Ten ADA Issues That Continue to Confound and Confuse Employers, and Give Hope To Even Slightly Impaired Plaintiffs and Their Lawyers

State Bar of Texas CLE – November 16, 2016

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1. Be Careful Disqualifying an Employee as "Unfit for Duty"

- It may be that the function they cannot perform without or without reasonable accommodation is not an "essential" function, such that their inability to perform it does not render them "unqualified" under the ADA:

  - *EEOC v. LHC Group., Inc.*, 773 F.3d 688, 702 (5th Cir. 2014) (even though the job description indicated that driving was an essential function of Team Leader position, there was a genuine dispute of material fact as to whether it really was, and thus the employee's inability to drive did not necessarily render her unqualified for the position).

1. Be Careful Disqualifying an Employee as "Unfit for Duty"

- *Carmona v. Southwest Airlines Co.*, 604 F.3d 848, 859 (5th Cir. 2010) (regular attendance was not an essential function of flight attendant's job; hence, his inability to attend his job regularly did not render him unqualified under the ADA).

- *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 due to the fact that he could not obtain a "full medical release," even though he could perform all his job's essential functions, and the only functions he could not perform were not essential, but rather marginal).

1. Be Careful Disqualifying an Employee as "Unfit for Duty"

- Important and often overlooked point: Most courts hold that, once challenged, it is the **employer's burden to demonstrate that an alleged essential function really is "essential."** *See Maziarka v. Mills Fleet Farm, Inc.*, 245 F.3d 675, 680 (8th Cir. 2001) ("an employer who disputes the plaintiff's claim that he can perform the essential functions must put forth evidence establishing those functions."); *see also Johnson v. Cleveland City School Dist*., 443 Fed. Appx. 974, 985 n.18 (6th Cir. 2011) (same); *Bates v. United Parcel Svc., Inc.*, 511 F.3d 974, 991 (9th Cir. 2007) (en banc) (same).

1. Be Careful Disqualifying an Employee as "Unfit for Duty"

- Or, it may be that even if the at-issue function is "essential," they could perform it with a reasonable accommodation, and thus be a "qualified individual" under the ADA:

  - *EEOC v. LHC Group., Inc.*, 773 F.3d 688, 699 (5th Cir. 2014) (reversing summary judgment for employer in part because, "[e]ven if driving were an essential function of a Team Leader, Sones might have carried out the job with reasonable accommodation.").

  - *Cannon v. Jacobs Field Servs. N. Am., Inc.*, 813 F.3d 586, 592-94 (5th Cir. 2016) (although driving and climbing ladders were essential functions of the job, there was sufficient evidence that the plaintiff could have performed both functions with or without a reasonable accommodation, so as to mandate reversal of summary judgment in the employer's favor and submission of the case to a jury).

2. Causation Conundrum Currently Cutting in Plaintiffs' Favor

- The ADA prohibits discrimination "on the basis of disability." 42 U.S.C. § 12112(a).

- In 2002 and 2008, both pre-*Gross* and *pre-Nassar*, The Fifth Circuit has held that "[u]nder the ADA, 'discrimination need not be the sole reason for the adverse employment decision'" as long as the discrimination "'actually play[s] a role in the employer's decision making process and ha[s] a determinative influence on the outcome.'" *Soledad v. United States Dept. of Treasury*, 304 F.3d 500, 503-04 (5th Cir. 2002). *See also Pinkerton v. Spellings*, 529 F.3d 513, 519 (5th Cir. 2008) (same).

2. Causation Conundrum Currently Cutting in Plaintiffs' Favor

- In 2014, post-*Gross* and post-*Nassar*, the Fifth Circuit applied a "motivating factor" standard to an ADA case. The court reversed summary judgment for the employer even though the EEOC failed to demonstrate pretext, finding that nevertheless the EEOC raised a fact question as to whether disability discrimination was a motivating factor in the employee's termination. *See EEOC v. LHC Group., Inc.*, 773 F.3d 688, 702 (5th Cir. 2014).

