

Recent Developments in EEO

“Disability Discrimination”

Part 3 of 4

Presenter

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Disability Discrimination

- ❑ What's involved in the typical disability discrimination case?
- ❑ Still, no EEOC case guidance on the ADAAA, which was effective January 1, 2009.

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Disability Discrimination/ADAAA

- ❑ **But there are court decisions interpreting ADAAA**

Kravits v. Shinseki, Department of Veterans Affairs, 112 LRP 10229, No. 10-861 (W.D. Pa. 2012). A human resources specialist with PTSD at the Department of Veterans Affairs brought claims for discriminatory termination and denial of accommodation under the Rehabilitation Act. The Court found that PTSD is virtually always considered a disability under the ADAAA but that there was no evidence in the record that the employee had such a condition. A bare assertion was not enough.

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Disability Discrimination/ADAAA

- *Smothers v. Solvay Chemicals*, 114 LRP 3502, __F.3d__ (10th Cir. 01/21/14). Appellant, with severe neck and back pain, survived summary judgment because a reasonable jury could find that his medical condition *substantially* limited his ability to sleep. His limitation was substantial if he was “significantly restricted as to the condition, manner or duration” of sleep “as compared to ... the average person.”

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Disability Discrimination/ADAAA

- *Johnson v. City of Chicago*, 114 LRP 3593, __F.App'x__ (7th Cir. 01/14/14). The district court erred when it determined that Johnson failed to show that her walking was not substantially limited. Her “Consent to Return to Work Form,” which was completed by her treating physician for her sickle cell, stated that she could return to work but needed to refrain from physical exertion and should be restricted to desk duty. The medical questionnaire (which was signed by her physician and accompanied her request for an accommodation) also recommended that she should be limited to desk duty, and added that she needed a walker and would have “gait instability” for six to nine months. Johnson also testified that her sickle cell substantially limited her walking. Based on this evidence, a reasonable jury could conclude that Johnson was substantially limited in her walking.

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Disability Discrimination/ADAAA

- *Coker v. Enhanced Senior Living Inc.*, 112 LRP 46633, 897 F.Supp.2d 1366 (N.D. Ga. 2012). Employee's breast disease constituted a disability in light of the un rebutted affidavit testimony of her treating physician, that her breast disease is "the result of abnormal cell growth and abnormal endocrine and reproductive functioning."
- *Smith v. Valley Radiologists*, 112 LRP 41373, No. CV11-0599-PHX DGC (D. Ariz. 08/09/12). Employee, a radiographic technologist, was transferred from her mammography position to other duties. The Court found that to determine if she was an individual with a disability, her poor vision needed to be evaluated in its uncorrected state. Employee had 20/200 vision. Although her special high powered glasses enabled her to read, she has centrally located blind spots in both eyes that are not correctable, and she functions solely on her peripheral vision. Although Plaintiff has a driver's license, she was able to drive "only small distances in familiar areas" with the use of special lenses that carry a telescopic magnifier.

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Disability Discrimination/ADAAA

- *Bush v. Donahoe*, 113 LRP 33026, __F.Supp.2d__ (W.D. Pa. 08/08/13). Employee with ankle/foot sprain, did not have an actual disability. His condition was temporary and non- chronic. Plaintiff had been wearing the open-toed boot for approximately two weeks at work and was performing her regular duties without restriction. Moreover, Bush testified that she was able to drive a car — she simply removed the boot and wore a regular shoe to drive. There is a complete lack of medical evidence to show the employee was disabled.

