Disability Law and Reasonable Accommodation

Mark Maxin, Esq.
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The views expressed in this presentation are those of Mr. Maxin and do not necessarily represent the views of his employer.

Purpose of Anti-Discrimination Disability Laws

- The purpose of the antidiscrimination disability laws is to surmount barriers in the workplace, to counteract the accumulated myths and fears associated with a medical condition, and to make decisions based on sound medical judgments. School Bd. of Nassau County v. Arline - 480 U.S. 273 (1987)
- http://www.youtube.com/watch?v=LBP8QDI m6OA

Ensure The Agency Acts Based on Actual Facts and Sound Medical Evidence Rather Stereotypes Associated with a Medical Condition

Matilde M. v. Carolyn Colvin, Acting Commissioner, Social Security Administration (OFO, EEO Appeal No. 012014014, January 17, 2017)(Agency discriminated against an employee with a mental illness when it asked her to take home a "Crown of Thorns" a symbol of Jesus' suffering that was on her desk, because it upset other employees and the perception that the employee was "unstable" and that the Crown could be used as a dangerous weapon, where the agency produced no evidence that employees actually complained and there was no support in the record that the Agency's instruction to remove the Crown "resulted from any other factor other than the Agency's wholly unsubstantiated perception that Complainant might use the Crown as a weapon.")

What The ADAAA Does

- Retains Previous Express Definition of Individual with a Disability:
 - A Physical or Mental Impairment that Substantially Limits (SL) a Major Life Activity (MLA)(Actual Disability); A Record of Such an Impairment; or Being Regarded as Having Such an Impairment
- Changes Rules of Construction that Make it Easier for Individual to show Disability under the Act
 - Easier to Show Actual and Record of Disability
 - Definition of Disability must be "broadly construed"
 - Expands the Definition of "Major Life Activity" (MLA)
 - Easier to Prove "Substantial Limitation" (SL)(lowers degree of functional limitation and eliminates the "severely or significantly restricted" test and "central importance to daily living" test
 - Eliminates "Mitigating Measures" in assessing whether individual is disabled
 - Makes it easier to show SL in MLA of "working" as described in Appendix
 - Clarifies that Impairment that is Episodic or in Remission May Qualify as a Disability if it Substantially Limit a MLA
 - Easier to Show "Regarded As" Definition of Disability
 - Focus on adverse treatment because of actual or perceived impairment rather than on whether employee believed a SL of a MLA.
 - No RA for "Regarded As" only
 - Not "Regarded As" if Transitory [less than 6 months] or minor illness

Definition of Disability

- Substantial Impairment of a Major Life Activity
- History of a Disability
- Regarded as Disabled
- Under ADAAA very easy to show employee is an individual with a disability. Rare to find EEOC address whether employee is an individual with a disability—usually jumps right to the qualified individual with a disability analysis.
- Rare example of individual who was NOT disabled: Idell v. Vilsak, Department of Agriculture (Farm Service Agency), EEOC Doc 01200140792; 2016 WL 4426506 (2016)(complainant had surgery on her left foot and took two weeks of sick leave for surgery and requested but was denied the opportunity to work at home during her recovery from surgery. The recovery time was approximately 6 weeks, gradually starting weight baring as tolerated. There was no evidence that she was otherwise substantially limited in a major life activity, had nothing more than a temporary impairment and therefore was and therefore was not an individual with a qualified individual with a disability.

Qualified Individual With A Disability

42 U.S.C. 12102(8); 29 CFR 1630.2(m): individual with a disability who, with or w/o RA can perform essential functions.



"I'm O.K. with everything except the part about being up high..."

"Qualified Individual With a Disability?" – "Essential Functions"

- Essential functions(EF) are **fundamental duties of a job**, that is the **outcomes that must be achieved** by someone in that position. EF and job performance are not the same thing. Work performance typically encompasses not only how well an employee performs the fundamental duties of a position, but also performs marginal duties.
- Reasons a function may be considered essential:
 - Reason position exists
 - Limited number of employees
 - Highly specialized
- Evidence function is essential may include:
 - Employer's judgment
 - Written job descriptions
 - Amount of "on the job time" function consumes
 - Consequences if function not performed
 - Terms of collective bargaining agreements
 - Experience of past and current employees

Essential Function Cases

- <u>Complainant v. Dep't of Labor</u>, EEOC DOC 0120132817, 2015 WL 4510914, at *3 (July 15, 2015)(Claims examiner who requested "no deadlines and no complex decisions" was unable to perform essential functions of the job of adjudicating claims for occupational illness compensation, because the job required adjudicating complex claims with "severe time constraints." The employee had "depression, anxiety, post-traumatic stress disorder, migraines, irritable bowel syndrome, Graves' disease, and other conditions.")
- Karol K., Complainant v. Dep't of Agriculture, EEOC DOC 0120140323, 2016 WL 4699290, at *2 (Aug. 23, 2016)(Forest botanist with osteoarthritis of the knee was unable to perform essential functions of a job that involved walking over rugged and steep terrain.)
- Berenice R., Petitioner v. Federal Mediation and Conciliation Service, EEOC DOC 0320150023, 2016 WL 1055188 (Mar. 1, 2016)(HR specialist suffered from physical and mental disabilities that "prevented her from traveling, speaking in a normal classroom-level training voice, and dealing with work-related stress." The court found that she could not perform the essential functions of her position, since she had been out of work for almost a year, and since the job required "training, travel, and face-to-face interaction.")
- <u>Johana S., Complainant v. Dep't of Agriculture (Forest Service)</u>, EEOC DOC 0120131804, 2016 WL 3853888 (July 1, 2016)(Law enforcement officer conducting raids on marijuana grow sites was unable to participate in raids on the ground because of a back injury. However, the officer was able to perform the essential functions of her job since the raids were not the major part of the job and since she could participate in the raids by observing in the helicopter)

