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OVERVIEW OF THE ADA AMENDMENTS ACT

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. WHAT HAVE THE ADAAA AND EEOC REGULATIONS CHANGED? 1

- A. Created categories of impairments 1
- B. Defined the role of "mitigating measures" 2
- C. Expanded the definition of "major life activities" 4
  - 1. General expansion of "major life activities" 4
  - 2. Activities explicitly defined as "major life activities" 4
  - 3. Activities not explicitly defined as "major life activities" 5
- D. Definition of "working" 6
- E. New interpretation of "substantially limits" 7
- F. Expanded the definition of "regarded as" 10
- G. Relaxed the standard for "record of" 12

III. THE INTERACTIVE PROCESS AND REASONABLE ACCOMMODATION: WHAT'S DIFFERENT? 13

- A. Common accommodations: Leaves of absence, work-at-home, transfers, and shift changes 14
  - 1. Leaves of Absence 14
  - 2. Work-at-home 14
  - 3. Transfers 15
  - 4. Shift Changes 16
- B. Accommodations for mental disabilities 16
- C. What's required: Preferential treatment for the disabled or an equal playing field? 19

IV. CONDUCT AND ATTENDANCE ISSUES 20

- A. Generally 20

APPENDIX 22

TABLE OF AUTHORITIES

Page(s)

CASES

Adeyemi v. District of Columbia,
525 F.3d 1222 (D.D.C. 2008), cert. denied, 129 S. Ct. 606 (2009) 19, 29

Aka v. Washington Hosp. Ctr.,
156 F.3d 1284 (D.C. Cir. 1998) 28

Albertson's Inc. v. Kirkingburg,
527 U.S. 555 (1999) 4

Alston v. Washington Metropolitan Area Transit Authority,
Civ. No. 07-0122 (ESH), 2008 U.S. Dist. LEXIS 58020 (D.D.C. July 31, 2008) 28

Angelone v. Seyfarth Shaw LLP,
No. Civ. S-05-2106 (FCD) (JFM), 2007 WL 1033458 (E.D. Cal. Apr. 3, 2007) 27

Barnes v. GE Sec., Inc.,
No. 06-1632-AA, 2008 U.S. Dist. LEXIS 34049 (D. Ore. Apr. 22, 2008), aff'd,
No. 08-35486, 2009 U.S. App. LEXIS 13129 (9th Cir. June 18, 2009) 21

Bolden v. Magee Women's Hosp. of the Univ. of Pittsburgh Med. Ctr.,
281 Fed. Appx. 88 (3d Cir. 2008) 10

Boykin v. Honda Manufacturing of Alabama,
288 Fed. Appx. 594 (11th Cir. 2008) 6, 7

Brady v. Wal-Mart Stores, Inc.,
531 F.3d 127 (2d Cir. 2008) 11, 12

Castro-Medina v. Procter & Gamble Commercial Co.,
565 F. Supp. 2d 343 (D.P.R. 2008) 19, 22

Chapple v. Waste Mgm't, Inc.,
Civ. No. 05-2583 (ADM) (JSM), 2007 WL 628361 (D. Minn. Feb. 28, 2007) 26

Clinkscales v. Children's Hosp. of Philadelphia,
No. 06-3919, 2009 U.S. Dist. LEXIS 38939 (E.D. Pa. May 7, 2009) 14

Cohen v. Ameritech Corp.,
No. 02-C-7378, 2003 WL 23312801 (N.D. Ill. Dec. 23, 2003) 25

Dilley v. SuperValu, Inc.,
296 F.3d 958 (10th Cir. 2002) 27, 28

Dixon-Thomas v. Okla. Board of County Comm'rs,
293 Fed. Appx. 613 (10th Cir. 2008) 14

Duffet v. Lahood,
331 Fed. Appx. 763 (2d Cir. 2009) 3, 7

E.E.O.C. v. Dillon Cos., Inc.,
310 F.3d 1271 (10th Cir. 2002) 20, 27

EEOC v. Chevron Phillips Chemical Co.,
570 F.3d 606 (5th Cir. 2009) 2

EEOC v. Humiston-Keeling, Inc.,
227 F.3d 1024 (7th Cir. 2000) 19, 25, 26

Ekstrand v. School District of Somerset,
583 F.3d 972 (7th Cir. 2009) 18

Eshelman v. Agere Systems, Inc.,
554 F.3d 426 (3d Cir. 2009) 13

Evans v. UDR, Inc.,
644 F. Supp. 2d 675 (E.D.N.C. 2009) 24

Felix v. N.Y.C. Transit Auth.,
154 F. Supp. 2d 640 (S.D.N.Y. 2001) 12

Felix v. N.Y.C. Transit Auth.,
324 F.3d 102 (2d Cir. 2003) 22

Fikes v. Wal-Mart, Inc.,
322 Fed. Appx. 882 (11th Cir. 2009) 9

Filar v. Board of Education of the City of Chicago,
526 F.3d 1054 (7th Cir. 2008) 19

Fink v. Richmond,
No. 07-0714 (DKC), 2009 U.S. Dist. LEXIS 89853 (D. Md. Sept. 29, 2009) 24

Fiumara v. Harvard Coll.,
327 Fed. Appx. 212 (1st Cir. 2009) 14

Galloway v. GA Technology Authority,
182 Fed. Appx. 877 (11th Cir. 2006) 28

Gambini v. Total Renal Care, Inc.,
486 F.3d 1087 (9th Cir. 2007) 20, 21, 27

Germano v. International Profit Association, Inc.,
No. 06 CV 5638, 2007 U.S. Dist. LEXIS 80940 (E.D. Ill. Nov. 1, 2007) 25

Giebeler v. M & B Assocs.,
343 F.3d 1143 (9th Cir. 2003) 27

Hammel v. Eau Galle Cheese Factory,
407 F.3d 852 (7th Cir. 2005), cert. denied, 546 U.S. 1033 (2005) 24

Hartnett v. Fielding Graduate Inst.,
400 F. Supp. 2d 570 (S.D.N.Y. 2005), aff'd, 198 Fed. Appx. 89 (2d Cir. 2006) 23

Hedrick v. Western Reserve Care Sys.,
355 F.3d 444 (6th Cir. 2004), cert. denied, 543 U.S. 817 (2004) 24

Holly v. Clairson Indus., LLC,
492 F.3d 1247 (11th Cir. 2007) 20, 28

Huber v. Wal-Mart Stores, Inc.,
486 F.3d 480 (8th Cir. 2007), cert. dismissed, 552 U.S. 1136 (2008), cert. dismissed, Huber v. Wal-Mart Stores, Inc., 128 S. Ct. 1116 (2008) 19, 25, 26

