEOC, an employer is only required to initiate the reasonable accommodation interactive process without being asked if the employer: (1) knows that the employee has a disability; (2) knows or has reason to know that the employee is experiencing workplace problems because of the disability; and (3) knows or has reason to know that the disability prevents the employee from requesting a reasonable accommodation. If the individual with a disability states that they do not need a reasonable accommodation, the employer will have fulfilled its obligation. Moreover, it would seem that such circumstances would be extremely rare. Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act at 23 (1999).

- On the other hand, once an employee has made their condition known, identified the workplace problem their condition causes, and takes steps to ask for an accommodation, then employers may not simply avoid their duty to engage in an interactive process by terminating the employee. Cutrera, 429 F.3d at 113. Rather, they must go through the interactive process. Id.

- Employers should document all the efforts they have undertaken in the interactive process. In addition, if the employee fails to provide necessary information, or suggest an accommodation, that too should be contemporaneously documented.

- Require physicians who examine employees to determine whether or not they can perform the essential functions of their job, based upon a clear, but comprehensive, written explanation of what the essential functions of the employee's job are. Also, if the employer ultimately concludes that there is no reasonable accommodation available, it should notify employees of that conclusion, tell them why they have reached that conclusion, and also give them some amount of time to provide information that would change the conclusion.

- The EEOC, as well as some courts, take the position that when an employer knows of an employee's mental disability, the employer may have some greater obligation than normal to work proactively with the employee in determining whether the mental disability has caused a workplace limitation and in crafting a reasonable accommodation. See, e.g., Miller v. Illinois Department of Corrections, 107 F.3d 483 (7th Cir. 1997) (if the "nature of the disability is such as to impair the employee's ability to communicate his or her needs, as will sometimes be the case with mental disabilities, the employer, provided of course, that he is on notice that the employee has a disability, has to make a reasonable effort to understand what those needs are even if they are not clearly communicated to him"). The Fifth Circuit's opinion in Taylor, however, indicates that it does not share that view of the law.

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- Involve counsel during all phases of the interactive process.

## V. REASONABLE ACCOMMODATION

Under the ADA, employers are required to make reasonable accommodations for disabled employees if such accommodations would allow them to perform the essential duties of their job. The ADA defines "reasonable accommodation" as:

> (1) making existing facilities used by employees readily accessible to and useable by persons with disabilities; and
>
> (2) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials, or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111 (9).

### A. Cases.

#### 1. U.S. Airways v. Barnett, 122 S. Ct. 1516 (2002)

In this case, the Supreme Court addressed the question of whether the ADA requires an employer to reassign a disabled employee with less seniority to a vacant position as a reasonable accommodation.

Barnett injured his back while working as a non-union baggage handler for U.S. Airways, Inc. On doctor's orders, he switched to a job in the mailroom that did not require heavy lifting. When mailroom jobs became open for bid under the airline's seniority system, Barnett lost his mailroom assignment and was eventually terminated. The district court granted summary judgment for the employer. The Ninth Circuit Court of Appeals reversed, holding that an employer may have to set aside seniority when finding a new job for an otherwise qualified disabled worker.

The Supreme Court held that, in most cases, the ADA's reasonable accommodation duty does not require employers to deviate from seniority-based systems, even if those systems disadvantage otherwise qualified employees with disabilities. However, the employee may be able to show special circumstances justifying an exception to the seniority-based rule. The burden in this regard is on the employee, and employers do not have to reexamine seniority-based systems each time that an exception is requested as an accommodation. Thus, the Court ruled that in general, an employer is entitled to follow its neutral job-placement system, such as seniority, so long as that system is consistently applied. The Court's ruling means that the ADA's reasonable accommodation duty does not necessitate an affirmative measure that would impinge on seniority of co-workers without disabilities.

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However, the Court did recognize that there could be exceptions to this general rule. For example, if the company had frequently deviated from a seniority system in the past, it might have to do so as a reasonable accommodation. Otherwise, the Court held that an employer need not revisit seniority-based policies on a case-by-case basis every time an employee with a disability requests an exception to the employer's policy. Rather, employers can lawfully apply seniority policies in most cases, even to the disadvantage of employees with disabilities, unless the employee can demonstrate "special circumstances" which would warrant an exception to the seniority-based rule.

#### 2. E.E.O.C. v. Agro Distribution, LLC, 555 F.3d 462 (5th Cir. 2009)

In this case, the Fifth Circuit held that even if an employee's anhidrotic ectodermal dysplasia, a condition which made him unable to perspire, was a disability under the ADA, a determination as to the reasonableness of accommodations provided by employer was precluded by the employee's failure to show up for work; in the past, employee was allowed to take breaks as necessary to cool himself off and employee stated the only accommodation he needed was air movement and clean water. The court noted that the ADA provides a right to reasonable accommodation, not to the employee's preferred accommodation. Id. at 471.

#### 3. Reed v. Petroleum Helicopters, Inc., 218 F.3d 477 (5th Cir. 2000)

Reed was a helicopter pilot for PHI. She suffered a work related back injury in 1986, but subsequently returned to work. In January 1994, she dislocated her shoulder in an off-the-job injury and took a leave of absence. In May 1994, she submitted a letter from her doctor indicating she could fly, but only in a two-pilot aircraft.

FAA and PHI regulations require that all pilots must be able to fly their aircraft on their own, without depending on another pilot. Consequently, PHI's vice-president of human resources advised Reed that her doctor's restrictions were unacceptable, and that until she produced a valid airmen's medical certificate, she could not return to work.

Reed produced a valid airmen's medical certificate in January 1995, and subsequently returned to work flying helicopters. However, in March 1995, she went on medical leave because of back pain, high blood pressure, and the flu. Because Reed's prior injuries had exhausted her leave under PHI's leave policy, Reed was placed on leave under the Family and Medical Leave Act. She was advised that this leave would expire on June 2, 1995.

On June 2, 1995, Reed's employment with PHI was terminated. Later the same month, her doctor issued a report stating that she was still unable to work and could not be a pilot. Given her condition, Reed applied for disability benefits with ITT Hartford, as well as the Social Security Administration. As part of her application process, she declared under oath that she could not perform "all of the physical demands necessary to fly a helicopter." Nonetheless, in 1996, Reed filed a lawsuit against PHI under the ADA. In 1997, she received a new airmen's medical certificate.

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The district court granted PHI's summary judgment. In affirming that summary judgment, the Fifth Circuit first held that Reed's representations to the Social Security Administration in an attempt to obtain benefits, wherein she stated that she could not work, definitely could not fly a helicopter safely, and was in fact "totally disabled," precluded her from contending that she was a qualified individual with a disability within the meaning of the ADA. Id. at 479. In addition, the court held that PHI had no obligation to place her on an indefinite leave of absence whenever she was unable to fly. As the court stated:

> Moreover, Reed makes no argument that her employer had any duty to retain her after she exhausted 9 months of company leave, all of her vacation time, and 12 weeks of leave under the FMLA. Specifically, Reed does not argue that PHI should have accommodated her by placing her on indefinite leave whenever she was unable to fly. Courts confronted with that request routinely deny the reasonableness of such accommodations. See, e.g., Rogers v. International Marine Terminals, Inc., 87 F.3d 755, 759 (5th Cir. 1996) (citing Myers v. Hose, 50 F.3d 278, 280. 283 (4th Cir. 1995)). Thus, Reed's termination was not wrongful.

Id.

### 3. Allen v. Rapides Parrish School Board, 204 F.3d 619 (5th Cir. 2000)

Allen held an administrative position with an elementary school in Louisiana. He had tinnitus, a condition causing a constant ringing in his ears which often incites nervousness and agitation. The effects of the tinnitus were mitigated by ambient noise that masks the ringing sound.

In December 1994, Allen told his supervisor that he wanted a transfer to the position of principal in an elementary school because working alone in rooms as a coordinator aggravated his tinnitus. In response, his supervisor rejected Allen's idea that he be given a principal position, but gave him the choices of: (1) closing his door and playing music; (2) moving his office to an area close to where videos are recorded; or (3) putting a television in his office. Allen dismissed each of these suggestions, and instead went on sick leave.

When Allen returned from sick leave he was given the position of librarian at a high school. When he complained that the library position did not produce enough background noise to mitigate the symptoms of his tinnitus, he was transferred to a librarian position at another school, which did produce enough background noise to alleviate his tinnitus. That position, however, resulted in a decrease of his yearly salary of approximately ten thousand dollars. Allen sued the school board for failing to accommodate him by giving him a principal position which would have allowed him to maintain his prior salary. The district court granted summary judgment in favor of the school board, and Allen appealed.

The Fifth Circuit held that the choices the school board gave Allen constituted offers of reasonable accommodations under the ADA, and thus the school board was not liable. Regarding Allen's complaint that he should have been transferred to a principal position, the

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Fifth Circuit held "the ADA does not require an employer to give an employee with a disability his job of choice especially when there are qualified individuals who desire the same position." (citation omitted). The Fifth Circuit held that the ADA did not impose an obligation upon the school board to prefer Allen over non-disabled employees for open positions, including the principal position. The court stated, "the ADA gives Allen a claim only for discriminatory action and not for unfair treatment." Id. at 623 (citing Armstrong v. Turner Industries, Inc., 141 F.3d 554, 560 n. 16 (5th Cir. 1998); Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995), cert. denied, 116 S. Ct. 1263 (1996)). Accordingly, the Fifth Circuit affirmed summary judgment in the school board's favor.

#### 4. Gonzales v. City of New Braunfels, Texas, 176 F.3d 834 (5th Cir. 1999)

Approximately two years after being hired as a police officer with the City of New Braunfels, Gonzales developed diabetes mellitus. Despite his condition, Gonzales remained with the force for the next 10 years, successfully performing all of the duties of his job. During the winter of 1995 and the fall of 1996, however, Gonzales failed his routine firearms requalification test and his driving requalification test as well. The police chief initiated a disability investigation, and the doctor determined that Gonzales suffered from severe diabetic neuropathy which limited his ability to drive safely and handle firearms. As result of this determination, Gonzales was required to take early medical retirement.