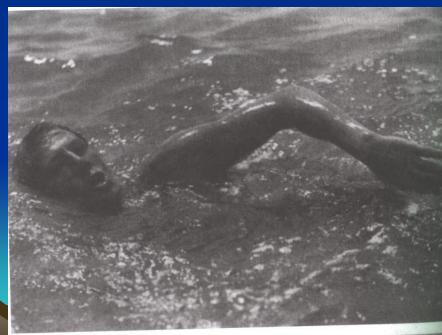
Essential Function (Con't)

- Alvara v. Department of Homeland Security, 121 MSPR 613 (Special Panel 2014)(attendance is not an essential function and inability to perform graveyard shift due to sleep apnea of Customs and Border Patrol Agent (CBPA) was not an essential function and agency did not show it was an undue hardship.
- EF is to examine what essential duties an individual can perform while at work.
- Attendance may be a condition precedent to performing a function or a method by which an employee accomplishes a function—but it is not in and of itself an essential function.
- Employee could perform essential functions while at work
- RA to swap shifts subject to Undue Hardship analysis.
- Hundreds of CBPAs and agency history of permitting the swapping of shifts therefore no Undue Hardship.
- Agency discriminated when it denied employee RA request to avoid assignment to graveyard shift
- Complainant v. Carter, DOD, 2015 WL 1399447 (March 18, 2015)(Store Worker unable to perform essential functions because of inability to break down daily deliveries or lift boxes over 30 pounds.)

Keep An Open Mind: Carefully Assess What Functions Are Essential And What Reasonable Accommodations Are Effective

Keith v. County of Oakland 703 F.3d 918 (6th Cir. 2013) (deaf applicant for a lifeguard position might, after a careful individualized inquiry, be capable of performing the essential functions of the position with reasonable accommodations and therefore the employer's MSJ was denied.)

(FYI: Leroy Columbo-Deaf Lifeguard saved 907 lives).



Definition of Reasonable Accommodation

• 1630.2(o): A covered entity is required, absent undue hardship, to provide reasonable accommodation to a qualified individual with a disability with a substantially limiting impairment or a "record of" such an impairment. However, a covered entity is not required to provide an accommodation to an individual who meets the definition of disability solely under the "regarded as" prong." App p. 34

U.S. Airways v. Barnett and Reasonable Accommodation

- "Dwight B." v. Dep't of Justice, EEOC Appeal No. 0120142370 (Dec 15, 2016).
- In a case brought under the Rehabilitation Act, the complainant has the initial responsibility of showing that a suggested accommodation is "reasonable" (i.e., that is generally plausible in the job being performed by the individual). See U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002); Enforcement Guidance. While this is not a high burden for the complainant, it is an initial plausibility threshold that the complainant must meet. Once the complainant shows that the requested accommodation is plausible, the burden then shifts to the agency to show whether the accommodation, even if plausible, would nonetheless impose an undue hardship (i.e., a significant difficulty or expense) on the operations of the agency. See Harge v. Dep't of Veterans Aff., EEOC Appeal No. 0120111521, 2013 EEOPUB LEXIS 3569 (Dec. 4, 2014), request to reconsider denied, EEOC Request No. 0520140135 (May 29, 2014).
- "Hertha W." v. Dep't of the Air Force, EEOC Appeal No. 0120141498 (Oct 26, 2016).
- A reasonable accommodation must be effective. See **U.S. Airways v. Barnett, 535 U.S. 391, 400, 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002).** "[T]he word 'accommodation' ... conveys the need for effectiveness." Id. "An ineffective 'modification' or 'adjustment' will not accommodate a disabled individual's limitations." Id. In the context of job performance, this means that a reasonable accommodation enables the individual to perform the essential functions of the position. See Guidance. A complainant who seeks to hold an agency liable for failing to accommodate a disability need not show that they have suffered an adverse employment action. An agency is required to accommodate an employee's disability whether or not a failure to do so is motivated by discrimination based on that disability.

U.S. v. Barnett (continued)

- "Yessenua H." v. Dep't of Veterans Affairs, EEOC Appeal No. 0720070027 (2015).
- One category of reasonable accommodation is a modification or adjustment to the work environment that enables a qualified individual with a disability to perform the essential functions of that position. Enforcement Guidance at 2. A modification or adjustment is "reasonable" if it "seems reasonable on its face, i.e., ordinarily or in the run of cases"; this means it is "reasonable" if it appears to be "feasible" or "plausible." An accommodation also must be "effective" in meeting the needs of the individual: the accommodation must remove a workplace barrier, thereby providing the individual with an equal opportunity to apply for a position, to perform the essential functions of a position, or to gain equal access to a benefit or privilege of employment.
- Complainant] v. Social Security Administration, EEOC Appeal No. 0720120034 (2014).
- An agency is required to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee with a disability, unless it can demonstrate that the accommodation would impose an undue hardship on the operation of its business. 29 C.F.R. § 1630.9(a). The term "qualified," with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds and, with or without reasonable accommodation, can perform the essential functions of the position. 29 C.F.R. § 1630.2(m). A modification or adjustment is "reasonable" if it "seems reasonable on its face, i.e., **ordinarily or in the run of cases;**" this means it is "reasonable" if it appears to be "feasible" or "plausible." EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, No. 915.002 (Oct. 17, 2002) (Reasonable Accommodation Guidance). An accommodation also must be effective in meeting the needs of the individual. Id. An employer is not required to lower production standards -- whether qualitative or quantitative -- that are applied uniformly to employees with and without disabilities; however, an employer may have to provide reasonable accommodation to enable an employee with a disability to meet the production standard. Id.

Reasonable Accommodation

- EEOC's Oct 2002 Guidance on Reasonable Accommodation: may include but is not limited to:
 - (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
 - (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

What's Not a Reasonable Accommodation?

- Guidance to 2630.2(o); EEOC's 2002 Guidance on Reasonable Accommodation: "An employer never has to reallocate essential functions as a reasonable accommodation, but can do so if it wishes."
- EEOC's RA Guidance Question 9: Employee entitled to reasonable effective accommodation, not accommodation of choice
- Consider the employee's request, but agency can choose between 2 effective accommodations.