Humphrey v. Memorial Hospitals Ass'n,
239 F.3d 1128 (9th Cir. 2001) 14, 20, 21

Johnson v. McGraw-Hill Cos.,
451 F. Supp. 2d 681 (W.D. Pa. 2006) 23

Kellogg v. Energy Safety Services, Inc.,
544 F.3d 1121 (10th Cir. 2008), cert. denied, 129 S. Ct. 1916 (2009) 5, 6

King v. City of Madison,
550 F.3d 598 (7th Cir. 2008) 15, 16, 25

Koteles v. ATM Corp. of Am.,
No. 05-1061, 2008 U.S. Dist. LEXIS 72280 (W.D. Pa. Sept. 23, 2008) 23

Ladenheim v. American Airlines, Inc.,
115 F. Supp. 2d 225 (D.P.R. 2000), aff'd, Gelabert-Ladenheim v. American Airlines, Inc., 252 F.3d 54 (1st Cir. 2001) 22

Lloyd v. Washington & Jefferson College,
288 Fed. Appx. 786 (3d Cir. 2008) 9

Maslanka v. Johnson & Johnson, Inc.,
No. 08-2329, 2008 U.S. App. LEXIS 26269 (3d Cir. 2008)....................16

Mason v. Frank,
32 F.3d 315 (8th Cir. 1994), aff'd, 339 F.3d 682 (8th Cir. 2003)....................26

Mays v. Principi,
301 F.3d 866 (7th Cir. 2002)....................25

Medrano v. City of San Antonio, Texas,
179 Fed. Appx. 897 (5th Cir. 2006) 24

Mobley v. Allstate Insurance Co.,
531 F.3d 539 (7th Cir. 2008)....................14

Murphy v. United Parcel Serv.,
527 U.S. 516 (1999)....................3

Norman v. University of Pittsburgh,
No. Civ. A. 00-1655, 2002 WL 32194730 (W.D. Pa. Sept. 17, 2002)....................23

O'Dell v. Dep't of Public Welfare of the Commonwealth of Pa.,
346 F. Supp. 2d 774 (W.D. Pa. 2004)....................23

Peebles v. Potter,
354 F.3d 761 (8th Cir. 2004)....................26

Pender v. State of N.Y. Office of Mental Retardation & Developmental Disabilities,
No. 02-CV-2438 (JFB) (LB), 2006 WL 2013863 (E.D.N.Y. July 18, 2006), aff'd,
225 Fed. Appx. 17 (2d Cir. 2006), cert. denied, No. 07-5023, 2007 WL 20052666....................22

Peyton v. Fred's Stores of Ark.,
561 F.3d 900 (8th Cir.), cert. denied, 130 S. Ct. 243 (2009)....................14

Picinich v. United Parcel Serv.,
No. 5:01-CV-01868 (NPM), 2005 WL 3542571 (N.D.N.Y. Dec. 23, 2005), aff'd
in part, vacated in part, 236 Fed. Appx. 663 (2d. Cir. 2007)....................22

Reilly v. Revlon, Inc.,
620 F. Supp. 2d 524 (S.D.N.Y. 2009).................... 17, 18

Roberts v. Cessna Aircraft Co.,
Civ. No. 05-1325 (MLB), 2007 WL 1100206 (D. Kan. Apr. 11, 2007)....................27

Roberts v. Cessna Aircraft Company,
Civ. No. 07-3133, 2008 U.S. App. LEXIS 17645 (10th Cir. Aug. 14, 2008), aff'd
289 F. App'x 321 (10th Cir. 2008) 27

Rogers v. City of New York,
No. 08-4416-cv, 2009 U.S. App. LEXIS 28704 (2d Cir. Dec. 31, 2009) 6

Rohr v. Salt River Project Agricultural Improvement & Power Dist.,
555 F.3d 850 (9th Cir. 2009) 8

Santacrose v. CSX Transp., Inc.,
288 Fed. Appx. 655 (11th Cir. 2008) 16

Shapiro v. Township of Lakewood,
292 F.3d 356 (3d Cir. 2002) 23

Sicilia v. UPS,
279 Fed. Appx. 936 (11th Cir. 2008), cert. denied, 129 S. Ct. 1000 (2009) 1, 2, 3, 16

Smith v. Midland Brake, Inc.,
180 F.3d 1154 (10th Cir. 1999) 27

Stamos v. Glen Cove Sch. Dist.,
78 Fed. Appx. 776 (2d Cir. 2003) 23

Sutton v. United Airlines,
527 U.S. 471 (1999) 3

Talley v. Family Dollar Stores of Ohio, Inc.,
542 F.3d 1099 (6th Cir. 2009) 11

Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,
534 U.S. 184 (2002) 7, 8

US Airways, Inc. v. Barnett,
535 U.S. 391 (2002) ....passim

Walsh v. Bank of Am.,
320 Fed. Appx. 131 (3d Cir. 2009) 12

Walton v. U.S. Marshals Service,
492 F.3d 998 (9th Cir. 2007) 3, 4

Willnerd v. First Nat'l of Nebraska, Inc.,
No. 8:05-CV-482, 2007 WL 2746866 (D. Neb. Sept. 19, 2007) 26

Wilson v. Phoenix Specialty Manufacturing Co.,
513 F.3d 378 (4th Cir. 2008) 10, 11

Winsley v. Cook County,
563 F.3d 598 (7th Cir. 2009) 6

Wood v. Crown Redi-Mix, Inc.,
218 F. Supp. 2d 1094 (S.D. Iowa 2002) 26

Woodruff v. School Board of Seminole County,
304 Fed. Appx. 795 (11th Cir. 2008) 16

Woodruff v. School Board of Seminole County,
No. 6:06-cv-1937-Orl-22KRS, 2008 U.S. Dist. LEXIS 22179 (M.D. Fla. Mar. 20, 2008) 28

STATUTES

29 C.F.R. § 1630.2(j)(3)(i) 6

29 U.S.C. § 791(g) 3

OTHER AUTHORITIES

H. Rep. No. 110-730, 110th Cong., 2d Sess. (2008) 5, 8, 10

Pub. L. No. 110-325, § 2 (2008) 3, 7, 8

Pub. L. No. 110-325, § 3 (2008) 6

Pub. L. No. 110-325, § 4 (2008) .... passim

Pub. L. No. 110-325, § 6 (2008) 10

REGULATIONS

74 Fed. Reg. 48,441 (Sept. 23, 2009) (proposed to be codified at 29 C.F.R. pt. 1630) .... passim

I. INTRODUCTION

Seeking to ensure that the Americans with Disabilities Act of 1990 ("ADA") was given the "broad coverage" originally intended, Congress passed the ADA Amendments Act of 2008 ("ADAAA"), which went into effect on January 1, 2009. The ADAAA amends the ADA to explicitly overturn U.S. Supreme Court decisions that Congress believed "narrowed the broad scope of protection intended to be afforded by the ADA." ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a) (2008). Additionally, the ADAAA required the Equal Employment Opportunity Commission ("EEOC"), the agency charged with enforcing the ADA, to rewrite its regulations on the ADA. The EEOC published its proposed rules on September 23, 2009.