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Disability Discrimination/ADAAA

- *Allen v. Southcrest Hospital*, 111 LRP 78312, 455 F.App'x 827 (10th Cir. 2011, *unpublished*). Employee with migraines was not disabled. Discharged employee failed to establish that her alleged migraines substantially affected major life activity of caring for herself; while employee's migraines, when active and treated with medication, did not permit her to perform activities to care for herself in the evenings and compelled her to go to sleep instead, there was no indication as to how much earlier she went to bed than usual, which specific activities of caring for herself she was forced to forego as result of going to bed early, how long she slept after taking medication, and whether it was possible for her to complete activities of caring for herself the next morning that she neglected the previous evening

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Disability Discrimination/ADAAA

- *Mengel v. Reading Eagle Co.*, 113 LRP 13865, No. 11-6151 (E.D. Pa. 03/28/13). Terminated employee who was deaf in one ear did not have a disability. The employee only provided evidence of hearing loss in one ear rather than bilateral deafness. At her deposition, she testified that she was still able to hear even though she is deaf in one ear, but that she had difficulty hearing in noisy environments such as the newsroom in which she worked. Likewise, she failed to present evidence that her hearing loss in one ear substantially limited her hearing. See 29 C.F.R. 1630.2(j)(1)(ii) (even under post-ADAAA regulations, "not every impairment will constitute a disability within the meaning" of the ADA"), (4)(i) (substantial limitation is determined based on the extent the impairment interferes with major life activities).

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Disability Discrimination / Reasonable Accommodation

■ Reasonable Accommodation Denied

Blocher v. VA, 0120111937, 113 LRP 19242, (2013)

- hip replacement / Employee worked as a Service Chief / Blanket agency assertion that supervisors may not telework on the basis that face to face supervision is an essential function of position not sufficient to support denial of request for accommodation.

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Disability Discrimination / Reasonable Accommodation

Compensatory Damages Available Absent "Good Faith" Effort to Reasonably Accommodate

• *Zehe v. NASA*, 113 LRP 15745, EEOC No. 0120113282 (2013).

- "Outright denial" of telework as a reasonable accommodation deprives agency of "good faith" effort exception to damages award.

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Disability Discrimination / Reasonable Accommodation

- ❑ *Pitts v. USPS*, 113 LRP 13889, 0120130039 (2013). Failure to provide reasonable accommodation / employee with kidney disease, who frequently needed restroom, requested but denied administrative leave when agency restrooms out of order. **What result?**
- ❑ *Hunter v. SSA*, 0720070053 112 LRP 9373 (2012). Failure to provide reasonable accommodation / Denial of use of space heater for a complainant with Crohn's disease / discussion of issue of who would purchase and whether personal item. **Personal item? What is the standard?**
- ❑ *Miller v. Navy*, 0120102511 (2012). Employee walked into EEO office without an appointment and was not provided a sign language interpreter immediately, as requested. **Problem? What is agency's obligation?**

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Disability Discrimination / Reasonable Accommodation

- ❑ *Davis v. Interior (BIA)*, 0120123517, 113 LRP 7944 (2013). Rehabilitation Act does not require accommodation for spouse of federal employee who was not a federal employee or applicant / request for accessible housing for disabled husband. **But what if agency provides housing to employees?**
- ❑ How about an employee who is disabled and must go to agency training but requires his wife to travel with him on the plane? **Who pays for his wife's travel?**

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Reasonable Accommodation / Reassignment

▣ *Thompson v. Department of the Air Force*, 012012130, 113 LRP 22159 (EEOC OFO 2013).

- Complainant worked as a Contract Negotiator in the Contracting Branch / diagnosed with major depression and panic anxiety disorder / medical examination revealed he would have difficulty with certain aspects of his job, namely the complexity and scope of assignments as well as "personal contacts." / physician recommended that management limit the number of contracts assigned to Complainant simultaneously or that Complainant is assigned lower priority/lower stress contracts.

- Complainant indicated that was receptive to a reassignment but did not identify a vacant, funded position for which he could have performed the essential functions, with or without reasonable accommodation, and there is no evidence of one in the record.

Does he lose?

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Disability Discrimination / Reasonable Accommodation / Direct Threat

▣ *Lamb v. SSA*, 0120103232 (2012), recons. den. 0520120399 (2012) (Denial of reasonable accommodation / administrative assistant employee with psychiatric disability (among many others) requested modified hours, which agency had allowed for many years before a change in supervision / undue hardship not proven / also, direct threat defense rejected: agency assertion that complainant may hurt herself if she were in the workplace alone not supported by objective evidence).