The Interactive Dialogue

- http://www.youtube.com/watch?v=6wtfNE4z6a8
- Engage in the interactive process with the employee
- LISTEN! RESPECTFULLY DISCUSS THE ACCOMMODATION
- Identify essential functions of job
- Identify functional limitations of employee
- Determine potential reasonable accommodations
- Determine those reasonable accommodations that are effective that meet the needs of the employer and the employee [not necessarily the perfect accommodation of choice]
- Determine whether additional medical information is needed to make an informed decision and get signed medical release [get an agency doctor/contract doctor involved if necessary]
- Make the Accommodation
- Monitor Effectiveness

Examples of Reasonable Accommodation

- Technology
- Teleworking
 - http://www.youtube.com/watch?v=7CRLVLmN7

Complainant v. Jeh Johnson, Department of Homeland Security (U.S. Coast Guard) 2015 WL 4537202 (July 15, 2015) (Telework was properly denied. Complainant's position required her to spend approximately 80% of her time working with special needs families who come directly to the office to meet with Complainant. If Complainant teleworked from home or worked from Sacramento, she would be unable to help individuals who come into the office in Alameda for assistance. Additionally, the staff in the office is very small, and a regular out-of-office schedule for Complainant could result in an understaffed office that is unable to meet the needs of the clients that come in for assistance. As a result, Complainant's requested accommodation of working alternate weeks between Sacramento and Alameda would not have allowed her to perform the essential functions of the position.)

<u>Lavern B. Complainant v. Castro, Secretary of Housing and Urban Development</u>, 2015 WL 780702 (February 12, 2015)(Financial Analyst with disability affecting his spine improperly denied 100% telework where mail could be scanned and not excessive, meetings and training via telephone or video conference, and could occasionally travel. "...the fact that Complainant received a 'fully successful' annual evaluation while telecommuting 100 percent of the time <u>greatly undermines</u> the Agency's contention that his inability to report to the Minneapolis office creates an undue burden on the Agency.")

- Q.7 May an employer withdraw a telework arrangement or a modified schedule provided as a reasonable accommodation because the employee is given an unsatisfactory performance rating?
- http://www.eeoc.gov/facts/performance-conduct.html
- See Complainant v. Brennan, USPS, EEOC Doc. 0120111921, 2015 WL395538 (EEQC, June 19, 2015)

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Additional Examples of Reasonable Accommodations

- Job Restructuring
 - Normally the reallocation or redistribution of nonessential, marginal job functions.
- Kane v. U.S. Postal Service, 2011 WL 5506200 (EEOC) (An employer can reasonably accommodate an employee with a disability-related occupational injury by restructuring a position through the reallocation or redistribution of marginal functions that the employee cannot perform because of the disability, but an employer cannot eliminate the essential functions of a position. EEOC Enforcement Guidance: Workers' Compensation and the ADA, EEOC Notice No. 915.002, at Question 20. Here, the Agency cannot accommodate Complainant's needs, suspicions, and phobias by restructuring a managerial or supervisory position by reallocating to him marginal administrative tasks while eliminating the essential function of managing and supervising employees. Therefore, we find that Complainant is not a "qualified" individual with a disability because he cannot perform the essential functions of a managerial or supervisory position, with or without a reasonable accommodation.)
- <u>Lowell H., Complainant</u>, EEOC DOC 0120140609, 2016 WL 1554567, at *9 (Apr. 8, 2016)(The agency was not required to lower production standards or reallocate essential functions as a reasonable accommodation for a veterans claims examiner who could not meet the agency's 240-cases-per-month quota because of arthritis and neuropathy in his hand which made typing difficult.)
- Altering the Way Things are Typically Done
 - E.g. written instruction instead of oral instruction

Additional Examples of Reasonable Accommodation

Leave

- Not entitled to indefinite leave
- See <u>Complainant v. McDonald, Secretary Department of Veterans Affairs</u>, 2015 WL 5522284(EEOC September 11, 2015)(employee not entitled to provide recovery time of two years as a reasonable accommodation with no expected date of return and an employer does not have to provide paid leave beyond that which is provided to similarly-situated employees.)
- Bryan R. v. U.S. Postal Service, 2015 WL 1399479, EEOC DOC 0120130020 (2015) (Request for Unscheduled leave four to six times a month would have caused an undue hardship for a Mailhandler with vision and lung impairments given that the agency had previously provided over 400 hours of leave).

Reasonable Accommodation (Con't)

- Interpreters
- Interpreters and Readers
 - Qualified and effective
 - Complainant v. U.S. Postal Serv., 2015 WL 1636024 (EEOC) (reasonable accommodation, at a minimum, requires providing an interpreter for safety talks, discussions on work procedures, policies or assignments, and for every disciplinary action so that the employee can understand what is occurring at any and every crucial time in his or her employment career, whether or not he/she asks for an interpreter)
 - Steele v. Pension Benefit Guaranty Corp, 2014 WL 4661872 (EEOC)(deaf employee entitled to effective accommodation not a perfect accommodation so they were entitled to qualified interpreters and agency reasonably accommodated employee by providing a pool of preferred interpreters even if they weren't available all of the time
 - Lupe M., Complainant, EEOC DOC 0120162330, 2016 WL 6921492, at *9 (Nov. 4, 2016). (Agency provided reasonable accommodation to deaf distribution supervisor when it gave him the ability to schedule an on-site interpreter, emergency interpretation services which were available with only 15 minutes of notice, and various technological aids. The employee claimed it was difficult to communicate with others because, without a full-time interpreter, impromptu meetings were difficult and some employees did not want to communicate in writing because of limited English literacy. The employee's request for a full-time interpreter was denied on the grounds that the employee was successful at the essential functions of his job with the accommodations provided. The employee had not shown that the existing accommodations were not effective; individuals are "not necessarily entitled to their accommodation of choice.")
 - Darius C., Complainant, EEOC DOC 0120160004, 2016 WL 6903599, at *2 (Nov. 1, 2016). (Agency did not make good faith effort to accommodate deaf mail handler. The employee was unable to participate in a last-minute meeting, and the agency's promises that it would hold a repeat meeting with an interpreter were not fulfilled (agency stated the scheduled interpreter did not show up). The agency's "tepid" promises to the employee were mere "lip service" which did not show good faith.)