2. Causation Conundrum Currently Cutting in Plaintiffs' Favor

- On the other hand, post-*Gross*, at least three Circuit Courts have held that the ADA requires "but for" causation to establish prohibited discrimination under the law. *See Gentry v. E.W. Partners Club Mgmt. Co.*, 816 F.3d 228 (4th Cir. 2016); *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 321 (6th Cir. 2012) (en banc); *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010).

- So, the Fifth Circuit's "motivating factor" standard per *LHC Group., Inc.* is very arguably subject to attack by employers. That said, for now, it is the law in the Fifth Circuit, and certainly favors plaintiffs.

3. Because It Is Now So Easy To Prove "Regarded As" Status, Any Employer That Terminates An Employee Shortly After Even A Relatively Minor Injury Could Face An ADA Claim

- For example, in *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 239-40 (5th Cir. 2015), the plaintiff inhaled chemical fumes while on the job, later reported chest pains at work and was ultimately attended to by the company medical department and then EMS. As a result, a workers' compensation claim was filed. About two weeks later the decision was made to fire her for alleged poor performance. She sued under the ADA, for discrimination based on her status as being "regarded as" having a disability. The district court granted SJ, but the Fifth Circuit reversed.

- The Fifth Circuit noted that post-amendment a "regarded as" ADA plaintiff can prevail by establishing "she has been subjected to an action prohibited under [the ADA] because of an actual or perceived physical or mental impairment **whether or not the impairment limits or is perceived to limit a major life activity**." *Burton*, 798 F.3d at 230 (citing 42 U.S.C. § 12102(3)(A) (bold added)).

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- This is a low standard, that Burton easily satisfied through proof that Freescale was well aware of Burton's health related complaints, treatment, and that its supervisors generated multiple reports explicitly tying complaints about Burton's conduct at work to her asserted medical needs. *Id*. at 231.

- Similarly, in *Cannon v. Jacobs Field Servs. N. Am., Inc.*, 813 F.3d 586 (5th Cir. 2016), the plaintiff had an inoperable rotator cuff injury that limited him to no driving of company vehicles; no lifting, pushing, or pulling more than ten pounds; and no working with his hands above shoulder level. Based on this, a technical services manager from Jacobs stated that Cannon would "not be able to meet the project needs and required job duties." In reversing SJ, the Fifth Circuit held that this evidence alone was sufficient to make out a fact question as to whether Jacobs regarded Cannon to be disabled under the ADA. *Id*. at 591-92.

4. Sleeper Alert: Associational ADA Discrimination

The ADA provides that it is unlawful for an employer to discriminate against an individual because of his relationship or association with an individual with a disability. 42 U.S.C. § 12112(a), (b)(4).

More informally, this provision prohibits three types of discrimination against employees associated with, or related to someone with, a disability:

- Discrimination based on **expense**: where an employee suffers an adverse employment action because of an association with a disabled individual covered under the employer's health plan, which is costly to the employer.

- Discrimination based on **disability by association**: where the employer fears that the employee may contract the disability of the person he or she is associated with (e.g., HIV), or the employee is genetically predisposed to develop a disability that his or her relatives have.

- Discrimination based on **distraction**: where the employee suffers an adverse employment action based on the employer's speculation that they will be inattentive at work because of the disability of someone with whom he or she is associated.

4. Sleeper Alert: Associational ADA Discrimination

- Relying on this theory, the EEOC sued the employer in *E.E.O.C. v. DynMcdermott Petroleum Operations Co.*, 537 Fed. Appx. 437 (5th Cir. 2013), the EEOC alleged that the employer had refused to hire an otherwise outstanding candidate because his wife had cancer. The district court threw the EEOC's lawsuit out, but the Fifth Circuit Court of Appeals reversed the district court's decision and remanded the case for trial.

5. Fort Worth TCHRA Interpretation v. Fifth Circuit ADA Interpretation: Conflict On Important Reasonable Accommodation Question

If there is a vacant position for which an actually disabled employee is qualified, and has sought as a reasonable accommodation, does the ADA entitle that employee to the position, or merely entitle them to be considered for that position on equal terms as anyone else?

The Fifth Circuit has held the ADA only entitles that employee to be considered for that position on equal terms as anyone else. *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).

