



## Invisible Disabilities and the ADA

By Equip for Equality<sup>1</sup>

Many people covered by the Americans with Disabilities Act (ADA) have disabilities that are not apparent to others, such as diabetes, epilepsy, substance use disorder, mental health disabilities, traumatic brain injury, or HIV/AIDS. The “invisible” nature of these disabilities can raise unique legal issues. This legal brief will review recent court decisions on several legal issues particularly important for people with non-apparent disabilities: (1) Whether the condition is a disability under the ADA; (2) Medical inquiries and examinations, both pre- and post-offer; (3) Confidentiality of the employee’s medical information; (4) Direct Threat<sup>2</sup>; (5) Demonstrating when the employer became aware of a disability (as an element of proving an ADA claim); and (6) Hostile work environment claims under the ADA.

### I. Is the Condition a Disability Under the ADA?

The threshold question in any ADA case is whether the individual is a person with a disability under the ADA. The statute provides three categories of disability under 42 U.S.C. § 12102(1):

The term “disability” means, with respect to an individual: (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.

Who counts as a person with disabilities was liberally answered under the ADA Amendments Act of 2008 (ADAAA).<sup>3</sup> The ADAAA expanded protections for individuals with non-apparent disabilities by widening the definition of disability, removing the requirement that mitigating measures be taken into account when assessing whether an individual has a substantial limitation, confirming that an impairment that is episodic or in remission be evaluated when active, and adding additional major life activities including a separate category that includes “major bodily functions.” Congress’ primary focus in enacting the ADAAA was to make clear that the Supreme Court and lower courts had unduly narrowed the definition of disability and, as a result, many people with impairments that it had intended to be covered, had been deemed not to have an ADA disability.<sup>4</sup>

## A. The ADAAA's Definition of Disability

The ADAAA provisions regarding episodic conditions and mitigating measures are very important to people with non-apparent disabilities. Further, as most ADA cases had focused on an individual's medical condition rather than on the alleged discrimination, Congress specifically stated that the issue of whether a person's impairment constitutes an ADA disability should "not demand extensive analysis."<sup>5</sup>

## B. Major Life Activities & Major Bodily Functions

When the ADA was passed, Congress did not include specific examples of "major life activities" in the actual text of the ADA. In the ADAAA, Congress listed several examples while also making clear that this list is not exhaustive. Congress included the list of major life activities previously contained in EEOC Regulations and Guidance and added some additional major life activities. Major life activities relevant to people with invisible disabilities include: concentrating and thinking; caring for oneself; lifting; bending; eating; speaking; sleeping; breathing; learning; concentrating and thinking; reading; bending; and communicating.<sup>6</sup>

In addition, Congress added a list of "major bodily functions" under the definition of "major life activities." Again, this is not an exhaustive list. The list of major bodily functions in the ADAAA follows with impairments that may involve the function listed parenthetically:

- **immune system:** (HIV/AIDS, auto-immune disorders, lupus);
- **neurological:** (multiple sclerosis, epilepsy);
- **normal cell growth:** (cancer);
- **brain:** (schizophrenia, developmental disabilities);
- **digestive:** (Crohn's disease, celiac disease);
- **respiratory:** (asthma);
- **bowel:** (ulcerative colitis);
- **bladder:** (kidney disease);
- **circulatory:** (heart disease, high blood pressure);
- **endocrine:** (diabetes); and
- **reproductive functions:** (infertility).<sup>7</sup>



This new category of major bodily functions in the ADAAA has made it significantly easier for individuals with non-apparent disabilities to show a substantial limitation of a major life activity. Among others, courts have found:

- Arterial and blood conditions substantially limit the cardiovascular system<sup>8</sup>
- Kidney failure substantially limit the cleansing of the individual's blood and processing of waste<sup>9</sup>
- Type 2 diabetes substantially limits the endocrine function<sup>10</sup>
- Cancer substantially limits normal cell growth<sup>11</sup>
- HIV substantially limits the immune system<sup>12</sup>
- Hypertension substantially limits circulatory function<sup>13</sup>
- Irritable bowel syndrome (IBS) substantially limits bowel functions<sup>14</sup>
- Graves' Disease substantially limits immune, circulatory and endocrine functions<sup>15</sup>
- Multiple Sclerosis (MS) substantially limits neurological functions<sup>16</sup>
- Brain tumor substantially limits brain functions and normal cell growth<sup>17</sup>
- Spinal stenosis, cervical disc disease, neural foraminal stenosis, and cervical radiculopathy substantially limit operation of the musculoskeletal system<sup>18</sup>
- Removal of stomach and other parties of gastrointestinal system substantially limit bowel and digestive bodily functions<sup>19</sup>
- Post-Traumatic Stress Disorder (PTSD), schizophrenia, and other mental conditions substantially limit brain function<sup>20</sup>
- Hepatitis C substantially limits the immune system, digestive, bowel and bladder function<sup>21</sup>
- Coronary disease substantially limits the cardiovascular system<sup>22</sup>
- Sleep apnea substantially limits sleeping or breathing<sup>23</sup>

## II. Disability Inquiries & Medical Examinations<sup>24</sup>

The ADA prohibits certain medical examinations and disability inquiries and differentiates between three stages of employment in determining what medical information may be sought by employers. While the ADA's provisions covering disability-related inquiries and medical examinations have not engendered as much litigation as the discrimination and accommodation provisions, several interesting issues have been examined by the courts. Some of these cases are discussed below.



## A. Pre-Employment Medical Examinations & Inquiries

The ADA bars employers from questioning about the existence, nature or severity of a disability and prohibits medical examinations until after a conditional offer of employment has been made.<sup>25</sup> The ADA's restriction against pre-employment inquiries reflects the intent of Congress to prevent discrimination against individuals with "invisible" disabilities, such as HIV, heart disease, cancer, mental illness, diabetes and epilepsy, as well as to keep employers from inquiring and conducting examinations related to more apparent disabilities like people who are deaf, blind or use wheelchairs. The ADA's prohibition against pre-employment questioning and examinations seeks to ensure that the applicant's disability is not considered prior to the assessment of the applicant's qualifications.

### Cases finding for the Employee

At the pre-offer stage, the employer is only entitled to ask about an applicant's ability to perform the essential functions of the job.<sup>26</sup> In ***Phelps v. Lee Cty., Fla., No. 2:21-cv-121-JLB-MRM, 2021 WL 5826235 (M.D. Fla. Dec. 8, 2021)***, the district court denied the defendant's motion to dismiss. Plaintiff had acute bilateral atrophy, causing him to be visually impaired since birth. As part of his application for the position of library associate, he was asked whether he was "Handicapped/Disabled" and whether he had a valid driver's license. Based on his answers to these questions, he was rejected. The district court held that plaintiff had Article III standing to challenge the pre-employment test, owing to his not being hired. "Mr. Phelps's suggestion that he was not hired because of his responses to an allegedly unlawful pre-employment inquiry is sufficient to allege that he has suffered an injury or damages as a result of the inquiry. At the motion to dismiss stage, this alone is sufficient to plausibly state a claim of relief."

It does not matter if these questions are asked out of "compassion." In ***Helmuth v. Troy Univ., No. 2:19-cv-601-RAH-SMD, 2021 WL 1081118 (M.D. Ala. Mar. 19, 2021)***, the district court held that even well-intended if paternalistic questions about disability may constitute illegal medical inquiries. During an applicant's job interview, the interviewer asked such questions as "Why are you in a wheelchair?," "How long will you be in a wheelchair for?," "What are the doctors saying is wrong with you?," and "Where are you receiving medical care?" The district court held that there was a genuine dispute of material fact whether such questions violated 42 U.S.C. § 12112(d)(2)(A). Assuming the interviewers asked such questions of plaintiff, they "crossed the



proverbial line when they, even out of compassion, asked overbroad, intrusive questions that are not permissible under the ADA regardless of how innocent their intentions may have been.”

Plaintiffs do not need to show that they are qualified individuals with disabilities to bring these claims. In ***Hurd v. Cardinal Logistics Mgt Corp., No.: 7:17-cv-00319, 2018 WL 4604558 (W.D. Va. Sept. 25, 2018)***, plaintiff, a commercial driver, applied to work at Cardinal after that company acquired his former employer (PlyGem) and then terminated all of the commercial drivers there. During the application process, Cardinal required plaintiff “to submit to physical examinations—although he was already medically certified—and refused to hire him unless it received a new medical certificate . . . . After receiving the certificate, Cardinal asked Hurd to submit to a hemoglobin A1C test, which he did on October 15. The test showed that he had hyperglycemia and placed him at an increased risk for diabetes. The test also showed that Hurd took Dilantin for an unspecified condition. These medical examinations cost Hurd approximately \$1,020 in lost wages at PlyGem, in addition to mileage.” The district court granted plaintiff’s motion for partial summary judgment, holding (among other things) that Cardinal was not exempt from the ADA pre-employment under the provisions Federal Motor Carrier Safety Administration (FMCSA); that plaintiff need not prove that he was a “qualified person with a disability” to have standing to bring a claim for a pre-employment medical inquiry; and that plaintiff established Article III standing because he was at least injured to the tune of lost wages and costs of mileage. “The court . . . concludes that Cardinal’s pre-offer medical examinations and inquiries of and regarding Hurd constituted a per se violation of the ADA.”

## Cases finding for the Employer

At least one court has concluded that an applicant who faced impermissible questions during his job interview could not bring a claim if he could not prove causation between his answers and his adverse action. In ***White v. Town of Hurley, N.M., No. CIV 17-0983 JBKRS, 2019 WL 1411135 (D.N.M. Mar. 28, 2019)***, plaintiff—an applicant for a police officer position—was interviewed by town employees who already knew him. Because it was a small community, the interviewers were already personally aware that the applicant had been injured in a motorcycle accident. “Before the formal interview, an interviewer informally asked White about his treatment and ‘how [he] was doing.’” Plaintiff was ultimately denied the position. While the town characterized this exchange as simply casual conversation, the district court held that the questions constituted a prohibited pre-offer inquiry. “[D]rawing a line between a formal sitting down and asking of pre-recorded questions, and the walking into a room and informal chit-chat makes

little sense. Such questions plant the idea that an interviewee has a disability and insults the interviewee no matter when an employer asks the questions.” Nevertheless, the court granted summary judgment on the ground that plaintiff did not present a genuine dispute of material fact on causation, *i.e.*, that he was denied employment because of the pre-offer inquiry. “The Town of Hurley describes that the interviewers’ perceived White as a hot head, with temper issues, who would not be able to work courteously with Town of Hurley citizens as the position requires . . . . the interviewers could have concluded that the [successful] candidate exhibited a less volatile temperament and could have deemed that candidate more qualified.”

In ***McBratnie v. McDonough*, No. 20-cv-12952, 2023 WL 3318029 (E.D. Mich. May 9, 2023), appeal filed (May 16, 2023)**, the district court held that a Veterans Administration could require a temporary nurse practitioner applicant to verify in a Declaration of Health that they “do not have a physical or mental health condition that would adversely affect [their] ability to carry out the[ir] clinical privileges” and submit it with the Physician Confirmation verifying the responses. The district court held that these documents “fall well outside the boundaries of a ‘medical examination.’ They are neither ‘procedures’ nor ‘tests’ that are employed to assess the job applicant’s ‘physical or mental impairments or health’ . . . . Because the Physician Confirmation *does not require* the certifying doctor to perform any ‘new tests or procedures,’ it is more appropriately viewed as an ‘inquiry’ rather than a ‘medical examination’” (emphasis in original). Treated as an inquiry, it is lawful because “employers may ask job applicants about their ability ‘to perform job-related functions,’ 42 U.S.C. § 12112(d)(2)(B), and to ‘describe or ... demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions.’ 29 C.F.R. § 1630.14(a),” and the Declaration of Health does precisely that and no more.

## **B. Medical Examinations and Inquiries Following a Conditional Job Offer**

Once an employer extends a conditional offer of employment, employers may require medical examinations and ask disability-related inquiries subject to certain restrictions and safeguards.<sup>27</sup> For instance, such examinations and inquiries must be made for all entering employees in that job category.<sup>28</sup> If an examination or inquiry screens out an individual because of a disability, the exclusionary criterion must be job-related and consistent with business necessity.<sup>29</sup> In addition, the employer must show that the criterion cannot be satisfied and the essential functions cannot be performed with a reasonable accommodation.<sup>30</sup>



## Cases finding for the Employee

In *Avila-Arreola v. King Orchards, Inc.*, 2021 WL 3672231 (D. Or. Jul. 15, 2021), **report and recommendation adopted**, 2021 WL 3673809 (D. Or. Aug. 18, 2021), a supervisor at defendant fruit orchard was aware that plaintiff had a knee injury from a prior employment experience. Plaintiff “did not inform King Orchards that he was disabled” with a knee injury, “nor that he was unable to perform aspects of the pruning job, and he had never requested an accommodation from King Orchards . . . for a knee impairment.” Nevertheless, he was told that the orchard “would not hire him unless [he] provided a doctor’s note stating that he could perform the pruning job safely.” The magistrate judge concluded that the demand for a doctor’s note could be a prohibited pre-employment inquiry. There was a genuine dispute of material fact whether the orchard had made an offer before requiring the note. “Nevertheless, it is undisputed that King Orchards did not require a medical examination for all of its pruning job applicants . . . Thus, whether or not King Orchards extended a job offer before Barajas requested the doctor’s note provides no defense to King Orchards under the ADA.” The magistrate judge also concluded that even if proof of an adverse employment action were required for a medical-inquiry claim, the orchard did not hire plaintiff, which was an adverse action.

Medical examinations and inquiries made post-conditional job offer must also satisfy the standards of job-relatedness and business necessity. In *EEOC v. Dolgencorp, LLC*, No. 2:17-cv-01649-MHH, 2022 WL 2959569 (N.D. Ala. July 26, 2022), the district court denied summary judgment concerning whether the employer (which operates the national chain of Dollar General stores) violated the ADA by subjecting job applicants who were offered warehouse employment to vision and blood pressure tests. “Here, the EEOC alleges, and the evidence, viewed in the light most favorable to the EEOC and [charging party] Mr. Jackson, demonstrates, that Dollar General required job applicants to undergo a post-offer medical examination, and Dollar General deemed not qualified for employment in Dollar General’s Bessemer warehouse applicants whose corrected vision did not measure 20/50 or better in both eyes, whose blood pressure measured 160/100 or higher, and/or whose blood sugar exceeded a certain threshold.” Moreover, “[d]isputed questions of fact regarding Dollar General’s screen out policy preclude judgment in Dollar General’s favor based on the company’s job-relatedness and business necessity defenses.” Specifically, there was record evidence that the applicants could perform the essential functions of the job safely. (The case was litigated both under 42 U.S.C. § 12112(b)(6) and § 12112(d)(3); the district court dismissed the § 12112(d)(3) claim as “duplicative.”)



In ***Washington v. Montgomery Cnty., Md.*, No. GJH-17-3046, 2018 WL 3585259 (D. Md. July 26, 2018)**, the district court denied a motion to dismiss and for summary judgment. Plaintiff, an applicant for a bus-driver position, was ordered by Dr. Salvador Sylvester, who “held himself out as a doctor employed by Defendant’s Office of Human Resources, Occupational Medical Services,” to seek “additional medical information related to her [disability], including all doctor’s notes from 2014 and 2015, diagnosis, treatment, prognosis, follow up plan, medications, test results, and work restrictions.” This directive came despite that the employer “already had notes from Ms. Washington’s physicians that she was able to work without restrictions and that her condition did not pose a risk to others given her job description.” “Assuming all facts to be true, Plaintiff has also plausibly alleged that Sylvester impermissibly used an ‘exclusionary criteria [sic]’—Plaintiff’s disability—which was not ‘job-related and consistent with business necessity....’ Plaintiff has pleaded that Sylvester withheld Plaintiff’s medical clearance solely because of her disability, and that her disability did not impact her ability to drive a school bus.”

In ***Blakenship v. Metro Gov’t of Nashville & Davidson Cnty., Tenn.*, No. 3:19-CV-00146, 2021 WL 3037485 (M.D. Tenn. July 19, 2021)**, plaintiff, an individual with Type 1 diabetes, was conditionally hired as a firefighter, contingent upon a medical examination. Defendant did not hire plaintiff because they deemed his diabetes to pose “a significant risk to the safety and health of the person or others unless” he met a series of twelve criteria, of which he failed to meet one (quarterly testing of his A1C). Plaintiff filed suit and demonstrated a *prima facie* case of discrimination because that criterion screens out individuals with diabetes. Defendant asserted a business necessity defense, that “the quarterly A1C levels were necessary because insulin-dependent diabetics potentially have frequent blood sugar level fluctuations, which can lead to confusion or loss of consciousness, potentially placing them and others at risk.” Defendant went on to say that because the criterion requiring the quarterly A1C readings were tied to being able to carry out the essential functions of the job in a way that is safe not only for the firefighter but also for his team, it is job-related and consistent with business necessity. Both sides moved for summary judgment on the business-necessity defense. The Court held there was a genuine dispute of material fact about whether the criterion was job-related and consistent with business necessity and thus denied the cross-motions.

The ADA’s protections extend to requirements that impose substantial burdens on employees. For example, in ***EEOC v. BNSF Ry. Co.*, 902 F.3d 916 (9th Cir. 2018)**, the Ninth Circuit affirmed summary judgment for the EEOC on whether the employer violated the ADA by revoking a job offer for a security officer—who had spinal surgery





two years prior yet was medically cleared to work—when the applicant refused to submit to have a MRI on his back at his own expense. “BNSF chose to perceive Holt as having an impairment at the time it asked for the MRI and at the time it revoked his job offer.” The Ninth Circuit holds as a matter of law that the ADA did not authorize the employer to order the applicant to pay for the MRI. “[T]he EEOC concedes that BNSF could have required Holt to get an MRI if BNSF had offered to pay for the MRI. The dispute is over cost allocation. Although it authorizes testing that may disproportionately affect persons with disabilities, § 12112(d)(3) does not, by extension, authorize an employer to further burden a prospective employee with the cost of the testing, however necessary the testing may be.”

Employers must first acquire all non-medical information before extending a conditional job offer and seeking medical information. If this is not done and non-medical information is sought along with medical information, courts hold that the alleged conditional job offer was not an actual job offer under the ADA. For example, in ***Sorber v. Sec. Walls, LLC*, No. A-18-CV-1088, 2020 WL 2850227, at \*2, \*11–12 (W.D. Tex. June 1, 2020)**, ***disapproved on other grounds, Paugh v. Lockheed Martin Corp.*, No. 21-50472, 2023 WL 417648 (5th Cir. Jan. 26, 2023)**, the district court found that that the defendant violated 42 U.S.C. § 12112(d), though the court denied plaintiffs’ motion for summary judgment on the elements of injury and causation. Plaintiffs applied to be security guards at an Internal Revenue Service office. They challenged the requirement, established by a federal Executive Order, that required “[a]ll prospective employees [to] undergo a pre-employment medical/physical examination” by a licensed physician. The district court held that, contrary to defendant’s argument, the applicants had not received conditional offers of employment before they were required to submit to a medical examination. “Plaintiffs’ awareness of the Executive Order, the [employer’s] right of refusal for incumbent employees, and conditional requirements that would be imposed [on a job offer] do not equate to a conditional offer of employment . . . . Moreover, any alleged oral conditional offers of employment made during initial transition meetings with incumbent guards cannot be considered ‘real’ offers for the purposes of the ADA because Defendant had not evaluated all other hiring information and had not completed all non-medical portions of the application process.”



## Cases finding for the Employer

Courts are divided over whether an employee must allege a tangible injury to have Article III standing in federal court to bring an improper medical examination or inquiry claim under the ADA. In ***Taylor v. Health*, 675 F. App'x. 676 (9th Cir. Jan. 10, 2017)**, plaintiff was given a “conditional job offer” before the employer had obtained all non-medical information. The Ninth Circuit affirmed on the ground that plaintiff presented no genuine dispute about being qualified for the position because lifting more than 50 pounds was an essential function of the Certified Nursing Assistant position. It held that while the ADA “prohibit[s] medical examinations and inquiries until *after* the employer has made a ‘real’ job offer to an applicant,” Article III standing “requires a concrete injury even in the context of a statutory violation.” Because plaintiff was not qualified for the position, and therefore could not have been hired even absent the violation, she could not prove a concrete injury at the time of the medical exam.