Gonzales sued under the ADA, and the district court granted summary judgment in favor of New Braunfels. The Fifth Circuit affirmed. In doing so, it addressed Gonzales' contention that the city could have accommodated his physical limitations in one of two ways.

First, Gonzales claimed that the city could have reasonably accommodated his condition by giving him an opportunity to retest on both his firearms and driving tests. The Fifth Circuit rejected this argument because it concluded that, with or without the retesting, the undisputed evidence was that Gonzales' medical condition rendered him unqualified to safely drive his police car.

Second, Gonzales contended that the city could have reasonably accommodated his limitations by reassigning him to the position of evidence technician, which was vacant at the time he retired. The Fifth Circuit rejected this argument because Gonzales failed to produce sufficient evidence to raise a genuine issue of material fact as to whether he was qualified for the evidence technician position, with or without reasonable accommodation.

#### 5. Burch v. City of Nacogdoches, 174 F.3d 615 (5th Cir. 1999)

Burch was a firefighter with the City of Nacogdoches. He hurt his back while rescuing a co-worker trapped in the attic of a burning house. After an extended leave, he was released by his doctor to return for light-duty work only. Approximately twenty months after his injury, Burch had still not received a full work release, so the city terminated his employment. Burch sued under the ADA, and the district court granted summary judgment for the city.

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On appeal, Burch contended that the city should have reasonably accommodated him by creating a light-duty job. The court rejected this argument because an essential duty of any firefighter is to fight fires, and Burch could not do that. Because the ADA does not require an employer to relieve an employee of any essential functions of his or her job, he could not be reasonably accommodated as a matter of law.

Burch also contended that he could have been accommodated through reassignment to a vacant non-firefighter position. The court rejected this argument because there was no proof that Burch had ever asked for a transfer to a vacant position, was qualified for any vacant position, or had ever been medically released for any such work.

### 6. Robertson v. The Neuromedical Center, 161 F.3d 292 (5th Cir. 1998), cert. denied, 119 S. Ct. 1575 (1999)

Robertson was a neurologist with Attention Deficit Hyperactivity Disorder ("ADHD"). He was terminated after numerous performance problems. In affirming summary judgment against the plaintiff, the Fifth Circuit reiterated that the law does not require an employer to transfer from a disabled employee any of the essential functions of his job. See also Jones v. Kerrville State Hospital, 142 F.3d 263 (5th Cir. 1998); Barber v. Nabors Drilling U.S.A., Inc., 130 F.3d 702, 709 (5th Cir. 1997).

### 7. Hypes v. First Commerce Corp., 134 F.3d 721 (5th Cir. 1998)

In this case, Hypes was terminated for excessive absenteeism. Summary judgment was granted in the employer's favor, and the Fifth Circuit affirmed. In doing so, the Fifth Circuit stated that:

- An employer is generally not required to allow a disabled worker to work at home, where productivity inevitably would be greatly reduced.
- Attendance is an essential function of most every job. Thus, someone who is incapable of regular attendance is generally not a qualified individual under the ADA.

### 8. Burch v. Coca-Cola Co., 119 F.3d 305 (5th Cir. 1997), cert. denied, 118 S. Ct. 871 (1998)

Burch was a Coca-Cola manager and a recovering alcoholic. After some inappropriate behavior at a company-sponsored dinner, Burch checked himself into Charter Hospital to undergo treatment for alcohol abuse. After his release, Burch requested that he be returned to his job. Instead, Coca-Cola terminated Burch for his behavior at the dinner.

Burch sued under the ADA, and the jury awarded him more than seven million dollars in punitive and compensatory damages. On appeal, the Fifth Circuit reversed the award and rendered judgment against Burch.

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One of Burch's claims was that Coca-Cola violated the ADA's reasonable accommodation requirement by refusing his request to return to work after his treatment at Charter Hospital. The Fifth Circuit held that this was not a proper reasonable accommodation claim because a "second chance" or a plea for grace is not an accommodation as contemplated by the ADA. Id. at 319-20.

### 9. Foreman v. Babcock & Wilcox Co., 117 F.3d 800 (5th Cir. 1997), cert. denied, 118 S. Ct. 1050 (1998)

In this case, the Fifth Circuit held that the ADA's reasonable accommodation requirement does not require an employer to take action inconsistent with the contractual rights of other workers under a collective bargaining agreement.

### 10. Turco v. Hoechst Celanese Chemical Group, Inc., 101 F.3d 1090 (5th Cir. 1996)

In this case, the plaintiff claimed that the employer should reasonably accommodate his limitation by changing his schedule from a rotating shift to a straight day-shift position. The court rejected the plaintiff's contention because the employer proved that moving the plaintiff to a straight day-shift would place a heavier burden on the rest of the employees in the plant where the plaintiff worked. The court stated that "an accommodation that would result in other employees having to work harder or longer is not required under the ADA."

### 11. Riel v. Electronic Data Systems Corp., 99 F.3d 678 (5th Cir. 1996)

Riel was a systems engineer for EDS. Because of his diabetic condition, he experienced vision and renal system health problems. These problems caused severe fatigue, which periodically interfered with his job performance. As part of his job, he had "milestone deadlines" and "final deadlines" for each project. While Riel sometimes missed milestone deadlines, he never missed a final deadline on any project.

EDS ultimately fired Riel for missing 13 milestone deadlines. Riel sued under the ADA, and the district court granted summary judgment in EDS's favor, finding that Riel was not a "qualified individual with a disability" because he could not perform the essential function of meeting milestone deadlines, with or without an accommodation. The Fifth Circuit reversed.

The Fifth Circuit noted that a "qualified individual with a disability" is someone who can perform the essential functions of the employment position with or without a reasonable accommodation. The evidence conflicted regarding whether meeting milestone deadlines was an essential function. Since it may not have been, it is possible that a jury could conclude that Riel's failure to meet the milestone deadlines did not render him "unqualified."

Moreover, the court held that Riel proposed two potentially reasonable accommodations to EDS: (1) further adjustment of the milestone deadlines; and (2) transfer to a position without milestone deadlines. In response to EDS's argument that transfer was not possible because of its

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policy against transferring employees with poor ratings, the court concluded that EDS was attempting to impose an improper burden on Riel. The court stated:

> EDS legally enjoys the affirmative defense of "undue hardship." But as EDS did not plead "undue hardship" and conceded below that it was not defending on those grounds at the summary judgment stage, our focus is limited to whether Riel has identified accommodations reasonable "in the run of cases." . . . EDS may not place the burden of proof of undue hardship on Riel merely by refusing to plead the affirmative defense and then attacking his proposed accommodations as unreasonable in his specific circumstance; Congress' intent was to place that burden on the employer. Rather, if EDS wishes to refute Riel's proposed accommodations as unreasonable in his specific circumstances, it must plead the defense and offer evidence to support it.

Id. at 684.

#### 12. Rogers v. International Marine Terminals, Inc., 87 F.3d 755 (5th Cir. 1996)

In this case, the Fifth Circuit held that the ADA does not require an employer to grant a disabled employee "indefinite leave" as a reasonable accommodation.

### B. Texas State Court Decisions Under Chapter 21

#### 1. Davis v. City of Grapevine, 188 S.W.3d 748 (Tex. App.–Fort Worth 2006, pet. denied)

Multiple sclerosis prevented Davis from being physically able to continue performing the essential functions of his job as a firefighter/paramedic. He was terminated. Davis sued, arguing that the City could have reasonably accommodated him by assigning him to light-duty work in his firefighter/paramedic job or by transferring him to another job within the city. Because the City had done so in the past to accommodate two other firefighter/paramedics, the court held that it would have been reasonable for it to have done so for Davis. The City argued that Davis's situation was different because, unlike the past situations, when Davis's condition arose, it was under severe budget constraints at the time, and, thus, did not have the funds to create a light-duty position. The court found that this argument constituted an "undue hardship" defense, which the City had failed to properly raise in its summary judgment motion. Thus, the City could not rely on the fact that Davis's situation was different than the prior cases to support its summary judgment.

The court in this case also recited the fact that Davis had asked to be transferred to a vacant position for which he was qualified. Yet, the City required Davis to apply for that vacancy like any other employee. The court held that, under the law, the City was required to simply give the job to Davis as a reasonable accommodation. In reaching this conclusion, the court ignored Fifth Circuit law that directly rejects its holding (see Allen v. Rapides Parrish School Board, 204 F.3d 619, 622-23 (5th Cir. 2000) and Daugherty v. City of El Paso, 56 F.3d 695 (5th Cir. 1995), cert. denied, 116 S. Ct. 1263 (1996)) and instead relied upon cases from two

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other circuits. See Smith v. Midland Brake, Inc., 180 F.3d 1154,1164 (10th Cir. 1999) and Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1304 (D.C. Cir. 1998).

### 2. **Johnson v. Hoechst Celanese Corp., 127 S.W.3d 331 (Tex. App.– Corpus Christi 2004, no pet.)**

Johnson had an injured shoulder and underwent several surgeries. In October of 1997, Severo Garza transferred into Johnson's division and became her supervisor. He assigned her a full-time helper. Soon after, he took away the full-time helper because he thought it was an unreasonable accommodation. Johnson eventually lost her job.

Johnson filed suit against Hoechst Celanese Corporation ("HCC") for failing to grant her a reasonable accommodation. Summary judgment was granted for HCC and an appeal followed. On appeal, HCC argued that Johnson's request for a full-time helper was unreasonable as a matter of law. Johnson did not dispute that point, but instead asserted that she had also requested, and been denied, "access to a helper to work with me." Without any additional analysis, the court of appeals held that was enough to create a question of fact on whether HCC had failed to reasonably accommodate Johnson. Id. at 882.

### 3. **Jenkins v. Guardian Indus. Corp., 16 S.W.3d 431 (Tex. App.– Waco 2000, pet. denied)**

Jenkins was employed by Guardian in 1984 at its glass manufacturing plant in Corsicana. On January 25, 1993, Jenkins injured his knee while working and filed a workers' compensation claim. Jenkins continued on "light duty" through March of 1993, when he had surgery. From March of 1993 until June of 1994, Jenkins did not work at all and received medical and indemnity benefits from Guardian's workers' compensation carrier. His workers' compensation benefits ceased after sixteen months and, because the long-term disability insurance carrier determined that Jenkins was not totally disabled from working in all occupations, his long-term disability benefits also ceased on August 30, 1994.