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Disability Discrimination: A closer look at direct threats

29 CFR 1630.2 (r): *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. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

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Disability Discrimination: A closer look at direct threats

29 CFR 1630.2 (r): In determining whether an individual would pose a direct threat, the factors to be considered include:

- The duration of the risk;
- The nature and severity of the potential harm;
- The likelihood that the potential harm will occur; and
- The imminence of the potential harm.

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Disability Discrimination: A closer look at direct threats

- In these situations, can an agency simply order a medical or fitness for duty exam?

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Disability Discrimination: A closer look at direct threats

- *Cleckler v. DOD*, DLA, 0120091162, 113 LRP 14271 (2013) (DOD committed disability discrimination when it withdrew its tentative offer of employment after complainant found not qualified for position /agency doctor's belief that a diagnosis of PTSD excludes all individuals from sensitive positions is discriminatory)

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Disability Discrimination/Direct Threat

- ❑ *Sanders v. USPS*, 113 LRP 17004, 0120130214 (2013) (Complainant posed direct threat due to medical condition / bipolar disorder / employee made several "disturbing" statements / e.g., alleged that the Agency had placed a chip in his teeth and was monitoring his behavior, alleged that customer told him that she should turn dog on him, etc.).
- ❑ *Seymour v. USPS*, 0120093459 (2012) (Direct threat proven by agency for employee with epilepsy who operated equipment / previous history of seizures at work with good medical information showing that he could not safely work on or even around machinery).

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Disability Discrimination/Direct Threat

- ❑ *Nathan v. Department of Justice (FBI)*, 113 LRP 40981, 0720070014 (2013).
 - Applicant for special agent position rejected due to vision impairment (monocular vision).
 - EEOC finds agency failed to meet burden of proof to show direct threat.

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Disability Discrimination / Compensatory Damages?

- *Abeijon v. DHS*, 0120080156 (2012) (employee unable to perform Customs and Border Patrol position because of herniated disc and nerve injuries / could have but did not reassign him to a vacant light duty position / however, good faith effort, so that compensatory damages denied).

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Disability Discrimination / Delays

- An unreasonable delay is the equivalent of a denial of reasonable accommodation:

Factors in determining whether delay is unreasonable:

The Commission relies on the ADA guidance standards for judging the unreasonableness of a delay, which include: "(1) the reason(s) for delay, (2) the length of the delay, (3) how much the individual with a disability and the employer each contributed to the delay, (4) what the employer was doing during the delay, and (5) whether the required accommodation was simple or complex to provide."

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Disability discrimination / Delay

A Few cases:

- ▣ *Beltram v. IRS*, 0120112386 (2012) (5 month delay not unreasonable / claimed breathing difficulty from perfume worn by coworkers)/agency suggested number of possible accommodations / initial offer to move complaint to vacant office, which she refused).
- ▣ *Legania v. Department of State*, 0120121698 (2012) (5 month delay unreasonable / Passport Specialist, legally blind in one eye/ request for special key / print / keyboard / delay caused largely by confusion over whether management or HR was processing request).

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Disability discrimination / Delay

- ▣ *Shealey v. Equal Employment Opportunity Commission*, 0120070356, 111 LRP 30774 (2011).
 - Commission held the Agency violated the Rehabilitation Act by unnecessarily delaying its response to Complainant's request for an accommodation.
 - Complainant initially requested a reasonable accommodation in July but the Deputy Director did not issue a final determination on her request until approximately nine months later/ insufficient justification for 9 month delay / Acting Disability Program Manager inexplicably took several months to make a recommendation and Deputy Director did not issue a final determination for two months after receiving the Acting Disability Program Manager's memorandum/ Agency's own procedures for providing reasonable accommodation during the relevant time period required Agency officials to make a decision on a request for accommodation within 15-20 business days after receipt of any requested medical documentation, absent additional extenuating circumstances.