II. WHAT HAVE THE ADAAA AND EEOC REGULATIONS CHANGED?

The ADAAA expands the ADA in several key ways. The EEOC estimates that one million additional individuals will now be covered by the ADA.

A. Created categories of impairments

The ADAAA makes it more likely that courts will find certain impairments, which would not have been disabilities under the ADA previously, are covered disabilities. The EEOC's proposed regulations provide examples of certain impairments that "will consistently result in a finding of disability." These disabilities include: autism, cerebral palsy, epilepsy, multiple sclerosis and muscular dystrophy, deafness, blindness, intellectual disability, missing limbs, mobility impairments requiring the use of a wheelchair, cancer, diabetes, major depression, bipolar disorder, HIV/AIDS, schizophrenia, post-traumatic stress disorder, and obsessive compulsive disorder. Proposed Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 74 Fed. Reg. 48,441 (Sept. 23, 2009) (proposed to be codified at 29 C.F.R. pt. 1630). Although certain other impairments – asthma, back and leg impairments, and learning disabilities – are not included in the list of impairments consistently resulting in a finding of disability, the EEOC's regulations indicate that "the level of analysis required still should not be extensive" for those impairments. Id.

Many pre-ADAAA cases involving the impairments listed in the proposed regulations may have had a different outcome had they been decided under the ADAAA. For example, in Sicilia v. UPS, 279 Fed. Appx. 936, 938 (11th Cir. 2008) (unpublished), cert. denied, 129 S. Ct. 1000 (2009), the court concluded that the plaintiff's epilepsy did not substantially limit a major life activity, and therefore was not a disability. Applying ADA precedents to the plaintiff's Florida Civil Rights Act disability claim, the court affirmed summary judgment in favor of the employer. According to the court, the plaintiff's "seizures are infrequent, not severe, and controlled with medication; he can tell when he is going to have a seizure and does not lose consciousness during one. . . . Even with the doctor-imposed restrictions, [the plaintiff] still can perform certain jobs." Id. The court concluded that the plaintiff was not substantially limited in a major life activity and so was

not disabled. Under the proposed EEOC regulations, however, epilepsy is listed in the category of impairments that "will consistently result in a finding of disability." A court analyzing a similarly situated plaintiff in the future would be more likely to rule that the plaintiff's epilepsy is a disability covered by the ADA.[1]

With respect to impairments not listed in the regulations, courts may compare how similar a particular impairment is to ones that are listed. The analysis may be similar to that in EEOC v. Chevron Phillips Chemical Co., 570 F.3d 606 (5th Cir. 2009) in which the court compared the employee's impairment to other impairments addressed in previous decisions. In Chevron, the EEOC brought an enforcement action under the ADA on behalf of a former employee who suffered from chronic fatigue syndrome ("CFS"). The district court granted summary judgment in favor of the defendant because the former employee's CFS was "intermittent" and her related impairments were "short-lived, non-permanent, and non-severe." Id. at 613. The Fifth Circuit reversed and remanded, after concluding that a jury could find the former employee was substantially limited in the major life activities of caring for herself, sleeping, and thinking. With respect to caring for herself, the plaintiff could not shower for several days because the water pressure was too painful and because her arms hurt too much to wash herself; additionally she was unable to cook, shop for food, dress herself, or use the bathroom without assistance. With respect to sleeping, for two weeks out of every month, the former employee slept for only one or two hours per night, and once a month would need to sleep for seventeen hours. During the day, she needed to rest and would sometimes fall asleep while driving. With respect to thinking, the plaintiff occasionally forgot her son's name, forgot how to perform routine tasks, and could not concentrate. Such symptoms, the Fifth Circuit concluded, were sufficient for a reasonable jury to conclude the plaintiff was substantially limited in caring for herself, sleeping, and thinking. The Fifth Circuit rejected the lower court's conclusion that the plaintiff's disability was intermittent or short-lived; according to the circuit court, "the relevant time for assessing the existence of a disability is the time of the adverse employment action. . . . [T]he record reflects that [the plaintiff's] CFS symptoms began to manifest themselves in June or July 2002, continued through and after her discharge on February 27, 2003, and were of sufficient severity and of expected duration to constitute an ADA disability throughout this entire period." Id. at 618. Further, the court cited cases "recognize[ing] that relapsing-remitting conditions like multiple sclerosis, epilepsy, or colitis can constitute ADA disabilities." Id. Medical evidence indicated that CFS was "a chronic disease of indefinite duration" and therefore CFS was "much more akin to conditions like epilepsy and MS than it is to a broken leg or the flu," two impairments which the EEOC and other courts had concluded were not disabilities under the ADA. Id. at 619.

B. Defined the role of "mitigating measures"

Under the ADAAA, the ameliorative effects of mitigating measures *are not* to be considered when analyzing whether an impairment substantially limits a major life activity.

[1] Additionally, Sicilia might have had a different outcome due to the ADAAA's mitigating measures provision, as discussed in greater detail below.

Pub. L. No. 110-325, § 4(a) (2008). Additionally, the negative effects of mitigating measures *are* taken into account when analyzing whether someone has a disability. Id. The ADAAA provides examples of mitigating measures, including medication, prosthetics, hearing aids and cochlear implants, reasonable accommodations or auxiliary aids, and learned behavioral or adaptive neurological modifications. Id. The ameliorative effect of ordinary eyeglasses or contact lenses, however, must be considered when analyzing whether an impairment substantially limits a major life activity. Id. In other words, if a plaintiff has an eye condition that is treated by medication, a court will consider whether the plaintiff is substantially limited in a major life activity if he were not taking the medication. If a plaintiff has an eye condition that is treated by wearing ordinary eyeglasses, however, a court will consider whether he is substantially limited in a major life activity when wearing the glasses.

The ADAAA explicitly rejects the Supreme Court's rulings in Sutton v. United Airlines, 527 U.S. 471 (1999) and Murphy v. United Parcel Serv., 527 U.S. 516 (1999), which held "that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures." Pub. L. No. 110-325, § 2(b) (2008).