In a letter dated August 10, Guardian notified Jenkins that his benefits would cease on August 30 and also informed him that he could continue his health insurance coverage at his own expense for an additional 18 months. On August 18, Jenkins' doctor signed a release stating that he could "return to full duties." Jenkins returned to Guardian on August 30 with the release and stated that he was ready to return to work, although he could not bend his knee and, therefore, his abilities were limited. He admitted that his doctor did not really believe he was ready to return to work, but signed the release because he asked for it. Guardian conditionally offered Jenkins a position on the "raw glass production line," as this was the "only job available." Jenkins attempted to perform a "return-to-work physical" which tested whether Jenkins could perform the position offered, but he could not pass it. Jenkins indicated that he believed he could perform one of the jobs "in the warehouse," but he was not offered any position other than the one on the production line. On September 30, Guardian notified Jenkins in writing that their employment relationship was terminated.

Jenkins sued Guardian for (among other things) disability discrimination and failure to make a reasonable accommodation. Guardian argued that Jenkins was terminated because he

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could not perform the production job, which, it asserted, was the only job which was available at the time he wanted to return to work. The trial court granted Guardian's summary judgment motion and Jenkins appealed. The Waco court of appeals reversed, stating:

> Jenkins filed an affidavit in an attempt to show that Guardian's stated reason for termination is false. He states that, after his injury, he could do jobs "such as [his] old job in the warehouse," but Guardian would not place him in those positions. Guardian offered him only a position which he could not perform and refused to "accommodate" him in a "light duty" position. He also offered evidence that Guardian had made the decision to terminate him prior to conducting a physical examination to see if he was able to perform the job.
>
> Jenkins asserts that he is able to reasonably perform a job if Guardian will fulfill its obligation to make "reasonable accommodation." The types of reasonable accommodation which he suggests include: 1) assigning him to light duty work; 2) assigning him to a position occupied by a temporary worker; or 3) allowing him to take vacation time or unpaid leave until a job that he could perform becomes available. In response, Guardian says that the summary judgment evidence shows that Jenkins could not perform any job at the plant, available or not, and that it had no duty to create a position which Jenkins could perform.
>
> Considered in the light most favorable to Jenkins, the record shows that Guardian considered only whether Jenkins could perform the "lower-line" raw glass production position which was available at the time Jenkins wanted to return to work. It is undisputed that this is a hard-labor job. Guardian did not consider whether Jenkins could perform any of the jobs that were being filled by temporary workers. The evidence shows that temporary workers are paid considerably less than full-time Guardian employees and receive no benefits. Guardian said it did not consider placing Jenkins in one of those positions because it would not be "cost-effective."
>
> The evidence shows that jobs exist in the warehouse at Guardian which are considered "light duty." In the past, Jenkins and other employees worked on these "light duty" jobs after injuries. Jenkins was not offered a light duty position in the warehouse, but Guardian contends that no such job was available at the time Jenkins wanted to return to work. Furthermore, Guardian asserts that the regular practice is to rotate employees through the warehouse jobs in an effort to minimize the monotony of the job and thereby reduce the risk of injury. Thus, it says, putting Jenkins in one position when he could not perform all the others would have placed a burden on the rotation schedule. However, there is also some evidence that employees were allowed from time to time to refrain from rotating until they were able to perform some of the other jobs. This option was not provided to Jenkins.

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> The evidence also shows that other injured employees were put on leave to retain their employee status and not lose their accrued benefits until a job which they could perform became available. This option was not given to Jenkins.
>
> Guardian also asserts the "undue hardship" defense provided by section 21.260 of the TCHRA. Id. § 21.260. At a trial, it would bear the burden of proof on its defense. Austin State Hosp., 903 S.W.2d at 91. In the summary judgment context, it bears the burden of conclusively establishing every element of this affirmative defense. See Williams, 955 S.W.2d at 268.
>
> Considered in the light most favorable to Jenkins, the summary judgment evidence does not conclusively establish that Guardian would have suffered an undue hardship in allowing Jenkins to take advantage of one of the alternative jobs raised by the summary judgment evidence until he was able to fully perform other jobs. See Austin State Hosp., 903 S.W.2d at 92.
>
> Giving Jenkins the benefit of all inferences and construing the evidence in the light most favorable to him, we find that genuine issues of material fact exist about whether, with reasonable accommodation, Jenkins could have reasonably performed the essential functions of any available job at Guardian. Thus, we find fact issues about whether Jenkins was fired in violation of the TCHRA.

Id. at 440-41.

### C. **Advice For Employers.**

- When confronted with a reasonable accommodation request, employers should contemporaneously document the chronology of events, so that they will be able to successfully defend any eventual ADA claim.
- Offers of reasonable accommodation should be put in writing to the employee. If an employee rejects a reasonable accommodation, the employer should also document his rejection.
- Before taking adverse action against an individual with a disability-related impairment or deciding he is not qualified or cannot perform the essential functions of the job even with a reasonable accommodation, an employer should share its description of the essential functions of the job with the individual in an interactive dialogue, and thereafter, ask him to state in writing: (1) his qualifications; (2) whether he can perform the essential functions of the job without accommodation; (3) if not, what accommodation he believes would allow him to perform the essential functions of the job; and (4) whether he would accept the accommodation offered by the employer (if any).
- Employers should develop a procedure for engaging in the interactive process and making a reasonable accommodation. The procedure should

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include: (1) obtaining information to analyze the employee's "disabled" status; (2) verifying that any alleged workplace limitation results from the alleged disability; (3) analyzing the particular job involved to determine its purpose and essential functions; (4) consulting with the employee to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation; (5) consulting with the individual to identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and (6) selecting and implementing the accommodation that is the most appropriate for both the employee and employer, unless there is no available reasonable accommodation.

- Unless an employer is prepared to affirmatively prove "undue hardship," it should not reject a proposed reasonable accommodation on the ground that the proposal is unreasonable based upon the employee's specific circumstances. As Riel teaches, an employee need only offer an accommodation that is reasonable in the "run of cases." Riel, 99 F.3d at 683. If the proposed accommodation is reasonable in the "run of cases," the employer must make the accommodation, unless they can show that the proposed accommodation would present an "undue hardship" when applied to the employee's specific circumstances, or can offer some other effective reasonable accommodation. Id. at 684. Proving undue hardship is difficult. Moreover, it is a factually intense affirmative defense, and obtaining summary judgment based upon "undue hardship" is unlikely.

- As several Fifth Circuit decisions teach, an employer need not transfer a disabled employee as part of a "reasonable accommodation" unless: (1) the employee is qualified for the position to which they desire a transfer; (2) there is an actual opening; and (3) the employee asks for the transfer. As the Court stated in Jenkins v. Cleco Power, LLC, 487 F.3d 309 (5th Cir. 2007), "[a] disabled employee has no right to a promotion, to choose what job to which he will be assigned, or to receive the same compensation he previously received." (citing Allen v. Rapides Parish Sch. Bd., 204 F.3d 619, 622-23 (5th Cir. 2000)).

- Employers need not hire extra employees to perform work that a disabled employee is unable to perform because of their disability. Burch, 174 F.3d at 621; Robertson, 161 F.3d at 295.

- Employers should not require releases for "full duty" before they allow a disabled employee on leave to return to work. Rather, employers should simply require that the employee present proof that they are medically released to perform the essential functions of their job. Barber illustrates the point. See Barber, 130 F.3d at 705 (employer that would not allow employee to return to work until he received "full medical release"

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violated the ADA, because even without a "full medical release," the employee would have been able to perform the essential functions of his job).

- Similarly, as Barber and an even more recent case teach, employers should take care not to terminate an employee for not being able to do part of their job, if that part is only a marginal or non-essential function. See Carmona v. Southwest Airlines Co., 604 F.3d 848, (5th Cir. 2010) (on specific facts of case, regular attendance was not an essential function of job, so employee's inability to regularly attend work did not render him unqualified for his position).

- This is so because, as Barber and Carmona illustrate, under the ADA, an employee is qualified for their job so long as they can perform the "essential functions" of the job, with or without reasonable accommodation. 42 U.S.C.A. § 12111(8); Barber, 130 F.3d at 706. The term "essential functions" means the fundamental job duties of the employment position the individual with a disability holds or desires. 29 C.F.R. § 1630.2(n). The term "essential functions" does not include the marginal functions of the position. *Id*. Under the ADA:

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

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

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

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

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

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

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

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

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

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

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

Id.; see Barber, 130 F.3d 706 (approving of district court's instruction that essentially repeated these factors and noting that whether a duty is essential or not is ordinarily a fact question for the jury to decide).

- Employers who use company doctors, or any other medical professionals, to help decide whether an employee is a "qualified individual with a disability," and whether a particular reasonable accommodation would work, need to be sure that the doctor has been to the facility to inspect the job requirements and has made an individualized assessment of the particular employee's situation. This advice is important because if a medical professional decides an employee is unable to perform a job's essential functions based on an incorrect job description, then an employer that relies on that decision will have committed an ADA violation. See, e.g., Giles v. General Elec. Co., 245 F.3d 474 (5th Cir. 2001) (upholding over $400,000.00 verdict against GE because it refused to allow the plaintiff to return to work based on a doctor's opinion that he could not do his job, but the doctor was given the wrong job description).

- Employers may use reassignment to a vacant position as a reasonable accommodation. Note that the EEOC has concluded that it is permissible to pay the employee based on the rate for the vacant position, even if it is lower paying than the position the employee previously occupied.