In contrast, the Fort Worth Court of Appeals has held that the TCHRA actually entitles that employee to the job itself, not merely to compete for the job on equal terms, provided that such accommodation would not create an undue hardship or run afoul of a collective bargaining agreement. *See Davis v. City of Grapevine*, 188 S.W.3d 748, 765 (Tex. App.–Fort Worth 2006, pet. denied). Several federal circuit courts agree with this holding. *See EEOC v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (en banc); *Aka v. Washington Hospital Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998) (en banc).

6. The "Full Duty" Trap

- *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 he could perform all the essential functions of his job).

- *Wright v. Middle Tenn. Elec. Membership Corp.*, M.D. Tenn., No. 3:05-cv-00969 (Dec. 7, 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").

7. "Direct Threat" Debacles

"Direct threat" is regarded by most, but not all, courts to be an affirmative defense. It is not easy to prove, and employers often lose when relying on this defense, especially when they have not relied on solid medical guidance. For example:

- *EEOC v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724 (5th Cir. 2007) (affirming jury verdict in ADA, affirming $300,000 punitive damages award, and rejecting defendant's direct threat defense based on its claim that the employee's medical condition prevented her from safely exiting the plant if there was an emergency, and thus presented a direct threat to herself and others).

- *Rizzo v. Children's World Learning Centers, Inc*., 84 F.3d 758 (5th Cir. 1996) (reversing summary judgment because the evidence did not prove as a matter of law that the bus driver's hearing impairment presented a threat to safety of the children on her bus, especially given that she had safely driven the bus for twelve years).

- *Rodriguez v. ConAgra Grocery Products Co.,* 436 F.3d 468 (5th Cir. 2006) (reversing summary judgment for employer and rendering judgment for plaintiff because the employer's doctor's conclusion that the plaintiff's diabetic condition prevented him from safely doing his job was wrong as a matter of law). *See also Keith v. County of Oakland*, 703 F.3d 918 (6th Cir. 2013) (reversing district court's summary judgment ruling that a deaf person could not be a lifeguard due to safety reasons, and reasoning that employers cannot escape liability under the ADA merely by mechanically relying on the medical opinions and advice of third parties).

8. Interactive Process Missteps

-Violation of the interactive process requirement is not independently actionable in the Fifth Circuit, but often it leads to the conclusion that summary judgment is not appropriate on the question of whether or not the employee could have been reasonably accommodated. For example:

-*EEOC v. LHC Group., Inc.*, 773 F.3d 688, 700 (5th Cir. 2014): "Sones expressly reached out to her supervisors, indicating that she wanted temporary help using computer programs and remembering her passwords in light of her high medication levels. Faced with Sones's request for "extra help," Taggard, her supervisor, kept silent and walked away. On this record, a reasonable jury could find that Sones reached out to LHC for accommodation and was denied an interactive process. Because the EEOC has identified a genuine dispute of material fact regarding whether LHC satisfied its duty to accommodate Sones's disability, the district court erred in granting summary judgment on this issue."

8. Interactive Process Missteps

- In addition, when an employer fires an employee shortly after the employee requests an accommodation, rather than going through the interactive process, bad results for the employer often follow:

  - *EEOC v. Chevron Phillips Chemical Co., LP*, 570 F.3d 606, 621-22 (5th Cir. 2009) (reversing summary judgment and finding that a reasonable jury could find that once Chevron received a doctor's note requesting accommodations for the plaintiff it set about to find a pretextual reason to fire her, and then did so).

  - *Cutrera v. Board of Supervisors of Louisiana State Univ.*, 429 F.3d 108, 113 (5th Cir. 2005) (reversing summary judgment an holding 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").

8. Interactive Process Missteps

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.

8. Interactive Process Missteps

- It really is not that demanding of a requirement to comply with, as demonstrated by *Loulseged v. Akzo Nobel Inc*., 178 F.3d 731 (5th Cir. 1999)

- 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.

8. Interactive Process Missteps

- 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.

- 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 affirming summary judgment against failure to accommodate claim in similar factual context).