A Request for Reasonable Accommodation Related to Commuting

- **Gerald v. McDonald**, EEOC No. 0120130776 (2015)(complainant, a physician with a disability [spinal cord injury, sleep apnea, carpel tunnel and monocular vision]
- The agency has no responsibility to provide transportation to an employee for his commute. A reasonable accommodation must be reasonable on its face, i.e. plausible or feasible. The agency asserted using government funds for commuting costs violated appropriation law.
- The agency was not obligated to provide a driver.
- Allowing the use of the shuttle each day would constitute an undue hardship if, to allow Complainant to use the shuttle to get
 to Muskogee to treat patients would have contravened regulations as it would have required the use of appropriated funds
 for commuting to the Muskogee facility each day.
- The accommodation re: the shuttle would not have been effective because its schedule is from 8:00 to 4:30 and his schedule had to be restricted to 6 hours a day. Further he had to nap during the workday. Thus, the number of patients he would be able to see would be reduced. Moreover, he could not perform CPR should he have to resuscitate a patient. An employer is not required to lower performance standards or come up with work to do.
- The agency made reasonable efforts to accommodate by offering part-time work and providing car-pool options.
- Excusing the Complainant from serving patients in Muskogee medical facility was not reasonable and would cause an undue
 hardship resulting in the denial of a service to patients closer to their homes and always having them to drive further away
 from the Muskogee area to the Tulsa facility.
- Castro v. Department of Housing and Urban Development, EEOC case No, 0720130029 (2015) complainant, a Financial Analyst with a painful spine condition that was exacerbated by his 10-hour commute requested a reasonable accommodation in the form of full-time telework. The EEOC held that a request for teleworking or a shorter commuting time because of a disability triggers an Agency's responsibility under the Rehabilitation Act to consider as a request for reasonable accommodation. The fact that the employee received a fully successful performance rating while commuting 100% of the time undermines the Agency's contention that his inability to report to the office creates an undue burden on the agency. This is particularly the case given the federal government role as a "model employer" which may require innovation, fresh approaches and technology as effective methods of providing reasonable accommodations.
- Nothing limits the agency from granting an alternative effective accommodation.

Reassignment

Reassignment

- Accommodation of last resort
- Employee must be qualified for the position
- Don't have to create a job
- Vacant funded position
- Consider accommodations w/i job first unless the employee and agency agree otherwise
- nationwide search/downgrade may be appropriate
- Employee has the burden to prove such a position was available
- Thompson v. Department of the Air Force, 2013 WL 2146762 (E.E.O.C.) Complainant worked as a Contract Negotiator in the Contracting Branch. He was diagnosed with major depression and panic anxiety disorder. A 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." As a result, this physician recommended that management limit the number of contracts assigned to Complainant simultaneously or that Complainant be assigned lower priority/lower stress contracts. The agency attempted to reassign the Complainant a number of times but he was not receptive and he was terminated. While Complainant indicated that he would have been receptive to a reassignment he 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. Complainant has an evidentiary burden to establish that it is more likely than not that there were vacancies during the relevant time period into which he could have been reassigned. Accordingly, the Commission found the agency was not denied reasonable accommodation in violation of the Rehabilitation Act.
- Gonzalez Acosta v. Department of Veterans Affairs, 113 MSPR 277 (2010) Housekeeping Aide who could not perform EF was entitled to be considered for reassignment to a vacant funded position for which he was qualified. The fact that he was assigned to perform clerical duties was not a reassignment; he was merely permitted for a time to perform light duty. The agency is not required to eliminate essential functions of the position. (E) has burden to show that there was a vacant funded position for which he was qualified. (E) proved there was a higher graded administrative position for which he was qualified but the agency has no duty to promote (E) as a RA. (A) produced evidence that it had done a search of actual vacancies but there were none that he was qualified for.

A Request for Reassignment Away from a Particular Supervisor is Not a Request for a Reasonable Accommodation

- Matilde M. v. Carolyn Colvin, Acting Commissioner, Social Security Administration (OFO, EEO Appeal No. 012014014, January 17, 2017) (Complainant, who alleged harassment based on disability (mental illness) and other protected basis' was not entitled to a reassignment to a different supervisor since the EEOC October 2002 Enforcement Guidance Question 33 provides that "reassignment to a new supervisor generally does not constitute a request for reasonable accommodation." The OFO clarified however that notwithstanding the foregoing guidance "agencies nonetheless are required to undertake an individualized assessment as part of the reasonable accommodation process, even when the accommodation requested amounts to a request for a different supervisor."
- Belton v. Shinseki, Dep't of Veterans Affairs, EEOC DOC 0320120052, 2013 WL 1497130 (Jan. 30, 2014) (Electrician claimed that hostile interactions with his supervisor (no specific facts on these interactions provided in case) exacerbated his mental disability. He requested reassignment as a reasonable accommodation, which the Agency denied based on insufficient medical documentation. The EEOC concluded that his requests for reassignment amounted to requests for a new supervisor he felt that he could no longer work under that manager's supervision because the manager was "the source and trigger of his symptoms." The EEOC found the Agency did not err in denying his reassignment requests as reasonable accommodation because the Agency may, but is not required to, provide an employee with a new supervisor as a reasonable accommodation)

Timely Response To An Accommodation Request

- Shealy v. EEOC, 2011 WL 1621428 (E.E.O.C.) (delays of 4, 6 and 9 months in addressing a reasonable accommodation request have been found to violate the law.
- In determining whether there has been an unnecessary delay in responding to a request for reasonable accommodation, relevant factors would 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.