- As the Fifth Circuit decisions in Reed and Rogers demonstrate, an employer need not provide an indefinite leave of absence to an employee as a reasonable accommodation. However, employers should not take this too far because, in certain circumstances, extending a leave of absence a short while may be a required reasonable accommodation. For example, in the case of Garcia-Ayala v. Lederle Parenterlas, Inc., 212 F.3d 638 (1st Cir. 2000), the company had a leave of absence policy that allowed employees to take disability leave for up to one year. If an employee exceeded that time period, they were automatically terminated. Garcia-Ayala had been diagnosed with breast cancer and took a leave of absence to undergo several surgeries, chemotherapy, and ultimately, a bone marrow transplant. At the end of her one-year leave of absence, her doctor authorized her to return to work in seven weeks. However, the company refused her request for an extra seven weeks leave and terminated her pursuant to its one-year leave of absence policy. Garcia-Ayala sued, and the district court granted her former employer's motion for summary judgment. On appeal, however, the First Circuit Court of Appeals reversed the district court's decision. The court said that extending Garcia-Ayala's leave of absence would not have been an undue hardship on the company because she did not ask for open-ended time off. In addition, the evidence showed that the company could have handled her job functions with temporary workers, and noted that the company failed

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to present any evidence that an additional seven weeks leave would have affected company operations or negatively impacted the ability of other employees to do their jobs. Accordingly, as this case teaches, employers are not always on solid ground in relying upon company policies that provide employees will be terminated after being on a leave of absence after a certain period of time. Rather, when confronted with a request for leave as a reasonable accommodation, employers should: (1) consider whether granting the leave will cause an undue burden, in terms of cost, and effect on other employees; (2) evaluate the employee's special skills, and if there are none, consider having temporary workers do their work on an interim basis; (3) be sure to obtain a specific return date, and if the employee cannot provide one, then consider denying the request pursuant to the logic set forth in Reed and Rogers; and (4) get legal advice to be sure your decision complies with the latest ADA case law.

**D. Conflicts Between Fifth Circuit Authority And The EEOC's Reasonable Accommodation Guidance.**

On October 17, 2002, the EEOC released an enforcement guide entitled "Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act" ("EEOC Guidance"). This updated the EEOC's previous guidance of the same name that was issued in March 1999. There are a number of conflicts between the EEOC's Guidance and Fifth Circuit cases. Those conflicts are set forth below.

- According to the EEOC Guidance, attendance is not necessarily an essential function of a job under the ADA because it is not one of the "fundamental job duties of the employment position." This conflicts with the Fifth Circuit's holdings in Hypes, 134 F.3d at 721 and Rogers, 87 F.3d at 759. It also conflicts with the holdings of numerous other courts from around the country.

- According to the EEOC Guidance, providing indefinite leave is a form of required reasonable accommodation unless an employer is able to show that the lack of a fixed return date causes them an "undue hardship." This position conflicts with the Fifth Circuit's holding in Rogers, where the court held that reasonable accommodation under the ADA does not require an employer to wait indefinitely for the employee's medical condition to be corrected while they are out on leave. Rogers, 87 F.3d at 759.

- The EEOC Guidance states that an employer's obligation to offer reassignment to a vacant position as a reasonable accommodation is not limited to those vacancies within the employee's office, branch, agency, department, facility, personnel system, or geographical area. Rather, the employer must consider vacant positions in its entire operations, unless to do so would impose an undue hardship. While the Fifth Circuit has not expressly made a holding on this issue, the EEOC Guidance is contrary to the holding in Emrick v. Libbey-Owens-Ford Co., 875 F. Supp. 393, 398 (E.D. Tex. 1995), where Judge Brown held that an employer is not

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required by the ADA to offer a disabled employee a transfer to another of its facilities to reasonably accommodate their disability, absent evidence that the employer regularly transferred its employees between its facilities.

- The EEOC Guidance states that the reasonable accommodation of reassignment does not simply mean that the employee should be permitted to compete for a vacant position. Rather, it means that the employee actually receives the vacant position if they are qualified. This position is at odds with the Fifth Circuit's decision in Daugherty v. City of El Paso, 56 F.3d 695 (5th Cir. 1995), cert. denied, 116 S. Ct. 1263 (1996), where the court held:

  > [W]e do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled. It prohibits employment discrimination against qualified individuals with disabilities, no more and no less.

  Id. at 700. See also Allen v. Rapides Parrish School Board, 204 F.3d 619, 622-23 (5th Cir. 2000) ("The ADA does not require an employer to give an employee with a disability his job of choice especially when there are qualified individuals who desire the same position.") (citation omitted); Jenkins v. Cleco Power, LLC, 487 F.3d 309 (5th Cir., May 18, 2007), "[a] disabled employee has no right to a promotion, to choose what job to which he will be assigned, or to receive the same compensation he previously received." (citing Allen v. Rapides Parish Sch. Bd., 204 F.3d 619, 622-23 (5th Cir. 2000)).

  The Tenth Circuit Court of Appeals relied upon the EEOC Guidance in holding that the reasonable accommodation of reassignment to a vacant position means that the employee is actually given the vacant position, not merely that the employee is allowed to compete on an equal basis with other applicants for the position. See Smith v. Midland Brake, Inc., 180 F.3d 1154,1164 (10th Cir. 1999) (en banc). Defying the Fifth Circuit, the Fort Worth Court of Appeals agreed with this holding in Davis v. City of Grapevine, 188 S.W.3d 748 (Tex. App.–Fort Worth 2006, pet. denied). On the other hand, the Seventh Circuit has sided with the Fifth Circuit, and rejected the EEOC's position, stating, "the ADA does not require an employer to reassign a disabled employee to a job for which there is a better applicant, provided it is the employer's consistent and honest policy to hire the best applicant for the particular job in question rather than the first qualified applicant." EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1029 (7th Cir. 2000).

- The EEOC Guidance provides that whether an employee is a "qualified individual with a disability" is decided based upon whether the employee can perform the essential functions of any available job within the company, with or without a reasonable accommodation. In other words, according to the EEOC Guidance, an

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employee can be a "qualified individual with a disability" when that employee is unable to perform the essential functions of their present job, regardless of the level of accommodation offered, but could perform the essential functions of other available jobs within the company with or without a reasonable accommodation. This guidance is contrary to the holdings of several courts that have found that an employee who was unable to perform the essential functions of their current position is not a qualified individual with a disability, and, therefore, has no right to the reasonable accommodation of a reassignment. See, e.g., Schmidt v. Methodist Hosp. of Indiana, Inc., 89 F.3d 342, 345 (7th Cir. 1996); Myers v. Hose, 50 F.3d 278, 284 (4th Cir. 1995); Pangalos v. Prudential Ins. Co. of Am., 5 A.D. Cas. (BNA) 1825, 1826 (E.D. Pa. 1996). As the Tenth Circuit recognized, the Fifth Circuit's position on this issue is not clear, as there is dicta in several opinions that could be read to support either position. See Smith, 180 F.3d at 1163, n. 3 ("We are unsure of the Fifth Circuit's position on this issue.").

## VI. THE VIOLENT OR EMOTIONALLY UNSTABLE EMPLOYEE

The ADA covers physical and *mental* disabilities. Sometimes, a mental disability can cause an employee to act violently or emotionally unstable. The question then follows: if the employer terminates an employee because of misconduct caused by their mental disability, has the employer terminated the employee "because of a disability," and thus violated the ADA? The courts have answered the question: "No."

### A. Cases.

#### 1. Hamilton v. Southwestern Bell Telephone Co., 136 F.3d 1047 (5th Cir. 1998)

Hamilton worked for Southwestern Bell for approximately 20 years. Approximately four months before he was fired, he rescued a drowning woman. As a result of the experience, he began to suffer mental disturbances and extreme fatigue. After he struck a co-worker, he was referred to a social worker and psychiatrist, both of whom diagnosed him with post-traumatic stress disorder ("PTSD"). Several weeks later, Hamilton slapped a physically smaller female manager, and loudly called her a "f_ _ _ing bitch!" Southwestern Bell terminated Hamilton for this misconduct.

Hamilton sued Southwestern Bell under the ADA. The court concluded that even if Hamilton was disabled as a result of PTSD, he was terminated not because of his disability, but "rather because he violated Bell's policy on workplace violence." The court concluded by stating:

> The cause of Hamilton's discharge was not discrimination based on PTSD but was rather his failure to recognize the acceptable limits of behavior in a workplace environment. The nature of the incident, shown by the record, presents a clear case in which Hamilton was fired for his misconduct in the workplace. We adopt for an ADA claim the well-expressed reasoning applied in the context of a protected activity-retaliatory discharge claim: the rights afforded to the

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> employee are a shield against employer retaliation, not a sword with which one may threaten or curse supervisors. Hamilton cannot hide behind the ADA and avoid accountability for his actions.

Id. at 1052 (footnote omitted).

**2. Seaman v. CSPH, Inc., 179 F.3d 297 (5th Cir. 1999)**

Seaman was employed as a store manager by CSPH, which owns and operates numerous Domino's pizza stores in the Dallas-Fort Worth area. Over a several month period in 1996, he frequently left the pizza store he managed unattended, and he had numerous other performance problems. Seaman told his boss that he believed his problems were caused by bipolar disorder and sleep apnea, although he had been diagnosed with neither condition.

In March 1996, he gave his boss a doctor's note stating that he was "emotionally and physically exhausted" and demonstrated "clinical criteria for a Major Depressive Reaction." The following month, he was counseled for disruptive comments on the job, and in response Seaman filed a charge of discrimination with the EEOC. Two days later, he repeatedly yelled at his boss during a heated argument and was fired.

In the ensuing lawsuit, Seaman claimed, among other things, that he was fired in retaliation for filing his EEOC claim. The district court granted summary judgment against all of Seaman's claims, and the Fifth Circuit affirmed. Specifically regarding his retaliation claim under the ADA, the Fifth Circuit concluded, "[t]hat Seaman mentioned his EEOC complaint to [his boss] moments before the termination does not, absent other evidence, constitute sufficient proof that the termination was retaliatory. Seaman may not use the ADA as an aegis and thus avoid accountability for his own actions." Id. at 301 (footnote omitted).

**3. Palmer v. Circuit Court of Cook County, 117 F.3d 351 (7th Cir. 1997)**

Palmer was a social service case worker for the Circuit Court of Cook County. She was diagnosed as having major depression and delusional (paranoid) disorder. As a result of her paranoia, Palmer became convinced that her supervisor was harassing her and was trying to orchestrate a case against her.