8. Interactive Process Missteps

The Fifth Circuit continues to find for employers when the facts show they made a good faith effort to accommodate the employee, or at least engage in the interactive process, and the employee dropped the ball thereafter. *See, e.g., Dillard v. City of Austin, Tex.*, __ F.3d __, No. 15-50779, 2016 WL 4978363, at *4—5 (5th Cir. Sept. 16, 2016) (opinion written by Judge Costa affirming summary judgment for employer, and rejecting claim the employer failed to reasonably accommodate the employee, where the employer offered the employee the position in good faith and the employee accepted, but then mismanaged his job so badly that he was terminated for cause).

8. Interactive Process Missteps

- Tip for Employers:

- 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.

8. Interactive Process Missteps

Another Hot Tip for Employers:

Be careful of the request for accommodation that is implicit, as that may trigger the duty to engage in the interactive process. *See, e.g., Kowitz v. Trinity Health*, __F.3d __, No. 15-1584, 2016 WL 6068146, at *3-4 (8th Cir. Oct. 17, 2016) (reversing summary judgment for employer because a reasonable employer should have interpreted the plaintiff's statements as an implicit request for an accommodation, given that it knew she had a disability and could not perform the essential function of her job that the employer demanded of her (and ultimately fired her for failing to do)).

9. Inflexible Leave of Absence Policies

- *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 request for a modification of the Company's maximum leave of absence policy was the sort of accommodation the ADA required the employer to consider, and granting the 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.

9. Inflexible Leave of Absence Policies

- Employers have had such difficulty with this issue, the EEOC issued comprehensive guidance on it earlier this year that you should read. *See Employer-Provided Leave and the Americans with Disabilities Act* (May 9, 2016), found at https://www.eeoc.gov/eeoc/publications/ada-leave.cfm#_edn1.

- The EEOC has also had several successful enforcement actions against employers such as that it believed violated the ADA through their use of allegedly inflexible leave of absence policies and attendance policies . . .

9. Inflexible Leave of Absence Policies

- ***EEOC v. Princeton Healthcare.*** The EEOC sued Princeton HealthCare System (PHCS), alleging that its fixed leave policy failed to consider leave as a reasonable accommodation, in violation of the ADA. According to the EEOC, since PHCS's leave policy merely tracked the requirements of the federal Family Medical Leave Act (FMLA), employees who were not eligible for FMLA leave were fired after being absent for a short time, and many more were fired once they were out more than 12 weeks. Under the consent decree settling the suit PHCS will pay $1,350,000, which the EEOC will distribute to employees who were unlawfully terminated under PHCS's former policy.

- PHCS also is prohibited from having a blanket policy that limits the amount of leave time an employee covered by the ADA may take. PHCS must instead engage in an interactive process with covered employees, including employees with a disability related to pregnancy, when deciding how much leave is needed. In addition, PHCS can no longer require employees returning from disability leave to present a fitness for duty certification stating that they are able to return to work without any restrictions. PHCS also agreed that it will not subject employees to progressive discipline for ADA-related absences, and will provide training on the ADA to its workforce.

- Other significant resolutions of EEOC cases involving leave and attendance policies from previous include cases against Interstate Distributor, ($4.85 million nationwide resolution challenging maximum 12-week leave policy), Supervalu ($3.2 million resolution challenging termination of approximately 1,000 employees at the end of medical leave),Sears ($6.2 million resolution challenging automatic termination policy and failure to accommodate employees injured at work) and Verizon ($20 million nationwide resolution challenging "no fault" attendance policy).

10. Thinking Attempts At Reasonable Accommodation Are A "One and Done" Requirement

- *Humphrey v. Memorial Hospital Assoc.*, 239 F.3d 1128 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 1592 (2002) (just because flexible schedule accommodation failed did not mean employer could summarily deny request to work at home).

Bonus Tip #1: Do Not Deny An Otherwise Reasonable Accommodation On the Basis Of Prior Discipline Caused By the At-issue Disability

- *Riel v. Electronic Data Systems Corp.*, 99 F.3d 678 (5th Cir. 1996) (absent proof of undue hardship, employer could not deny otherwise reasonable accommodation on basis that employee could not have the accommodation due to prior discipline in his file that was caused by the disability he sought accommodation for).

Bonus Tip #2:

- 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.").

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