Many cases decided before the effective date of the ADAAA, therefore, may have been decided differently had they been filed after the amendments went into effect. For example, in Sicilia v. UPS, 279 Fed. Appx. 936, 938 (11th Cir. 2008) (unpublished), cert. denied, 129 S. Ct. 1000 (2009), the Eleventh Circuit held that the plaintiff's epilepsy was not a disability because his "seizures are infrequent, not severe, and controlled with medication; he can tell when he is going to have a seizure and does not lose consciousness during one. . . . Even with the doctor-imposed restrictions, [the plaintiff] still can perform certain jobs." This suggests that the Eleventh Circuit was analyzing the plaintiff's condition in its medicated state, which is no longer appropriate under the ADAAA. Whether the Sicilia court would rule the same way under the ADAAA depends on the nature of the plaintiff's epilepsy when he was not taking his medication. (The Sicilia case is discussed in greater detail above.)

The ADAAA also effectively reverses case law requiring consideration of the human body's own compensatory measures, not just artificial mitigating measures, when determining whether an individual is disabled under the ADA. In Walton v. U.S. Marshals Service, 492 F.3d 998 (9th Cir. 2007), the plaintiff suffered hearing loss in one ear that limited her ability to localize sound. After she was terminated for failing a required hearing test, the defendant terminated her employment. The plaintiff brought suit under the Rehabilitation Act[2] and argued that she was substantially limited in the major life activities of

[2] When deciding a case under the Rehabilitation Act, courts apply the same standards as are applied to ADA cases. E.g., Duffet v. Lahood, 331 Fed. Appx. 763, 765 (2d Cir. 2009) (unpublished) (quoting 29 U.S.C. § 791(g), a subsection of the Rehabilitation Act, for the proposition that "[t]he standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied [in the Americans with Disabilities Act]").

hearing and localizing sound. The district court concluded that the plaintiff was not disabled under the Rehabilitation Act, and therefore granted summary judgment in favor of the defendant. The Ninth Circuit affirmed. In part, the Ninth Circuit pointed to a medical report stating "that the compensatory measure of 'visual localization' mitigates the effects of an inability to localize sound." Id. at 1008. Quoting the Supreme Court's decision in Albertson's Inc. v. Kirkingburg, 527 U.S. 555, 565 (1999), the Ninth Circuit explained that "there is 'no principled basis for distinguishing between [mitigating] measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems.'" Walton, 492 F.3d 988. The Ninth Circuit acknowledged that visual localization has "minor drawbacks," such as being less efficient than auditory localization and it is impossible in dark environments. Walton, 492 F.3d at 1009. Nonetheless, because the plaintiff presented no evidence that her difficulty with auditory localization was not mitigated by visual localization, the Ninth Circuit held that "no reasonable trier of fact could find that the inability to localize sound, as characterized here, is in fact substantially limiting." Id. Because the ADAAA states that mitigating measures include "learned behavioral or adaptive neurological modifications," courts will no longer consider whether a plaintiff with difficulty localizing sound makes up for it with visual localization.

C. Expanded the definition of "major life activities"

1. General expansion of "major life activities"

As discussed above, the ADAAA generally requires courts to construe the ADA broadly. The EEOC has proposed defining "major life activities" as "those basic activities, including major bodily functions, that most people in the general population can perform with little or no difficulty." 74 Fed. Reg. 48,440. According to the EEOC, the analysis of whether an activity is a "major life activity" must be based on a "common-sense approach that does not require an exact or statistical analysis." Id. at 48,446. Further, the EEOC's proposed rules make clear that major life activities are basic activities that most people in the general population can perform with little or no difficulty; courts are not to look to the "average person" or similarly situated individuals. Id.

2. Activities explicitly defined as "major life activities"

The ADAAA explicitly defines the following as major life activities: caring for oneself; performing manual tasks; seeing; hearing; eating; sleeping; walking; standing; lifting; bending; speaking; breathing; learning; reading; concentrating; thinking; communicating; and working. Pub. L. No. 110-325, § 4(a) (2008). Additionally, the EEOC regulations would expand this list to include "sitting, reaching and interacting with others." 74 Fed. Reg. 48,442.

Further, the ADAAA defines "major life activities" to also include the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine,

and reproductive functions. Pub. L. No. 110-325, § 4(a) (2008). The EEOC's proposed regulations provide the following examples: hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular. 74 Fed. Reg. 48,442.

The U.S. House Committee on Education and Labor's report on the ADAAA indicates that major life activities include "interacting with others, writing, engaging in sexual activities, drinking, chewing, swallowing, reaching, and applying fine motor coordination." H. Rep. No. 110-730, 110th Cong., 2d Sess. (2008). Although these categories are not explicitly included in the statute, courts may look to this legislative history for guidance when considering whether such activities are major life activities.

3. Activities not explicitly defined as "major life activities"

The ADAAA and the proposed regulations do not address whether certain activities – including driving, using a computer, and sexual relations – are major life activities, even though such questions have been litigated prior to the enactment of the ADAAA.

Therefore, it is likely still necessary to look to pre-ADAAA cases with respect to such activities, though the exact effect of the ADAAA on such case law is currently unclear.

> In Kellogg v. Energy Safety Services, Inc., 544 F.3d 1121 (10th Cir. 2008), cert. denied, 129 S. Ct. 1916 (2009), the plaintiff's job required her to drive to various locations, often up to two hours away from her office. After the plaintiff was diagnosed with epilepsy, the defendant demanded a "full release" from the plaintiff's doctor declaring that the plaintiff could drive safely. When the plaintiff failed to provide such a release, the defendant terminated her employment. She brought suit alleging discrimination under the ADA. The trial court instructed the jury that driving was a major life activity, particularly in Wyoming where the plaintiff worked, because of the significant distances between cities. The jury found in favor of the plaintiff. The defendant appealed, including on the ground that the trial court erred in instructing the jury that driving is a major life activity. Id. at 1122. The Tenth Circuit agreed, and remanded the case. The court held that driving is not a major life activity, despite its importance to major life activities such as working and caring for oneself. Id. at 1125. The Tenth Circuit explained that "driving is, literally, a means to an end," whereas major life activities "are all profoundly more important in and of themselves." Id. Further, major life activities are important no matter where a person lives; driving may be valued differently depending on where a person lives. Id. at 1125-26. "To conclude, as did the district court, that driving is a major life activity because of its importance to the performance of other major life activities, such as caring for oneself or working, would shortcircuit the analysis in determining whether one of those major life activities has been substantially limited. . . . Undoubtedly, an inability to drive will sometimes enable the plaintiff to meet this standard. Likewise, a restriction on driving could cause one to be substantially limited in the activity of caring for oneself. But a plaintiff should not be permitted to bypass having to prove substantial limitations in these major life activities by

providing only evidence that she cannot drive." Id. at 1126 (quoting 29 C.F.R. § 1630.2(j)(3)(i)).