Undue Hardship

 "Undue hardship" means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act, No. 915.002 (revised October 17, 2002).

Undue Hardship (Con't)

- <u>Bryan R v. U.S. Postal Service.</u>, 2015 WL 1399479, EEOC DOC 0120130020 (2015) (Request for Unscheduled leave four to six times a month would have caused an undue hardship for a Mailhandler with vision and lung impairments given that the agency had previously provided over 400 hours of leave).
- Yvette H., Complainant v. Dep't of Defense (Defense Commissary Agency), EEOC DOC 0120140365, 2016 WL 4771652, at *1 (Aug. 29, 2016). (Agency failed to show it would be an undue hardship to allow a sales store checker a 10-minute break every hour to accommodate her shoulder pain and carpal tunnel syndrome.)
- <u>Complainant v. Johnson, Department of Homeland Security</u>, 2014 WL 3571431 (EEOC). A determination of undue hardship should be based on several factors, including:
 - the nature and cost of the accommodation needed;
 - the overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility;
 - the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);
 - the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer;
 - the impact of the accommodation on the operation of the facility.
- Here, the facility employed about 700 Customs and Border Protection Officers to monitor, at all times, four bridges connecting the United States and Mexico. It is undisputed that the Agency permitted officers at this facility to swap shifts with each other, and exempted female officers, who were pregnant or breastfeeding, from working the graveyard shift for up to two years per child. Thus, there was insufficient evidence to show that the inability to perform the graveyard shift would cause an undue hardship.

Obtaining Medical Documentation and Assessing the Probative Weight of the Documentation

- 2002 Enforcement Guidance on Reasonable Accommodation, Questions 6 and 8: Agency can deny reasonable accommodation request if employee does not provide medical information needed to determine if the employee has a disability or evaluate a reasonable accommodation request. However, the agency may not ask for medical evidence where the need for the accommodation is obvious.
- Dwight B. v. Dep't of Justice (Federal Bureau of Prisons, EEOC DOC 0120142370, 2016 WL 7440910 (Dec. 15, 2016)(Complainant worked in a gun tower at a prison. He injured his back and requested "no inmate contact" and no climbing. He claimed that the agency failed to reasonably accommodate him and that it subjected him to harassment regarding requests for medical documentation. The EEOC found that the Agency's requests for medical documentation was not pursued to harass the Complainant; rather, it was to determine whether he could continue to work with "limited inmate contact" and whether his medical restriction on climbing included climbing stairs.)
- Joann C. Heard, Complainant, EEOC DOC 0120110751, 2013 WL 1787087, at *7 (Apr. 19, 2013).(A temporary accommodation may not be sufficient for a permanent condition. A legal assistant with MS requested a handicapped parking space to accommodate her difficulty walking. The agency granted her a temporary parking space, but repeatedly threatened to revoke the space and "redundantly and needlessly" requested medical documentation, although the employee had already provided clear documentation showing her condition was permanent. The court found the agency failed to reasonably accommodate her.)
- Brown v Department of the Interior, 121 MSPR 205 (2014) the factors for assessing the "probative weight" of the medical evidence are: reasoned explanation vs. conclusory assertions; qualifications of expert; extent and familiarity with treatment of (E); knowledge of employee's job/PD (GS-12 Criminal Investigator with history of back injury, subject to annual FFD exam, did not meet certain medical standards for her position, e.g. couldn't engage in maximum exertion without warning, pursue perpetrators on foot, and respond to emergencies. More "probative weight" given to the agency doctor [Who gave a FFD exam] over the employee's doctor Dr. [who said he could perform the job] because the agency doctor considered actual duties in the PD whereas the employee's Dr. merely relied on the employee's characterization of what he did)
- Jayna A., Petitioner, v. Sally Jewell, Secretary, Dep't of the Interior (Fish and Wildlife Service), EEOC DOC 0320140059, 2016 WL 1055190 (Mar. 1, 2016)Upheld agency decision to remove FWS Special Agent because of medical inability to perform due to back injury. The administrative judge properly noted the appellant's physicians' expertise and qualifications as specialists in back and spine conditions and their familiarity with the appellant. However, the administrative judge found that the appellant's treating physicians did not base their medical opinions on the appellant's position description but rather on the appellant's own description to them of her functions and duties. Accordingly, the administrative judge found their opinions that the appellant was able to perform her job duties were not persuasive because they were conclusory assertions not based on a reasoned explanation...

27

Probative Weight of Medical Evidence (Con't)

- <u>Chari S., Petitioner</u>, EEOC DOC 0320150067, 2016 WL 556097 (Feb. 3, 2016) (Staff assistant suffered from migraines, asthma, allergies and acid reflex that "impaired her capacity for mental concentration." Doctor's notes stating staff assistant should be allowed to come in "late" did not clearly communicate she needed to come in after 9:30 AM and was not able to abide by a flexible schedule allowing her to come in between 7:30 and 9:30 AM.
- Michelle G. v. Dep't of the Treasury (Internal Revenue Service), EEOC DOC 0120132463, 2016 WL 3034855 (May 13, 2016) Employee's request too open-ended and vague. Complainant requested a flexible work schedule to accommodate her ADD and depression, because she had difficulty getting ready in the morning and arriving to work on time. Although it may be a reasonable accommodation to modify an employee's schedule by adjusting arrival or departure times, her request here was too open-ended and vague. She had requested "leeway with time" and said that she may have difficulty in "mak[ing] it at all." The EEOC held that nothing in the record explained whether she "needed a few minutes occasionally, an unlimited number of minutes frequently, or a random amount of unpredictable absences."