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Disability discrimination / Delay

- ▣ *Spence v. NRC*, 112 LRP 49140, 0120093196 (2012).

Agency award of \$100,000 for delay of 2 years in providing reasonable accommodation of telework affirmed by EEOC.

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Disability Discrimination / Disclosures and Inquiries

- ▣ A recent emphasis in case law on Improper medical disclosures and Improper inquiries (disability related inquiries)
- ▣ These provisions of the Rehabilitation Act / ADA apply to all employees, disabled or not.

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Disability Discrimination / Disclosures

□ 29 CFR 1630.14(c)(1)

“(c)(1) Information obtained . . . regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that: (i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;”

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Disability Discrimination / Disclosures

Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

- First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment;
- Government officials investigating compliance with this part shall be provided relevant information on request. 42 U.S.C. 12112(d)(3)(B), (4)(C); 29 C.F.R. 1630.14; Guidance I at 4.

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Disability Discrimination / Disclosures

Some Limited Exceptions:

- ❑ Disclosure of medical information to state workers' compensation offices, state second injury funds, workers' compensation insurance carriers, and to health care professionals when seeking advice in making reasonable accommodation determinations.
- ❑ Disclosure by employers for insurance purposes.
- ❑ Disclosures in response to orders of courts of competent jurisdiction
- ❑ Disclosure to comply with the requirements of another federal statute or rule, even if that statute or rule conflicts with the requirements of the ADA, 29 C.F.R. 1630.15(e)

Bennett v. USPS, 0120073097 (Jan. 11, 2011)

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Disability Discrimination / Disclosures

Some Recent EEOC Cases on Improper disclosure of Medical Information :

- ❑ *Debacker v. DOJ*, 113 LRP 6350, 0120120307 (2013) (Commission finds agency acted lawfully when EAP counselor notified security that complainant was suicidal and had access to firearm).
- ❑ *Mayo v. DOJ*, 0720120004 (2012) (Failure to keep complainant's medical information confidential / information as to complainant's diagnosis and symptoms placed in non- medical adverse action file in HR).

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Disability Discrimination / Disclosures

- ❑ *Davis v. Treasury*, 112 LRP 34795, 0120102597 (2012) (Release of description of disability (recovering alcoholic/addict) to coworker witnesses during EEO investigation not a violation).
- ❑ *Moore v. USDA*, 112 LRP 55429, 0120112882 (2012) (Per se violation of confidentiality provisions of Rehabilitation Act when supervisor disclosed complainant's condition (scabies) to coworkers / supervisor allowed 2 coworkers to listen in on call with complainant).
- ❑ *Grey v. USPS*, 112 LRP 47904, 0120121846 (2012) (Postmaster kept complainant's medical records in closet at home and thus violated confidentiality provisions of Rehabilitation Act / estranged spouse found files and reported Postmaster).

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Disability Discrimination / Disclosures

- ❑ *Cruz v. USPS*, 0120101339 (July 21, 2011) (while Complainant was on suspension, a co-worker asked his supervisor why Complainant had been absent from work. In response, the supervisor told the coworker that Complainant was being treated by a psychiatrist, who had diagnosed Complainant as "very nervous.") **Violation?**
- ❑ Complainant v. USPS, 0120123252, 113 LRP 46503 (2013) (A clerk's confidential medical information was included in the agency's enterprise resource management database / Agency's enterprise Resource Management System (eRMS) "contained information such as fatigue, orthopaedic, and sleep disorder" /Complainant states that her medical diagnosis was improperly accessed and available in the eRMS database to any employee with access to the database including all supervisors and temporary supervisors (204b), and was subject to being openly displayed on computer screens where other, non management employees could see it) **Violation?**

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Disability Discrimination / Disclosures