Palmer called one of her co-workers and said, "I'm ready to kill her [the supervisor]. I don't know what I'll do. Her ass is mine. She needs her ass kicked and I'm going to do it . . . I want [the supervisor] bad and I want her dead." In another call to the supervisor herself, Palmer said, "your ass is mine, bitch." Palmer was terminated for her threats.

Writing for the Seventh Circuit, Judge Richard Posner affirmed summary judgment against Palmer, stating "if an employer fires an employee because of the employee's unacceptable behavior, the fact that the behavior was precipitated by mental illness does not present an issue under the Americans with Disabilities Act." Id. at 352 (citations omitted).

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### B. Advice For Employers.

In light of the clear law on the subject, employers should:

- Have unambiguous policies prohibiting workplace violence, threats of violence, insubordinate behavior, and other forms of clearly inappropriate workplace conduct.

- Uniformly apply their policies regarding workplace violence, threats of violence, etc. While the EEOC agrees that an employer may discipline or terminate an individual with a disability for violating a workplace conduct standard even if the misconduct resulted from a disability, it also cautions that an employer may not apply such policies more harshly to mentally-disabled employees than those that are not disabled.

## VII. DIRECT THREAT

One of the elements an ADA plaintiff must prove is that they are a qualified individual with a disability. Burch v. City of Nacogdoches, 174 F.3d 615, 619 (5th Cir. 1999); Robertson v. Neuromedical Ctr., 161 F.3d 292, 294 (5th Cir. 1998), cert. denied, 119 S. Ct. 1575 (1999). An employee who is a "direct threat" to "the health or safety of individuals in the workplace" is not a qualified individual with a disability. Daugherty v. City of El Paso, 56 F.3d 695, 696 (5th Cir. 1995), cert. denied, 116 S. Ct. 1263 (1996). The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation. 42 U.S.C. § 12113 (3). The determination that an individual poses a "direct threat" must 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. In determining whether an individual presents a direct threat, the factors to be considered include:

(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.

29 C.F.R. § 1630.2(r).

### A. Cases.

#### 1. Chevron U.S.A., Inc. v. Echazabal, 122 S. Ct. 2045 (2002)

The ADA provides an affirmative defense to discrimination against a disabled person if the employer can show that the person poses a direct threat to the health or safety of other individuals in the workplace. See 42 U.S.C. § 12113(b). The EEOC passed a regulation

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carrying the defense one step further, and allowing an employer to screen out a potential worker with a disability for risks on the job to his *own* health or safety. See 29 C.F.R. §1630.15(b)(2). The Ninth Circuit U.S. Court of Appeals held that the EEOC's regulation exceeded the scope of permissible rule making under the ADA.

The United States Supreme Court reversed the Ninth Circuit's holding. The Court gave a number of reasons why the EEOC's regulation was a legitimate decision to fill a gap in the statutory text, rather than (as the plaintiff argued) a contradiction of the statute. For example, the Court stated "[w]hen Congress specified threats to others in the workplace, 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 workplace? If Typhoid Mary had come under the ADA, would a meat packer have been defenseless if Mary had sued after being turned away?"

The Court also rejected the plaintiff's argument that the EEOC's regulation was "the kind of workplace paternalism the ADA was meant to outlaw." Rather, the Court found, the regulation was a valid balancing of the rights of disabled persons against the risks employers would be legally required to incur if they were forced to employ persons who posed a health and safety risk to themselves. Moreover, the Court observed, the direct threat defense is not available in any context unless it is based upon objective scientific knowledge, rather than mere stereotypes and biases.

**2. E.E.O.C. v. E.I. Du Pont de Nemours & Co., 480 F.3d 724 (5th Cir. 2007)**

DuPont argued that the employee presented a direct threat to herself and other employees because she allegedly was unable to safely evacuate the plant where she worked. The jury rejected this argument, found for the plaintiff, and awarded actual and punitive damages. On appeal, the Fifth Circuit found that the jury's verdict was supported by sufficient evidence. Specifically, Barrios (the employee on whose behalf the EEOC sued) safely ambulated the evacuation route without assistance in 2003, and testimony at trial supported that she could safely evacuate without threatening the safety of others.

**3. E.E.O.C. v. Exxon Corp., 203 F.3d 871 (5th Cir. 2000)**

In July 1989, Exxon adopted a policy that precludes all employees who currently have substance abuse problems and all employees with a history of substance abuse from working in designated "safety sensitive" position. "Safety sensitive" positions constitute about ten percent of all jobs at Exxon. The EEOC challenged this blanket exclusion of rehabilitated substance abusers under the ADA. The question for the Fifth Circuit was whether Exxon could defend its blanket exclusion based upon "business necessity" or was required to demonstrate that a "direct threat" was presented by each affected employee. The district court concluded that Exxon had to prove that each individual presented a "direct threat." The Fifth Circuit reversed.

The Fifth Circuit concluded that when an employer screens employees based upon a safety-based qualification standard, it is not necessarily required to prove that each individual screened out by the standard poses a "direct threat" to the health or safety of other individuals in the workplace. Rather, the court held, the employer may instead justify the safety-based

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qualification standard as a "business necessity." See 42 U.S.C. 12113(3). The court held that the "direct threat" defense only necessarily applies in cases where an employer responds to an individual employee's supposed risk that is not addressed by the employer's existing qualifications standards.

In its conclusion to the decision, the Fifth Circuit stated:

> In evaluating whether the risks addressed by a "safety-based" qualification standard constitute a business necessity, the court should take into account the magnitude of possible harm as well as the probability of occurrence. The acceptable probability of an incident will vary with the potential hazard posed by the particular position: a probability that might be tolerable in an ordinary job might be intolerable for a position involving atomic reactors, for example. In short, the probability of the occurrence is discounted by the magnitude of its consequences. In Exxon's case, the court should thus consider the magnitude of a failure in accessing whether a rate of recidivism among recovery in substance abusers constitutes a safety risk sufficient for business necessity.

Id. at 875.

#### 4. Kapche v. City of San Antonio, 176 F.3d 840 (5th Cir. 1999)

Kapche applied for a position as a police officer for the City of San Antonio. He was rejected because he is an insulin-dependent diabetic. Kapche sued under the ADA, and the district court granted the city's motion for summary judgment on the ground that Kapche posed a "direct threat" as a matter of law.

On appeal, the Fifth Circuit noted that, as a police officer, driving would be an essential function of Kapche's job. It further observed that in two prior cases it had held, as a matter of law, that drivers with insulin-dependent diabetes pose a direct threat. Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993); Daugherty v. City of El Paso, 56 F.3d 695 (5th Cir. 1995), cert. denied, 116 S. Ct. 1263 (1996). The court held that Chandler's and Daugherty's per se rule should no longer be applied because after those cases were decided, the Department of Transportation amended its highway safety regulations to abolish its prohibition of insulin-dependent diabetics from the operation of noncommercial motor vehicles. In addition, the court observed that since its earlier decisions there have been technological improvements that have significantly increased the ability of diabetics to monitor blood sugar levels and thereby prevent hypoglycemic reactions. As a result, the court reversed summary judgment for the City of San Antonio, to allow for an individualized assessment of whether or not Kapche's condition posed a "direct threat" to himself or others.

#### 5. Robertson v. The Neuromedical Ctr., 161 F.3d 292 (5th Cir. 1998), cert. denied, 119 S. Ct. 1575(1999)

Robertson was a neurologist with Attention Deficit Hyperactivity Disorder ("ADHD"). His ADHD caused short-term memory loss. Robertson admitted that these problems caused him to pose a threat to his patients' safety, stating that "it was only a matter of time before he

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seriously hurt someone." Id. at 296. The Fifth Circuit found that this evidence demonstrated that Robertson was a "direct threat" to his patients' "basic medical safety," and thus affirmed summary judgment for the employer.

#### 6. **Rizzo v. Children's World Learning Centers, Inc., 84 F.3d 758 (5th Cir. 1996)("Rizzo I")**

Rizzo was a teacher's aide for Children's World Learning Centers, which operates a daycare center. Her duties included driving children in the Children's World van. In 1993, a parent complained to Rizzo's boss about her being left alone with children. Because of Rizzo's hearing impairment, the parent was concerned about whether she would be able to hear a choking child in the back of the van. Rizzo's supervisor confronted her with this concern and asked her to bring a report from her audiologist stating that it was safe for her to drive the van. Shortly thereafter, Rizzo brought a report from her audiologist which said she could hear emergency vehicles. However, the report did not discuss whether Rizzo could hear a child choking at the back of the van. Since it did not, Children's World removed Rizzo from her driving duties and assigned her to work in the kitchen on a split shift (early mornings and late afternoons), which resulted in a significant reduction in her hours of work. Ultimately, Rizzo resigned and filed an ADA lawsuit.

The district court granted Children's World's motion for summary judgment on the grounds that Rizzo posed a direct threat to the children, in that she may not be able to hear a choking child due to her disability. The Fifth Circuit reversed the summary judgment, concluding that, "[w]hether a person who can hear emergency vehicles, but cannot hear a choking child, is a direct threat is question of fact." Id. at 764.

#### 7. **Rizzo v. Children's World Learning Centers, Inc., 173 F.3d 254 (5th Cir. 1999) ("Rizzo II"), aff'd on reh'g, 213 F.3d 209 (5th Cir.) ("Rizzo III"), cert. denied, 121 S. Ct. 382 (2000)**

##### a. **Rizzo II**

After the Fifth Circuit reversed and remanded Rizzo I, the case proceeded to trial. At trial, the plaintiff prevailed, and recovered $100,000 in mental anguish damages. Children's World appealed, and the Fifth Circuit affirmed.

The Fifth Circuit began its opinion by clarifying the burden of proof requirements as applied to the "direct threat" defense. The court held that, as a general matter, the plaintiff must prove that they do not pose a direct threat to the health or safety of themselves or others as part and parcel of proving that they are "a qualified individual with a disability." Id. at 258. However, when the employer imposes a safety requirement that tends to screen out the disabled or a class of individuals with disabilities, then the defendant has the burden of proof to show that the employee poses a direct threat to the health or safety of themselves or others. Id. at 259-60.