Probative Weight of Medical Evidence (Con't)

- <u>Kocher v. Social Security Administration</u>, 2013 WL 3778046 (EEOC, 2013)(Inadequate medical documentation: Complainant's July 20, 2006 medical note, to support a request for extended leave, did not identify Complainant's prognosis or diagnosis. Similarly, in an August 9, 2006 note from Complainant's physician, it stated that Complainant had a potentially serious medical condition and for privacy reasons the physician would not discuss it in more detail. This vague medical documentation was not sufficient to support the request for a reasonable accommodation.)
- Conclusory and unspecific medical evidence limits its probative value. Wren v. Department of the Army, 121 MSPR 28 (March 25, 2014)(A letter from (E's) Dr., did not clarify and unambiguously establish that his ability to perform EF of IT Specialist position warranted reversal of MIP. Letter contained nothing but bare opinion that employee could engage in work-related travel as long as the travel duration is no more than 2 weeks at a time, unsupported by clinical findings or any discussion of the basis for the opinion, and contradicted the Dr's own prior opinion that (E) should not engage in any work-related travel, and employee admitted that his Dr. had not examined him since he gave his former medical opinion.)
- Conclusory medical opinion, "No mobility assistance scooter at this time" with no further explanation, was not probative and not relied upon by the MSPB, regarding GS-7 Legal Technician and Court Reporter with knee impairment, who had difficulty attending hearings with steep incline in certain hearing rooms. Employee insisted on reopening hearing room that would give her access w/o the use of a scooter. Miller v. Department of the Army, 121 MSPR 189 (May 30, 2014).
- (A) MIP case overruled based on cumulative weight of 7 (E) Drs. which contradicted the (A) Dr. **Paetow v. Department of Veteran's Affairs**, 118 MSPR 462 (2012)(Agency Dr. had concluded that one incident of raising his voice in frustration to his boss, followed by a statement in a FFD exam that he "wanted to kick another officer's ass" 3 months later, warranted demoting him from his Police Officer position, which required carrying a gun, to a Security Assistant position that was not a gun-carrying position. The (A) Dr. concluded he was a potential danger to others. (E) Drs. concluded (E) was not a danger and could carry a gun. He was reinstated by the MSPB because there was not a substantial probability of harm to himself or others.
- We find that the statements in the above documents do not constitute a request for an accommodation. The statements made by appellant's doctors were **terse and unspecific answers** to the medical documentation questionnaire sent by the agency and would require the agency to extrapolate an intent to request accommodation and return to work." (Emphasis added) **Clemens v. Department of the Army,** 120 MSPR 616,626 (March 10, 2014)(Supervisory Safety Dispatcher, who suffered stroke and significant loss of speech, provided inconclusive medical documentation providing that "perhaps text to voice" software could be helpful, and MIP upheld where other medical reflected he could not perform the essential safety 29 related communication dispatcher functions of his job.

Fitness for Duty Must Be Job Related and Consistent With Business Necessity and Only Can Be Ordered in Very Narrow Circumstances

- Doe v. Pension Ben. Guar. Corp., 117 M.S.P.R. 579 (March 27, 2012)

 An agency may order a medical examination only in the following limited circumstances: (1) An individual has applied for or occupies a position which has medical standards or physical requirements or which is part of an established medical evaluation program, 5 C.F.R. § 339.301(b); (2) an employee has applied for or is receiving continuation of pay or compensation as a result of an on-the-job injury or disease, 5 C.F.R. § 339.301(c); or (3) an employee is released from his or her competitive level in a reduction in force and the position to which the employee has reassignment rights has medical standards or specific physical requirements which are different from those required in the employee's current position, 5 C.F.R. § 339.301(d).
- An agency may offer, rather than order, a medical examination (including a psychiatric evaluation) in any situation where the agency needs additional medical documentation to make an informed management decision, including situations where an individual has a performance or conduct problem which may require agency action. 5 C.F.R. § 339.302.
- Family and Medical Leave Act 5 CFR 630.1208 (d) –(f) permits the agency to order a second medical opinion at agency expense a medical exam where the medical evidence to support the FMLA request is insufficient
- See **Sullivan v. USPS**, 464 Fed. Appx. 895 (Fed Cir. 2102 nonprecedential)

Confidentiality

- Information obtained regarding the medical condition or history of any employee shall be treated as a confidential medical record. See 29 C.F.R. § 1630.14; EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the American with Disabilities Act ("Guidance"), Notice No. 915.002 (rev. Oct 17, 2002). Footnote 111 of the Guidance contains the following exceptions: "The limited exceptions to the ADA confidentiality requirements are: (1) supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations; 2) first aid and safety personnel may be told if the disability might require emergency treatment; 3) government officials investigating compliance with the ADA must be given relevant information on request. See also 29 C.F.R. § 1630.14(c)(1); Hampton v. U.S. Postal Serv., EEOC Appeal No. 01A00132 (Apr. 13, 2000).
- By its terms, the requirement applies to confidential medical information obtained from any employee and is not limited to individuals with disabilities. If an agency discloses medical information pertaining to complainant in a manner that did not conform to this regulation, then its act of dissemination would constitute a violation of the Rehabilitation Act. There is no requirement of a showing of harm beyond the violation. Mayo v. Department of Justice, Federal Bureau of Prisons, 2012 WL 5426913 (E.E.O.C.)(Improper storage of medical records is a per se violation)
- <u>Buster D. v. Department of Agriculture</u>, EEOC Appeal No. 0120141171 (2016)(The Commission found a violation of the Rehabilitation Act regarding the recordkeeping of confidential medical information when it disclosed Complainant's medical diagnosis [Attention Deficit Disorder] as part of numerous documents labeled A to ZZZ to the Chief Union Steward who did not have a need to know during the agency's handling of Complainant's notice of proposed removal for unacceptable performance).