## C. Medical Examinations and Inquiries for Employees

Once a person is employed, an employer may make disability-related inquiries and require medical examinations *only* if they are job-related and consistent with business necessity.<sup>31</sup> The EEOC Guidance on Disability-Related Inquiries and Medical Examinations explains that to meet this standard, an employer must have a reasonable basis to believe that an employee is not qualified, poses a direct threat, or needs a reasonable accommodation. In response to a reasonable accommodation request, employers may request “reasonable documentation” about an individual’s “disability and its functional limitations that require reasonable accommodation” in situations “when the disability or the need for the accommodation is not known or obvious...”<sup>32</sup> The Guidance notes that employers may not generally ask what prescription medications employees are taking.<sup>33</sup>

## Cases finding for the Employee

In ***LaCroix v. Boston Police Dep’t*, No. 19-cv-11463-DJC, 2022 WL 876885 (D. Mass. March 24, 2022)**, two police officers injured on-duty and placed on leave, along with their unions, brought suit against the police department alleging that the city’s “blanket requirement for a physical examination after three-month leave and an additional psychological examination after six-month leave violates the ADA.” The district court granted summary judgment to the plaintiffs. The court primarily addressed the city’s assertion of business necessity. “Police officers face ‘unique stressors’ on the

job, . . . and BPD ‘needs to ensure that the officers assigned to its neighborhoods and those patrolling the streets are fully capable of performing the duties required of a police officer to the best of their abilities’ . . . . Additionally, BPD argues that ‘[m]ental health issues are often overlooked and underreported,’ which, in the context of armed police officers, could have very serious consequences for the safety of officers and the public.” But the court holds that however serious these concerns may be, they did not warrant an examination “where there are no specific concerns about an individual’s ability to perform their job duties . . . . Additionally, BPD has failed to present any evidence to establish that being on leave for three months or six months causes increased risk for physical and/or psychological conditions, respectively, that could negatively impact an officer’s job performance.” **See also *Lewis v. Gov’t of the Dist. of Columbia*, 282 F. Supp. 3d 169 (D.D.C. 2017)** (stating “[t]he business necessity standard is quite high, and is not to be confused with mere expediency” when concluding that the employer’s request for all employees who worked in a specific facility to disclose their alcohol and prescription-drug use).

Similarly, in ***Lewis v. Univ. of Penn.*, 779 F. App’x 920 (3d Cir. 2019)**, the plaintiff was a university police officer with a skin condition, pseudofolliculitis barbae (PFB), which prevented him from shaving. He obtained an exemption from the shaving requirement, but at the cost of having to provide medical certification every 60 days to support the accommodation. Among the plaintiff’s claims in this case was a challenge to the certification requirement under 42 U.S.C. § 12112(d). The Third Circuit reversed summary judgment on that claim. “Even if the certificates at issue do not require examinations, they still qualify as a form of inquiry . . . . We therefore conclude that § 12112(d)(4) applies to the Penn medical certificate requirement.” Notably, the court concluded that the frequency at which the plaintiff had to submit the certification was also subject to the business necessity requirement.

The scope of a medical release is similarly subject to the business necessity requirement. In ***EEOC v. Blue Sky Vision, LLC*, No. 1:20-cv-285, 2021 WL 5535848 (W.D. Mich. Nov. 1, 2021)**, the district court denied summary judgment on a claim that the employer terminated the employee—an optometrist—for refusing to submit to an unduly broad medical examination. Charging party Jansma had homonymous hemianopsia, which caused has a blind spot in the periphery of his vision. The employer learned of the condition and insisted, as a condition of continued employment, that plaintiff undergo a comprehensive medical evaluation which—by the terms of the release—might include review of “alcohol, mental health and substance abuse records, including psychotherapy notes; records protected under the regulations of 42 Code of Federal Regulations, Part 2, if any; [and] HIV and AIDS records . . . .” (Plaintiff agreed to evaluation only of his vision.) “Viewing the record in the light most favorable to Plaintiff,



the scope of the medical release was too broad. Defendant would be hard pressed to identify a medical record that would not be covered by the release. Indeed, Defendant does not try to do so. Thus, to the extent that [the evaluating doctor] Dr. Glisson would have obtained *any* health information from Jansma and *any* of Jansma's medical records, Dr. Glisson would be authorized to release that information to Defendant. The release therefore was overly broad and has not been justified as job-related and consistent with business necessity."

One issue is whether an employee voluntarily discloses disability-related information or discloses in response to a disability-related inquiry. In ***EEOC v. Loflin Fabrication, LLC*, 462 F. Supp. 3d 586 (M.D.N.C. 2020)**, a Plaintiff with a cervical disc disorder argued that a metal fabricating business' prescription drug disclosure policy violated the ADA's prohibition on medical inquiries that are likely to elicit information about a disability. The business argued that the employee was not subjected to an improper inquiry because she volunteered the information. The court held, however, that because the employee only stated that she was on a muscle relaxant after learning that she was to be subjected to a random drug test, a reasonable jury could find that she did not volunteer the information, and as a result, denied the employer's motion for summary judgment.

When courts examine fitness-for-duty tests, there, too, the question is whether they are job-related and consistent with business necessity, such as when employees are returning from medical leave. One determinative factor may be the information that the test is measuring. Is the test measuring an employee's ability to perform a particular task, *e.g.*, lifting 50 pounds, or is it measuring a physiological response that occurs during a task, *e.g.*, measuring an employee's blood pressure or heart rate when lifting 50 pounds.

In ***Hilliard v. Twin Falls Cnty. Sheriff's Off.*, No. 1:18-cv-00550-CWD, 2021 WL 149831 (D. Idaho Jan 15, 2021)**, the court denied cross-motions for summary judgment on whether the county's fitness-for-duty examinations were sufficiently individualized to the employee and whether the examinations were biased against the plaintiff. The plaintiff, a police captain, was treated for depression and took leave for back surgery. When he returned to work, there was testimony that he appeared impaired. "Hilliard was placed on paid administrative leave and asked to submit to a fitness for duty evaluation." But plaintiff contended that Chief Deputy Newman's statements to the examining doctor "falsely accused" Hilliard of having a history of substance abuse and improperly interfered with the doctor's evaluation. Hilliard argued "that the subjective and biased lay opinions of other employees relied upon by Defendants fail to satisfy



Defendants' burden of showing Hilliard posed a direct threat sufficient to establish the affirmative defense . . . . Hilliard challenges that the fitness for duty evaluations were 'a sham,' had nothing to do with the actual functions of the job, and, regardless, were unreliable because of [Chief Deputy] Newman's interference and his false allegations of prior substance abuse by Hilliard." The court holds: "On the present record, the Court finds there are genuine issues of material fact on this issue. Such as, whether Defendants followed County policies, whether Newman interfered with or tainted the fitness for duty evaluations, and whether Hilliard in fact was impaired and could perform the essential functions of his position. There is evidence from which a reasonable jury could find Defendants possessed sufficient information to conclude Hilliard posed a direct threat. Likewise, a reasonable jury could conclude Defendants failed to make an appropriate individualized assessment of Hilliard's ability to perform the essential functions of the job."

## Cases finding for the Employer

In ***Hannah P. v. Coats*, 916 F.3d 327 (4th Cir. 2019)**, the Fourth Circuit held that referral of a temporary employee to an Employee Assistance Program (EAP) was not an unlawful inquiry under the Rehabilitation Act (which incorporates the protections of the ADA for federal-sector employees). EAP is "is a voluntary counseling service for employees and their family members that provides 'free, confidential, short-term mental health[,] financial, and addictions counseling and referral to cleared community providers.'" Supposedly, the employee was referred to EAP by her supervisors when efforts to counsel her about her tardiness at work were unsuccessful. The Fourth Circuit held that the referral could not be considered a pre-employment medical examination "because Hannah was a current employee, not a job applicant. Although Appellee knew Hannah was considering applying for permanent positions with Appellee at the time she was referred to EAP, she had not yet done so." Viewed as a "medical examination of a current employee," the panel held there was no genuine dispute that "EAP is intended to be used as a voluntary counseling service, and not as a mandatory medical examination that would violate the Rehabilitation Act." Alternatively, the referral met the standards of job-relatedness and business necessity "because Appellee had a reasonable belief that Hannah's ability to perform the essential functions of her job was impaired by her repeated issues with attendance and timely reporting." **See also *Flanary v. Baltimore Cty., Md.*, No. CCB-16-3422, 2017 WL 1953870 (D. Md. May 11, 2017)** (finding an employer's requirement that a police officer undergo therapy as a condition of employment was job-related and consistent with business necessity," while citing the plaintiff's specific unique experience and that police departments have greater

leeway under the ADA's medical examination provision due to the unique job and safety responsibilities of a police officer).

It is well-settled that employers can ask disability-related questions in certain situations in response to requests for reasonable accommodations. In ***Rowlett v. Baltimore City Police Dep't*, No. 21-1205-BPG, 2023 WL 2664232 (D. Md. Mar. 28, 2023)**, that court holds that as part of the interactive process to make reasonable accommodations, an employer may request medical proof of an employee's pregnancy, citing the EEOC's *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act*, Question No. 10 (July 27, 2000), available at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> and 16 C.F.R. § 1630.14(c).

In ***Menoken v. Dhillon*, 975 F.3d 1 (1st Cir. 2020)**, the First Circuit affirmed dismissal of a complaint that the employer—the EEOC—“repeatedly access[ed] and review[ed] medical information in [plaintiff's] [Office of Workers' Compensation Programs (“OWCP”)] file” and that the EEOC lacked a “legitimate business justification” for such intrusions. The court holds that the employee failed to plausibly allege a critical element of the Rehabilitation Act claim, *i.e.*, that the inquiry concerned plaintiff's medical condition. “The only allegations that pertained to a medical inquiry by the EEOC were those relating to Menoken's request for a reasonable accommodation in 2012. As the district court explained, Menoken did not allege that the EEOC's attempt to access her OWCP files in 2014 bore any relation to its consideration of her reasonable accommodation request more than a year earlier.” Moreover, the Rehabilitation Act did allow the agency to inquire into the plaintiff's ability to perform job-related functions.

The district court denied cross-motions for both parties in ***Hixon v. Tennessee Valley Auth. Bd. of Dirs.*, 504 F. Supp. 3d 851 (E.D. Tenn. 2020)**, where the issue was whether the employer could require an employee to submit to psychological examinations on the basis of a positive drug test. Plaintiff had anxiety and depression and used a prescription drug, Marinol, to treat those conditions. Twice, on January 6 and 14, 2014, due to positive drug tests (detecting levels of the prescription drug and possible THC) the employer referred the employee to comprehensive examinations by two different doctors. The district court held that both parties presented genuine disputes of material fact about whether these examinations were warranted. Under the ADA, “there must be substantial evidence that an individual is unable to perform the essential attributes of her job to warrant an examination.” The district court held that neither side established their position as a matter of law: “Taking all inferences in favor of Defendant, Plaintiff cannot prove there is no genuine dispute of material fact as to

whether his Marinol usage affected his ability to perform his work. Plaintiff was taking a drug with potentially debilitating side effects, and it is possible that taking Marinol would prevent him from working safely as a chemist. Taking all inferences in favor of Plaintiff, Defendant cannot prove there is no dispute of material fact as to whether Plaintiff could perform the essential elements of his job. Defendant had no evidence Plaintiff was acting any differently at work or working in an unsafe manner. As there was no evidence Plaintiff's actual work was impaired, a jury could find that requiring an examination was unreasonable."

## D. Wellness programs

Employee wellness plans often require employees to submit to medical examinations and inquiries to participate. Some of these plans are tied to employer-sponsored health insurance, while others are not. Employers often provide strong "incentives" for employees to participate in their wellness plans, including greatly reduced healthcare costs. And while the ADA imposes restrictions on certain medical examinations and inquiries—as does a companion statute, the Genetic Information Nondiscrimination Act, 42 U.S.C. § 2000ff *et seq.* ("GINA")—employers find limited exceptions to these restrictions by way of the ADA's safe harbor provision and the "voluntary" nature of employee participation.

In ***Williams v. City of Chicago*, 616 F. Supp. 3d 808 (N.D. Ill. 2022)**, a district court denied a motion to dismiss a claim that a wellness plan was not "voluntary." "Plaintiffs allege that the Wellness Program is involuntary because the City made a \$50 payroll deduction for each month that an employee or covered spouse did not participate . . . . By contrast, the City argues that the Wellness Program is voluntary, as the inclusion of a "financial incentive" does not render the program involuntary . . . . The City notes that EEOC regulations in 2016 permitted wellness programs to include incentives of up to 30% coverage, but the EEOC withdrew these regulations in 2017 . . . . The issue of whether the Wellness Program is voluntary is a question of fact."

In ***EEOC v. Orion Energy Sys., Inc.*, 208 F. Supp. 3d 989 (E.D. Wis. 2016)**, the EEOC settled with an employer after an employee whom it had terminated accused the employer of retaliating against her for complaining that the employer's wellness program violated the ADA. Employees who opted out of this wellness plan were required to pay their entire monthly health insurance premium. After investigating the claim, the EEOC filed suit in a Wisconsin district court. The court dismissed cross-motions for summary judgment and set the case for trial. In its ruling, the court found that the ADA safe harbor provision was inapplicable in these circumstances, but that the employer could still avail itself of the "voluntariness" exception in spite of the very strong financial incentives for



its employees to join in the wellness program. The parties settled prior to trial, with the consent decree providing for a financial settlement for the employee in question, and with the employer agreeing to ensure that its wellness plans going forward would comply with the ADA's voluntariness provisions, and that it would not retaliate against any employees raising concerns of this nature in the future.<sup>34</sup>

The EEOC filed suit in a different Wisconsin federal district court to challenge another employer's wellness program on ADA grounds. In ***EEOC v. Flambeau, Inc.*, 846 F.3d 941 (7th Cir. 2017)**, the central issue presented in the district court was whether a wellness plan falls within the ADA's safe harbor provision if it is part of the employer's health insurance plan. The district court entered judgment for the employer. The Seventh Circuit dismissed the EEOC's appeal on the narrow grounds that the claim was moot due to the complaining employee having since resigned his position.

The EEOC has a long, and thus far unfruitful, history (starting in 2016) of issuing regulations about wellness plans. A federal district court ordered vacatur of rules previously promulgated by the EEOC in ***AARP v. EEOC*, No. 16-2113 (JDB), 2017 WL 6542014 (D.D.C. Dec. 20, 2017)**, finding that the agency was moving too slowly in revising these rules, per a prior order of the court. In 2016, AARP filed suit seeking an injunction against a then-recently adopted EEOC rule that permitted employers to impose penalties of up to 30% of the cost of coverage to encourage employees to disclose information that was protected under the ADA and GINA, without rendering such disclosures involuntary. In August 2017, the court agreed that the EEOC's rulemaking process had been arbitrary and sent the rule back to the agency for further revision. Finding the EEOC's projected timeline for completing its revisions to be unacceptably slow, the court responded to AARP's motion to alter or amend its earlier judgment by vacating the rule altogether, effective January 1, 2019.

A new proposed EEOC regulation of wellness plans (issued Jan. 7, 2021) were placed on hold by the Biden Administration's "Regulatory Freeze Pending Review" effective January 20, 2021, see order at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/regulatory-freeze-pending-review/>. Today, there remain no EEOC regulations in effect about these plans.





## E. Drug Testing

By definition, company-wide drug tests used to screen for illegal use of drugs are not medical examinations under the ADA. 42 U.S.C. § 12114(d)(1). Yet if the employer uses the test results in a way that screens out or tends to screen out individuals with disabilities, then the employer may be in violation of Section 12112(b)(6) of the ADA prohibiting “using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.”

### Cases finding for the Employee

In ***Bates v. Dura Auto. Sys., Inc.***, 767 F.3d 566 (6th Cir. 2014), employees were required to submit to drug testing because of concerns about illegal drug use in the workplace. As a result, several employees were removed from work because they failed initial drug screening tests due to their legal use of prescription drugs. Although these employees were not individuals with disabilities under the ADA, the Sixth Circuit held that a person did not need to be disabled to challenge an unlawful medical inquiry under the ADA. The court based this determination on Congress’ efforts to “curtail all questioning that would serve to identify and exclude persons with disabilities from consideration for employment.” (internal quotation marks omitted). The court held that the employer’s policy went further than what the ADA’s drug-testing exception permitted. As such, the court remanded the case for trial. **See also *Connolly v. First Personal Bank***, 623 F. Supp. 2d 928 (N.D. Ill. 2008) (denying motion to dismiss and explaining that although pre-employment drug tests for illegal drugs do not violate the ADA, when the tests cover legally prescribed drugs and are used to make employment decisions beyond the prohibition of illicit drug use, then such tests may violate the ADA.)

### Cases finding for the Employer

In ***EEOC v. Rogers Behavioral Health***, No. 19-cv-935-pp, 2022 WL 4080649 (E.D. Wis. Sept. 6, 2022), **appeal filed (Nov. 7, 2022)**, the district court granted summary judgment to an employer that subjected applicants for employment to a post-offer bank of drug tests, administered by an independent Medical Review Officer (MRO), which in the charging party’s case detected a prescription drug (Alprazolam). Acknowledging that screening for illegal drug use is lawful under the ADA, the EEOC argued that “that



exception does not apply here because defendant's drug screen also tested for drugs taken under the supervision of a licensed health care professional (in other words, drugs that do not meet § 12111(6)(A)'s definition of 'illegal drugs')." But the district court held that after extensive discovery, the EEOC presented no evidence "that the defendant was testing for anything other than the 'illegal use of drugs.' Defendant requires all candidates to pass a post-offer drug test." If a prescription drug were detected, then under the employer's procedures "the candidate provides the MRO with proof of a prescription, the MRO 'changes the positive result to a negative result and forwards the negative result' to the defendant." Here, the applicant was supposedly afforded opportunities to present evidence of her medical prescription and did not. "[T]here were two contacts with plaintiff after the positive drug test" in the form of voicemails, yet despite opportunities for the applicant "to find out why the MRO was trying to speak with her, opportunities that she did not take."

## F. COVID-19 Testing and Vaccine Mandates

Courts have had several opportunities to consider employer vaccine mandates during the COVID-19 pandemic. In ***Aronson v. Olmsted Med. Cntr.*, No. 22-1594 ADM/JFD, 2023 WL 2776095 (D. Minn. Apr. 4, 2023)**, the district court held that the plaintiff did not state a claim in challenging the employer's policy that employees must either get vaccinated against COVID-19 or submit to regular testing. "To the extent that Aronson alleges the vaccine requirement violated § 12112(d)(4)(A), the allegation fails to state a claim because a vaccine is not a procedure that seeks information about Aronson's health and is not an inquiry into whether Aronson has a disability . . . . Regarding the vaccine policy's requirement that employees report their vaccination status to OMC, this requirement is not an unlawful inquiry under the ADA because inquiring about an employee's vaccination status." Finally, with respect to the alternative that the employees who are not vaccinated must submit to weekly testing, "Aronson does not allege that she personally underwent any COVID-19 testing. Even if Aronson had alleged that she was subjected to COVID testing, such testing does not amount to an unlawful medical examination."

In ***Sharikov v Philips Med. Sys. MR Inc.*, No. 1:22-cv-00326 (BKS/DJS), 2023 WL 2390360 (N.D.N.Y. Mar. 7, 2023), appeal filed (Mar. 21, 2023)**, the district court dismissed a complaint challenging the employer's COVID-19 testing and self-reporting requirements. "Plaintiff alleges that Defendant violated the ADA by making "disability-related" medical inquiries and subjecting him to 'non-job-related medical examinations' by asking for his vaccination status and whether he had contact 'with any 'infectious people' and by requiring testing for COVID-19 and daily temperature screenings." First,



plaintiff did not plausibly allege that any of these inquiries would disclose that plaintiff had a disability. Second, “[e]ven assuming such inquiries or examinations were impermissible under 42 U.S.C. § 12112(d)(4)(A), because it is apparent from the Amended Complaint and its attachments that they were job-related and consistent with business necessity,” i.e., “the need to prevent the spread of COVID-19 in the workplace, the need to follow customer premises requirements, and the need to follow federal and state guidance on vaccination during the times alleged in the Amended Complaint.

### III. Confidentiality Issues

The ADA’s statutory language requires employers who obtain information about the medical condition or history of an applicant to be collected and maintained on separate forms, kept in separate medical files, and treated as a confidential medical record.<sup>35</sup> Medical information may only be shared by employers “in limited circumstances with supervisors, managers, first aid and safety personnel, and government officials investigating compliance with the ADA.”<sup>36</sup> In its regulations, the EEOC states that an employer’s confidentiality requirements apply to information learned in response to medical examinations and inquiries for employees, as well as information provided by employees as part of a voluntary health program.<sup>37</sup>

#### Cases finding for the Employee

In ***Ferguson v. Memorial Health Care Sys., Inc.*, No. 1:20-cv-00346-JRG-SKL, 2021 WL 1323935 (E.D. Tenn. Mar. 24, 2021)**, the plaintiff alleged that the results of her drug test were disclosed by the employer in its motion to dismiss in the current litigation, in violation of Section 12112(d)(4). The employer argued on a renewed motion to dismiss that defendant “is not prohibited from disclosing the medication in defense of Plaintiff’s ADA claim in this lawsuit.” But the district court held that information protected by Section 12112(d)(4)(C) is subject only to limited exceptions stated expressly therein and use of the information in litigation with the employee is not an enumerated exception. Moreover, while drug tests for illegal use of drugs are not medical examinations under the ADA, such results must nevertheless remain confidential insofar as they are obtained as part of an “inquir[y] into the ability of an employee to perform job-related functions,” the second part of Section 12112(d)(4)(B).

Like Ferguson, other plaintiffs’ confidentiality claims have focused on disclosure based on the results of drug tests. In ***Lisby v. Tarkett Alabama, Inc.*, No. 3:16-cv-01835-MHH, 2020 WL 1536386 (N.D. Ala. Mar. 31, 2020)**, the district court denied summary

judgment in a case where plaintiff's supervisor "told him in a 'medium talk' in front of several non-supervisor employees at the orientation that Dr. Daniel would not permit him to work because he tested positive for amphetamines—she may have said 'methamphetamines'—and methadone." Defendant argued that plaintiff "has no evidence of damages that he suffered as a result of any breach of confidentiality . . . . But Mr. Lisby has evidence that he suffered emotional distress from the breach, and emotional damages can support a medical inquiry claim."