See also Rogers v. City of New York, No. 08-4416-cv, 2009 U.S. App. LEXIS 28704, at *4 (2d Cir. Dec. 31, 2009) (holding that the plaintiff's inability to climb stairs did not amount to a substantial limitation on a major life activity); Winsley v. Cook County, 563 F.3d 598 (7th Cir. 2009) (relying on an analysis similar to that used by the Kellogg court to conclude that driving is not a major life activity).

D. Definition of "working"

The ADAAA reinterated that "working" is a major life activity. Pub. L. No. 110-325, § 3 (2008). The EEOC's proposed regulations provide further information of the meaning of "working." According to the proposed regulations, "[a]n impairment substantially limits the major life activity of working if it substantially limits an individual's ability to perform, or to meet the qualifications for, the type of work at issue." 74 Fed. Reg. 48,442. This standard must be construed broadly. Id. The "type of work at issue" includes "the job the individual has been performing, or for which the individual is applying, and jobs with similar qualifications or job-related requirements which the individual would be substantially limited in performing because of the impairment." Additionally, the type of work may be determined by reference to "the nature of the work an individual is substantially limited in performing because of an impairment as compared to most people having comparable training, skills, and abilities." Finally, the type of work may be determined by reference to "job-related requirements that are characteristic of types of work include, but are not limited to, jobs requiring: Repetitive bending, reaching, or manual tasks; repetitive or heavy lifting; prolonged sitting or standing; extensive walking; driving; working under certain conditions, such as in workplaces characterized by high temperatures, high noise levels, or high stress; or working rotating, irregular, or excessively long shifts." Id. As an example, the EEOC states that "[c]arpal tunnel syndrome that does not substantially limit a machine operator in the major life activity of performing manual tasks when compared with most people in the general population nevertheless substantially limits her in the major life activity of working if the impairment substantially limits her ability to perform her job and other jobs requiring similar repetitive manual tasks." Id.

In the pre-ADAAA case of Boykin v. Honda Manufacturing of Alabama, 288 Fed. Appx. 594 (11th Cir. 2008) (unpublished), the Eleventh Circuit held that the plaintiff's chronic obstructive pulmonary disorder ("COPD") did not limit him in the major life activity of working. The plaintiff worked in a manufacturing plant and claimed that the dust and other environmental elements in the plant aggravated his COPD. Therefore, the plaintiff argued, he was substantially limited in the major life activity of working. In rejecting that argument, the court noted that the plaintiff was "fully capable of working anywhere that did not expose him to the heat, humidity, dust, and pace of the Honda manufacturing line and, therefore, he is not disqualified from a class of jobs. Further, the fact that, at the time of his deposition, he was working two jobs hauling fertilizer and concrete, and was not under any medical restrictions with regard to those jobs or other jobs, shows that he is not

disqualified from a broad range of jobs." Id. at 597. In reaching that conclusion, the Eleventh Circuit relied on pre-ADAAA case law and EEOC regulations. Those authorities indicated that to be substantially limited in the major life activity of working, a plaintiff must be "significantly restricted" in the ability to perform "a class of jobs" or "a broad range of jobs in a variety of classes." Id. at 596 (citations omitted). The EEOC's pre-ADAAA regulations defined "class of jobs" as "[t]he job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of an impairment." Id. at 596-97 (citation omitted). The regulations defined "broad range of jobs in various classes" as "[t]he job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment." Id.

The EEOC's proposed regulations implementing the ADAAA, however, replace the concept of "class of jobs" and "broad range of jobs" with the concept of "type of work." 74 Fed. Reg. 48442. Therefore, the proposed regulations may change the analysis of cases such as Boykin. In fact, the Boykin plaintiff might be substantially limited in the major life activity of working if other manufacturing jobs would require him to work in an environment where he would be exposed to heat, humidity, dust, and pace similar to that of the Honda manufacturing line. See 74 Fed. Reg. 48,442 (defining "type of work" to include "jobs requiring . . . working under certain conditions, such as in workplaces characterized by high temperatures, high noise levels, or high stress"). Under the proposed regulations, therefore, an employer may not be able to point to the plaintiff's ability to work in a job as dissimilar as hauling fertilizer and concrete to show that a plaintiff was not substantially limited in the major life activity of working.

See also Duffet v. Lahood, 331 Fed. Appx. 763, 765 (2d Cir. 2009) (unpublished) (affirming jury verdict in favor of employer because "evidence at trial showed that, after his surgery, [the plaintiff] was assigned to various positions . . . that fell within the broad field of air traffic control. [The plaintiff] was excluded, however, from positions involving 'live' air traffic control in light of the possibility that lingering effects of his condition would interfere with his ability to perform this critical, public safety function."; "[T]he jury could have . . . conclude[d] that the [defendant] did not regard [the plaintiff] as having an impairment that substantially limited the major life function of working in the broad field of air traffic control, even though he was not permitted to work in positions involving 'live' air traffic control.").

E. New interpretation of "substantially limits"

The ADAAA rejects the definition of "substantially limits" that the Supreme Court articulated in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002). Pub. L. No. 110-325, § 2(a)-(b) (2008). In Toyota, the Supreme Court held that "the terms 'substantially' and 'major' in the definition of disability under the ADA 'need to be interpreted strictly to create a demanding standard for qualifying as disabled,' and that to be

substantially limited in performing a major life activity under the ADA 'an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives.'" Pub. L. No. 110-325, § 2(b) (2008) (quoting Toyota, 534 U.S. 184).

The ADAAA explicitly rejects Toyota's standard that "substantially" and "major" "need to be interpreted strictly to create a demanding standard for qualifying as disabled." Pub. L. No. 110-325, § 2(a)-(b) (2008). Rather, "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." Id.

The Act also rejected the EEOC's ADA regulations, which defined "significantly limits" to mean "significantly restricted," as setting "too high a standard." Id. (instructing the EEOC to revise its regulations). As a result, in its proposed regulations, the EEOC offers the following definition of "substantially limits":

> An impairment is a disability within the meaning of this section if it "substantially limits" the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered a disability.