MISCONDUCT AND POOR PERFORMANCE

- http://www.youtube.com/watch?v=QMz RQuTBII •
- Complainant v. Dep't of the Army, EEOC DOC 0120123043, 2015 WL 1399404 (Feb. 25, 2015)(Diabetic complainant received a one-day suspension for leaving the worksite without permission during an episode of low blood sugar. He admitted that at the time he left, he did not have control over his faculties. Another colleague testified that he had driven away at a high rate of speed and that in his condition, he represented a safety hazard to himself, other employees, and other visitors who might have been on the grounds. Complainant also had a prior disciplinary record (two previous reprimands). The EEOC upheld the one-day suspension, noting that the agency was not required to excuse his past misconduct even if it was the result of the individual's disability)
- Complainant v. Holder, Attorney General, Department of Justice, 2014 WL 586587 (EEOC)Complainant, an AUSA, with various psychiatric disabilities slammed a case file down on the desk of a secretary and stated in a loud, angry agitated voice "If I can't work on my cases, I'm not going to work his." Later in the day pointed his finger at his supervisor's face and was effectively "striking out at his supervisor" among other things. The employee requested as a reasonable accommodation "Cut me some slack, recognize this (treatment) is along drawn out process.
- Hailey v. Postal Service 2011 WL 2956814 (E.E.O.C.) Complainant did not notify the relevant, responsible Agency officials about his depression until after the absences had already occurred. An employer does not have to withhold discipline or termination of an employee who, because of a disability, violated a conduct rule that is jobrelated for the position in question and consistent with business necessity. "Since reasonable accommodation is always prospective, an employer is not required to excuse past misconduct even if it is the result of the individual's disability." Id. Therefore, even if Complainant's depression caused him to be absent on numerous occasions, his failure to request a reasonable accommodation for his depression before or immediately after the absences occurred (such as during the interviews with management) means that the Agency did not have to withhold discipline or termination. http://www.eeoc.gov/facts/performance-conduct.html

Poor Performance

- If an employer gives a lower performance rating to an employee and the employee responds by revealing she has a disability that is causing the performance problem, may the employer still give the lower rating?
- Yes. The rating reflects the employee's performance regardless of what role, if any, disability may have played.
- Example 10: Odessa does not disclose her learning disability, even when she begins having performance problems that she believes are disability-related. Her supervisor notices the performance problems and counsels Odessa about them. At this point, Odessa discloses her disability and asks for a reasonable accommodation. The supervisor denies the request immediately, explaining, "You should not have waited until problems developed to tell me about your disability." Odessa's delay in requesting an accommodation does not justify the employer's refusal to provide one. If a reasonable accommodation will help improve the employee's performance (without posing an undue hardship), the accommodation must be provided.
- http://www.eeoc.gov/facts/performance-conduct.html
- Petitioner v. Pritzker, Secretary, Department of Commerce (International Trade Commission) 2015 WL 754755 (EEOC February 4, 2015)International Trade Specialist with obsessive compulsive disorder properly removed for unacceptable performance caused by his disability when, despite efforts to reasonably accommodate him, he could not perform the major duties of his job such as planning and coordinating trade programs, analyzing and recommending positions on complex trade issues.

Poor Performance Continued

• Example 11: A federal employee is put on a 60-day Performance Improvement Plan (PIP). In response, the employee requests a reasonable accommodation. The supervisor postpones the start of the PIP and immediately discusses the request with the employee, enlisting the agency's Disability Program Manager (DPM) in the interactive process. The supervisor and DPM determine that a reasonable accommodation might help address the employee's performance problems. The supervisor arranges for the reasonable accommodation and the 60-day PIP commences.

The employer <u>did not have to cancel the PIP</u> because reasonable accommodation never requires excusing poor performance or its consequences. However, the fact that the employee did not ask for an accommodation until being placed on a PIP does not relieve the agency of its obligation to provide reasonable accommodation if the employee has a disability and an accommodation will help improve her performance.

The <u>temporary postponement of the PIP</u> to process the request for a reasonable accommodation ensures that, if a reasonable accommodation is needed, the employee will have an equal opportunity to improve her performance. If the employer determines that the employee is not entitled to a reasonable accommodation (<u>e.g.</u>, the employee does not have a "disability"), the employee should be so informed and the PIP should begin.

http://www.eeoc.gov/facts/performance-conduct.html

Direct Threat

- 42 U.S.C. 12112(3): Direct threat: The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.
- 42 U.S.C. 12113(b): The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.
- 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.
- 29 CFR 1630.15(B)(2) Direct threat as a qualification standard. The term "qualification standard" may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace
- **Echazabal v. Chevron**, 532 U.S. 925 (2002) (Contract employee at a Chevron oil refinery wanted to work for Chevron. He twice failed company physical suffered from Hepatitis C. Following second failure, Chevron directed contractor to move him to area without exposure to dangerous fumes or remove him from the refinery; the contractor laid him off. Echazabal argued ADA says "threat to others" not "threat to self." Supreme Court held Direct threat may be threat to self or others.
- Kesha Y. v. U.S. Postal Service (Great Lakes Area), EEOC DOC 0120140713, 2016 WL 7032938 (Nov. 18, 2016) (Complainant "clearly show[ed] that she posed a danger to herself and others" when she expressed to the Customer Service Supervisor that she had suicidal thoughts of driving her postal vehicle through an intersection into another vehicle.)
- <u>Nathan v. Holder, DOJ</u> (FBI), 2013 WL 3965241 (EEOC)(Special Agent applicant with monocular vision was improperly denied employment and did not show reasonable probability of substantial harm when medical exam did not take into consideration individualized assessment of applicant such as learned behaviors, practical experience which would allow him to perform the position safely.)