Information obtained from fitness for duty examinations, in response to accommodation requests, and to justify absences are also generally required to be kept confidential. In ***McCarthy v. Brennan*, 230 F. Supp. 3d 1049 (N.D. Cal. 2017)**, an employee on the autism spectrum who worked for postal service, was required to take a fitness for duty examination, the results of which contained personal, confidential information about his medical history and diagnosis. The employee was eventually cleared for duty without the need for accommodations. However, the examination report was made available to all of plaintiff's supervisors. One of the supervisors, who had a history of animus towards people with disabilities, referenced the contents of this examination in letters complaining about plaintiff to the Letter Carriers' Union, the Postmaster, and the human resources manager. The supervisor also made discriminatory comments about plaintiff's disability in front of co-workers and took several adverse actions against him, including termination. Despite being aware of the unauthorized access to plaintiff's confidential medical records, the post office took no corrective action. The court held that the content of a fitness-for-duty examination is confidential information protected from unnecessary disclosure under the ADA. The court also found that plaintiff sufficiently alleged that the disclosure led to a tangible injury when plaintiff was terminated. **See also *Hoffman v. Family Dollar Stores, Inc.*, 99 F. Supp. 3d 631 (W.D.N.C. 2015)** (finding employer's disclosure of plaintiff's HIV to coworkers and customers could have violated the ADA's confidentiality requirements as it was disclosed as an explanation for an absence).

The ADA's statutory and regulatory language include clear exceptions to the employer's requirement to keep disability-related information confidential. As seen in ***Rivera v. City of North Chicago*, No. 19 C 5701, 2021 WL 323794 (N.D. Ill. Feb. 1, 2021)**, courts are reluctant to authorize additional disclosures, even when they come in the form of civil litigation discovery. In ***Rivera***, plaintiff alleged that the employer disclosed his medical information in its files to his ex-wife in response to a litigation subpoena. The district court denied the employer's motion to dismiss on plaintiff's claim of unlawful maintenance and disclosure of confidential medical information under the ADA. It rejected each of defendant's arguments that "(1) the information disclosed was

volunteered to them by Mr. Rivera, not obtained through an employment-related “inquiry”; (2) the information was disclosed outside of the employment context, and therefore is not protected by the ADA; and (3) the complaint does not allege that Mr. Rivera suffered a tangible injury as a result of the disclosure.” As to (1), the court holds that on the summary judgment record, plaintiff only voluntarily disclosed his “severe emotional and physical anguish,” and that the medical information was obtained as a result of further inquiries by the employer. Regarding (2), it was not material to the claim that the information was disclosed in litigation after plaintiff terminated his employment relationship. “Defendants are correct that the complaint alleges that the improper disclosure occurred after Mr. Rivera’s employment ended. But the ADA imposes no time limits on an employer’s confidentiality obligations, and courts and the EEOC have held that those obligations survive termination.” Finally, on (3), plaintiff’s assertion of emotional distress was a sufficient injury on which to base the claim. The court also notes that although the records were sought by a third party in litigation, there was no blanket litigation privilege that would support the unconsented disclosure. “[C]ourts generally have considered the purpose behind the ADA’s confidentiality provisions in deciding whether confidentiality concerns prevail over principles of liberal discovery, and have noted that the ADA’s confidentiality provisions themselves dictate that protected information may only be used in a manner consistent with the statute . . . . Here, even assuming the subpoena was valid and the documents at issue were responsive (both of which Mr. Rivera disputes), there can be no argument that the use of Mr. Rivera’s confidential medical information furthers the ADA’s purpose.

Not all disclosures to managers are permissible. In ***Brown v. Wilkie, No. 1:20-cv-01154-JPH-MJD, 2022 WL 1658802 (S.D. Ind. May 24, 2022)***, the district court denied summary judgment on a claim that the employer, the Veterans Administration, violated 42 U.S.C. § 12112(d)(4)(C) by sending copies of a letter containing plaintiff’s health information to three VA employees. The plaintiff had requested, and was denied, a reassignment to accommodate a chronic medical condition, hidradenitis suppurativa Stage II, which caused debilitating pain. “The VA argues that it is entitled to summary judgment on Ms. Brown’s unlawful disclosure claim because the letter was issued in response to Ms. Brown’s request for reassignment rather than a request for accommodation.” But the court holds that there is no “authority to support its argument that the Rehabilitation Act only covers disclosures of medical information related to a request for accommodation,” and the plain language “specifies that any information obtained through” an inquiry into the employee’s ability to perform job-related functions” is subject to the ADA’s confidentiality requirements . . . . Therefore, it does not matter that the VA obtained Ms. Brown’s information through her reassignment request instead

of through a formal request for accommodation.” The agency also argued that the disclosure fell within the exception under subsection (d)(3)(B)(i) permitting disclosure of medical information to managerial employees if related to “necessary restrictions on the work or duties of the employee and necessary accommodations.” But the court holds that that disclosure did not relate to work restrictions because the accommodation was denied. “[B]ecause that outcome was a denial, a reasonable jury could determine that there was no ‘necessary restriction’ or ‘accommodation’ of which [the supervisors] needed to be informed.”

In cases involving a breach of confidentiality, one issue courts examine is what evidence supports the plaintiff’s allegations that the employer breached confidential obligations. In ***Byrd v. Outokumpu Stainless USA, LLC*, No. 20-0520-WS-M, 2022 WL 2134993 (S.D. Ala. June 14, 2022)**, the district court denied summary judgment on a claim that the employer disclosed plaintiff’s drug test results to employees. Plaintiff was not hired after a pre-employment drug screen revealed the presence of prescription drugs. “There is evidence that some persons at the mill understood the plaintiff had not been hired due to his medications. First, an electrician employed by the defendant told the plaintiff that someone asked over the radio who was coming in on the next shift and, when the answer was ‘Daniel,’ someone said, ‘Oh, the one who can’t pass a drug test.’ . . . Second, another electrician employed by the defendant told the plaintiff there was a rumor going around in the administration building that the plaintiff had ‘too much medication going on’ and so the defendant couldn’t hire him . . . Third, Dickson heard someone say over the radio, ‘Where is that druggie at?’ . . . The plaintiff, who was with Dickson at the time, became angry and said, ‘I’m tired of hearing that,’ so Dickson assumed the reference was to the plaintiff . . . Finally, according to the plaintiff, Steve Zielinski, a team leader employed by the defendant, ‘went to my boss and told her that I was on four or five different medications and they couldn’t hire me.’” The district court also held that evidence of mental distress was sufficient to support a tangible injury for Article III standing.

Courts generally hold that the ADA’s confidentiality requirements do not apply to disability or medical information disclosed voluntarily, and not acquired in response to an employer’s medical inquiry. In ***Dedrick v. Abilene Motor Exp., Inc.*, No. 1:21CV00027, 2021 WL 5236817 (W.D. Wash. Nov. 8, 2021)**, the district court denied a motion to dismiss a claim under Section 12112(d)(4)(B), where defendants allegedly disclosed information about plaintiff’s benign brain tumor “to her co-workers, including on numerous occasions [plaintiff’s supervisors] complaining about her need to take breaks if she experienced symptoms and joking about her need for frequent medical testing.” While defendants argued that plaintiff disclosed the information voluntarily, not



subject to a medical inquiry, plaintiff plausibly alleged that the information was disclosed in a “fitness for duty report [that] would clearly be an employer-related medical inquiry protected by the ADA.”

However, if an employee’s voluntary disclosure to the defendant was done outside of an employer relationship, such as a client- or patient-relationship, this exception for voluntary disclosures does not necessarily apply. In ***Derin v. Stavros Ctr. for Ind’t Living, Inc.*, 581 F. Supp. 3d 351 (D. Mass. 2022)**, the district court denied a motion to dismiss on a claim that the employer allowed a coworker to “access[] her health records contained in Defendant’s client files,” who in turn allegedly shared her private medical information with other coworkers, none of whom had a legitimate business need to know the information.” While the employer argued that the information was not obtained through a medical examination or inquiry, this argument overlooked that the files were maintained by the center both as her employer *and* as her health provider. “[S]he provided the relevant information to Defendant as a client of its services, not within the context of her employment. The dual nature of the relationship between Plaintiff and Defendant is an important factor that distinguishes this case from others in which courts have found that employers were not required to treat information provided voluntarily as confidential health information.”

## Cases finding for the Employer

In ***Chandler v. Louisiana-Pacific Corp.*, No. 1:21-00341-KD-C, 2022 WL 15570702 (S.D. Ala. Oct. 28, 2022)**, the district court held that the disclosure of plaintiff’s bipolar and schizoaffective disorders was not covered by the ADA because the information was disclosed voluntarily and not subject to a medical examination or inquiry. Rather, as plaintiff admitted, “I told [the HR manager] that I wanted her to know that I was covered under the Americans With Disabilities Act, that I wanted to give her my mental health diagnosis, and I did[ ]” -- “I told her that I am a diagnosed bipolar with schizoaffective disorder.” The HR manager was then allowed to share this information with others in management, per Section 12112(d)(3)(B)(i). “[S]upervisor to supervisor disclosure of medical information of an employee is permissible, as such information assists employers to provide reasonable accommodations for an employee if and when needed.” And for good measure, the court observed that even if the information had been obtained as part of a medical examination or inquiry, disclosure was still job-related and consistent with business necessity to alert staff for plaintiff’s safety and the safety of the workplace.



One court concluded that a technical violation may not establish a cause of action in an ADA confidentiality case. In ***Smithson v. Miller, No. 1:20-cv-03021-JRS-MJD, 2022 WL 4098583 (S.D. Ind. Aug. 4, 2022), appeal filed (Sept. 6, 2022)***, the district court held that notwithstanding the failure of the employer to segregate plaintiff’s medical records as required by the Rehabilitation Act (adopting by reference the ADA standards of confidentiality), plaintiff failed to raise a genuine dispute of material fact about injury. “At some point, documentation of Smithson’s accommodations was stored in her personnel file, which was kept in a locked cabinet behind a locked door . . . . This was improper, as the documentation should have been maintained in a ‘separate medical file[.]’ However, to be entitled to relief on an improper-disclosure claim, courts have required a plaintiff to show that the medical information was disclosed by the employer and that the plaintiff suffered a tangible injury as a result . . . . [Plaintiff’s] only argument on this front is that her information must have been disclosed because people “who had no other way of knowing” about her medical condition knew about it, ‘as evidenced by the constant efforts to disrupt Smithson’s work environment and affect her anxiety and attention deficit’ . . . . But this is merely speculation, which will not defeat summary judgment.”

Likewise, in ***Mullin v. Secretary, U.S. Department of Veterans Affairs, No. 8:20-cv-2697-VMC-AEP, 2022 WL 2159721 (M.D. Fla. June 15, 2022), appeal filed (July 18, 2022)***, the district court granted summary judgment on a confidentiality claim under 42 U.S.C. § 12112(d) and 29 C.F.R. § 1630.14(c), based on disclosure of plaintiff’s breast cancer diagnosis to a union steward. Sidestepping whether the employer obtained this information on account of a “medical inquiry,” the court instead held that there was no proof of injury. “Here, while Mullin testified that she was ‘worried’ and ‘concerned’ when she found out about [the disclosure], she also testified that she was generally anxious about her cancer treatments. Thus, Mullin has not presented more than a scintilla of evidence of a tangible injury resulting from the alleged disclosure of her breast cancer diagnosis. Thus, any technical violation of the statute would not give rise to liability.”

One example of a court that concluded that a disclosure was voluntary was ***Childers v. St. Vincent Heart Cntr. of Ind., LLC, No. 1:18-cv-03984-JPH-TAB, 2021 WL 146998 (S.D. Ind. Jan. 14, 2021)***, the court granted summary judgment in a case where the employer shared information about the plaintiff’s back surgery. “[T]he incidents identified by Ms. Childers—[her supervisor] Ms. King discussing Ms. Childers’ back condition in front of fellow St. Vincent employees—are outside the scope of what’s protected by the ADA . . . . The confidentiality provisions of the ADA do not apply because the information was not obtained through a medical exam or an inquiry about Ms. Childers’ ability to perform job-related functions. The designated evidence shows that the August 9 conversation stemmed from an email that Ms. Childers sent to Ms. King informing her





that Ms. Childers had a doctor's appointment . . . Ms. Childers reached out to Ms. King unprompted and voluntarily disclosed the fact that she had an upcoming doctor's appointment, excluding it from coverage under 42 U.S.C. § 12112(d)."

In ***Hannah P. v. Coats*, 916 F.3d 327 (4th Cir. 2019)**, the Fourth Circuit held that referral of a temporary employee to an Employee Assistance Program (EAP) did not violate the employee's confidentiality rights under the Rehabilitation Act (which incorporates the protections of the ADA for federal-sector employees). EAP is "is a voluntary counseling service for employees and their family members that provides 'free, confidential, short-term mental health[,] financial, and addictions counseling and referral to cleared community providers.'" Plaintiff "allege[d] two separate Rehabilitation Act violations regarding her medical information: first, that [plaintiff]'s supervisors wrongfully sought and disclosed confidential medical information elicited from [plaintiff], and second, that the EAP psychologist wrongfully disclosed confidential medical information gathered from the EAP session to [plaintiff]'s supervisors." With respect to the former, "Hannah voluntarily disclosed her depression diagnosis to her supervisors" and "[t]he Rehabilitation Act does not protect information shared voluntarily" by the employee. Regarding the latter theory, the record yielded "no evidence that the EAP psychologist shared *medical information*" with plaintiff's bosses.

The ADA provides that confidential information may be shared with individuals who need to know the information. In ***Perez v. Denver Fire Dep't*, 724 F. App'x 646 (10th Cir. 2018)**. In *Perez*, an individual with PTSD deriving from military service was employed as a firefighter. After having an emotional reaction to events on the job, plaintiff disclosed to his supervisors and coworkers that his reaction was related to events he had experienced during his military service and that he was currently receiving treatment at the VA; plaintiff has no memory of stating that he has PTSD. The employer later had him undergo a fitness for duty evaluation and told his coworkers that plaintiff had PTSD and was being evaluated. The Tenth Circuit upheld the district court's decision finding that plaintiff failed to provide evidence that his employer disclosed information that was derived from a medical exam or inquiry. The court further held that "an employer can't be liable for disclosing medical information that the employee voluntarily disclosed outside of a medical examination." **See also *Sheets v. Interra Credit Union*, 671 F. App'x 393 (7th Cir. 2016)** (finding employer did not breach the ADA's confidentiality obligations when medical information was shared with management because the ADA "allows disclosure to supervisors and managers for the purpose of ascertaining necessary work restrictions and accommodations"); ***McLean v. Delhaize Am.*, No. 1:12-cv-00381-GZS, 2013 WL 1632646 (D. Me. Mar. 27, 2013)**

(finding plaintiff sufficiently alleged an ADA claim based on impermissible disclosure of medical information when his management disclosed his request leave for his substance abuse and mental health to coworkers causing him significant distress and making him emotionally unable to return to work).

#### IV. Direct Threat<sup>38</sup>

An employer may avoid liability for discrimination by establishing its employee posed “a direct threat to the health or safety of other individuals in the workplace.” 42 U.S.C. § 12113. “Direct threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” 29 C.F.R. § 1630.2(r). A direct threat determination must be based on an “individualized assessment of the individual’s present ability to safely perform the essential functions of the job.” *Id.* This individualized 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.” *Id.*

Factors that the regulations suggest should be considered in determining direct threat 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. *Id.* In most (but not all) courts, the burden is placed on the employer to prove direct threat.

## Cases finding for the Employee

In *Nall v. BNSF Ry. Co.*, 917 F.3d 335 (5th Cir. 2019), the court reversed summary judgment in a case involving a trainman diagnosed with Parkinson's. "A reasonable jury could conclude that BNSF did not consider the 'best available objective evidence' or meaningfully 'engage in an "individualized assessment' of whether Nall could perform the essential duties of a trainman safely—and that, as a result, BNSF's direct threat determination was not objectively reasonable. First is the issue of identifying those essential duties." The job description, contrary to the employer's testimony, "did not include any reference to quick movements, balance, or steadiness. Moreover, BNSF's terminal manager testified that it was not essential to work quickly as a conductor, switchman, or brakeman." There was also a genuine dispute about whether the railroad performed an individualized assessment. "The evidence that Nall presented—that BNSF employees (1) disregarded Nall's medical release forms; (2) relied on safety violations they later identified in Nall's field test despite his successful completion of the assigned tasks; (3) changed the trainman job description to incorporate tasks that an individual with Parkinson's may have difficulty performing; and (4) made comments indicating a belief that Parkinson's categorically disqualified an individual from working as a trainman—calls into question the credibility of BNSF's decision to disqualify him."

In *Brasier v. Union Pac. R.R. Co.*, No. CV-21-00065-TUC-JGZ (MSA), 2023 WL 2754007 (D. Ariz. Mar. 31, 2023), the district court denied summary judgment in a case involving a railroad conductor who "underwent brain surgery," where the "dispute centers on [plaintiff]'s post-surgery seizure risk. First, the court found a genuine dispute about whether plaintiff obtained an individualized assessment. "[N]o physicians with expertise in neurology or brain surgery participated in the FFD [fitness-for-duty] assessment because" the evaluating doctors considered the case to be "straightforward." Further, there was evidence that the evaluating doctors "relied exclusively on the [Federal Motor Carrier Safety Administration's (FMCSA) 2014 Medical Examiner] Handbook's generalized statement that all individuals with a penetrated dura had a permanently increased seizure risk." Moreover, there was "no analysis of [plaintiff]'s specific risk of seizure or the potential harm that could occur if he experienced a seizure while on duty." On the four regulatory factors, the district court found genuine disputes as well. "Union Pacific argues the Magistrate Judge should have afforded greater weight to the second § 1630.2(r) factor: nature and severity of the potential harm . . . . According to Union Pacific, Brasier *suffering* from a seizure while responsible for a 5,000-ton train carrying hazardous material could cause "catastrophic harms" . . . . This potential for catastrophe, however, is disputed. As a conductor, Brasier contends he does not operate the train but manages paperwork and ensures the engineer, who does operate the train, follows correct protocols . . . . Brasier also

contends there are multiple safeguards, including the use of a three-person train crew and ‘alerter bottoms,’ which prevent catastrophic harms should one crew member suddenly become incapacitated.” (*But see Goode v. BNSF Railway, Inc., infra*, for a different result on similar facts.)

In ***EEOC v. Outokumpu Stainless USA, LLC*, No. 20-521-CG-B, 2022 WL 4004769 (S.D. Ala. Sept. 1, 2022)**, the court denied summary judgment in a case involving a charging party (Burress) who operated heavy equipment for the employer. Burress had anxiety disorder and ADHD and used prescription Xanax for treatment. When he applied for a new position at the company as an Entry Operator in the steel mill, he received a conditional offer which was later withdrawn because of the prescription drug. While the employer raised a direct-threat defense, the court held “that Burress has presented facts from which a jury could reasonably conclude that he was not a direct threat. First, the undisputed evidence is that Burress only took Xanax to sleep and never less than five hours prior to working. Consequently, any side effects he may have experienced do not unequivocally establish he posed a direct threat. On that note, Burress has additionally testified that he never experienced side effects at work and there is no evidence to the contrary. Instead, Burress’ track record of safety at work supports his testimony. Specifically, Burress has presented evidence that he has worked in hazardous environments, including one similar to the Melt Shop, without any safety incidents. The testimony of Dr. Edwards also supports Burress’ testimony as to when he took Xanax and Dr. Edwards’ records do not contradict that Burress only took Xanax to sleep and did not experience side effects of Xanax at work.” The EEOC also presented expert testimony about the absence of direct threat. Finally, there was contested evidence about the individualized inquiry. Although Danielson (the Certified Registered Nurse Practitioner who performed the examination) completed an in-person exam of Burress, “the EEOC has presented facts which show that (1) Danielson did not determine whether Burress was actually taking Xanax, (2) if he was taking Xanax, how often or when, or (3) if he was experiencing any potential side effects of Xanax, or ever had.” Danielson relied almost entirely on the patient insert for Xanax, which describes fatigue as a possible side-effect.

In ***Sanders v. Union Pac. R.R. Co.*, No. 4:20CV3023, 2022 WL 3446189 (D. Neb. Aug. 17, 2022), appeal filed (Sept. 1, 2022)**, the district court denied judgment as a matter of law on the direct threat defense after a jury found the employer liable under the ADA for firing a foreman. “Sanders presented evidence that he was actually disabled because he had suffered from a GI bleed that resulted in a cardiac event, and he had hypertension, and knee and back issues.” The jury also could have found that the employer failed to give plaintiff an individualized assessment. “Essentially, the

evidence shows that Sanders’s heart was fine. But Union Pacific refused to listen to Sanders, refused to listen to his doctors, refused to call his doctors, refused to examine him consistent with his heart condition, and refused to authorize an alternative to the Bruce Protocol test. It issued restrictions on Sanders that far exceeded the recommendations of his three treating doctors.”