74 Fed. Reg. at 48,440; see also H. Rep. No. 110-730, 110th Cong., 2d Sess. (2008) (stating that the ADA requires courts to compare an individual to "most people," not to individuals with similar demographic traits). Finally, the EEOC's proposed regulations indicate that certain impairments generally will not fit the definition of "substantially limits." These include the common cold, the flu, a sprained joint, minor and non-chronic gastrointestinal disorders, and appendicitis. 74 Fed. Reg. 48,440.

Some courts already require such a comparison. For example, in Rohr v. Salt River Project Agricultural Improvement & Power Dist., 555 F.3d 850, 858 (9th Cir. 2009), the Ninth Circuit noted that "[t]o determine whether an insulin-dependent type 2 diabetic like [the plaintiff] is substantially limited in his eating, we must compare 'the condition, manner or duration under which he can [eat] as compared to the condition, manner, or duration under which the average person in the general population can [eat]." The court concluded that the plaintiff was substantially limited in the major life activity of eating because, on a daily basis, he had to monitor what he ate and schedule his food intake. Further, the plaintiff would aggravate his diabetes by failing to follow his diet regimen for more than even a meal or two. Id. at 859-61. Although the court decided Rohr under its pre-ADAAA precedents, it noted that the results would be the same under the ADAAA. Id. at 862-63.[3]

[3] Additionally, because the ADAAA requires a disability to be analyzed in its unmedicated state, courts will be more likely to find insulin-dependent diabetes a disability. The proposed EEOC regulations also indicate that diabetes typically should be a disability.

Other pre-ADAAA case law considers activities an individual plaintiff is capable of performing when deciding whether that individual was "substantially limited." The proposed regulations, however, state that "[i]n determining whether an individual has a disability, the focus is on how a major life activity is substantially limited, not on what an individual can do in spite of an impairment." 74 Fed. Reg. at 48,440. Courts therefore are likely to focus more on what the plaintiff cannot do as a result of the impairment.

In Lloyd v. Washington & Jefferson College, 288 Fed. Appx. 786 (3d Cir. 2008) (unpublished), the plaintiff was a college professor. The defendant college implemented a policy requiring all professors in the plaintiff's department to be on campus at least four days per week for four hours a day. The plaintiff, however, worked on campus only three days a week and worked from home for the remainder. After the plaintiff returned from an FMLA leave, the college offered to transfer him to a non-teaching position. The plaintiff failed to report for work in that position and so the college considered him to have resigned. The plaintiff then brought suit, including under the ADA, arguing that he had a "record of impairment" because of past treatment for agoraphobia and panic attacks. The district court granted summary judgment, and the Third Circuit affirmed. First, the Third Circuit noted that the plaintiff inaccurately suggested that "a record of impairment suffices absent substantial limitation on a major life activity." Id. at 788. Additionally, the court rejected the plaintiff's contention that he was substantially limited in the major life activities of thinking and interacting with others. Quoting the pre-ADAAA EEOC regulating defining "substantially limited" as "significantly restricted," the court concluded that the plaintiff was "not substantially limited [because] he was able to work and/or teach on campus three days per week, as well as serve as a councilman [for the borough in which he lived], engage in family and social outings, and spend hours on the weekends working on [departmental] projects and course development." Id. at 789. In short, the court analyzed whether the plaintiff was "substantially limited" by considering the activities he *could* perform. Under the ADAAA and proposed EEOC regulations, such a comparison likely is not appropriate. The Lloyd court's ultimate decision, however, may not have been different, including because the court also concluded that he would not be qualified for his position as a college professor if he were substantially limited in his ability to think and to interact with others. Id.

Similar to the Lloyd decision, in Fikes v. Wal-Mart, Inc., 322 Fed. Appx. 882 (11th Cir. 2009) (unpublished), the court considered what activities the plaintiff could perform to determine whether he was disabled. The plaintiff in Fikes suffered from a knee impairment, which caused him pain when sitting or standing for long periods, as well as when he engaged in excessive bending, kneeling, walking, lifting, or climbing. The court noted that the plaintiff was capable of a "broad range of activity," including yard work, washing clothes and dishes, sweeping, cooking, driving, assembling bicycles and other products sold in the defendant's store, giving tours of the store to new employees, plumbing, electrical work, welding, and carpentry work. Id. at 884. According to the court, "[t]his broad range of activity . . . stands in stark contrast to – and belies – Plaintiff's vague assertions that he is restricted in the major life activities of working and performing manual tasks." Id. As a result, the court affirmed the district court's ruling that the plaintiff was disabled under the ADA.

F. Expanded the definition of "regarded as"

The ADAAA expands the definition of "regarded as" disabled to an individual who "has been subjected to an action prohibited under [the ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." Pub. L. No. 110-325, § 4(a) (2008). Employees can establish they were "regarded as" disabled regardless of whether the employer was motivated by myths, fears, or stereotypes. Evidence that the employer believed the individual was substantially limited in any major life activity is not required.

Further, under the ADAAA, an individual cannot be "regarded as" disabled if he or she has a minor condition *and* that condition lasts for less than six months.[4] Pub. L. No. 110-325, § 4(a) (2008).

The ADAAA makes clear, however, that an employer need not provide a reasonable accommodation to someone who is regarded as disabled. Pub. L. No. 110-325, § 6 (2008).

In Wilson v. Phoenix Specialty Manufacturing Co., 513 F.3d 378 (4th Cir. 2008), the plaintiff claimed that the defendant perceived him as disabled due to Parkinson's disease and as a result terminated him in violation of the ADA. Following a bench trial, the district court ruled in favor of the plaintiff. The defendant appealed, arguing that it accurately perceived the plaintiff as having an impairment. The Fourth Circuit rejected this argument and affirmed judgment in favor of the plaintiff. According to the Fourth Circuit, for a "regarded as" claim to succeed, the employer "must entertain a misperception: it must believe . . . that [an individual] has a substantially limiting impairment when, in fact, the impairment is not so limiting." Id. at 385 (quotations and citation omitted). The circuit court noted that the plaintiff's symptoms were well controlled with medication and did not affect his ability to perform his job at the time of his discharge. Id. at 386. Despite that fact, significant evidence suggested that the defendant viewed the plaintiff as substantially limited in the major life activities of seeing and performing manual tasks. For example, the defendant told the plaintiff not to perform computer work, such as inputting information, because the defendant feared he would make a mistake; according to the Fourth Circuit, that was evidence that the defendant believed the plaintiff could not see well. Additionally, the defendant instructed the plaintiff not to count washers (which the defendant manufactured)