Children's World demoted Rizzo based upon the safety requirement that a van driver be able to distinguish spoken words and specific sounds. That requirement obviously tends to screen out a class of individuals with hearing disabilities. Consequently, Children's World had

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the burden of proof to show that Rizzo posed a direct threat to the health or safety of herself or others. Id.

In examining the "direct threat" question, the court noted that Rizzo had been driving the van safely for two years. There was no evidence that she posed a threat to the safety of the children because of her hearing disability. Consequently, the court concluded that Children's World failed to meet its burden to prove that Rizzo constituted a direct threat.

#### b. Rizzo III

Four months after its opinion in Rizzo II, the full Fifth Circuit agreed to rehear the case en banc. Approximately 15 months after its initial decision, the court handed down Rizzo III. In a 10 to 3 decision, the court affirmed the panel's decision in Rizzo II. However, in this opinion, the court was more circumspect regarding the burden of proof on the issue of "direct threat." Specifically, the en banc court simply found that the district court had not committed plain or "obvious" error in instructing the jury that Children's World had the burden of proof to show that Rizzo posed a direct threat. The court found that the district court's instruction was not plain or "obvious" error because there were numerous cases attributing the burden of proof to either side.

Accordingly, unlike the panel's decision in Rizzo II, the en banc court did not discuss in detail who has the burden of proof in an ADA case when the "direct threat" issue presents itself. Rather, the en banc court simply held that the district court did not clearly err in assigning the burden to Children's World. Accordingly, whether Rizzo II's rules regarding proper assignment of the direct defense apply will have to be resolved by another decision.

### 8. Turco v. Hoechst Celanese Chemical Group, Inc., 101 F.3d 1090 (5th Cir. 1996)

Turco was a chemical operator for Hoechst Celanese at its Clear Lake, Texas plant for 13 years. He was also diabetic. In 1994, his diabetic condition became exacerbated, causing him to become extremely fatigued while on the job and suffer wild variations in blood sugar levels.

After several safety infractions, Turco was terminated. In affirming the district court's summary judgment, the Fifth Circuit held that Turco was not a qualified individual with a disability because he posed a "direct threat to the health or safety of other individuals in the workplace." The court stated:

> Turco's position at Hoechst Celanese required him to work with complicated machinery and dangerous chemicals. Any diabetic episode or loss of concentration occurring while operating any of this machinery or chemicals had the potential to harm not only himself, but also others. This would be a walking time bomb and woe unto the employer who places an employee in that position.

Id. at 1094.

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## B. Advice For Employers.

- Employers should be very cautious before taking any adverse employment action against an employee because of their belief that the employee poses a direct threat to the health and safety of themselves or others. As Rizzo I and II teach, unless the direct threat posed by the plaintiff is obvious, courts tend to look at the defense with a jaundiced eye. Also, as the Supreme Court held in Bragdon, a good faith belief that the plaintiff poses a direct threat is not enough to sustain the defense. Rather, objective proof of a significant risk is necessary.

- Employers should think through their safety requirements, to determine whether they tend to screen out an individual with a disability or class of individuals with disabilities. If they do, such as the safety requirement in Rizzo, the employer must be prepared in advance to shoulder the burden of proving in court that an individual screened out by the safety requirement in fact poses a direct threat to the health or safety of themselves or others.

- After an employer makes a job offer, the ADA allows an employer to make inquiries to determine whether an individual would pose a "direct threat" to the health and safety of themselves or others. Consequently, before taking adverse employment action against an employee because of a perceived "direct threat," an employer should take advantage of its right to make medical inquiries, so that it will be prepared to defend an ADA claim.

- For example, if an employee falls asleep on the job, has excessive absenteeism, or exhibits other performance problems, an employer may require a medical examination to determine if the problem is caused by an underlying medical condition. If the examination reveals an impairment that is a disability under the ADA, the employer must consider possible reasonable accommodations. If the impairment is not a disability, the employer is not required to make an accommodation.

- Before rejecting an applicant, or displacing a current employee because of the "direct threat" risk, employers should be prepared to prove: (1) what the specific risk is; (2) a significant current risk of substantial harm; (3) that the risk is documented by objective medical or other factual evidence regarding the particular individual; and (4) that the risk cannot be eliminated or reduced below the level of a "direct threat" by reasonable accommodation. Rizzo I, 84 F.3d at 763. It is most probable that, had Children's World made such an analysis in Rizzo, it would have concluded that it could not successfully defend its action against Rizzo under the "direct threat" defense and avoided the adverse jury verdict as

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well as the substantial attorneys' fees it surely incurred in defending the case.

- Unless mandated by law, employers should be very careful before imposing a blanket policy that discriminates against disabled employees because of an alleged "direct threat."

- In a related vein, the ADA also provides that employers may only use "qualification standards . . . that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability, if such standards are job-related and consistent with business necessity, and . . . performance cannot be accomplished by reasonable accommodation . . . ." 42 U.S.C. § 12113(a). Thus, employers should review their qualification standards, to ensure that they are, in fact, job-related and consistent with business necessity.

## VIII. RESOURCES AVAILABLE FOR EMPLOYERS TO COMPLY WITH THE ADA

The EEOC has issued numerous guidelines for employers to comply with the ADA. Court decisions, particularly from the Fifth Circuit, frequently conflict with the EEOC's guidance. Typically, the court decisions tend to impose less of a burden upon employers than the EEOC's guidance. As a result, employers that comply with the EEOC's guidance can usually be very confident that their actions will withstand legal scrutiny if challenged in court. On the other hand, strict adherence to the EEOC's position reduces an employer's flexibility in addressing issues related to an allegedly disabled employee. Thus, whether to follow the EEOC's or the courts' position depends, in part, on the degree to which an employer is willing to risk litigation vis a vis adhering to its own operational goals and desires. Copies of the EEOC's various guidance documents are available from the EEOC or through its website at www.eeoc.gov. Some of the most useful publications are listed below:

- A Technical Assistance Manual On The Employment Provisions (Title I) Of The Americans With Disabilities Act

- Enforcement Guidance: Preemployment Disability-Related Questions And Medical Examinations

- Enforcement Guidance: Workers' Compensation And The ADA

- Enforcement Guidance: The Americans With Disabilities Act And Psychiatric Disabilities

- Enforcement Guidance: Definition Of Term "Disability"

- Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act

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## IX. TOP 15 TIPS FOR ADA COMPLIANCE

Tip # 1: If an employee requests a reasonable accommodation, ask them to provide proof of their disability, the workplace limitations it causes, and how those limitations can be reasonably accommodated, unless all of these things are "open, obvious, and apparent." Document these requests and all responses (or lack thereof) (See EEOC Guidance and McAlpin/Beck). Make sure the documentation is "jury friendly" (Don't forget to use your Mr. Smiley).

Tip # 2: Always state that you are accommodating a "workplace limitation" not a disability. (See McInnis).

Tip # 3: If it is reasonably possible, offer an employee with a medical restriction an alternative position within the company if the restriction precludes him from performing the essential functions of their current position with or without reasonable accommodation. Make sure you make the offer in good faith, and that the position offered is not degrading under the circumstances. (See Talk, Foreman, and R.J. Gallagher).

Tip # 4: Do not unilaterally offer an employee a reasonable accommodation unless the employee's disability, resulting workplace limitations, and the necessary reasonable accommodations are "open, obvious, and apparent." (See Taylor).

Tip #5 Train your managers and HR to know when their interactive process duty has been triggered (it is not always obvious), and what their responsibilities are. (See Gagliardo; Chevron Phillips Chemical Co., LP).

Tip # 6: Never deny a request for a reasonable accommodation without first engaging in the interactive process by: (1) requesting proof of the disability and its resulting workplace limitations; (2) discussing the proposed reasonable accommodation with the employee in light of the employee's job's essential functions; and (3) explaining to the employee why you believe their proposed accommodation is not reasonable and giving them an alternative proposed accommodation, or at least an opportunity to respond or propose a new accommodation. (See Humphrey).

Tip # 7: Do not deny a requested accommodation on the basis that although it is generally reasonable, the employee cannot have that accommodation because of poor performance or disciplinary action that was caused by the effects of their disability. (See Humphrey and Riel).

Tip # 8: If a disabled employee requests a reasonable and definite leave of absence as an accommodation, grant their request unless you can prove that doing

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so would cause an "undue hardship" on your business (which is usually very difficult to prove). (See Garcia-Ayala).

Tip # 9: Do not implement "safety-based" qualification standards for job applicants that tend to exclude disabled persons unless you can meet the "business necessity" standard. (See Exxon).

Tip # 10: Do not remove an employee from their job because you are concerned that because of their disability they pose a "direct threat" to the health and safety of themselves or others unless you can prove based on the most current medical evidence (not myth, fear, or stereotype, that the employee is "a walking time bomb." (See Rizzo, Turco, and E.I. Du Pont de Nemours & Co.).

Tip # 11: Do not deny a request for a reasonable accommodation on the grounds that to do so would "show favoritism," "set a bad precedent," or undermine the company's need to apply policies consistently. (See Garcia-Ayala; EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act Q&A No. 24, 915.002 (Oct. 17, 2002). ("It is a reasonable accommodation to modify a workplace policy when necessitated by an individual's disability-related limitations, absent undue hardship."); Ralph Waldo Emerson ("A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines."); Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 436, 126 S.Ct. 1211, 1223 (2006) (Roberts, J.) (noting in different context that such an "argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions.").

Tip # 12: If you require "fitness for duty" pre-employment medical exams, make sure the doctor knows what the essential qualifications for the job are, and performs an "individualized assessment." You cannot necessarily simply blindly rely on what your doctor says, if he or she did not follow these rules. (See ConAgra).

Tip # 13: When an employee seeks a reasonable accommodation, do not terminate them instead, unless the grounds for termination are rock solid and unrelated to their request or their medical condition (*e.g.*, they were caught on tape stealing). Otherwise, you are taking a big risk. (See Chevron Phillips Chemical Co., LP and Cutrera).

Tip. # 14: Don't fall into the "full duty" trap. (See Barber v. Nabors Drilling, U.S.A., Inc., 130 F.3d 702 (5th Cir. 1997) (affirming jury verdict for the plaintiff in an ADA case because the employer refused to allow an employee to return to work because he could not obtain a "full medical release" even though he could perform all the essential functions of his job); Wright v. Middle Tenn. Elec. Membership Corp., M.D. Tenn., No.