In ***Munoz v. Union Pac. R.R. Co.*, No. 2:21-cv-00186-HL, 2022 WL 4348605 (D. Or. Aug. 9, 2022)**, the district court denied summary judgment in a case involving a track laborer with alleged cognitive and vision disabilities, without a definitive diagnosis. “Although UPRR gathered substantial medical evidence regarding Plaintiff’s condition, a genuine dispute nonetheless exists whether Plaintiff posed a direct threat to the health or safety of others in the workplace. For example, Dr. Shakoor determined that Plaintiff’s vision was excellent, and Dr. Shakoor released Plaintiff to return to work without restrictions . . . . Dr. Hegmann and Dr. Anis both determined that Plaintiff may have cognitive limitations, but neither doctor arrived at a definitive diagnosis . . . . Dr. Anis also suggested an on-the-job assessment to test Plaintiff’s ability to perform his actual work, but UPRR did not conduct such an inquiry . . . . Further, while Dr. Fuja opined that Plaintiff lacks depth perception, . . . Dr. Lewis acknowledged that it is possible for an individual who lacks depth perception to safely operate a machine . . . . When presented with this conflicting medical evidence, a reasonable juror could conclude that UPRR has not met its burden of demonstrating that Plaintiff posed a significant risk to the health or safety of others.” (*But see Milan v. Union Pac. R.R. Co.*, *infra.*)

Likewise, in ***Byrd v. Outokumpu Stainless USA, LLC*, No. 20-0520-WS-M, 2022 WL 2134993 (S.D. Ala. June 14, 2022)**, the district court denied summary judgment on a direct-threat defense based on plaintiff’s use of prescription Hydrocodone. The court found a genuine dispute about whether there was an individualized assessment of plaintiff. “In this case, [the nurse practitioner] Sesera’s recommendation that the plaintiff be excluded from safety-sensitive work was based only on a product packet identifying drowsiness as a potential side effect of hydrocodone and on the failure of Dr. McAlister to provide her with information regarding the frequency and timing of the plaintiff’s use of hydrocodone. There is no evidence that Sesera knew anything about hydrocodone beyond what she had read on a package insert. There is no evidence that she asked either Dr. McAlister or the plaintiff himself to identify the frequency and timing of his use of hydrocodone. There is no evidence that she asked either Dr. McAlister or the plaintiff himself about his actual experience with hydrocodone, including any side effects.”

In ***Lisby v. Tarkett Alabama, Inc.*, No. 3:16-cv-01835-MHH, 2020 WL 1536386 (N.D. Ala. Mar. 31, 2020)**, the district court denied summary judgment on the direct threat defense for a factory worker who was prescribed methadone to treat chronic pain. “Here, evidence contradicts Tarkett’s argument that Mr. Lisby posed a direct threat . . . . Tarkett reached its decision based only on Dr. Daniel’s opinion. But Dr. Daniel did not examine Mr. Lisby or investigate whether Mr. Lisby actually exhibited impairments from taking methadone. Instead, Dr. Daniel opined that Mr. Lisby was a safety risk because Dr. Daniel generally considered all long-term opiate users to pose an increased risk of injury.”

In ***EEOC v. St. Joseph’s/Candler Health System, Inc.*, No. 4:20-cv-112, 2022 WL 628542 (S.D. Ga. Mar. 3, 2022)**, the court denied summary judgment on direct threat in a case involving a Safety Officer (named McKeever) with HIV. “Safety Officers’ responsibilities include patrolling the Hospital’s facilities, providing patient assistance when requested by medical staff, and responding to calls for vehicle assistance, domestic or family disputes, psychiatric patient issues, and emergency room patients exhibiting violent tendencies.” The employer argued McKeever’s HIV-positive status rendered him a direct threat in the Safety Officer role because responding to conflict situations or aggressive patients is an essential function of the job, and McKeever could have sustained injuries that caused him to bleed, potentially causing the transmission of HIV to others.” But the court found contested issues of fact about both individualized inquiry and direct threat. “[N]othing in the record indicates that McKeever has ever experienced blips or that his viral load has reached detectable levels since being diagnosed with HIV. Indeed, the parties agree that, since at least October 2015 to September 2018, McKeever has tested his viral load twice a year and received a result indicating an undetectable viral load each time.” Moreover, the record failed to reveal evidence the hospital asked any medical professional “to review Floyd’s medical records and assess his risk of transmission prior to rendering her ultimate decision. Likewise, while the fact that Floyd obtained an opinion . . . via email after providing some general information about McKeever’s HIV status could support a determination that Floyd performed an individualized assessment, this is undercut by the fact that [the assessing physician] had neither examined McKeever nor reviewed his medical records in formulating the opinion[.]”

In ***Hill v. Greater Philadelphia Health Action, Inc.*, No. 19-4928, 2021 WL 3708685 (E.D. Pa. Aug. 19, 2021)**, the court found “close to the platonic ideal of a ‘genuine dispute of material fact’” about individualized inquiry. Plaintiff was a dental assistant with a seizure disorder. “Defendant leans on the report of its Chief Medical Officer, Dr. Janet Young in arguing Plaintiff posed a direct threat to the employer. However, Dr. Young’s



report sits beside the evaluation of an equally qualified doctor who actually interacted directly with Plaintiff: Dr. Bradley's. Dr. Young viewed Dr. Bradley's instruction that Plaintiff not engage in certain unsupervised risky activities as dispositive of Hill's unfitness for employment. In her report, she wrote '[t]hese restrictions raise serious concerns about Ms. Hill's risk of injury to herself and others should a lapse of consciousness occur' . . . . By contrast, Dr. Bradley's preceding sentence stated '[Plaintiff] should be allowed to resume work immediately', and the risk of repeat seizures was low 'with appropriate initiation of medication' and regular use."

In ***Blankenship v. Metro Gov't of Nashville & Davidson Cnty., Tenn.*, No. 3:19-CV-00146, 2021 WL 3037485 (M.D. Tenn. July 19, 2021)**, Plaintiff, an individual with Type 1 diabetes, was conditionally hired as a firefighter, contingent upon a medical examination. Defendant did not hire plaintiff because they deemed his diabetes to pose "a significant risk to the safety and health of the person or others unless" he met a series of twelve criteria, of which he failed to meet one (quarterly testing of his A1C). Plaintiff filed suit and demonstrated a *prima facie* case of discrimination because that criterion screens out individuals with diabetes. The Court denied the employer's use of the "Direct Threat" defense because the standard appeared primarily to be about ensuring the applicant's fitness for duty, and only secondarily about directly protecting others from any threat posed by any lack of such fitness.

In ***Karr v. City of Decatur, Ill.*, No. 19-CV-2134, 2021 WL 6109037 (C.D. Ill. Mar. 22, 2021)**, the court denied summary judgment in a case involving a city police officer being treated for a seizure disorder. "The record does not provide any explanation of how or even whether Defendant assessed Dr. Braco, Dr. Petersen, and Dr. Kathuria's recommendations for objective reasonableness. The record does not show that Defendant took account of or considered the records from Plaintiff's treating providers. Of note is the letter by Dr. Hamilton, who on December 1, 2016, wrote of his treating relationship with Plaintiff, noted her excellent medication compliance, and stated that she was not restricted from duty. Also of note is APN Spangler's multiple statements that Plaintiff was not restricted from duty due to her treatment. Relevant to Defendant's January 2019 decision to rescind its offer to reemploy Plaintiff as a police officer are APN Spangler's statement that the NFPA 1582 standards *would* impact Plaintiff's ability to do her job, and the Board's medical examinations, which support inferences favorable to both parties."

In ***Bailey v. Metal-Fab, Inc.*, No. 19-1098-JWB, 2020 WL 6077315 (D. Kan. Oct. 15, 2020)**, plaintiff was diagnosed with *petit mal* seizures. The employer terminated her from working as a fabricator in a metal shop because, after a medical evaluation, it concluded that a seizure in the shop could be hazardous. The district court denied

summary judgment, finding genuine disputes about whether plaintiff received an individualized assessment and genuinely posed a direct threat. “According to the uncontroverted evidence, Plaintiff’s seizures usually involved a short lapse in concentration and had never resulted in a fall. A jury could conclude that [plant manager] Harris’s opinion was not based on individualized consideration of Plaintiff’s disability, but was based on unfounded assumptions about persons who have seizures. Harris does not remember if he knew anything about whether Plaintiff fell when she had seizures or the duration, frequency, or likelihood of her seizures, and testified that he and [the HR director] did not discuss the likelihood of Plaintiff having a seizure.” The only medical opinion in the record was by plaintiff’s physician, Dr. Hassan, “who after being apprised of Plaintiff’s job conditions opined that she was able to perform the job with restrictions including no welding and using machinery with safety devices. He expressed no concern and imposed no restriction relating to working around forklifts. With respect to the duration, nature, and likelihood of the risk, a jury could find that Defendant lacked objective evidence of a significant risk to health or safety.”

In ***Garibay v. Hamilton Cnty., Tenn.*, 496 F. Supp. 3d 1140 (E.D. Tenn. 2020)**, the court denied the employer’s motion for summary judgment because a genuine issue of material fact existed as to whether a properly individualized inquiry into plaintiff’s PTSD occurred. A job applicant for a correctional officer position was not hired after he failed to get clearance from a psychologist. When conducting the assessment, the psychologist reviewed answers from plaintiff’s written psychological examination and medical records and conducted a 45-minute interview. However, he stated that people with a history of PTSD “are not considered suitable for this type of work” and that they “don’t qualify for the evaluation, really.” The Court found that these comments could be construed as “stereotypes and generalizations,” rather than an individualized assessment.

In ***EEOC v. T&T Subsea, LLC*, 457 F. Supp. 3d 565 (E.D. La. 2020)**, an employee (Woods) who was a commercial diver was terminated when the employer determined that under the Association of Diving Contractors International (ADC) guidelines, his cancer and treatment would preclude him from passing the dive physical. The court denied summary judgment on a direct threat defense, finding a lack of an individualized assessment. “Considering the evidence before the Court that T&T relied on the advice of a physician who did not examine Woods or his medical records before firing him, a reasonable jury could find that T&T did not make an individualized assessment of Woods’s actual ability to perform safely the essential functions of the job. Whether T&T relied on the best available objective evidence of Woods’s condition is a disputed issue of material fact because Woods’s treating physician cleared him for diving shortly after T&T fired him and T&T refused to rehire Woods based upon the treating physician’s



clearance. On the record before the Court, it is not enough to garner judgment as a matter of law for T&T to point to the ADCI guideline on malignancies and a five-year waiting period. Indeed, T&T itself allowed Woods to dive after his chemotherapy and radiation treatments when it was aware of Woods's cancer. Moreover, after T&T fired Woods post-surgery, he was soon employed by another company as a diver after passing a pre-employment physical, thus evincing a factual dispute as to whether his condition poses a direct threat to safety. Therefore, T&T is not entitled to summary judgment on its direct-threat defense."

In ***West v. Union Pac. R.R. Co., No. 4:18-CV-3340, 2020 WL 1446908 (S.D. Tex. Mar. 24, 2020)***, the court denied summary judgment in a case where a train conductor was diagnosed with major depression, attempted suicide, and tested positive for illegal drugs. The examining doctor, Dr. Holland, testified that plaintiff had a greater likelihood of attempting suicide again. But he cited no "medical research or any other basis for this conclusion. Asked whether he was aware of any medical literature that demonstrates that people who have attempted suicide present an unacceptable safety risk in the workplace, Dr. Holland cited reports of commercial airplane crashes attributable to probable suicide attempts by flight crew . . . . Asked whether he was aware of any medical literature supporting his opinion that an employee who attempts suicide presents an unacceptable safety risk in the workplace, Dr. Holland said he had not looked at that issue specifically . . . . While his conclusion is presumably based on his experience and expertise, his otherwise unsubstantiated assertion is not enough to warrant summary judgment. Neither a history of psychiatric disability nor attempting suicide constitute *per se* bases for finding that an employee poses a direct threat." (*But see Rohr v. Union Pac. R.R. Co., infra.*)

In ***Goode v. BNSF Ry., Inc., No. 4:18-CV-319-Y, 2020 WL 1527864 (N.D. Tex. Mar. 20, 2020)***, applied for a conductor position with BNSF. Goode had a pacemaker and an implantable cardioverter-defibrillator (ICD) installed for a heart condition. The court held on summary judgment that the employer prevailed as a matter of law on its direct threat defense. Two doctors' declarations indicate that they concluded that re-employing Goode in a train-service position presented an unacceptable risk of harm due to the possibility of his ICD's firing and causing him to collapse. The evidence reflects that if Goode's ICD fires and he collapses, he could easily present a danger both to himself and to others. If riding on the side of the train while acting as a conductor when his ICD fires, Goode might fall off the train, thus causing himself injury. If standing between tracks in proximity to each other in the railyard when his ICD fires, he might be run over or struck by moving equipment. Either of these events might jeopardize other employees as well, either in an attempt to rescue Goode or as a result of a larger accident that might result. If Goode were acting in an engineer capacity and transporting

hazardous material at the time his ICD fires, the risk to himself, his fellow employees, and the general public could be great. The probability and duration of the risk caused by his ICD's firing both might be low, but the nature and severity of the risk caused when he collapses as a result of his ICD's firing is potentially catastrophic." (*But see Brasier v. Union Pac. R.R. Co.*, *supra*, for a different result on similar facts.)

In ***Darr v. WRB Refining LP*, No. 3:17-CV-1355-NJR-GCS, 2019 WL 2338507 (S.D. Ill. June 3, 2019)**, the court held there was a genuine dispute about the applicability of the direct threat defense in a case involving an instrument and control systems designer who worked for an oil refinery. Plaintiff was diagnosed with multiple sclerosis (MS). Her doctor cleared her medically for all duty other than hand-over-hand climbing, but the company terminated her anyway. The court holds that the employer did "not present evidence that a 'reasonable medical judgment' compels summary judgment, because, again, they do not offer an opinion from a medical expert concerning Darr's ability to perform her job . . . . In fact, the only relevant medical judgment comes from Dr. Dirkers's fitness for duty exam, which took place roughly nine months before Darr's termination and concluded that Darr could perform all of her job functions . . . . Also, this is not a case where a medical opinion is unnecessary to establish the direct-threat-defense, because there is not enough unfavorable non-medical evidence against Darr."

In ***Hartmann v. Graham Pkg. Co., L.P.*, No. 1:19-cv-488, 2022 WL 219385 (S.D. Ohio Jan. 25, 2022)**, the court denied cross-motions in a case concerning a forklift driver who used prescription drugs to treat chronic pain. The court denied both parties' motions for summary judgment on direct threat. "[T]here remains a genuine dispute of fact as to whether Graham completed its individualized inquiry and whether it properly considered the relevant factors . . . . "First, [the company's] communications with [plaintiff's provider] cannot satisfy the individualized inquiry requirement because the hospital specifically declined to comment on whether Hartmann could perform the job functions . . . . Second, [the company's] requests for letters do not satisfy the individualized inquiry because, to the extent the resulting letters offered Graham any guidance in its decision-making, it was *in favor* of hiring Hartmann, or at least, pointed in favor of engaging in further inquiry." Nevertheless, "both parties have failed to develop the record sufficiently for the Court to conclude that Graham either did, or did not, complete the individualized inquiry . . . . [T]here is evidence from which a jury could conclude that Graham's inability to complete the inquiry arose from shortcomings that Hartmann caused."

In ***Hilliard v. Twin Falls Cnty. Sheriff's Off.*, No. 1:18-cv-00550-CWD, 2021 WL 149831 (D. Idaho Jan.15, 2021)**, the plaintiff was a police captain receiving treatment for depression and pain from back surgery. (See discussion of this case *supra* at § II.D, "Fitness-for-Duty Tests.") The court denies both motions for summary judgment on the

direct threat defense. “Defendants rely in large part on the employee reports and concerns about Hilliard’s behavior in the workplace in June and July 2017, as evidence that Hilliard failed to meet the minimum job related qualification standards, even on light duty, and that he posed a direct threat to the safety of others . . . . Hilliard counters that the subjective and biased lay opinions of other employees relied upon by Defendants fail to satisfy Defendants’ burden of showing Hilliard posed a direct threat sufficient to establish the affirmative defense . . . . There is evidence from which a reasonable jury could find Defendants possessed sufficient information to conclude Hilliard posed a direct threat. Likewise, a reasonable jury could conclude Defendants failed to make an appropriate individualized assessment of Hilliard’s ability to perform the essential functions of the job.”

In ***Hunter v. Texas Roadhouse, Inc.*, No. 4:18-cv-00296-DCN, 2020 WL 534521 (D. Idaho Feb. 3, 2020)**, the court denied cross-motions for summary judgment on direct threat. Plaintiff was a kitchen manager with epilepsy. His “unpredictable seizures rarely manifest by the loss of bodily functions and convulsions, but more typically include a loss of consciousness and haziness.” Once, the plaintiff burnt himself with hot water during a seizure. “The best available objective evidence supports both parties’ respective positions [regarding direct threat]. On one hand, evidence shows that Hunter’s seizures only caused one relatively minor injury in a seven-year span, a remarkable statistic considering the dangers present in a restaurant’s kitchen, such as hot flat-tops, scorching oil and grease, steam wells, boiling water, and sharp knives. On the other hand, the evidence shows that Hunter experienced numerous seizures in this dangerous environment, though Hunter disputes his actions during some of these seizures. Even though only one resulted in injury, the potential for severe harm to Hunter was great.”

## Cases finding for the Employer

In ***Pontinen v. United States Steel Corp.*, 26 F.4th 401 (7th Cir. 2022)**, the court affirmed summary judgment in a case where the employer, a steel mill, rescinded its conditional employment offer to work as a utility person to the plaintiff-applicant after discovering that he had an allegedly uncontrolled seizure disorder. The job “involves working with and around torches, shovels, power actuated tools, mobile equipment, pneumatic equipment, oxygen lances, materials that may be hot, heavy, or sharp, hazardous chemicals, and molten metal, and will involve, eventually, cranes, tractors, trucks, dozers, loaders, boom trucks, and feeders.” Plaintiff contended that there was no individualized assessment of his circumstances. The restrictions, though, “were based primarily on the fact that Pontinen suffers from an *uncontrolled* seizure disorder. This

was evident from Pontinen’s own statements that he stopped taking Depakote, . . . notes from the fitness-for-duty exam, and [his treating doctor’s] progress notes, among other things. It is also undisputed that when Pontinen has seizures, he tends to lose consciousness. Therefore, USS’s imposition of restrictions was based on information pertinent to Pontinen’s personal experience with his seizure disorder. That is sufficiently individual.” The panel also held that the four factors articulated in 29 C.F.R. § 1630.2(r) weighed decisively in favor of the employer: the duration of risk was indefinite; the nature and severity of potential harm was unreliable and possibly life-threatening, the likelihood of reoccurrence was significant, and “It is possible that he could have a seizure at any moment.”

In ***Leppek v. Ford Motor Co.*, No. 18-13801, 2021 WL 1720839 (E.D. Mich. Apr. 30, 2021)**, a plaintiff with a seizure disorder—medically refractory localization-related epilepsy—which was not treatable with medication was held, as a matter of law, to be a direct threat on an automobile assembly line, relying on the treating doctor’s report and observations by co-workers. “Although Kirscher’s IME [independent medical examination] did not state specifically that Leppek could not be returned to work or that he posed a direct threat, Ford in part relied on that medical opinion, the restrictions instituted therein, and Leppek’s coworkers’ reports of his incidents, in reasonably determining that Leppek could not safely be returned to work in Department 61 or elsewhere in the Plant because all areas had direct access to potentially hazardous areas.”

***Anderson v. Norfolk S. Ry. Co.*, No. 3:18-cv-00190, 2021 WL 1214622 (W.D. Pa. Mar. 31, 2021)**, concerned a train engineer with Brugada Syndrome, described as “a lifelong condition that causes disruption to the heart’s normal rhythm that can result in the sudden loss of consciousness,” referred to as “syncopal episodes.” The court found no genuine dispute that the engineer posed a direct threat. It concluded that even though the examining doctor did not specifically use the words “direct threat” in their analysis, there was ample record evidence that an appropriate individualized assessment was done. Plaintiff argued that the evaluating physician “did not consult with a cardiologist or obtain independent medical evaluation, despite it being an option . . . . It is unclear how not consulting with a cardiologist or obtaining an independent medical evaluation means that there was not an individualized assessment of Anderson’s ability to perform his job.” It likewise held there was no genuine dispute on each of the elements considered under the ADA regulation, i.e., “(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). The duration of the risk was lifetime, the nature and severity of harm included

the catastrophic loss that might occur of a train derailed with hazardous materials or in a densely populated area, and the likelihood of an occurrence was significant and imminent.

In ***Jackson v. Union Pac. R.R. Co.*, No. 4:19-cv-00069-RGE-RAW, 2021 WL 1726895 (S.D. Iowa Mar. 29, 2021)**, the court granted summary judgment on the direct threat defense for a track laborer who had a stroke. It held that there was no genuine dispute of material fact that the company carried out an individualized assessment. “Union Pacific doctors reviewed Jackson’s posthospitalization clinical records, as well as his speech and occupational therapy reports to conduct their Fitness for Duty evaluation . . . . The record further indicates Union Pacific considered the factors outlined in 29 C.F.R. § 1630.2(r). As to duration of risk, Union Pacific, determined Jackson needed five-years of sudden incapacitation work restrictions after its doctors considered Jackson’s stroke, its location, and Jackson’s specific health conditions putting him at risk for future seizures . . . . As to nature and severity of the potential harm, Union Pacific evaluated Jackson with regard to his specific job duties as a track laborer. Because a track laborer must operate machinery, sustain concentration, and respond to dangerous situations on the job, Union Pacific determined Jackson’s risk of incapacitation on the job posed a serious safety risk . . . . As to likelihood of harm, Dr. Charbonneau and Dr. Hughes considered the location of the stroke, in combination with factors particularized to Jackson’s medical history—hypertension, high BMI, and potential seizure episodes noted by Judd. From this assessment on likelihood of harm, they determined Jackson had an increased risk of seizures . . . . Finally, as to imminence of the potential harm, Dr. Holland concluded Jackson’s stroke history posed a significant and imminent risk of substantial harm.”