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[4] This six-month rule does not apply to actual and "record of" disabilities, according to the report on the ADAAA by the U.S. House Committee on Education and Labor. H. Rep. No. 110-730, 110th Cong., 2d Sess. (2008). It is possible, therefore, that courts will find individuals disabled even if their conditions last for less than six months. Some pre-ADAAA case law indicates, however, that impairments lasting for such short periods are not disabilities under the ADA. See, e.g., Bolden v. Magee Women's Hosp. of the Univ. of Pittsburgh Med. Ctr., 281 Fed. Appx. 88, 90 (3d Cir. 2008) (affirming summary judgment in favor of employer; plaintiff's arm injury was "a temporary, non-chronic impairment of brief duration" and plaintiff resumed many of her normal activities within four months of sustaining the injury, most of her activities within five months, and all of her activities within seven months).

because the defendant feared he could no longer count and would make errors. Id. at 385-86. The court also noted an email from the company president indicating that the plaintiff "qualifie[d] for ADA designation" and that the company ignored the plaintiff's doctor's opinion that the plaintiff could return to work. Finally, the court pointed to testimony that senior managers treated the plaintiff differently after his diagnosis, including by avoiding him. Id. at 385. As a result, the Fourth Circuit concluded that the defendant regarded the plaintiff as having an impairment that substantially limited him in the major life activities of seeing and performing manual tasks.

Had the Wilson case been brought after enactment of the ADAAA, the plaintiff may have claimed he was discriminated against because of an *actual* disability, rather than under the "regarded as" prong. The plaintiff's symptoms were well controlled *with medication*, but under the ADAAA, courts may not consider the ameliorative effects of medication when analyzing whether an impairment is a disability. The severity of the Wilson plaintiff's symptoms without medication is unclear from the decision.

In Talley v. Family Dollar Stores of Ohio, Inc., 542 F.3d 1099 (6th Cir. 2009), the plaintiff worked as a cashier, a position involving working the cash register, cleaning the store, and stocking shelves. She suffered from degenerative osteoarthritis in her spine, which caused her significant leg and back pain and made it impossible for her to sit or stand for long periods of time. The defendant terminated the plaintiff for job abandonment. The plaintiff brought suit under the ADA and an analogous state law. The district court granted summary judgment in favor of the defendant and the plaintiff appealed. On appeal, the Sixth Circuit first considered whether the plaintiff was "regarded as" disabled. The plaintiff claimed she was regarded as disabled as evidenced by testimony from her supervisors and co-workers that she was in obvious pain when working at the cash register. The Sixth Circuit, however, stated "[t]hat the defendants and other co-workers recognized that [the plaintiff] had severe health problems and physical impairments does not satisfy the regarded-as prong." Id. at 1106. Instead, a "regarded as" plaintiff must show either: "(1) that the defendants mistakenly believed that she had a limiting impairment when in fact she did not" or "(2) that the defendants believed she had a limiting impairment when that impairment, in fact, was not so limiting." Id. The plaintiff in Talley, however, argued neither, and evidence clearly indicated that the defendant believed the plaintiff could continue her job if she were given a proper accommodation. As a result, the plaintiff was not "regarded as" disabled. The Sixth Circuit, however, reversed and remanded the district court's ruling on other grounds.

In Brady v. Wal-Mart Stores, Inc., 531 F.3d 127 (2d Cir. 2008), the plaintiff had cerebral palsy, which caused him to walk slowly and with a limp and also effected his vision, mannerisms, and eating. The defendant hired him to work as a pharmacy assistant. His supervisor in the pharmacy allegedly treated him poorly and made it clear she did not want him working for her. After a few days, the defendant transferred him to a parking lot attendant position and then to the food department, where he was given a schedule that conflicted with his community college schedule. Out of frustration, the plaintiff quit his job and subsequently brought suit under the ADA and the New York State Human Rights Law.

The jury found that the plaintiff was disabled and/or regarded as disabled, that the defendant discriminated against him on that basis, and that the defendant failed to reasonably accommodate him. The defendant filed a motion for judgment as a matter of law and for a new trial, which the trial court denied. On appeal, the defendant's arguments included the contention that the district court improperly denied the motion for judgment as a matter of law on the plaintiff's failure to accommodate claim. In particular, the defendant argued that the plaintiff never requested an accommodation and testified that he did not believe he needed one, and also failed to demonstrate an appropriate reasonable accommodation. Id. at 134-35. The Second Circuit conceded that generally the individual employee must inform the employer that an accommodation is needed. Id. at 135. The court ultimately rejected the defendant's argument, however, concluding that "[a]pplication of this general rule [that a request for accommodation is a prerequisite to liability for failure to accommodate] is not warranted . . . where the disability is obvious or otherwise known to the employer without notice from the employee." Id. (quoting Felix v. N.Y.C. Transit Auth., 154 F. Supp. 2d 640 (S.D.N.Y. 2001)). An exception to the general rule is particularly appropriate when "an employer perceives an employee to be disabled but the employee does not so perceive himself." Id. at 135. The court therefore held "that an employer has a duty reasonably to accommodate an employee's disability if the disability is obvious—which is to say, if the employer knew or reasonably should have known that the employee was disabled." Id. Because employees in such cases have not requested particular accommodations, the employer must engage in the interactive process to determine whether and how an employee can be reasonably accommodated. Id. In Brady, because it was reasonable for the jury to conclude that the plaintiff was disabled or regarded as disabled, the court concluded that the defendant was required to engage in the interactive process and affirmed the jury's verdict. Id. at 135-36. Under the ADAAA, however, employers are not required to provide a reasonable accommodation to employees who are "regarded as" disabled but who are not in fact disabled.

See also Walsh v. Bank of Am., 320 Fed. Appx. 131, 133 (3d Cir. 2009) (unpublished) (holding that material issue of fact existed regarding whether plaintiff was "regarded as" disabled because: (1) his personnel records listed him as a "Disabled Vietnam Veteran"; (2) plaintiff testified at deposition that he informed three supervisors that he had post-traumatic stress disorder ("PTSD") and that one of them began treating him differently afterwards; and (3) plaintiff asked repeatedly for a reduced schedule to accommodate his PTSD, filled out the required paperwork multiple times, and was told he would receive a reduced schedule but never did).

G. Relaxed the standard for "record of"

The ADAAA makes clear that evidence that an individual has a past history of a substantially limiting impairment is all that is required to establish a record of disability. 74 Fed. Reg. at 48,443. Whether an employer actually relied on the record of disability in making an employment decision is relevant instead to the merits of an ADA claim.