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3:05-cv-00969 (Dec. 07, 2006) ("While an employer is not required to create a light duty position where none exists and the ADA permits job requirements that are job-related and consistent with business necessity, a '100 percent healed' or 'fully-healed' policy is a per se violation of the ADA.").)

Tip # 15: Make sure that when you give an employee a job description for their doctor to render an opinion upon, it is the right job description (See Giles).

Bonus Tip: Meaningfully involve employment counsel early in the process, and again before any adverse employment action is taken.

## X. DANGEROUS ADA ISSUES THAT CONTINUE TO PLAGUE EMPLOYERS

### A. Loose Lips Sink Ships: Employers That Use The Word "Disabled" Or "Handicapped" Or Otherwise Act As If They Regard The Plaintiff As Being Disabled

#### 1. McInnis v. Alamo Community College District, 207 F.3d 276 (5th Cir. 2000)

In McInnis, the plaintiff had suffered a severe closed head injury in an automobile accident that caused him slurred speech, a language communication disorder, a limp, and partial paralysis of his right side. He was a member of Palo Alto College's full-time faculty. At some point during his employment as a teacher, a student complained to the school that McInnis was intoxicated in class. He was investigated, and the school concluded that McInnis was not intoxicated, but rather appeared so due to his disability related appearance, such as his unsteady gait and slurred speech. The following year, when his contract came up for renewal, McInnis was informed that the college had decided not to renew his contract. McInnis sued under the ADA. A summary judgment was granted in the college's favor in the district court.

The Fifth Circuit reversed the summary judgment in the college's favor, and remanded the case for further proceedings. The Fifth Circuit held that there was a fact issue regarding whether the college perceived McInnis as being disabled. The court found that testimony from the college's own ADA compliance coordinator established that the college believed McInnis was disabled and specifically referred to McInnis in a letter as having a "handicap." Based on this evidence, the Fifth Circuit held that a reasonable jury could find that the college perceived McInnis as being disabled.

#### 2. McAlpin v. National Semiconductor Corp., 921 F. Supp. 1518 (N.D. Tex. 1996)

In this case, the plaintiff gave her employer a note stating that she could not work around any chemicals. The employer's employee relations manager told the plaintiff that he therefore believed that her condition (sarcoidosis) prevented her from working in virtually any job, allegedly "because even at a McDonald's store, they have chemicals." The court concluded that this evidence showed that the employer believed the plaintiff was substantially limited in her

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ability to work in a class or broad range of jobs, and therefore, it found that the employer perceived her as being disabled. The employer ended up winning the case for different reasons, but the employee relations manager's "loose lips" probably got them into the suit in the first place.

### B. Denying A Request For A Reasonable And Definite Leave Of Absence Because It Is Longer Than Company Policy Permits

#### 1. Garcia-Ayala v. Lederle Parenterlas, Inc., 212 F.3d 638 (1st Cir. 2000)

In this case the company had a leave of absence policy that allowed employees to take disability leave for up to one year. If an employee exceeded that time period, they were automatically terminated. Garcia-Ayala had been diagnosed with breast cancer and took a leave of absence to undergo several surgeries, chemotherapy, and ultimately, a bone marrow transplant. At the end of her one-year leave of absence, her doctor authorized her to return to work in seven weeks. However, the company refused her request for an extra seven weeks leave and terminated her pursuant to its one-year leave of absence policy. Garcia-Ayala sued, and the district court granted her former employer's motion for summary judgment. On appeal, however, the First Circuit Court of Appeals reversed the district court's decision. The court said that extending Garcia-Ayala's leave of absence would not have been an undue hardship on the company because she did not ask for open-ended time off. In addition, the evidence showed that the company could have handled her job functions with temporary workers, and noted that the company failed to present any evidence that an additional seven weeks leave would have affected company operations or negatively impacted the ability of other employees to do their jobs.

### C. Failing To Recognize That An Employee Has Initiated The Interactive Process, Or Responding To The Employee With Inaccurate Information

#### 1. Bartee v. Michelin North America, Inc., 374 F.3d 906 (10th Cir. 2004)

Bartee was a foreman at a Michelin factory in Oklahoma. In 1995, he developed avascular necrosis in both hips, which required bilateral hip surgery. Upon his return to work, Bartee asked Michelin for a four-wheeled cart. Michelin denied his request, but offered him a smaller three-wheeled cart. Bartee explained that he was too large to fit comfortably in the three-wheeled cart. Nonetheless, Michelin refused to give him a four-wheeled cart. Bartee thus endured the three-wheeled cart until it became too painful, at which point he went on a disability leave of absence. While he was on the leave of absence, Bartee called Michelin and asked to be assigned to a job that he could physically perform. In response, Michelin offered Bartee a job in the planning division, but that job required substantial walking, a twelve-hour workday, and also entailed a $20,000.00 pay cut. Michelin also informed Bartee that if he accepted this job, he would not be given a four-wheeled cart. Bartee rejected the offer after his doctor advised him not to accept it due to the strain all the walking would put on his hips, as well as the fact that he was limited to working an eight-hour workday. After one year, Bartee's employment was terminated pursuant to Michelin's one-year maximum leave of absence policy.

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Bartee sued and won a jury verdict based on Michelin's failure to reasonably accommodate his workplace limitations resulting from his disability. In affirming the jury's verdict, the Tenth Circuit held as follows:

> Michelin had a duty under the ADA to allow Mr. Bartee to work in the planning department if, through reasonable accommodations, he could fulfill the essential functions of the position. 42 U.S.C. § 12112(b)(5). To facilitate the reasonable accommodation, "[t]he federal regulations implementing the ADA envision an interactive process that requires participation by both parties." Templeton v. Neodata Servs., Inc., 162 F.3d 617, 619 (10th Cir. 1998) (quotation omitted); see also 29 C.F.R. § 1630.2(o)(3).
>
> "[T]he interactive process must ordinarily begin with the employee providing notice to the employer of the employee's disability and any resulting limitations, and expressing a desire for reassignment if no reasonable accommodation is possible in the employee's existing job." Midland Brake, 180 F.3d at 1171-72 (footnote omitted). After such notice--which the record illustrates occurred here through Mr. Bartee's May 3, 1999, letter--"both parties have an obligation to proceed in a reasonably interactive manner to determine whether the employee would be qualified, with or without reasonable accommodations, for another job within the company...." Id. at 1172.
>
> While "[t]he exact shape of this interactive dialogue will necessarily vary from situation to situation and no rules of universal application can be articulated[,]" id. at 1173, "[t]he interactive process [necessarily] includes good-faith communications between the employer and employee[,]" id. at 1172. As such, after receiving notice from Mr. Bartee, Michelin had a duty to engage with him in a good faith effort to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." Id. at 1171.
>
> Mr. Bartee produced evidence at trial showing that Michelin failed to participate in such an interactive process. Reading the evidence in the light most favorable to Mr. Bartee, Michelin did not inquire about his restrictions or about the accommodations that he needed to perform the planning position. Instead, Mr. Warner, Mr. Bartee's former area personnel manager, offered the planning job to Mr. Bartee without assessing any of its requirements. Michelin did not offer any position modifications to Mr. Bartee nor did it provide any evidence showing that shortening this position's work day to eight hours or acquiring a larger cart would disrupt essential functions of the job. In fact, the record does not indicate any accommodations offered to Mr. Bartee by Michelin other than the three-wheeled cart, which Mr. Bartee had already stated was too small for his use. The record, then, provides sufficient grounds for the jury to conclude that Michelin failed to reasonably accommodate Mr. Bartee. Thus, we affirm the District Court's denial of Michelin's motions for judgment as a matter of law.

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Id. at 916 (footnotes omitted).

### 2. **Gagliardo v. Connaught Laboratories, Inc., 311 F.3d 565 (3d Cir. 2002)**

Gagliardo was a customer service representative. A "special project" she handled was military orders from her company. For many years she was a good employee with no performance problems. After she developed Multiple Sclerosis (MS), however, she began making mistakes at work. Gagliardo told her supervisor and a manager of human resources – who was herself a MS sufferer – that taking away the military orders from her job duties would reduce her MS symptoms and thus improve her performance. The company agreed with this assertion, but never acted on it. Rather, Gagliardo was written up and then fired for poor performance.

Gagliardo sued under the ADA. At trial the jury ruled in Gagliardo's favor and awarded her $2,000,000.00 in compensatory damages and $500,000.00 in punitive damages. The Third Circuit affirmed, holding that any amounts awarded over the ADA's caps could still be recovered by Gagliardo under the Pennsylvania Human Relations Act, which is akin to the Texas Commission on Human Rights Act. The court affirmed the award of $500,000.00 in punitive damages based largely on the fact that Gagliardo had repeatedly requested a reasonable accommodation (removal of the military orders from her job duties) but the company simply ignored her requests and disciplined then terminated her.

### 3. **Humphrey v. Memorial Hospital Assoc., 239 F.3d 1128 (9th Cir. 2001), cert. denied, 122 S. Ct. 1592 (2002)**

Ms. Humphrey was a medical transcriptionist. Her performance was always very highly rated. However, in 1989 she began engaging in a series of obsessive rituals in the morning (such as washing her hair repeatedly for three hours) that caused her to be tardy or absent very frequently. The company wrote Ms. Humphrey up for her tardiness many times, which only caused her morning rituals to become worse.

In 1995 Humphrey was watching an episode of the *Oprah Winfrey Show* on obsessive compulsive disorder (OCD). Humphrey concluded she suffered from OCD and soon received medical confirmation of that fact from her doctor. Her doctor wrote a letter to the company specifically stating that Humphrey suffered from OCD and that her tardiness and absenteeism was caused by OCD. The doctor also explained in the letter that the OCD was a "disability" under the ADA and that a short leave of absence might help him treat Humphrey's OCD and "get the symptoms better under control."