In ***Rohr v. Union Pac. R.R. Co.*, 19-1114-JTM, 2020 WL 5802079 (D. Kan. Sept. 29, 2020)**, the court granted summary judgment in the case of a Locomotive Engineer fired after “two leaves of absence in 2016 and 2017, in which he dealt with a major depressive disorder, as well as repeated panic attacks, chronic ideations of homicide and suicide, and addiction to pain killer medications.” The court held that the employer’s assessment of direct threat was objectively reasonable. “The court concludes that summary judgment is appropriate because, in light of his major depressive disorder, his chronic ideations of homicide and suicide, and his admitted chronic addition to medications prohibited by the railroad’s rules, the plaintiff was otherwise not qualified for safe employment in his position as a Locomotive Engineer . . . . [T]he evidence establishes that Union Pacific relied on the most current medical knowledge and the best available objective evidence, and upon an expressly individualized assessment of the Rohr’s present ability to safely perform the essential

functions of the job of Locomotive Engineer.” (*But see West v. Union Pac. R.R. Co., supra.*)

In ***Krehbiel v. Union Pac. R.R. Co., No. 19-2002-JAR, 2020 WL 5503363 (D. Kan. Sept. 11, 2020)***, plaintiff was an Assistant Signalperson on a gang responsible for installing railroad signals and other crossing equipment. He was diagnosed with “alcohol use disorder, severe; persistent depressive disorder with intermittent major depressive episodes, recurrent, severe; and generalized anxiety disorder.” The railroad discharged him. The court held that there was no genuine dispute of material fact that he was a direct threat to himself and others at the workplace. It held that the record conclusively established that he received an individualized assessment. “Dr. Lewis, Defendant’s Associate Medical Director, first reviewed Plaintiff’s medical records and drafted a fitness-for-duty determination. In this assessment, Dr. Lewis issued work restrictions based on the nature of Plaintiff’s recurrent conditions, their lack of control, and their recent manifestation in a suicide attempt. To the extent Plaintiff contends that Dr. Lewis did not know about the essential functions of Plaintiff’s position, the deposition testimony cited by Plaintiff does not support this contention. In addition, Dr. Holland, Defendant’s Chief Medical Officer, finalized the fitness-for-duty determination. Dr. Holland reviewed Plaintiff’s medical records and history. Although Dr. Holland did not examine Plaintiff, he had the benefit of Plaintiff’s medical records. He noted that Plaintiff had been diagnosed with severe alcohol use disorder with ongoing problems with depression and anxiety. Furthermore, both Dr. Lewis and Dr. Holland appeared to have reasonably considered Plaintiff’s treatment and possibility of future treatment. In determining whether to impose permanent restrictions, they noted the recurrent nature of Plaintiff’s conditions and Plaintiff’s lack of control when his alcohol use and depression would recur.” Although plaintiff obtained a more favorable assessment from his own doctor, the court held that this was properly rejected because it was based on “on Plaintiff’s self-reporting and not knowledge of his essential job duties.”

In ***Sutherland v. Edison Chouest Offshore, Inc., No. 19-414, 2020 WL 5436654 (E.D. La. Sept. 10, 2020)***, the court granted summary judgment to an employer that operates a fleet of ships operating in the Gulf of Mexico. Plaintiff, a Master Captain, was removed from maritime duty when a physical examination revealed an irregular heartbeat and high blood pressure, possible early warning signs of coronary artery disease. The court held that there was no genuine dispute that the employer performed an individualized assessment. Plaintiff submitted to a stress test by Dr. Duet. “Sutherland could not complete the stress test, lasting only four minutes and twenty-two seconds of the prescribed 7.5 minutes. Dr. Duet stated that the failure to complete the stress test was significant not only because he could not rule out that Sutherland had coronary artery



disease. As noted earlier, Dr. Duet also found that Sutherland’s ability to exercise for only four minutes and twenty-two seconds ‘is insufficient exercise capacity’ to safely work in the medium-heavy to heavy duty master’s job, which required Sutherland to work ‘in remote areas’ where emergency medical personnel could not ‘timely respond.’ Sufficient exercise capacity is an express requirement of the master’s job description. The employment decisions here were not based on stereotypes, but on Dr. Duet’s individualized medical assessment of plaintiff’s actual risks and capabilities.”

In ***Witchet v. Union Pac. R.R. Co.*, No. 8:18CV187, 2020 WL 12762513 (D. Neb. Feb. 21, 2020)**, the court granted summary judgment in favor of the employer where a commercial driver had a stroke and did not qualify to drive under the safety standards of the Federal Motor Carrier Safety Act (FMCSA). “Contrary to Witchet’s assertion, he did receive an individualized assessment of his abilities. Witchet has not countered U.P.’s evidence Witchet is at risk for sudden loss of consciousness. Four doctors, based on either an examination or an individualized assessment of his records, including MRI results, concluded that Witchet had a stroke in the parietal area of his brain . . . . The defendant sought review at several levels, considered the plaintiff’s treating physician’s opinion, sought independent review and responded to the plaintiff’s retained expert’s conclusions. Witchet received an expressly individualized assessment of his ability to safely perform the essential functions of the job.”

In ***Milan v. Union Pac. R.R. Co.*, No. 3:17-cv-01246-YY, 2019 WL 2030553 (D. Or. Apr. 19, 2019)**, the magistrate recommended summary judgment in a claim involving a train engineer who experienced a seizure during a trip, the cause of which was never medically determined. “[T]he cause of plaintiff’s unconsciousness is uncertain. Where the cause has not been conclusively established, and other causes have not been ruled out, the duration of the risk is indefinite. The second factor is also met, as the nature and severity of potential harm could be catastrophic. Plaintiff was unconscious for several minutes . . . . As to the third factor, even assuming the likelihood of recurrence is small, because the cause is uncertain, whether and when it will occur cannot be predicted. For the same reasons, the fourth factor, ‘imminence of the potential harm is . . . unknown because of the unpredictability of [plaintiff’s] condition.’” While plaintiff argued that the employer relied on the opinions of two doctors who had never personally examined him, “this fact is inconsequential because plaintiff’s own doctors cannot provide an opinion that satisfies [the employer’s] qualitative [safety] standard.” (*But see Munoz v. Union Pac. R.R. Co.*, *supra*)

## V. Disabilities Must be Known to the Employer to Establish an ADA Violation

Generally, employers will not be found liable under the ADA if they had no knowledge of—or at least belief in<sup>39</sup>—an employee’s disability. This is true whether the issue involves a failure to accommodate or another type of adverse employment action.

### A. Disclosure and Reasonable Accommodations

Employees are under no legal obligation to disclose an invisible disability unless they are requesting a reasonable accommodation. Because employers are only responsible for accommodating known disabilities, employees must disclose their disability when making a reasonable accommodation request. In requesting accommodations, employees with invisible disabilities should let the employer know of the existence of a disability, identify the limitations that result from the disability, and try to identify possible accommodations, if possible. The request does not need to be written or expressed formally as long as the individual (or his/her representative) informs the employer know “an adjustment or change at work for a reason related to a medical condition” is needed.<sup>40</sup> It is considered a best practice, however, to make a reasonable accommodation request in writing.

### Cases finding for the Employee

In *King v. Steward Trumbull Memorial Hosp., Inc.*, 30 F.4th 551 (6th Cir. 2022), an employee sought a medical leave as an accommodation to enable her to address a flare-up of her asthma. The Sixth Circuit reversed summary judgment. “The Hospital argues that it could not have known about King’s disability merely because it ‘kn[ew] that King had asthma and that she called in sick on many occasions’ . . . . According to the Hospital, ‘knowing that King had a health issue is not the same as knowing she had a disability’ . . . . But, as King notes, an employee does not have to use “magic words” or explicitly use the word “disability” to put her employer on notice of her condition . . . . The Hospital admits that it knew King had asthma, thus the question is whether the Hospital knew that her condition substantially impaired her ability to perform her essential job functions. King raised sufficient factual disputes on this point to defeat summary judgment.”

“Whenever she called in sick, King told her supervisors that it was because of her asthma. She told Bungard that she ‘literally could not breathe,’ and that she could not get off the couch ‘without being out of breath and wheezing’ . . . . She even told [a supervisor] that her asthma was debilitating. When King called [the employer’s FMLA



provider] on May 19, she said that she needed medical leave because of her asthma. While an employer may not have knowledge of an employee's disability merely because they took leave in the past and the employer is aware that they have some medical issues, . . . . King alleges that she repeatedly notified the Hospital of her severe asthma when her symptoms prevented her from working. Thus, a jury could find that the Hospital knew that, during flare-ups, King's asthma was so severe that it rose to the level of a disability."

In ***Garrison v. Dolgencorp, LLC*, 939 F.3d 937 (8th Cir. 2019)**, the court reversed summary judgment in a case involving an employee who was denied a leave of absence that she requested because of her anxiety and depression. "Garrison repeatedly told [her immediate supervisor] Bell that she wanted to take a leave of absence, even if she never referenced the ADA . . . . By our count, assuming Garrison's evidence is true, she asked about leave no fewer than four times . . . . To be sure, Garrison never used the word accommodation or asked about anything other than leave. But our analysis 'is not limited to the precise words spoken by the employee at the time of the request,' and an employee need not even suggest what accommodation might be appropriate to have an actionable claim . . . . Here, Bell knew that Garrison suffered from various medical conditions, that those conditions had been worsening and had required regular doctor visits, and that she had repeatedly inquired about a leave of absence to deal with them. Under these circumstances, a reasonable jury could conclude that Garrison requested an accommodation, even if she never used those 'magic words,' because she made [defendant] 'aware of the need for' one[.]" **See also *Kowitz v. Trinity Health*, 839 F.3d 742 (8th Cir. 2016)** (holding that while an employee is "responsible for providing relevant information about her condition and needs" when initialing the accommodation process, "she need not use technical language to make the request or suggest what accommodation might be appropriate").

In ***Meeks v. Norfolk S. Ry. Co.*, No. 1:20-cv-331, 2023 WL 2653474 (S.D. Ohio Mar. 27, 2023)**, the court held that there was a genuine dispute of material fact whether the employer was on notice about the employee's need for a reduced schedule owing to an autoimmune disorder. The employer argued that the plaintiff's current supervisor (Franklin) was unaware of plaintiff's disability and a prior accommodation extended to the employee, but the court holds that this is immaterial. "While Franklin may have been unaware of Meeks' disability, . . . . the Court has not found any caselaw to suggest that an accommodation may be relinquished if a particular supervisor is not put on notice of an employee's disability or relevant accommodation. Moreover, Norfolk Southern has not presented any evidence to refute the existence of the accommodation agreement, or that Meeks failed to comply with the terms of that agreement in any way."



In *Kumagah v. Aldersgate United Methodist Ret. Cmty., Inc.*, No. 322CV00041FDWDCK, 2022 WL 17970566 (W.D.N.C. Dec. 27, 2022), a nurse working at a retirement community with several buildings submitted a letter from a doctor recommending that she not work in buildings with patients that had COVID due to having a “high-risk medical condition.” Despite repeated requests from her employer for additional information about her underlying condition, the nurse submitted additional letters that only spoke about “pre-existing health conditions.” After the nurse was terminated, she alleged a failure to accommodate under the ADA, which requires that she has a disability and that defendant was on notice about the disability. Though plaintiff alleged in her complaint that she had high blood pressure, pulmonary sarcoidosis, and diabetes, the employer argued that she could not produce evidence that she is disabled “as demonstrated by her reluctance to disclose the specifics of her alleged disability.” The Court found that even though “communications were certainly ambiguous, in viewing the evidence in the light most favorable to plaintiff, the Court will assume without deciding that plaintiff did have a disability within the meaning of the ADA.” Moreover, she also adequately established that the employer had adequate notice. “Though the Court agrees with Defendant that Plaintiff’s communications concerning her medical conditions were indeed vague, it finds that Plaintiff satisfied the low burden of the notice element of her failure-to-accommodate claim because at the very least, her letters from doctors and her letters to Hendrick identify Plaintiff as having a disability—assuming, as above, that Plaintiff’s underlying conditions and increased risk of COVID complications constitute an ADA disability—and her need for accommodations to allow her to continue to work without directly working with COVID patients.” Thus, because the employer knew of a disability and the need for an accommodation, the Court held that the employer had notice. (The court granted summary judgment on the alternative ground that plaintiff, not the employer, was responsible for the breakdown of the interactive process.)

In *EEOC v. AutoZone, Inc.*, No. 14-cv-3385, 2022 WL 4596755 (N.D. Ill. Sept. 30, 2022), the court denied summary judgment with respect to employees challenging the retailer’s strict attendance and points policy; they sought accommodations about attendance in connection with different kinds of disabilities. The court held that there was a genuine dispute of material fact about whether the employer had notice of the employees’ disabilities. One supervisor alluded to an employee’s “diabetes and ‘health concerns’ in two performance reviews. After [employee] received these negative remarks, he asked [store manager] if there were any ‘arrangements’ that could be made



due to his diabetes and doctors' notes . . . [but store manager] dismissed this request by saying his doctor 'would probably write a note ... for anything.'"

In ***Schmidt v. Watertronics, LLC*, No. 20-cv-1915-pp, 2022 WL 5242714 (E.D. Wis. Sept. 30, 2022)**, the plaintiff, a welder, had a medical condition that caused blood clots that made it difficult to stand. He testified that he informed the employer's HR director (Bemis) about his disability during his intake. The district court held that the plaintiff presented a genuine dispute of fact that the employer was aware of the disability. This was based solely on the plaintiff's affidavit (unchallenged by defendant) that he had informed HR. "The plaintiff testified that during on-boarding, he told Bemis about his blood disease, that he told her that the disease made it hard for him to stand and that he told her that he needed to go to the doctor frequently. He testified that Bemis told him it was not necessary to list the condition as a disability in his paperwork, which he is why he didn't. The defendant has not directly disputed this testimony. While there is no evidence that Bemis shared this information with anyone else, this testimony constitutes *some* record evidence creating a genuine dispute of material fact as to whether the defendant was aware of the plaintiff's alleged disability." (Summary judgment was entered for defendant on the alternative ground that there was no evidence that the plaintiff requested an accommodation.)

In ***Brown v. New York City Dep't of Ed.*, No. 20-CV-2424 (VEC) (OTW), 2022 WL 6559760 (S.D.N.Y. Sept. 1, 2022)**, the district court denied a motion to dismiss a reasonable accommodation claim under the ADA and Rehabilitation Act for an employee with an injured knee. The court notes that because the employer had already previously granted plaintiff an accommodation, it was perforce on notice about her disability. "Plaintiff has shown that Defendant had notice of Plaintiff's disability. Whether an employer has adequate notice of an employee's claimed disability does not turn on how the notice was given, to whom the notice was given, or whether the notice was accompanied by medical support . . . . Adequate notice does turn on if 'the employee or a representative for the employee provides the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation' . . . . Here, Plaintiff adequately alleges that as of 1993, she was granted accommodations because of her knee disability; accordingly, the NYC DOE must have been on notice that Plaintiff had a disability."

In ***Williams v. Fairfax Cnty.*, No. 1:21-cv-598 (RDA/IDD), 2022 WL 2346615 (E.D. Va. June 29, 2022)**, the district court denied summary judgment in case where the plaintiff sought an ergonomic chair (among other things) as an accommodation for chronic pain in her knees, hands, and wrists. While the plaintiff did not submit a written request

through the employer's formal procedures, there was other record evidence showing that the employer understood that she asked for the chair as a reasonable accommodation. "[W]ithout necessarily indicating whether the request was sufficiently supported or would be deemed reasonable, Cox seemed to acknowledge in his email response to Plaintiff that she was making a request for an accommodation under the ADA. 'The ADA request you are making for a specific type of chair will need recommendations from your physician on what chair(s) will meet your medical needs,' Cox replied." *But see Powley v. Railcrew Xpress, LLC, infra.*

In ***Malzberg v. New York Univ., No. 19-cv-10048, 2022 WL 889240 (LJL) (S.D.N.Y. Mar. 25, 2022)***, the district court denied summary judgment in a case involving a physician's assistant with chronic back pain seeking an accommodation of being able to perform some procedures while seated. "Defendant's argument seems to boil down to pointing out that Plaintiff did not provide medical documentation to NYU and did not specifically request an accommodation . . . . But Defendant does not cite case law holding that an employee must provide medical documentation for an employer to be on notice of the employee's disability and that, in the absence of medical documentation, the employer cannot be on notice. Additionally, as discussed further *infra*, the interactive process may involve the employer asking the employee for additional information of the disability, which thus suggests that such information need not be provided in the first instance to put the employer on notice."

In ***Krow v. PineBridge Investments Holdings U.S. LLC, No. 19 Civ. 5711 (ER), 2022 WL 836916 (S.D.N.Y. Mar. 21, 2022)***, the court found a genuine dispute of material fact about whether the employer was on notice of plaintiff's vision disability based on his declining performance after his stroke. "PineBridge has not established that it lacked knowledge of Krow's disability before January 2017. Krow's declining performance reviews, which indicate that his ability to do his job deteriorated markedly after his stroke, of which PineBridge had knowledge, arguably support a reading that the company should have known that something was wrong." (Summary judgment was granted, though, on a statute of limitations defense.)

In ***Murphy v. District of Columbia, 590 F. Supp. 3d 175 (D.D.C. 2022), as amended, No. 18-1478 (JDB), 2022 WL 2643554 (D.D.C. July 8, 2022)***, the court denied summary judgment in an ADA case, where plaintiff requested medical leave as an accommodation for stage five kidney failure, hypertension, and diabetes. Plaintiff presented a genuine dispute of fact whether his request for FMLA leave in addition to conversations that he had with his ADA coordinator provided sufficient information to trigger the interactive process. The FMLA application by itself did not trigger the process, the court held, because it "never identifie[d] Murphy as an individual with a

disability or otherwise suggest[] that he was requesting an accommodation under the ADA.” But plaintiff also “submitted a declaration swearing that he and [the ADA coordinator] Jones spoke about ‘short-term and long-term disability’ and that Jones gave him an FMLA application to complete . . . . Viewing Murphy’s statements in the light most favorable to him, a reasonable jury could find that the District was on notice of Murphy’s intent for his FMLA application to constitute a request for leave under both the FMLA and the ADA.”

In ***Lloyd v. Overstock.com, Inc.*, No. 2:18-cv-00955, 2021 WL 5495649 (D. Utah. Nov. 23, 2021)**, plaintiff with multiple sclerosis (MS) requested the accommodation of being able to work from home. The court held that plaintiff presented a genuine dispute of material fact about whether the employer was on notice of the need for an accommodation. “Ms. Shaw’s testimony that she did not specifically request an ‘ADA accommodation’ is not determinative, because she was not required to reference the ADA or ‘formally invoke the magic words ‘reasonable accommodation.’” . . . . Ms. Shaw testified she asked Mr. Stokes and Mr. Lutz to continue working from home and told them she couldn’t come into the office because she was too sick to drive . . . . Her supervisors were aware of her disability and aware she worked from home because of her disability—indeed, Mr. Lutz acknowledged Ms. Shaw sometimes couldn’t drive because of it . . . . Given this context, Ms. Shaw’s statements were sufficient to put her supervisors on notice that she was requesting an accommodation for her disability.”

In ***Woodruff v. Ohio Dep’t of Transp.*, No. 1:18-cv-853, 2021 WL 1338373 (S.D. Ind. Apr. 9, 2021)**, the district court denied summary judgment in a case where the employee with chronic pain due to a shoulder injury sought accommodations in a position where he operated heavy equipment (dump trucks and construction trailers). He was prescribed pain medication as treatment and he could not pass the mandatory drug tests. While the employer contended that plaintiff never requested an accommodation, the district court held that there was a genuine dispute of material fact as to that point. While “the record here does not reflect that plaintiff ever explicitly requested to return to work on his prescription as prescribed (with no change to medication type or dosage) . . . [plaintiff] relies on his employer’s implicit understanding of his request . . . . ODOT’s actions (pursuing the [independent medical review] to further evaluate plaintiff’s fitness for duty on his medication) reflect the understanding that plaintiff sought such an accommodation. There is likewise no question that ODOT understood plaintiff’s grievance and the IME to be related to plaintiff’s alleged disability.” There was also record evidence of a different proposed accommodation, i.e., taking the medication at a different time. [T]hat he specifically asked to be permitted to take his medication at a different time . . . has support in the record and is also sufficient to

create a genuine issue of material fact. An ODOT memorandum concerning plaintiff's August 21, 2018 pre-IDS hearing documents plaintiff's request: "[Plaintiff] ... indicated that he could speak to his physician about taking the medication at a different time."

In ***Piligian v. Ichan School of Medicine at Mount Sinai, No. 1:17-cv-01975 (ALC) (SDA), 2020 WL 6561663 (S.D.N.Y. Apr. 7, 2020)***, the district court held that a doctor with Convergence Insufficiency, an eye disorder that interferes with an individual's ability to maintain binocular function, presented a genuine dispute of material fact about the employer being on notice of the need for reasonable accommodation. Although the hospital maintained that it granted every accommodation that plaintiff requested, plaintiff continued to experience "failure to meet productivity standards" that ultimately caused him not to be renewed. Even where "the employee has not requested a specific accommodation, the employer must engage in an 'interactive process' to assess whether an employee's disability can be reasonably accommodated . . . . [A] reasonable jury could determine that the School knew or reasonably should have known that he was disabled and that the School failed to engage in the necessary interactive process to at least assess the possibility of additional accommodations before deciding not to reappoint Plaintiff."