- ❑ *Meadows v. Dept. of the Army*, 0120101541 (Aug. 17, 2010) (Violation / a Facility Manager announced during an open forum with Complainant's coworkers that he had been disqualified from his duties as an air traffic controller due to "psychological problems.") / "With limited exceptions, the Rehabilitation Act requires that an Agency keep confidential any medical information it learns about any applicant or employee—whether or not he is an individual with a disability—and it continues to apply even after an employee leaves the Agency. The Commission's view is that this restriction applies to all medical information, even if the information is disclosed by an applicant or employee voluntarily, and even if it is not generated by a health care professional. It includes past, present, and expected future diagnoses and treatment, as well as the fact that an applicant or employee has requested or received accommodation.")
- ❑ *Bennett v. USPS*, 0120073097 (Jan. 11, 2011) (Violation / Disclosure of maintenance mechanic's medical information in response to a state court subpoena, signed and issued by the Deputy in connection with civil litigation) **Okay?**).

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Disability Discrimination / Disclosures

How about these:

- ❑ Complainant contends that his second level supervisor improperly disclosed his medical information to a personnel official and the agency physician / In this case, the supervisor consulted with a personnel official and an agency physician so that he could ascertain how to accommodate complainant's medical condition. *Skarica v. Coast Guard*, 0120073399 (2010).
- ❑ The agency's occupational health nurse administrator (OHNA) released information to managers, in 3 e-mails, mentioning certain restrictions, the functions of the complainant's job as an equipment operator and the need for accommodations and the need to be evaluated by another doctor. These E-mails did not disclose "confidential medical information" / ...of information about complainant's restrictions on her work or duties, and about necessary accommodations, all of which may be disclosed without violating the Rehabilitation Act. There is no indication in the record that information about complainant's symptoms, diagnosis or prognosis was disclosed in these particular e-mails." *New v. USPS, Eastern Area*, 0120080269 (2010).

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Disability Discrimination / Inquiries and Medical exams

As interpreted by the Commission: Disability inquiries and medical exams are acceptable under 29 CFR 1630.14 when:

- The agency has a reasonable belief, based on objective evidence, that an employee's ability to perform essential job functions will be impaired by a medical condition.
- Or the agency believes an employee will pose a direct threat to himself or others due to a medical condition.

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Disability Discrimination / Inquiries and Medical exams

Some recent EEOC cases on Inquiries:

- *Bozeman v. USPS*, 113 LRP 20628, 0120120923 (2013) (Pre-employment inquiry by selecting official, who contacted complainant to clarify his medical restrictions, regarding complainant's medical restrictions violates Rehabilitation Act).
- *Uchtman v. USDA*, 113 LRP 11238, 0120110532 (2013) (Supervisor's question as to what type of medication complainant was taking found to be unlawful under Rehabilitation Act).

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Disability Discrimination / Inquiries and Medical exams

- Complainant v. USPS, 0120140209, 114 LRP 12350 (2014) A mail handler for the U.S. Postal Service alleged that the agency subjected him to discrimination based on disability (diabetes) when he was sent home following insulin reactions and was required to provide medical documentation to return to work. The EEOC found that the agency did not subject him to discrimination. The handler's supervisor explained that the handler had multiple episodes where he had spasms and became weak, disoriented, dazed, and confused. The supervisor asserted that she did not have medical training to determine if the handler could return to work. The supervisor expressed concern that the handler worked alone. The agency showed that the medical documentation was requested based on the handler's medical episodes that occurred in the workplace. The agency also established that its nurse was not always available at the facility to respond to medical emergencies. The EEOC concluded that the agency's request for medical documentation was job-related and consistent with business necessity.

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Disability Discrimination / Inquiries and Medical exams

- Complainant, a security assistant and applicant for a federal air marshal position, was subjected to unlawful disability discrimination when the agency required him to undergo a medical examination prior to giving him an employment offer. *Hoskins v. DHS*, 0120091046 (June 11, 2010), recons. den. 0520100500 (September 21, 2010).

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