Humphrey met with her supervisor about her doctor's letter. The two arranged for Humphrey to have a flexible starting time as an accommodation. Nonetheless, Humphrey continued to miss work and also to be late even under a flex time arrangement. Her supervisor warned her about her continuing absenteeism and tardiness. In response, Humphrey sent her supervisor an e-mail asking for a new accommodation: that she be allowed to work at home. In reply, her supervisor summarily denied her request on the grounds that "work at home" is only

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permitted for employees who, unlike Humphrey, had clean disciplinary records. Shortly thereafter, Humphrey was absent two more times, and was fired.

Humphrey sued under the ADA. In reversing a summary judgment that had been entered for the company – and rendering judgment in Humphrey's favor – the Ninth Circuit held that as a matter of law the company violated its duty to engage in the interactive process once Humphrey asked for the "work at home" accommodation. Id. at 1139. The court also found that since Humphrey's termination was linked to absenteeism and tardiness that was caused by her disability (her OCD) that she was entitled to a jury trial on the question of whether she was terminated "because of her disability," and, thus, in violation of the ADA.

Finally, in rejecting the company's rationale for denying Humphrey's request to work at home – that she had prior discipline on her record – the court held, "[i]t would be inconsistent with the purposes of the ADA to permit an employer to deny an otherwise reasonable accommodation because of past disciplinary action taken due to the disability sought to be accommodated. Thus, Humphrey's disciplinary record does not constitute an appropriate basis for denying her a work-at-home accommodation." Id. at 11347.

### 4. Giles v. General Electric Co., 245 F.3d 474 (5th Cir. 2001)

Giles sued under the ADA and the Fifth Circuit upheld a jury verdict in his favor. Although the court reduced Giles' compensatory damages award, he still recovered over $400,000.00.

Giles was a Class A Machinist. He injured his back and had surgery. In attempting to determine whether Giles could continue working as a machinist GE sought input from Giles' doctor. However, GE sent Giles' doctor a job description for a welder, which was a more physically demanding job than a machinist position. Based on that inaccurate job description, Giles doctor concluded he was unfit to continue working for GE as a machinist. Thus, GE refused to allow Giles to return to work. Giles then filed claims for LTD and a disability pension, both of which GE approved. Giles also filed for SSA benefits, which were denied on the (ironic) grounds that the SSA found he was still able to work as a machinist.

Giles sued GE under the ADA, claiming that had GE reasonably accommodated him, he would have been able to continue working as a machinist. The court rejected GE's judicial estoppel argument. The court also found that Giles was a "qualified individual with a disability" despite the doctor's conclusion to the contrary because that conclusion was based upon "an incorrect job description provided to [the doctor] by GE." Id. at 486. *See also Barber v. Nabors Drilling, U.S.A., Inc.*, 130 F.3d 702 (5th Cir. 1997) (affirming jury verdict for the plaintiff in an ADA case because the employer refused to allow an employee to return to work because he could not obtain a "full medical release" even though he could perform all the essential functions of his job).

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## D. Denying a Request For A Reasonable Accommodation On The Basis Of Preexisting Performance Problems That Were Caused By The Employee's Disability

### 1. Humphrey v. Memorial Hospital Assoc., 239 F.3d 1128 (9th Cir. 2001), cert. denied, 122 S. Ct. 1592 (2002)

See above (C.3).

### 2. Riel v. Electronic Data Systems Corp., 99 F.3d 678 (5th Cir. 1996)

Riel was a systems engineer for EDS. Because of his diabetic condition, he experienced vision and renal system health problems. These problems caused severe fatigue, which periodically interfered with his job performance. As part of his job, he had "milestone deadlines" and "final deadlines" for each project. While Riel sometimes missed milestone deadlines, he never missed a final deadline on any project.

EDS ultimately fired Riel for missing 13 milestone deadlines. Riel sued under the ADA, and the district court granted summary judgment in EDS's favor, finding that Riel was not a "qualified individual with a disability" because he could not perform the essential function of meeting milestone deadlines, with or without an accommodation. The Fifth Circuit reversed.

The Fifth Circuit noted that a "qualified individual with a disability" is someone who can perform the essential functions of the employment position with or without a reasonable accommodation. The evidence conflicted regarding whether meeting milestone deadlines was an essential function. Since it may not have been, it is possible that a jury could conclude that Riel's failure to meet the milestone deadlines did not render him "unqualified."

Moreover, the court held that Riel proposed two potentially reasonable accommodations to EDS: (1) further adjustment of the milestone deadlines; and (2) transfer to a position without milestone deadlines. In response to EDS's argument that transfer was not possible because of its policy against transferring employees with poor ratings, the court concluded that EDS was attempting to impose an improper burden on Riel. The court stated:

> EDS contends that a relaxation of milestone deadlines would cause disruption in its working structure, but this is for the trier of fact. EDS also argues that it could not transfer Riel because of its policy against transferring employees on PIPs or whose ratings were "below average." This contention turns the focus upon Riel's specific circumstances. In so doing, it mistakes the burdens of proof allocated to the parties; Riel need only show an accommodation reasonable "in the run of cases." The evidence of reasonableness "in the run of cases" and undue hardship will often be overlapping and resist neat compartmentalization. Nonetheless, they remain distinct inquiries even if asked of similar evidence.
>
> EDS legally enjoys the affirmative defense of "undue hardship." But as EDS did not plead "undue hardship" and conceded below that it was not defending on

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> those grounds at the summary judgment stage, our focus is limited to whether Riel has identified accommodations reasonable "in the run of cases." . . . EDS may not place the burden of proof of undue hardship on Riel merely by refusing to plead the affirmative defense and then attacking his proposed accommodations as unreasonable in his specific circumstance; Congress' intent was to place that burden on the employer. Rather, if EDS wishes to refute Riel's proposed accommodations as unreasonable in his specific circumstances, it must plead the defense and offer evidence to support it.

Id. at 684.

### E. Jumping To The Conclusion That An Employee Is A "Direct Threat" And Thus Unprotected By The ADA

#### 1. Rizzo v. Children's World Learning Centers, Inc., 84 F.3d 758 (5th Cir. 1996)("Rizzo I")

Rizzo was a teacher's aide for Children's World Learning Centers, which operates a daycare center. Her duties included driving children in the Children's World van. In 1993, a parent complained to Rizzo's boss about her being left alone with children. Because of Rizzo's hearing impairment, the parent was concerned about whether she would be able to hear a choking child in the back of the van. Rizzo's supervisor confronted her with this concern and asked her to bring a report from her audiologist stating that it was safe for her to drive the van. Shortly thereafter, Rizzo brought a report from her audiologist which said she could hear emergency vehicles. However, the report did not discuss whether Rizzo could hear a child choking at the back of the van. Since it did not, Children's World removed Rizzo from her driving duties and assigned her to work in the kitchen on a split shift (early mornings and late afternoons), which resulted in a significant reduction in her hours of work. Ultimately, Rizzo resigned and filed an ADA lawsuit.

The district court granted Children's World's motion for summary judgment on the grounds that Rizzo posed a direct threat to the children, in that she may not be able to hear a choking child due to her disability. The Fifth Circuit reversed the summary judgment, concluding that, "[w]hether a person who can hear emergency vehicles, but cannot hear a choking child, is a direct threat is question of fact." Id. at 764.

### F. Putting It On Autopilot: A Common Problem With Uniquely Bad Implications Under The ADA

Under Title VII, the ADEA, and many other employment discrimination laws, general incompetence, mistaken conclusions, and just plain poor decision-making is often not only not a fatal defect, but is actually a winning defense. *See, e.g., Bryant v. Compass Group USA, Inc.,* 413 F.3d 471, 478 (5th Cir. 2005) (stating in a Title VII case that "[m]anagement does not have to make proper decisions, only non-discriminatory ones."); *Jones v. Flagship Int'l.*, 793 F.2d 714, 729 (5th Cir. 1986) (holding that a termination decision is not pretextual if the employer "had reasonable grounds [for the decision], or in good faith thought it did") *Nawrot v. CPC Intern.*, 277 F.3d 896, 906 (7th Cir. 2002) ("But pretext requires more than a showing that the

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decision was 'mistaken, ill considered or foolish, [and] so long as [the employer] honestly believed those reasons, pretext has not been shown.'") (citing *Jordan v. Summers*, 205 F.3d 337, 343 (7th Cir. 2000); *O'Connor v. DePaul University*, 123 F.3d 665, 671 (7th Cir. 1997) ("On the issue of pretext, our only concern is the honesty of the employer's explanation....")).

### 1. Rodriguez v. ConAgra Grocery Products Co., 436 F.3d 468 (5th Cir. 2006)

In this case, the Fifth Circuit not only reversed a summary judgment that the employer had obtained, but also rendered judgment for the employee on his claim that the employer had regarded him to be disabled and discriminated against him on that basis. Rodriguez had worked a little over a month at ConAgra as a laborer performing heavy lifting and the like. Because he did good work, he was offered a permanent position in the plant's production area. First, however, ConAgra required Rodriguez to be examined by a doctor for a "fitness for duty" analysis. The doctor did not know the qualifications for the job Rodriguez had been offered. Nonetheless, the doctor concluded that Rodriguez was unfit because he had Type II diabetes, which the doctor claimed was "uncontrolled." Based on the doctor's conclusion, ConAgra refused to hire Rodriguez. Rodriguez sued under the TCHRA for disability discrimination, and the district court granted summary judgment for the employer.

On appeal, the Fifth Circuit observed that ConAgra (through its reliance on the doctor's unjustifiable conclusion) failed to do an "individualized assessment" to determine if, in fact, Rodriguez's condition actually rendered him unqualified for the specific job at issue. In addition, the court held that Rodriguez proved that ConAgra regarded him as being disabled. The court concluded that ConAgra regarded Rodriguez as being substantially limited in the major life activity of working (and not just a single job as so often is the case) because, in its discovery responses, ConAgra conceded that it believed that Rodriguez's diabetes rendered him unfit for any job in its plant. There are many types of jobs in the plant. This admission thus confirmed that ConAgra regarded Rodriguez to be "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities." 29 C.F.R. § 1630.2(j)(3)(i). Since ConAgra's belief was medically unjustified, its admission proved as a matter of law that it had rejected Rodriguez based on his perceived disability.

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