In ***Ryan v. Shulkin, No. 1:15-CV-02384, 2017 WL 6270209 (N.D. Ohio Dec. 8, 2017)***, plaintiff was diagnosed with PTSD after being sexually harassed and assaulted by a coworker. Plaintiff then requested a transfer to a new position and provided medical documentation in support of this request. The employer responded with a request that plaintiff complete additional documentation. Plaintiff failed to do so and the transfer was never granted. The employer contended that it did not have notice of plaintiff's need for accommodation because she did not respond to its request for additional documentation. The court rejected this argument, finding that "[n]either the ADA or the [employer's] Reasonable Accommodation policies required that [plaintiff] formally complete the Reasonable Accommodation process in order to obtain accommodation for her disability." The court held that plaintiff presented evidence that she requested a transfer because of her PTSD which was sufficient to put the employer on notice of her need for accommodation.

In ***Butler v. Washington Metro. Area Transit Auth., 275 F. Supp. 3d 70 (D.D.C. 2017)***, a plaintiff with sleep apnea sought reassignment after he was unable to perform the essential functions of his original position. His employer denied this request. Plaintiff brought suit and the employer alleged that plaintiff did not request an accommodation because he never requested reassignment to a non-union represented position. The court found that while the employer's assertion was true, "case law does not require accommodation requests to align identically with the accommodation received." It was

sufficient that plaintiff requested reassignment to some vacant position for which he was qualified.

In ***Hale v. Johnson*, 245 F. Supp. 3d 979 (E.D. Tenn. 2017)**, the court determined that plaintiff sufficiently requested an accommodation even though he did not use the term accommodation when making his request. Plaintiff was an individual with chronic obstructive pulmonary disease (COPD) and worked as a security guard for the employer. After the employer changed the physical requirements for the position, plaintiff asked if he could waive taking the newly required test and instead take the test that was previously used. The court held that there are no “magic words” that need to be said when requesting accommodations and that a reasonable jury could find plaintiff’s inquiry was a request for reasonable accommodation.

## Cases finding for the Employer

In a case brought under the Rehabilitation Act (applying ADA standards), the Eleventh Circuit in ***Owens v. Governor’s Off. of Student Achievement*, 52 F.4th 1327 (11th Cir. 2022)**, stated that to trigger the interactive process, “it is reasonable that the employee inform [their] employer how the accommodation [they] seek[] will address her limitations before requiring the employer to initiate the interactive process,” and while the “employee’s informational burden [is] modest,” it must “identify a statutory disability and explain generally how a particular accommodation would assist” them. In that case, the court held that plaintiff – who sought a telework accommodation after medical complications from childbirth – failed to meet either prong of this standard. “Although Owens’s unspecified ‘childbirth-related complications’ may have caused a disability, Owens never identified what that disability was. She points to her c-section and blood transfusions as information identifying a disability, but these are medical procedures and treatments, not disabilities . . . . Having failed to identify a disability, Owens also failed to explain to [the employer] why teleworking would accommodate her disability. Although her doctor’s recommendation that she telework qualifies as a demand for a specific accommodation, it does not explain how that accommodation would alleviate any physical or mental limitation.”

In ***Edmonds-Radford v. Sw. Airlines Co.*, 17 F.4th 975 (10th Cir. 2021)**, plaintiff was a newly hired customer service agent who told her same-level colleagues, but not her supervisors or the team in charge of accommodations, that she had a learning disability. Although she told supervisors that she “did not feel like [she] was getting the training that [she] needed with just one person,” she never explained that this was due to a disability. Therefore, the employer did not have notice of a disability and plaintiff could not prevail on a failure-to-accommodate claim.

In ***Anderson v. Diamondback Investment Gp., LLC***, --- F. Supp. 3d ----, 2023 WL 2503308 (M.C.N.C. 2023), appeal filed (Apr. 13, 2023), the district court granted summary judgment for the employer in a case where the employee with anxiety and joint pain failed a drug test that detected levels of Cannabidiol (CBD). Because “neither the nurse’s note, email, nor general statements by Plaintiff that she took CBD for anxiety are sufficient evidence to allow a reasonable inference that Plaintiff had an impairment that affected a major life activity, it follows that this same evidence is insufficient to show that Plaintiff put Defendant’s on notice of her claimed disability.”

In ***Nyarko v. DaVita Kidney Care, No. DLB-22-1141, 2023 WL 2758843*** (D. Md. Mar. 31, 2023), a plaintiff with “anxiety/depression and PTSD” who requested not to be assigned to “an identified COVID-19 site.” The district court held that plaintiff failed to state a claim for failure to accommodate when the employer reassigned her to a location that allegedly served patients with COVID-19 infections. “To allege a viable failure to accommodate claim based on the reassignment . . . , Nyarko must allege that DaVita was on notice of her disability and her need for an accommodation when it reassigned her . . . . Nyarko alleges that she expressed concerns about COVID-19 and her need for a stable work environment, but she does not allege that she identified her health conditions or otherwise explained what motivated her concerns. Indeed, she alleges that she notified DaVita of ‘the full extent of [her] disability’ on June 15, three days after DaVita announced the reassignment.”

In ***Mathias v. Dolgencorp, LLC, No. 1:20-cv-108, 2022 WL 16538182*** (N.D. Ind. Oct. 28, 2022), the court granted summary judgment for the warehouse that employed plaintiff, who sought the accommodation of being able to use a walking boot while at work to help with chronic ankle pain. “Here, when [plaintiff] spoke with [her boss] Daugherty, Mathias had been released to work three days earlier without restrictions. While she asked to wear a walking boot and perhaps even suggested she was having pain walking, there is no evidence that Daugherty or Dollar General had any information putting it on notice of Mathias’ need for an accommodation because of a disability. Moreover, even if Mathias’ testimony is credited, Daugherty told her that it would be considered a ‘crutch’ and violate safety protocols, presumably an undue burden for an employer. It was not until ten days later, when Dr. Roper submitted a letter connecting the walking boot to Mathias’ disability and requesting she be allowed to wear *either* the walking boot or an elevated closed-toe boot that Dollar General was on notice. And, from that point onward, it accommodated Mathias.”





In ***Behm v. Mack Trucks, Inc.*, No. 5:21-cv-02500-JMG, 2022 WL 2068425 (E.D. Pa. June 8, 2022)**, the district court granted summary judgment against an employee with depression and anxiety who sought to change shifts to accommodate her treatment. But the employee apparently told the employer that she wanted the change because of child-care needs. “Defendant could not have been on notice that Plaintiff desired to change shifts because of her disability when Plaintiff specifically told Defendant that she was requesting a shift change for a different reason. And, at the time Plaintiff made her request, there were no surrounding circumstances that would have put Defendant on notice that Plaintiff’s disability was the true cause for her request.”

In ***Abler v. Mayor and City Council of Baltimore*, No. BPG-18-3668, 2022 WL 824850 (D. Md. Mar. 18, 2022), appeal filed (June 9, 2022)**, the district court granted summary judgment in a case involving a paramedic with post-traumatic stress disorder (PTSD), severe depression, and anxiety. The court held that there was no genuine dispute that the employer was not on notice about plaintiff seeking accommodations based on the following communications: (1) his initial request for a voluntary reduction in rank that did not mention disability; (2) a letter from plaintiff’s clinician which the plaintiff could not establish was ever delivered to the employer; (3) plaintiff’s letter requesting a status on his reduction in rank that only cites “medical reasons,” where “such a vague statement does not sufficiently place the BCFD on notice that plaintiff’s request was based on his disability.”

In ***Andrews v. Cobb Cnty. Sch. Dist.*, No. 1:20-CV-04043-MLB-WEJ, 2021 WL 6113735 (N.D. Ga. Oct. 28, 2021)**, the court holds that a doctor’s certification presented while the employee was on FMLA leave was not enough to put the employer on notice about a disability. “[P]laintiff contends that [the district] should have known of his need for a reasonable accommodation from the Certification of Health Care Provider Form (GBRIG-1) that his physician submitted on October 11, 2019, which stated that he had hyperkeratosis on both feet, and that he would be ‘unable to stand for long periods of time’ while the condition persisted . . . . [S]ubmission of that certification is insufficient to place the CCSD on notice that Mr. Andrew was requesting a reasonable accommodation when it did not know he was disabled.”

In ***Lapham v. Florida Fish and Wildlife Conservation Comm’n*, No. 5:19-cv-579-MMH-PRL, 2021 WL 3828869 (M.D. Fla. Aug. 26, 2021)** – not an employment case but making a point worth noting – the court observed that just because an entity is on notice about a disability and need for accommodation, it is not obliged (absent notice) to provide a different or additional accommodation when the first one proves ineffective. Plaintiff sought an Alternative Mobility Permit (AMP) to use a public park. “FWC was on notice that Lapham had a disability and needed an accommodation . . . . Lapham

suggests that because FWC granted Lapham an accommodation by way of an AMP license, it knew that Lapham was disabled and needed additional accommodations beyond those already provided. However, Lapham cites to no authority supporting the contention that where an individual requests a specific accommodation and is granted the accommodation he requests, an entity would nevertheless be liable for having failed to identify and provide additional accommodations not even requested.”

In ***Ballard v. Terros Inc.*, No. CV-19-05658-PHX-DWL, 2021 WL 1597892 (D. Ariz. Apr. 23, 2021)**, a plaintiff with an unspecified stress disorder failed to create a genuine dispute of fact about whether the employer was on notice. “Ballard acknowledged in her deposition that the only mention of any health issues in connection with her various scheduling requests came in the August 31, 2018 letter written by her counsel . . . . [A]ssuming the letter was sent and received, it merely asserts that Ballard ‘is suffering from some conditions,’ without specifying what those conditions are or whether they constitute a disability. This vague and conclusory statement does not establish that Ballard informed Terros of her alleged disability—the mere utterance of the word ‘disability,’ which appeared in the first paragraph of the August 31, 2018 letter, is alone insufficient.”

In ***Powley v. Railcrew Xpress, LLC*, No. 4:19CV3058, 2020 WL 7481737 (D. Neb. Dec 18, 2020)**, the district court granted summary judgment in a case where plaintiff with back pain who requested an ergonomic chair as an accommodation. “It is clear that Powley spoke to her coworkers about her dissatisfaction with the chairs in the starter office. It is also clear that she spoke to her supervisor about her dissatisfaction with the chairs available to her. However, there is no evidence that Powley requested that [defendant] provide an ergonomic chair as an accommodation for an alleged disability (back pain) or because the current chair aggravated her back, causing migraines. The undisputed evidence shows that Powley did not use the accepted procedures in pursuit of a different chair, and she did not meet her burden to show that she put her supervisors or employer on notice that any accommodation was sought due to an alleged disability.”

In ***Kuykendall v. Leader Comm’ns, Inc.*, No. CIV-19-480-F, 2020 WL 2461481 (W.D. Okla. May 12, 2020)**, the court held that plaintiff did not present a genuine dispute about whether she put the employer on notice about her need for an accommodation (time off from work) because of migraines. “Even viewed in Kuykendall’s favor, the text messages do not provide notice to [company president] Cole that Kuykendall is seeking ‘approved’ time off for each day of absence from work due to her migraine. The text messages make Cole aware that Kuykendall has a migraine, but it do not place Cole on

notice that Kuykendall needs an approved leave of absence accommodation for her migraine at that time. At the April 2nd meeting, Kuykendall suggested to Cole that she should receive an extension of her introductory period. However, again, the text messages do not make any such request to Cole.”

In ***Garrett v. Cape Fox Facilities Servs., No. 1:19-cv-579, 2020 WL 265869 (E.D. Va. Jan. 17, 2020)***, the court granted a motion to dismiss a complaint that the employer denied a reasonable accommodation for an employee with PTSD to be transferred to a different building. “[P]laintiff has not alleged facts demonstrating that, when making the request that she and her team move to another building, she put CFFS on notice that she needed this reasonable accommodation *for her disability*. Instead, plaintiff alleges that she requested that she and her team be moved because of her fears of toxins in the air . . . . Nor does plaintiff allege that, at the time she made the request for an accommodation, CFFS was aware of her PTSD.”

In ***Hamilton v. Schneider Nat’l Carriers, Inc., No. 1:17-CV-3264-MHC, 2019 WL 11553748 (N.D. Ga. Mar. 7, 2019)***, the district court granted summary judgment in a case involving a stress disorder. The court held that an FMLA request for leave and medical certification were not sufficient to put the employer on notice of the disability. “It is undisputed that neither the July 21, 2015, nor August 10, 2015, FMLA certifications identified any specific medical condition other than job-related stress . . . . Hamilton argued that his submissions of his medical certifications setting out restrictions (even though those restrictions did not indicate a disability) ‘are sufficient to trigger an employer’s obligation to engage in the interactive process to determine whether a reasonable accommodation can be made’ . . . . Hamilton asserts that the Magistrate Judge ignored the doctrine of ‘constructive knowledge,’ and again argues that the submission of the medical certifications was enough to put Schneider on notice that required it to engage in an “interactive process” to provide a reasonable accommodation . . . . But none of the cases cited by Hamilton support the proposition that a physician’s certification that an employee is unable to work more than eight hours per day or 45 hours per week constitutes a disability or puts the employer on notice that it should engage in some further ‘interactive process.’” See also ***Walz v. Ameriprise Fin., Inc., 779 F.3d 842 (8th Cir. 2015)*** (rejecting plaintiff’s claim that her employer should have forced her to take a leave when she exhibited erratic and disturbing behavior following a medical leave, explaining that “an employer is not liable for its failure to accommodate an employee who made no request for an accommodation”).



## B. Adverse Employment Actions

The cases above demonstrate that employers must be aware of an ADA disability before they can be found liable for failure to provide a reasonable accommodation. The same reasoning applies to claims involving other adverse employment actions. (Cases raising issues of the employer's alleged lack of knowledge are extremely numerous and we offer just illustrative examples here.)

### Cases finding for the Employee

In ***Scaff v. Gap, Inc., No. 3: 21-cv-00815, 2023 WL 3467739 (M.D. Tenn. May 15, 2023)***, the court found that the employee presented a genuine dispute of fact about whether the employer knew about plaintiff's diabetes before firing him for absenteeism. "While none of the communications concerning the plaintiff's request for leave around that time identifies his disability as diabetes, the court finds that the documentation in the record gives rise to a reasonable inference that [HR generalist] Williams-Whitfield knew that the plaintiff was claiming a disability of some kind and was at least on notice as of his meeting with her on the day of his termination that he had diabetes and was at increased risk for COVID."

In ***EEOC v. McLane/Eastern, Inc., No. 5:20-cv-1628 (BKS/ML), 2023 WL 1102600 (N.D.N.Y. Jan. 30, 2023)***, the court denied summary judgment in a case where the employer failed to interview or hire a deaf applicant named Valentino. Although the employer denied knowing that the applicant was deaf, the record showed that the employer might have been tipped off by the fact that her initial phone contact with HR was by a Voice Relay Service (VRS) call. "A reasonable factfinder could further conclude that the employee who received the TRS call notified [HR manager] Orr of the call and put Orr on notice of Valentino's disability. According to the call transcript, the employee indicated that he or she would tell Orr about Valentino's call: 'I will have Ann[e] call or email' . . . . Given the TRS call transcript, the conclusion that Defendant—and Orr in particular—had knowledge of Valentino's disability is not, as Defendant argues, based entirely on conjecture and speculation."

### Cases finding for the Employer

In ***Hrdlicka v. General Motors, LLC, 63 F.4th 555 (6th Cir. 2023)***, the Sixth Circuit affirmed summary judgment under the ADA in part because there was no genuine dispute of fact about defendant's knowledge of plaintiff's disability (depression) before she was terminated. "Hrdlicka made only a single, unsubstantiated statement that she

was depressed without any corroborating medical evidence and without ever having sought medical help, and she consistently presented the issue as a workplace conflict, not a disability . . . . The mention of depression alone is insufficient to constitute a “severe symptom” for two reasons. First, depression does not always render an employee ‘disabled’ . . . . Second, Hrdlicka consistently and specifically attributed both her attendance issues and depression to a dislike of [a specific manager] and the work environment, leaving General Motors to “speculate” as to the existence of a disability as opposed to Hrdlicka’s concern about her interpersonal work conflict.”

In ***Edmonds-Radford v. Sw. Airlines Co.*, 17 F.4th 975 (10th Cir. 2021)**, the Tenth Circuit affirmed summary judgment for the employer where a customer service agent failed to disclose a learning disability that was affecting her performance in training, leading to their termination. “Edmonds-Radford does not refute the evidence showing that the Southwest decisionmakers involved in her termination . . . did not know of her disability. Indeed, nothing in the record suggests that any Southwest manager, supervisor, or other decisionmaker . . . was aware of Edmonds-Radford’s disability . . . . Nor is Edmonds-Radford’s learning disability the sort of disability that is obvious or visible, such that Southwest must have known of it . . . . The only evidence Edmonds-Radford offers to the contrary is her own deposition testimony in which she stated that she asked her . . . managers and supervisors for additional training (a request not expressly connected to a disability), and that while training and learning with her co-workers, she informed them of her disability. This does not rebut Southwest’s evidence because it fails to address whether Edmonds-Radford informed the relevant decisionmakers of her disability. Because those decisionmakers were not the individuals providing training, they would not fall into the category of individuals Edmonds-Radford could have informed while training.”

In ***Haahr v. Ovations Food Serv. LP*, No. CV-21-01461-PHX-SPL, 2023 WL 3125777 (D. Ariz. Apr. 26, 2023)**, the court granted summary judgment where there was no evidence that plaintiff disclosed his several disabilities to defendant before he was terminated. “It is unsurprising that Defendant failed to become aware of Plaintiff’s disabilities on its own, given that her alleged disabilities—depression, anxiety, migraines, and fibromyalgia—are not the sort of medical conditions which are open, obvious, or apparent. In such a situation, the burden falls on the employee to sufficiently disclose her disability and resulting limitations and to request a reasonable accommodation.”

In ***Dorsey v. DeJoy*, No. 1:18-cv-615, 2022 WL 908855 (S.D. Ohio Mar. 29, 2022)**, a Rehabilitation Act case, the court granted summary judgment holding in part that the employer (USPS) was unaware when they terminated plaintiff that he had “a musculoskeletal problem that substantially restricts major life functions including standing, walking, lifting, and carrying,” and “an avulsion fracture to his ankle and knee injuries.” The record established that USPS knew about injuries that plaintiff incurred at work, but not that they rose to disabilities. “[I]t is not enough that the employer knows that an employee was injured or otherwise had an impairment. Rather, the employer must know that the injury or impairment was of sufficient magnitude to substantially limit one or more major life activities . . . . Thus, although symptoms alone might put an employer on notice of a disability, those symptoms must be ‘severe enough to alert’ the employer as to that fact, or in other words, severe enough to provide the employer either actual knowledge or ‘some generalized notion’ of a disability . . . . Here, Dorsey has failed to establish that . . . [any] supervisor had enough information to know or reasonably infer that Dorsey was suffering from a disability as defined by law. USPS knew, of course, about Dorsey’s fall, and that Dorsey was experiencing some related pain and difficulty walking. And, crediting the narrative resulting from Dorsey’s sworn testimony, at least Schmalle, if not others, knew that Dorsey had hurt his knees and ankles, and was contemplating visiting a doctor.”

In ***Frederick v. Allor Mfg., Inc.*, 2:20-CV-12790-TGB-RSW, 2022 WL 598746 (E.D. Mich. Feb. 28, 2022)**, assuming that a “history of pneumonia” and a “heightened risk of severe COVID-19 infection” constitute a disability for purposes of the ADA, the district court held that the employee presented no genuine dispute of fact that the employer was aware of the disability when plaintiff was terminated. “Following the [COVID-19] Stay at Home order issued by the Governor of Michigan, Frederick told [HR manager] Ms. Kennedy that he planned to use his remaining vacation time to ‘self-quarantine’ . . . . He did not indicate to Ms. Kennedy that he was concerned about his susceptibility to COVID-19 due to his smoking habit or history of pneumonia . . . . Additionally, the voicemail Frederick left . . . indicated he wanted to use his vacation time to ‘self-quarantine’ and made no mention of a disability or susceptibility to contracting COVID-19.”

In ***Dees v. Dobson Technologies*, No. CIV-19-0915-F, 2021 WL 27476 (W.D. Okla. Jan. 4, 2021)**, plaintiff called in sick to work on October 3, 2017 and left a voice mail; later that day, he was taken to the hospital and diagnosed with a subarachnoid hemorrhage (a brain aneurysm). The district court held that the plaintiff failed to present a genuine dispute of material fact that the employer knew about that disability before it fired him for his absence. “The voicemail . . . does not identify anything that would

qualify as a legal disability, much less plaintiff's specific disability. . . Plaintiff, for his argument that the voicemail put defendants on notice of a disability, relies on statements in the voicemail such as: 'Man, I cannot move,' and 'I can't function.' But the voicemail also states: 'I got drugged or something,' 'I am just now waking up,' and 'Somebody slipped me something over the weekend.'"