Direct Threat Factors

- 29 CFR 1630(r): 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:
 - Duration of the risk
 - Nature and severity of potential harm
 - Likelihood potential harm will occur
 - Imminence of the potential harm
- Interpretive Guidance:
 - Employer must consider reasonable accommodation would eliminate risk or reduce risk to an acceptable level
 - Risk only considered when "significant", i.e., high probability, of substantial harm; a speculative or remote risk is insufficient

Qualification Standards

- § 1630.10 Qualification standards, tests, and other selection criteria. (a) *In general.* It is unlawful for a covered entity to use 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, on the basis of disability, 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**.
- (b) Qualification standards and tests related to uncorrected vision. Notwithstanding § 1630.2(j)(1)(vi) of this part, a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criterion, as used by the covered entity, is shown to be job related for the position in question and is consistent with business necessity. An individual challenging a covered entity's application of a qualification standard, test, or other criterion based on uncorrected vision need not be a person with a disability, but must be adversely affected by the application of the standard, test, or other criterion.
- Gwendolyn G v. Postal Service, EEOC No. 0120080613, 2013 WL 8338375 (2013)(Sales Associate position had lifting requirement of 70 pounds. The employee could only lift 10 pounds. There was some evidence in the form of supervisory testimony that the had to lift up to 20-30 pounds to perform 1 of 13 functions [mail distribution]. The EEOC held the 70 lb standard was not job related and consistent with business necessity. "While the agency could have justified a lower lifting requirement (35 lbs at best) it did not utilize a lower standard and hypothesizing about which standards might be sufficient would be speculation." The standard screened out the employee and therefore discriminated against him. The central question is whether the standard or test is "carefully tailored to measure an individual's actual ability to perform the essential functions of the job." Employers must also consider reasonable accommodations which will permit the employee to perform the essential functions of the position. "Essential functions are duties of a job-i.e. the outcomes that must be achieved by the person in the position. Once an agency identifies the essential functions for a position , the agency can then put in qualification standards, selection criteria or tests or employee tests that are designed to determine whether an employee or applicant can perform those essential functions."

Medical Inability to Perform

- If the employee works in a job with medical standards the test is:
 - The disabling condition itself is disqualifying;
 - Its recurrence cannot be ruled out; and
 - The duties of the position are such that a recurrence would pose a reasonable probability of substantial harm. Slater v. Department of Homeland Security, 108 MSPR 419 (2008).
- If the employee works in a job without medical standards the test is:
 - Nexus between the employee's medical condition and observed deficiencies in his performance or conduct;
 or
 - A high probability, given the nature of the work involved, that his condition may result in injury to himself or others.
 - In other words, the agency must establish that appellant's medical condition prevents him from able to safely and efficiently perform **core duties** [e.g. the essential functions] of his position.
 - Clemens v. Department of the Army, 120 MSPR 616 (March 10, 2014) (AJ applied the wrong MIP test; since the employee was not under medical standards, the AJ should have applied the test set forth above).
 - Ellshoff v. Department of the Interior, 76 MSPR 54 (1997)(employee with excessive absence who suffered from depression was improperly removed for medical inability to perform where the agency failed to establish a nexus between the absences and the depression.)

See **Savage v. Army**, 122 M.S.P.R. 612 (2015) (Army employee's removal was warranted based on her medical inability to perform her duties, where employee repeatedly failed to return to work on the dates projected by her psychologist, and second psychologist doubted that she would ever return to work in the same capacity.)

Excessive Absence

- To prove a charge of excessive absence, an agency must establish that:
 - (1) The employee was absent for compelling reasons beyond her control so that agency approval or disapproval was immaterial because the employee could not be on the job;
 - (2) the absences continued beyond a reasonable time, and the agency warned the employee that an adverse action could be taken unless the employee became available for duty on a regular full-time or part-time basis; and
 - (3) the position needed to be filled by an employee available for duty on a regular, full-time or part-time basis. **Fox v. Army**, 120 MSPR 529, 543 (2014), citing **Cook v. Department of the Army**, 18 MSPR 610, 611-12 (1984)
- The agency's excessive absence charge was reversed where the agency failed to prove the second element and did not notify her that her failure to return to work could lead to discipline even if her absences were approved. Indeed Appellant could have reasonably inferred from Agency warnings about AWOL that she would avoid disciplinary action altogether if she merely submitted medical evidence supporting her absences. Fox, supra.
- See **Savage v. Army**, 122 M.S.P.R. 612 (2015)(Of the 1,192 hours of approved leave cited in the proposal notice, 480 hours were covered by the FMLA, and therefore cannot support the charge. The agency failed to establish element (2) of the *Cook* exception. The record reflects that the supervisor notified the appellant that failure to come to work when not in an approved leave status would result in her placement in an AWOL status, which in turn could lead to an adverse action. Yet, it was not until April 3, 2009, that she was warned she could be removed not only for AWOL, but also for "excessive absenteeism," which might be understood to include approved leave. That warning came too late, though, for by then the agency had ceased to approve additional leave, and the appellant was in an AWOL status. Under these circumstances, we find that the appellant did not receive the notice required for the *Cook* exception to apply. Thus, the excessive absences charge cannot be sustained as to any of her approved absences)

Recommendations

- Reevaluate Employer RA Procedures and Policies
- Carefully Train All Managers on Employer RA Procedures and RA Obligations
- Carefully Evaluate Your Medical Qualification Standards
- Carefully Assess Any Decisions Based on Medical Evidence, e.g. Medical Inability to Perform

Tools To Use In Providing or Evaluating a Request for Reasonable Accommodation and Educational Material

- Computer Electronics Accommodation Program (CAP) http://cap.mil/
- Job Accommodation Network (JAN) http://askjan.org/links/scrulings.html
- Federal Occupational Health (FOH)
 http://foh.psc.gov/services/eh/ergonomics/accom.asp
- EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship
 - https://www.eeoc.gov/policy/docs/accommodation.html
- White House Summit on Disability and Employment Resource Guide for Employers

https://obamawhitehouse.archives.gov/sites/default/files/docs/employing_people_with_disabilities_toolkit_february_3_2015_v4.pdf

 Prior OPM YouTube Videos Presented by Maxin and Others on Disability Law and Reasonable Accommodation and Related Subjects

https://www.youtube.com/playlist?list=PL661A0022A79B9D45

My Country: A Disability Rights Tribute (Abridged and Captioned)

 https://www.youtube.com/watch?v=YKejnI OvACY