In ***Hembree v. Off. of Dist. Atty. Gen. for 13th Judicial Dist., No. 2:18-cv-00097, 2020 WL 4586176 (M.D. Tenn. Aug. 10, 2020)***, the district court held that there was no evidence that the employer was aware of plaintiff's neuropathy prior to termination. "There is no evidence that Hembree ever told [district attorney] Dunaway that she had neuropathy, or that her problems walking was a symptom of neuropathy. Knowledge of an employee's impairment or symptom may put an employer on notice that the employee is disabled if the 'symptoms are severe enough to alert [the employer], giving [the employer] either knowledge or some generalized notion of the disability' . . . . Hembree has presented evidence that Dunaway knew she had trouble walking. He may have also seen that she had a handicap placard on her car and sometimes dimmed the lights in her office . . . . But that evidence does not inform him that she has a disability."

In ***Boyd v. Zepf Center, No. 3:17-cv-677, 2020 WL 1531149 (N.D. Ohio Mar. 31, 2020)***, the district court granted summary judgment to the employer, finding that the decisionmaker lacked actual or constructive knowledge of plaintiff's multiple conditions, including major depressive disorder, generalized anxiety disorder, high blood pressure, migraine headaches, and post-traumatic stress disorder (PTSD) before termination. "Boyd does not present any evidence to show [decisionmaker] Moses was actually aware of Boyd's disabilities. Instead, Boyd first attempts to establish the knowledge requirement by arguing '[the company] Zepf had constructive knowledge' of her disabilities . . . . An employee's symptoms, if severe enough, can put the employer on notice of a disability . . . . But Boyd still needs to show it was Moses specifically who should have been on notice." The decisionmaker had not personally observed plaintiff enough to notice a disability, nor was the decisionmaker informed of the plaintiff's condition. Plaintiff invoked a "cat's-paw" theory that the Director of Administrative Services was on notice of her disabilities, but even as to that person, "[a]t most, Boyd has provided evidence to suggest Baskey knew Boyd was suffering from extreme stress. But there is no evidence to show Baskey knew Boyd's symptoms stemmed from a disability rather than the admittedly stressful circumstances at work."

## C. Knowledge of a “Record of” an Invisible Disability

To establish liability under the “record of” prong of the definition of disability in the ADA, an employee must show that the employer had knowledge that the “record of” a disability. However, the record of a disability need not be a written record, knowledge of a history of having a disability may establish liability. This situation would apply when an individual does not have a current disability.

### Cases finding for the Employee

In *EEOC v. Mfrs. and Traders Trust Co.*, 429 F. Supp. 3d 89 (D. Md. 2019), the district court denied summary judgment in a record-of case. Plaintiff “has an incompetent cervix” and also “a record of disability due to her prior miscarriages,” of which the employer was aware. Courts have recognized that reproductive impairments are covered by the ADA. Moreover, the charging party “had a record of cervical incompetence since at least 2008.” The charging party “provided M&T Bank with adequate notice of her record of disability. It is undisputed that ‘[i]n November 2012, [the charging party] informed her manager . . . that she was pregnant, had had miscarriages in the past, and needed to have a procedure to carry the baby to term.’” The employer’s “argument—that an employee must document his or her actual medical condition in order to establish a record of disability—conflicts with the ADA’s lax notification requirements. In particular, 29 C.F.R. pt. 1630 app. § 1630.2(k) provides: ‘An individual may have a ‘record of’ a substantially limiting impairment—and thus be protected under the ‘record of’ prong of the statute—even if a covered entity does not specifically know about the relevant record.’”

In *Trafton v. Sunbury Primary Care, P.A.*, 689 F. Supp. 2d 180 (D. Me. 2010), the employee raised claims that she was terminated due to having a “record of” a disability related to her major depression and post-traumatic stress disorder (PTSD). Prior to her termination, plaintiff’s supervisor made numerous comments to her that seemed to indicate that he had knowledge of her disability although she never disclosed the disability to him. At various times, the supervisor told plaintiff that that he thought the job was “too much for her,” that she could not handle the job because she was “unstable,” that she tended “to get out of control,” and once stated, “now don’t go out and burn the building down.” In addition, plaintiff presented circumstantial evidence of two other facts indicating her employer’s knowledge of her “record of” a disability. Plaintiff asserted that she had “numerous, highly visible” scars on her arms from a suicide attempt which she claimed were often visible around the workplace as she often had her sleeves



rolled up or wore short sleeve. In addition, plaintiff had received treatment from a company physician for her mental illness. The physician expressed having “serious reservations about noting [Trafton’s] work stress and depression in her medical record,” as the physician “suspected the privacy of employees’ medical records... was not scrupulously maintained” and stated that he never informed plaintiff’s supervisor of her disability. Despite this evidence, the magistrate judge recommended summary judgment in favor of the employer. The district court however rejected this recommendation, finding that plaintiff’s records of a hospitalizations for attempted suicides combined with her supervisor’s comments and termination provided sufficient evidence to raise a triable question as to whether her supervisor was aware of her record of a disability and if he terminated her for that reason.

## Cases finding for the Employer

In ***Lusby v. Savannah River Nuclear Solutions, LLC*, No. 1:20-cv-1165-SAL, 2022 WL 897151 (D.S.C. Mar. 28, 2022)**, the district court granted summary judgment to the employer, finding although plaintiff established a record of an *impairment*—cancer—he had failed to create a genuine dispute of material fact that the impairment was one that substantially limited a major life activity. “Here, Plaintiff placed in the record occupational health records maintained by defendant. The records document Plaintiff’s cancer treatment, and a 2009 record provides an isolated ‘disability’ notation . . . . But the records fail to document that his cancer substantially limited him in a major life activity, nor has Plaintiff made such an allegation . . . . On the contrary, the records reflect that Plaintiff successfully completed his treatments, was feeling great, and believed he could return to work without any restriction.”

In ***Raymo v. Civitas Media LLC*, No. 3:19-CV-01798, 2021 WL 6197741 (M.D. Pa. 2021)**, the district court also held that the employee failed to present proof of a “record of” disability. Plaintiff pointed to documentation in his files that he had taken an FMLA leave for neck surgery. The record indicated, though, that he underwent surgery and was then able to return to work following his recovery with no reported medical restrictions. “His short-term absence from work [for surgery] is insufficient to establish a record of impairment.”

## VI. Disability Harassment (Hostile Work Environment)

Title I of the ADA prohibits discrimination in employment and provides employees with disabilities with broad protections in the workplace. The statute states: “No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112 (a).

Courts that have recognized a cause of action for disability harassment have focused on the similarities between this provision of the ADA and Title VII. Although harassment is not expressly prohibited in Title VII, the U.S. Supreme Court has recognized that harassment based on a protected status is implicitly prohibited by Title VII. Because both Title I of the ADA and Title VII use the language “terms, conditions, and privileges of employment,” and courts have interpreted this to be the relevant portion of the statutes from which to draw a harassment claim. The courts have established that, should conduct rise to a level that is severe and pervasive, and creates an abusive work environment that interferes with an employee’s ability to perform the job, it is a form of discrimination, because it adversely effects the “terms and conditions” of that individual’s employment.

The U.S. Supreme Court has not yet addressed harassment under the ADA, but lower federal courts have either expressly recognized or presumed that the ADA also includes a cause of action for harassment based on disability since Congress was aware of the Supreme Court’s interpretation of “terms, conditions, and privileges of employment” under Title VII when it enacted the ADA. Multiple federal circuit courts of appeal have ruled that disability harassment/hostile work environment claims are actionable under Title I of the ADA. Many other circuits have presumed that the cause of action exists, but have not yet explicitly issued a ruling that a disability harassment claim is actionable under the ADA. Further, numerous federal trial courts have either recognized the claim or presumed that the claim exists. Significantly, no federal court has ruled that a disability harassment claim is not actionable under Title I of the ADA.

Courts recognizing a claim for disability harassment have adopted the Title VII analysis for harassment or hostile work environment claims, slightly modified to reflect that the claimed harassment is based on disability. Courts have held that, to establish a hostile work environment claim under the ADA, a plaintiff must prove that: (1) Plaintiff is a qualified individual with a disability; (2) Plaintiff was subjected to unwelcome harassment; (3) The harassment was based on plaintiff’s disability; (4) The harassment was sufficiently severe or pervasive to alter a term, condition, or privilege of

employment; and (5) Some factual basis exists to impute liability for the harassment to the employer (i.e. the employer knew or should have known of the harassment and failed to take prompt, remedial action).

In disability harassment cases, as in sexual harassment cases under Title VII, plaintiffs frequently have had difficulty establishing the fourth element, that the harassment was severe or pervasive enough to alter a term, condition, or privilege of employment. While people with visible or invisible disabilities may be subject to workplace harassment, it may be argued that there are more stereotypes, myths, misunderstandings, and mistreatment related to invisible disabilities than visible ones.

## Cases finding for the Employee

In ***Fox v. Costco Wholesale Corp.*, 918 F.3d 65 (2d Cir. 2019)**, the court reversed summary judgment and held that the plaintiff presented a genuine dispute of material fact about objectively severe or pervasive harassment. The district court had held that the plaintiff had to proffer “evidence regarding the number of times the comments were made per shift, week and/or month” to show that the hostile comments “pervaded Fox’s working environment.” But plaintiffs are not required to do so, held the Second Circuit. Because the plaintiff “identified specific comments—his co-workers mocking his Tourette’s by repeating ‘hut-hut-hike,’ presumably while touching the floor—and because he testified that ‘whenever I said [the F word], they said ‘hut-hut-hike’ for ‘months and months,’ Fox has provided evidence sufficient to meet his burden to demonstrate pervasiveness.”

In ***Woods v. AstraZeneca Pharma., L.P.*, --- F. Supp. 3d ---, No. 3:19-CV-00230, 2023 WL 2393649 (M.D. Pa. Mar. 7, 2023)**, the court granted summary judgment on a disability harassment claim under the ADA and Pennsylvania state law. It held that comments made over three-year period “regarding Plaintiff’s medical issues and related missed work time” due to pregnancy-related conditions (such as high-blood pressure, nausea/vomiting, and migraines) were “not of the severity contemplated in that the alleged statements, if not pervasive, would not ‘contaminate an environment.’”

In ***Beasley v. Kendall*, No. 22-cv-00971-NYW-MDB, 2023 WL 2824415 (D. Colo. Feb. 6, 2023)**, the court held that the employee with immune deficiency disorder and other disabilities plausibly alleged a hostile work environment claim under the Rehabilitation Act. “Ms. Beasley alleges that . . . her subordinates heard [her supervisor] Colonel Flarity make disparaging comments about Ms. Beasley on ‘several occasions,’ and that

they witnessed hostile and unfriendly encounters between Ms. Beasley and Colonel Flarity, and that Colonel Flarity became ‘agitated or upset [when Ms. Beasley] was out sick.’ (*Id.*) Ms. Beasley’s subordinates also claim she was “targeted,” “singled out,” “set up for failure,” and ignored in meetings by Colonel Flarity, who, as her superior, ‘had an agenda against’ her . . . . Assuming for the purpose of this Motion that all of Plaintiff’s allegations are true, a fact finder could find that Colonel Flarity’s comments, approach, and actions stemmed from animus against a protected class, and were pervasive enough to alter the terms, conditions, or privilege of employment.”

In ***Varvaro v. Univ. of Central Fla. Bd. of Trustees, No. 6:21-cv-329-PGB-LHP, 2022 WL 9350839 (M.D. Fla. Oct. 14, 2022)***, a resident who was blind in one eye and had difficulty reading as a result alleged that he was harassed about being too slow and his use of a dictation device as a reasonable accommodation. The court held that was a genuine dispute about whether the harassment was severe or pervasive, and whether it was objectively and subjectively offensive. “Plaintiff avers that ‘the work environment was incredibly hostile’ because he had to ‘work at a slower pace than [his] non-disabled colleagues and [his] supervisors constantly made [him] feel as if [he] was being assessed based on [his] speed.’ (Doc. 32-1, p. 2). Plaintiff also attests that his ‘[s]upervisors would yell at [him] in frustration and treat [him] as if [he] was intentionally not trying when in fact, [he] just work[s] slightly slower and was not afforded the accommodations [he] needed.’ (*Id.* at p. 3). He also states that, ‘[i]n general, [his] supervisors scrutinized [him] more heavily and treated [him] more poorly because of [his] disability.’ (*Id.*). Moreover, Plaintiff testifies that his ‘supervising physicians nitpicked at [his] every action, ultimately serving the purpose of harassment’ (*Id.* at p. 5) and that ‘[d]uring an academic half day Dr. Sayre made [him] stand up in front of the entire residency program to talk about the dictation device as [his] accommodation’ and that ‘[t]he residents belittled the need for [him] having to use one.’”

In ***Felts v. DeJoy, No. 1:21-cv-00370-LF-KK, 2022 WL 4332712 (D.N.M. Sept. 17, 2022)***, the plaintiff was a customer service manager with a variety of disabilities, i.e., “tumor, hernia, lung nodes, insomnia, stress/anxiety, and RSV (respiratory syncytial virus).” Allegedly, the postmaster at his post office “incessantly admonished Mr. Felts, embarrassed Mr. Felts on teleconferences in front of his peers, increasingly issued Mr. Felts ‘fact findings’ and ‘warnings with discipline,’ and claimed without basis that Mr. Felts was failing ‘to perform to the standards.’” Moreover, the postmaster regularly opposed his accommodations and made him work beyond his restrictions. The Postmaster “regularly required that Mr. Felts work outside his [agreed-upon] modified work schedule” despite that the postmaster “was kept apprised of [plaintiff’s] health problems and therefore knew of his disability.” The postmaster “ultimately told Mr. Felts



that he was going to return him to his regular hours, and that he didn't care what kind of deal Mr. Felts had made with the official who had approved his modified work schedule." The district court held that he plausibly alleged a claim of hostile work environment under the Rehabilitation Act.

In ***Prosa v. Austin*, No. ELH-20-3015, 2022 WL 394465 (D. Md. Feb. 8, 2022)**, the district court addressed an unusual harassment case based on the plaintiff's *association with* a person with disabilities under Section 501 of the Rehabilitation Act (incorporating 42 U.S.C. § 12112(b)(4) of the ADA). Plaintiff alleged harassment because of her spouse's disabilities, i.e., "from a cerebral hemorrhage in 2013, congestive heart failure since 2016, diabetes II, hypertension, and renal and vision failure." The court denied a motion to dismiss, holding that plaintiff plausibly alleged a hostile work environment where the boss—along with the more typical haranguing (verbally and by email)—allegedly engaged in a "physical altercation" with plaintiff resulting in a sprained wrist and took "advantage" of her relationship with an agency chaplain to obtain "confidential information that Plaintiff had disclosed to the chaplain."

In ***Nicolini v. Arizona Bd. of Regents*, No. CV-20-01798-PHX-GMS, 2021 WL 1597898 (D. Ariz. Apr. 23, 2021)**, the court held that a plaintiff diagnosed Post-Traumatic Stress Disorder (PTSD) and Complex Post-Traumatic Stress Disorder (CPTSD) plausibly alleged a claim for hostile work environment based on the following facts: "(1) [supervisors] Richards or Patten told her colleagues not to talk with [plaintiff], resulting in her colleagues not acknowledging her, . . . ; (2) Richards and Patten called many meetings 'with the goal of destabilizing [plaintiff] by exploiting her disability and causing her to make quick, panicked decisions[,] . . . (3) Patten 'coerced and bullied' [plaintiff] into working from home permanently with the goal to 'entirely remove [plaintiff] from the workplace[,] . . . ; (4) Patten yelled at [plaintiff] in a public place in front of [plaintiff's] colleagues while aware of [plaintiff's] PTSD . . . ; and (5) Richards told [plaintiff] that she was 'not to talk to anyone about what happened to [her] because [Richards] [didn't] want to hear it and no one else [did] either[.]'"

In ***Turner v. Greyhound Lines, Inc.*, No. 2:19-cv-02840-SHL-atc, 2021 WL 1051118 (W.D. Tenn. March 19, 2021)**, the court denied a motion to dismiss for a hard-of-hearing bus driver who alleged "two discrete incidences of discriminatory harassment. First, his roommate noticed his hearing loss and brought it up at a staff meeting, discussing it as if Turner could not hear, when he has only partial hearing loss. Second, when Turner could not understand a driving instruction and thus almost caused a collision, his trainer, Mr. Grey, yelled that Turner cannot hear, that he should not be

behind the wheel, and that he needed to put new batteries in his hearing aids.” Although the employer argued that there was no allegation that the harassment interfered with his work performance, “one of the incidents, when Mr. Grey allegedly berated Plaintiff, occurred while Plaintiff was driving a bus as part of his employment. This allegation makes it plausible that the harassment did interfere with Plaintiff’s employment duties.”

In ***Phillips v. Harbor Venice Mgt., LLC*, No. 8:19-cv-2379-T-33TGW, 2020 WL 2735201 (M.D. Fla. May 26, 2020)**, the district denied a motion to dismiss, holding that plaintiff (who was in treatment for breast cancer) alleged “sufficient facts that, taken as true and granting Phillips all reasonable inferences in her favor, show that the work environment at Harbor Venice in that three-month period of August, September, and October 2018 was of a kind that a reasonable person would find hostile or abusive” under ADA or Florida state-law standards. This included that her boss “became very upset and stated that he wanted a doctor’s note stating this,” and told her “that his wife and sons have had many surgeries and [they were] never told that they could not come out”; he “sent her approximately 22 ‘angry text messages’ in the days leading up to her reconstructive surgery”; when plaintiff “returned to work on August 13, 2018, with certain work restrictions, she was given what she considers a pretextual reason as to why she could not return to work”; then “[w]hen her doctor then changed her work restrictions, the human resources director shortly thereafter provided [plaintiff] a written copy of her job description, explained that the work restrictions were incompatible with her job description, and told her to leave the building”; “multiple other employees were allowed certain accommodations that she was not allowed, such as working from home, using comp days, or avoiding certain duties or patients in order to protect their health”; and when she complained about the unequal treatment, she was simply told “now we are going to do things this way.”

In ***Burns v. Nielsen*, 456 F. Supp. 3d 807 (W.D. Tex. 2020)**, the court granted summary judgment on a hostile work environment claim under the Rehabilitation Act. The plaintiff, a Field Technology Officer (FTO) who got migraines and had lumber spine puncture with back pain, alleged that he received three letters from his supervisor relating to medical documentation challenging his ability to climb (an essential function of his job) and restricting his work activities. “If the fact-finder were to reject [defendant]’s assertion that the Letters and the restrictions imposed by the letters were based upon safety concerns, as addressed above, then the Court finds that a reasonable jury could conclude that the requests for medical documentation and restrictions on climbing were based on Burns’s disability or disabilities.” Moreover, “[t]he Court finds that these letters, including the obligations and restrictions they imposed, could be found by a reasonable jury to affect a term of Burns’s employment.”

In ***Teegarden v. Gold Crown Mgt., LLC*, No. 4:18-cv-00554-SRB, 2020 WL 13682809 (W.D. Mo. Apr. 23, 2020)**, plaintiff with bipolar disorder as well as post-traumatic stress disorder (PTSD) alleged that the business owners “repeatedly criticized, belittled, insulted, cursed at, and called her derogatory names while she was an employee, in addition to [one owner] allegedly threatening and attacking her on December 20, 2017” by “shov[ing] a table at Teegarden that struck her and broke two of her fingernails.” The court denied summary judgment, holding that there was a genuine dispute whether the harassment rose to a level of severe or pervasive. Defendant argued “Teegarden’s workplace treatment had no relation to her disability and that she was not treated differently than other employees. However, some incidents alleged by Teegarden show disability-based animus on their face, such as being called ‘stupid,’ ‘crazy,’ ‘bipolar,’ and a ‘bipolar schizophrenic psycho bitch.’ While some of those terms or insults can be used without referring to a person’s specific condition or disability, a reasonable jury could find those insults were chosen for Teegarden because of her bipolar diagnosis.”

In ***Schmitt v. City of New York*, No. 15-CV-05992, 2018 WL 5777019 (E.D.N.Y. Nov. 1, 2018)**, the Court denied an employer’s motion for summary judgment on a police officer’s hostile work environment claim because of a genuine issue of fact. Plaintiff had from a variety of conditions that necessitated frequent bathroom trips and special shoes and had an inability to stand for prolonged periods of time or tolerate heat. He also took a leave of absence to treat his alcoholism. When he returned from leave, coworkers posted ads and comics about alcohol on a daily basis for months. After receiving accommodations at work, his supervisor frequently called him a “scammer” to the officer’s coworkers. The supervisor gave him assignments that required him to stand all day and work in heated areas, refused access to a chair or transfer to a cooler post, and penalized him for taking too many bathroom breaks. The Court found that although the advertisements, comics and being called a scammer did not meet the threshold for a hostile work environment on their own, there was a genuine issue of fact about whether refusing to accommodate his needs in his assignments and breaks created a physically threatening environment—an important factor when considering whether a workplace is hostile. **See also *Mashni v. Bd. of Educ. of City of Chicago*, No. 15 C 10951, 2017 WL 3838039 (N.D. Ill. Sept. 1, 2017)** (allowing harassment claim to proceed for technology coordinator with anxiety disorder who alleged that over the course of five months, he was subject to harassment on more than two dozen occasions); ***Rodriguez-Ivarez v. Diaz*, No. 14-01924-WGY, 2017 WL 666052 (D.P.R. Feb. 17, 2017)** (denying motion dismiss in case where plaintiff with alleged that after disclosing her disability, her employer immediately cut off access to the bathroom, forcing her to urinate in the hallway, stripped her of job duties, and excluded her from social gatherings).

## Cases finding for the Employer

Most dismissals of disability harassment cases have occurred because plaintiff has been unable to convince the court that the harassment was sufficiently severe and pervasive to alter the terms, conditions and privileges of employment. In ***Alston v. Holy Cross Health, Inc.*, No. DLB-20-2388, 2023 WL 2743332 (D. Md. Mar. 31, 2023)**, the district court granted summary judgment on (among other claims) an ADA hostile work environment claim. Plaintiff was immunocompromised and could not work in negative pressure isolation rooms, i.e., “an isolation technique used by hospitals to prevent the spread of airborne contagious diseases” where “[v]entilation lowers air pressure in the isolation room, allowing air to flow in but not out.” The court held that a series of alleged unfavorable job assignments was not itself severe or pervasive. Plaintiff “submits no evidence that he was intimidated, ridiculed, insulted, or humiliated. The record evidence shows that his shift assignments changed, his employer announced a policy change that would have conflicted with an accommodation for his disability, he received counseling based on reported misconduct, and he was subject to increased scrutiny regarding his practice of leaving work early. Generally, ‘unfavorable personnel actions[ ] do not constitute a hostile work environment’ . . . . To the extent the policy change might have posed a threat to his health, the risk never materialized because Holy Cross never required him to treat patients in a negative pressure isolation room.”

In ***Thompson v. Austin*, No. 5:21-CV-00283-M, 2023 WL 3682113 (E.D.N.C. Mar. 31, 2023), appeal filed (May 26, 2023)**, the court found that a series of six warnings and other disciplinary actions taken against the plaintiff (with a history of PTSD, bipolar disorder, and feelings of “increased anxiety”) in front of co-workers was not sufficiently severe or pervasive to support a hostile work environment claim under Section 504 of the Rehabilitation Act. “[W]hile Plaintiff may have felt (reasonably) uncomfortable with a non-management employee present during her meetings with Kemp, it is not uncommon for management to have “witnesses” present at disciplinary meetings with employees; in fact, on May 20, 2017, Plaintiff asked the store manager also to be present as a witness at her meeting with Kemp . . . . Further, any statements or actions aimed at Plaintiff in April and May 2017 appear to be closer to ‘merely offensive’ rather than ‘physically threatening or humiliating’ or ‘odious’ as necessary to be unlawfully hostile.”

In ***Bain v. Off. of Attorney Gen.*, --- F. Supp. 3d ---, 2022 WL 17904236 (D.D.C. 2022)**, the district court granted summary judgment to the defendant on a hostile work environment claim. “Bain’s hostile work environment claim fails because it constitutes little more than an additional label that she has placed on a series of discrete



discrimination and retaliation claims. Her complaint says nothing to support a hostile work environment claim independent from her allegations regarding her discrete claims of discrimination and retaliation. It instead contains a perfunctory indication that Bain is also bringing hostile work environment claim alongside her discrete claims . . . . Although her admonishment, counseling, performance evaluation, and reprimand claims are connected in one sense—they all arise out of allegations that Bain acted intemperately or unprofessionally—they do not appear to constitute a pattern of “discriminatory intimidation, ridicule, and insult . . . . The same is true for Bain’s work assignment claims. The Court has already held that these are actionable as discrete discrimination and retaliation claims. But simply because Bain asserts that she was repeatedly given more onerous or less desirable cases—by two different bosses in two different courts during two different time periods—does not mean that there was a hostile work environment in either workplace. These are, again, ordinary workplace actions.”

In ***Coleman v. Kettler Mgt., No. 1:22-cv-84 (RDA/JFA), 2022 WL 17585780 (E.D. Va. Dec. 12, 2022)***, the court holds that the plaintiff, a marketing specialist for a real estate company, forfeited her hostile work environment claim by not putting it in her EEOC charge. But even if the claim were not forfeited, the court holds that the claim is not plausibly alleged. Plaintiff alleged that she had a “serious immune compromised condition,” which allegedly placed her at a higher risk for severe illness from COVID-19. “[T]he gravamen of Plaintiff’s ADA hostile work environment theory is that her supervisors harassed her due to her disability ‘since [they] were specifically attacking her disabled status and her working from home, which was Plaintiff’s reasonable accommodation request for her disability’ . . . . However, nowhere in the Amended Complaint does Plaintiff allege facts that could support an inference that her supervisors’ purported mistreatment of her was because of her disability rather than her work-from-home status.”

In ***Marshall v. McDonough, No. 2:20-CV-215-M-BR, 2022 WL 17541038 (N.D. Tex. Nov. 18, 2022)***, an employee who had fibromyalgia, adrenal insufficiency and chronic fatigue claimed that she was subject to “taunting discriminatory remarks” regarding her disabilities, “including comments from certain co-workers that Marshall merely pretended to be sick and complained of devices she used to alleviate pain,” such as “co-workers’ comments that she is ‘just faking’ her illness and that she ‘use[s] her health as a crutch.’” The court held that the comments were not frequent or severe enough to support a hostile work environment claim under the Rehabilitation Act; also that the plaintiff had not presented a genuine dispute about whether the hostility was based

solely on disability. “[T]he record supports that the alleged insubordination and other aggrieved conduct was based on work-related disagreements and personality conflicts.”

In ***Hartzler v. Mayorkas*, No. 20-cv-3802 (GMH), 2022 WL 15419995 (D.D.C. Oct. 27, 2022), appeal filed (Nov. 29, 2022)**, an employee with spine and thyroid cancer alleged that her supervisor derided her physical condition, worked her beyond her medical limitations, put her on a performance improvement plan (PIP), and finally terminated her. The district court granted the agency summary judgment. “[D]rawing all reasonable inferences in her favor, [the evidence] do[es] not suffice to show that she was subjected to severe and pervasive ridicule and harassment. Indeed, many of Plaintiff’s allegations constitute ‘work-related actions by supervisors’ that ‘courts typically do not find ... sufficient for a hostile work environment claim,’” including the denial of medical leave and being placed on a PIP. “Plaintiff also alleges a number of incidents where she was verbally ridiculed, including having her medical conditions insulted and discussed openly. But these, too, are not enough to sustain a hostile work environment claim.”

In ***EEOC v. U.S. Drug Mart, Inc.*, EP-21-CV-00232-FM, 2022 WL 18539781 (W.D. Tex. Oct. 18, 2022), appeal filed (Jan. 31, 2023)**, the charging party, who had asthma, wound up in a heated fight with his bosses about whether he could wear a mask to work during the early months of the COVID-19 pandemic. While the district court expressed sympathy for the employee’s plight, it held that a single verbally abusive contact with the employer was not enough under Fifth Circuit case law to support a hostile work environment claim. The employee’s boss “taunted Mr. Calzada about his fear of COVID-19 and later admitted he had aimed to intimidate and threaten Mr. Calzada. Given the serious health risks Mr. Calzada faced, and the general societal tenor at that time, Mr. Mosher’s words may have felt particularly intimidating and insulting.” Nevertheless, the court could find no authority to find that a single verbal comment, however combative, could be considered “COVID-19 raised extreme and unusual challenges, and pandemic-era harassment against frontline healthcare workers, like Mr. Calzada, should be viewed in that context. But the court cannot escape the conclusion that, as a matter of law, the harassment here was not sufficiently severe to support Plaintiff’s hostile work environment claim. Therefore, that claim must fail.”

In ***Jaeckels v. Golden Nugget, LLC*, No. 1:21cv40-HSO-RHWR (S.D. Miss. May 27, 2022)**, the court granted summary judgment on the plaintiff’s hostile work environment claim. “The Complaint alleges that Mr. Jaeckels has suffered from significant mental disabilities since birth[.]” The court held that the plaintiff did not establish that the harassment affected a term,

condition, or privilege of his employment. Although it was alleged that he was assigned menial tasks, especially cleaning out pots and pans, “Mr. Jaeckels testified that he ‘[k]ind of’ liked washing the pots because it was easier than washing the dishes . . . . Even if the pots and pans station was less desirable, Mr. Jaeckels has not presented evidence regarding how frequently he was required to perform this task compared to other dishwashers, or how placing him on this duty was in any way related to his disability.” There were also allegations of teasing and name-calling by co-workers, but “Mr. Jaeckels has not articulated or adequately explained how these names related to his disability or how he perceived them as relating to his disability.”

In ***Shoul v. Select Rehabilitation, LLC*, No. 1:21-CV-00836, 2022 WL 2118322 (M.D. Pa. June 13, 2022)**, the court dismissed a complaint by a speech pathologist with “COVID-19, anxiety, breathing issues, gastro disorder, nausea, and COVID long haul medical issues.” Her principal allegation is that she was repeatedly called by her employer demanding to know when she would return to work. The court holds that the employer’s calls were neither severe nor pervasive and, for good measure, did not affect a term or condition of employment. “Asking an employee to return to work is the opposite of interference with work performance. In fact, Shoul’s allegations show Select was intent on Shoul performing her work without interference because of their critical staffing needs.”

In ***Newell v. Carter Bank & Trust*, No. 4:21-cv-007, 2022 WL 801601 (W.D. Va. Mar. 15, 2022)**, the court granted a motion to dismiss in a case involving an employee with “Macular Corneal Dystrophy, Minimal Change Disease, Graves’ disease, Casselman’s disease, and diverticulosis. These impair several of Newell’s daily life activities and functions including seeing, eating, speaking, walking, and working while standing for extended periods of time.” The plaintiff did not plausibly allege that any alleged harassment interfered with their performance or was severe or pervasive. “Newell alleges that employees joked in the office that Newell had been out drinking when she appeared wobbly because her medication’s effects were slow to start.”

In ***Hendrix v. Pactiv LLC*, 488 F. Supp. 3d 43 (W.D.N.Y. 2020)**, the district court granted a motion to dismiss where all plaintiff alleged was “a single, brief verbal quarrel between him and Bellis, as a result of which plaintiff perceived that his blood pressure was rising. That is far from enough in severity, frequency or duration to state a hostile work environment claim.”

In ***Meyer v. Brennan*, No. CV-17-00524-PHX-ROS, 2020 WL 4904228 (D. Ariz. Aug. 20, 2020)**, plaintiff injured her shoulder while working, which “resulted in [her] having ‘medical restrictions/limitations’ such that she was unable to perform certain tasks.” The court granted summary judgment because even according to the plaintiff’s own submissions, the supervisor “treated all employees poorly” and thus any hostile work environment was not because of disability.

In ***Anderson v. Sch. Bd. of Gloucester Cnty., Va.*, No. 3:18cv745, 2020 WL 2832475 (E.D. Va. May 29, 2020)**, the court granted a motion to dismiss an ADA hostile work environment claim by a teacher with chemical sensitivity who alleged “that her exposure to [certain] scents causes her to experience multiple physical reactions.” The judge held that the nine events alleged neither singularly nor collectively amounted to a hostile work environment. “First, an employer’s refusal to provide reasonable accommodations, by itself, does not comport with the plain meaning of harassment under the second element of the hostile work environment test. Dr. Anderson does ‘not allege any threats, disparaging comments, physical contact, or verbal abuse of any kind, much less harassment based on her ... disability.’” Moreover, though alleging various callous remarks by school administrators, “most of these statements did not specifically reference Anderson’s disability, but her professional performance in the classroom.”

***Garton v. BWXT Tech. Servs. Grp., Inc.*, No. 1:17-CV-00222-DCN, 2020 WL 86197 (D. Idaho Jan. 7, 2020)** dealt with verbal harassment related to the employee’s use of prescription pain medication. After learning of the employee’s use of “multiple potential medication altering medication[s],” the crane operator’s supervisor and a colleague called the employee “pill popper” approximately 10 times and gave him “disparaging looks.” The Court found that this was not pervasive enough to constitute discrimination. Furthermore, because the medications referenced were used to treat pain and not his diagnosed disabilities of depression and anxiety, plaintiff failed to establish a *prima facie* case and the Court granted summary judgment for the employer.

## **Conclusion**

This legal brief provided an overview of several unique legal issues that arise when an applicant or employee has a disability that is not readily apparent to others. It is important for employees to understand their rights and responsibilities, including the ADA’s restrictions on medical examinations and inquiries; the fact that the ADA’s confidentiality requirements do not necessarily apply to voluntarily-disclosed medical information; and that disabilities must be “known” to request accommodations. Employers, too, must understand their rights and responsibilities, including maintaining



confidentiality; conducting an individualized assessment prior to determining that an employee poses a direct threat; and preventing disability harassment.

<sup>1</sup> This Legal Brief was updated in 2023 by Paul W. Mollica, Senior Attorney and Katharine Boraz, Legal Intern for Equip for Equality, and in 2018 by Hannah R. Walsh, presently Employment Rights Helpline Manager, PABSS Manager, and Attorney, Equip for Equality. It was originally written in 2010 by Barry C. Taylor, then-Legal Advocacy Director (now Program Vice President), Alan M. Goldstein, then-Senior Attorney, and Rachel M. Weisberg, then-Staff Attorney (now Client Assistance Program Manager and Managing Attorney), Equip for Equality. Equip for Equality is the governor-designated protection and advocacy system for the State of Illinois and provides this information under a subcontract with Great Lakes ADA Center.

<sup>2</sup> Direct threat issues often involve people with non-apparent disabilities; however, many issues in direct threat cases are more related to employer stereotypes or misperceptions regarding the disability, rather than relating to the invisible nature of the disability itself. Please see the Legal Brief regarding Direct Threat, updated in 2018, at: [https://www.adagreatlakes.org/Publications/Legal\\_Briefs/BriefNo32\\_Direct\\_Threat\\_Under\\_the\\_ADA.pdf](https://www.adagreatlakes.org/Publications/Legal_Briefs/BriefNo32_Direct_Threat_Under_the_ADA.pdf).

<sup>3</sup> For a survey of the ADA Amendments Act, please see the Legal Brief, updated in 2018, at: [https://www.adagreatlakes.org/Publications/Legal\\_Briefs/BriefNo30\\_Litigation\\_Landscape\\_Nearly\\_One\\_Decade.pdf](https://www.adagreatlakes.org/Publications/Legal_Briefs/BriefNo30_Litigation_Landscape_Nearly_One_Decade.pdf).

<sup>4</sup> ADA Amendments Act Sections 2(a)(1)-(8) and 2(b)(1)-(6). Specifically, the ADAAA overruled the U.S. Supreme Court decisions in the Sutton trilogy, [*Sutton v. United Air Lines*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999); *Albertsons Inc. v. Kirkingburg*, 527 U.S. 555 (1999)] and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

<sup>5</sup> ADA Amendments Act §2(b)(5).

<sup>6</sup> ADA Amendments Act §4(a).

<sup>7</sup> *Id.*

<sup>8</sup> *Holt v. Houston Methodist Sugar Land Hosp.*, No. 19-564, 2020 WL 989911, at \*3 (S.D. Tex. Feb. 10, 2020) (blood clotting disorder); *Stainback v. Citadel Broad. Co.*, No. 2:13-CV-812-KOB, 2014 WL 7330833, at \*13 (N.D. Ala. Dec. 19, 2014) (congestive heart failure).

<sup>9</sup> *Methavichit v. Follenweider*, No. 1:20-CV-02841, 2021 WL 6050061, at \*8 (N.D. Ill. Dec. 21, 2021) (kidney failure).

<sup>10</sup> *Bell v. Alion Sci. & Tech. Corp.*, No. CV 3:15-4334-MGL-SVH, 2017 WL 2123933, at \*7 (D.S.C. May 1, 2017) (Type 2 diabetes).

<sup>11</sup> *EEOC v. K&L Auto Crushers, LLC*, Civil Action No. 6:20-CV-00455, 2021 WL 391313, at \*4-5 (E.D. Tex. Feb. 1, 2021) (small cell lung cancer); *Oncale v. CASA of Terrebone Parish, Inc.*, No. 19-14760, 2020 WL 3469838, at \*5-6 (E.D. La. June 25, 2020) (breast cancer).

<sup>12</sup> *Rodríguez-Álvarez v. Díaz*, No. 14-CV-1924, 2017 WL 666052, at \*2-4 (D.P.R. Feb. 17, 2017) (HIV).

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<sup>13</sup> *Vijjarungam v. Am. Acad. of Ophthalmology, Inc.*, No. 19-cv-02464 (APM), 2020 WL 13049430, at \*1 (D.D.C. May 28, 2020) (hypertension).

<sup>14</sup> *Berardinucci v. Temple Univ.*, Civ. A. No. 18-4193, 2020 WL 4201521, at \*3 (E.D. Pa. Dec. 27, 2020) (IBS).

<sup>15</sup> *Seim v. Three Eagles Commc'ns, Inc.*, No. 09-CV-3071-DEO, 2011 WL 2149061, at \*2-3 (N.D. Iowa June 1, 2011) (Graves' disease).

<sup>16</sup> *Chaney v. Wal-mart Stores, Inc.*, No. CIV-15-592-R, 2015 WL 6692108, at \*6 (W.D. Okla. Nov. 3, 2015) (MS).

<sup>17</sup> *Meinelt v. P.F. Chang's China Bistro*, 787 F. Supp. 2d 643, 651-52 (S.D. Tex. 2011) (brain tumor).

<sup>18</sup> *Barlow v. Walgreen Co.*, No. 8:11-cv-71-T-30EAJ, 2012 WL 868807, at \*4 (M.D. Fla. Mar. 14, 2012).

<sup>19</sup> *Kravtsov v. Town of Greenburgh*, No. 10-CV-3142 (CS), 2012 WL 2719663, at \*10-11 (S.D.N.Y. July 9, 2012).

<sup>20</sup> *Gough v. McCain*, Civ. No. 1:19-cv-11833, 2022 WL 669866, at \*21 (W.D. La. Feb. 2, 2022), *report and recommendation adopted*, 2022 WL 669411 (W.D. La. Mar. 4, 2022).

<sup>21</sup> *Gamel v. Forum Energy Tech., Inc.*, No. H-19-3604, 2021 WL 3556639, at \*6 (S.D. Tex. Aug. 11, 2021), (Hepatitis C), *aff'd*, No. 21-20479, 2022 WL 1551835 (5th Cir. May 17, 2022).

<sup>22</sup> *Hafermann v. Wisconsin Dep't of Corrections*, No. 14-cv-615-bbc, 2016 WL 206484, at \*4 (W.D. Wis. Jan. 15, 2016) (coronary disease).

<sup>23</sup> *Id.*

<sup>24</sup> Over the years, the EEOC has issued several documents that provide more in-depth analysis on disability related inquiries and medical examinations, including the enforcement guidance "Preemployment Disability-Related Questions and Medical Examinations Under the Americans with Disabilities Act" (1995); "Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act" (2000); and "Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act"; the technical assistance documents "Employment Tests and Selection Procedures" (2007); and "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws" (2022); and the fact sheet "Job Applicants and the Americans with Disabilities Act" (2003). Courts often cite these EEOC's documents as persuasive authority. Additional information about disability-related medical inquiries can be found in the Great Lakes ADA Center legal brief on this topic that is found at <https://www.adagreatlakes.org/publications/>.

<sup>25</sup> 42 U.S.C. §12112(d)(2)(A).

<sup>26</sup> 42 U.S.C. §12112(d)(2)(B).

<sup>27</sup> 42 U.S.C. §12112(d)(3) and (4).

<sup>28</sup> 42 U.S.C. §12112(d)(3).

<sup>29</sup> 42 U.S.C. §12112(b)(6).

<sup>30</sup> 42 U.S.C. §12111(8).

<sup>31</sup> 42 U.S.C. §12112(d)(4)(A).

<sup>32</sup> Equal Employment Opportunity Commission, *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA* (July 26, 2000), available at <https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees>.

<sup>33</sup> *Id.*

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<sup>34</sup> Equal Employment Opportunity Commission, *Wisconsin Employer Resolves EEOC Case Involving Wellness Program and Retaliation* (Apr. 5, 2017), available at [www.eeoc.gov/eeoc/newsroom/release/4-5-17a.cfm](http://www.eeoc.gov/eeoc/newsroom/release/4-5-17a.cfm).

<sup>35</sup> 42 U.S.C. §12112(d)(3)(B).

<sup>36</sup> *Id.*

<sup>37</sup> 29 C.F.R. § 1630.14; See also Equal Employment Opportunity Commission, *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA* (July 26, 2000), available at <https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees>.

<sup>38</sup> For discussion of direct threat, see the Great Lakes ADA Center legal brief, updated in 2018, available at [https://www.adagreatlakes.org/Publications/Legal\\_Briefs/BriefNo32\\_Direct\\_Threat\\_Under\\_the\\_ADA.pdf](https://www.adagreatlakes.org/Publications/Legal_Briefs/BriefNo32_Direct_Threat_Under_the_ADA.pdf).

<sup>39</sup> The Supreme Court clarified in *EEOC v. Abercrombie & Fitch Stores*, 575 U.S. 768 (2015), that there is no “knowledge” requirement under federal anti-discrimination acts, and that the material question is whether the protected status was a motivating factor, even if the employer lacked actual knowledge of the employee’s or applicant’s protected status. Thus, an employer agent’s belief that a person has a disability—for instance, from observing the employee having obvious difficulty walking—is sufficient for proving the claim even if they did not have actual knowledge of the disability. (Note, though, that this is separate from the proof that a plaintiff is a “qualified person with a disability,” which is an element of an ADA claim distinct from the employer’s knowledge.) But in the rubric of invisible disabilities, it will often be the case that an employer will deny any kind of awareness.

<sup>40</sup> *Id.*