In the pre-ADAAA case of Eshelman v. Agere Systems, Inc., 554 F.3d 426 (3d Cir. 2009), the plaintiff was diagnosed with breast cancer and took a six-month leave of absence to receive treatment. Upon her return, as a result of chemotherapy therapy, the plaintiff suffered from short-term memory loss, known as "chemo brain." To compensate, the plaintiff had to take more notes at work than she did previously. She also had difficulty driving to new places, which she sometimes had to do for her job, because she would become confused. She therefore would carpool with co-workers or pull over to regain her focus. Despite her memory problems, the plaintiff continued to receive outstanding performance reviews, bonuses, a promotion, and a raise. In October 2001, the defendant's profitability declined significantly, prompting the defendant to lay off 18,000 people and close the facility where the plaintiff worked. To determine which employees to lay off, the defendant ranked and scored all employees based on their skills. Employees with scores below a certain point were eligible for layoff; employees with higher scores would be retained. Originally, the plaintiff's supervisor gave her a high score and recommended that she be transferred to another location. The plaintiff expressed concern about working at another location because of the long commute, which might have been difficult due to her memory loss. The plaintiff also expressed confidence that she could do the job. Nonetheless, the plaintiff's supervisor was required to change her high score to one of the lowest possible scores. Based on that low score, the plaintiff was subsequently included in the layoff. She filed suit, alleging that the defendant terminated her because she was "regarded as" disabled and had a "record of" disability. The jury found in favor of the plaintiff, and the defendant appealed, arguing there was insufficient evidence. The Third Circuit rejected that contention and affirmed the jury's verdict. With respect to her "record of" claim, the plaintiff had a record of a disability, cancer and subsequent memory loss, which substantially limited her in the major life activities of thinking and working. Moreover, evidence showed that the defendant knew of the plaintiff's cancer and her "significant cognitive dysfunction" resulting from her chemotherapy. Id. at 437. Thus, the court concluded that "[p]aired with [the plaintiff's] six-month absence and [the defendant's] knowledge of her condition, this cognitive dysfunction permitted the jury to conclude that [the plaintiff] had demonstrated a record of impairment that substantially limited her ability to think and work." Id. at 438. Further, the Third Circuit concluded that a reasonable juror could have determined that the defendant relied upon the plaintiff's record of cancer and subsequent treatment in deciding to terminate her. In reaching that conclusion, the court cited evidence that the defendant believed that she was precluded from working in any capacity at any of its remaining locations. Id. at 438-39.

III. THE INTERACTIVE PROCESS AND REASONABLE ACCOMMODATION: WHAT'S DIFFERENT?

The ADAAA does not explicitly change the requirements for the interactive process or the definition of "reasonable accommodations." More employees are covered by the ADA, however, and employers are likely to receive an increased number of requests for reasonable accommodations and to face an increased number of charges of failure to accommodate.

A. Common accommodations: Leaves of absence, work-at-home, transfers, and shift changes

1. Leaves of Absence

Although a leave of absence may be a reasonable accommodation, courts have routinely held that employers do not have to grant a leave of absence for an indefinite period of time (*i.e.*, if an employee does not know when he or she will be able to return to work). See, e.g., Peyton v. Fred's Stores of Ark., 561 F.3d 900, 903 (8th Cir.) ("[A] request for an indefinite leave of absence . . . is not a reasonable accommodation under the ADA. . . . Courts recognize that employers should not be burdened with guess-work regarding an employee's return to work after an illness."), cert. denied, 130 S. Ct. 243 (2009); Fiumara v. Harvard Coll., 327 Fed. Appx. 212 (1st Cir. 2009) (unpublished); Dixon-Thomas v. Okla. Board of County Comm'rs, 293 Fed. Appx. 613, 615 (10th Cir. 2008) (unpublished) ("[An] indefinite or excessive absence is a legitimate reason for termination under both the ADA and state law.") (citations omitted); Clinkscales v. Children's Hosp. of Philadelphia, No. 06-3919, 2009 U.S. Dist. LEXIS 38939, at *36 (E.D. Pa. May 7, 2009) ("[A] request to stay home from work indefinitely is not a reasonable accommodation.").

2. Work-at-home

Several courts have held that employers generally are not required to allow employees to work at home as a reasonable accommodation. For example, in Mobley v. Allstate Insurance Co., 531 F.3d 539, 546-48 (7th Cir. 2008), the court noted that "as a general matter, working at home is not a reasonable accommodation." In Mobley, the defendant rejected the plaintiff's request to work at home as a reasonable accommodation but provided an alternative effective accommodation. Further, the plaintiff failed to establish that working at home would have effectively accommodated her disability. Therefore, even if allowing the plaintiff to work at home was not an undue hardship, the defendant was not required to grant the plaintiff's request.

Employers, however, may be required to allow employees to work at home as a reasonable accommodation if other employees are allowed to do so. In Humphrey v. Memorial Hospitals Ass'n, 239 F.3d 1128 (9th Cir. 2001), the plaintiff, a medical transcriptionist, had difficulty getting to work on time, if at all. This difficulty was due to obsessive rituals, such as the plaintiff's compulsive need to wash her hair for three hours. As a result of her absenteeism and tardiness, her employer issued her two warnings in a six-month period. The plaintiff otherwise was an excellent employee. After receiving her second warning, the plaintiff was diagnosed with obsessive compulsive disorder ("OCD"). Her doctor concluded that the OCD caused the plaintiff's attendance problems. The plaintiff requested that she be allowed to work from home as an accommodation for her OCD. The employer did allow other employees in the plaintiff's position to work from home; however, the employer denied the plaintiff's request because of its policy against allowing at-home work by any employee who previously had attendance problems. The employer eventually terminated the plaintiff for excessive absenteeism and tardiness. The

plaintiff sued for failure to accommodate and wrongful termination, both under the ADA. The Ninth Circuit concluded that the plaintiff may have been able to perform the essential functions of her job if the employer had allowed her to work from home. With respect to the plaintiff's failure to accommodate claim, the court rejected the employer's contention that the plaintiff was not eligible to work from home because of her previous warnings: "It would be inconsistent with the purposes of the ADA to permit an employer to deny an otherwise reasonable accommodation because of past disciplinary action taken due to the disability sought to be accommodated." The plaintiff had submitted sufficient evidence to raise an issue of fact as to whether she could perform the essential functions of her job, and thus whether she was a qualified individual under the ADA. With respect to the plaintiff's wrongful termination charge, the court rejected the employer's stated reason for the plaintiff's termination – her excessive absenteeism and tardiness. The court explained, "conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination. The link between the disability and termination is particularly strong where it is the employer's failure to reasonably accommodate a known disability that leads to discharge for performance inadequacies resulting from that disability." Therefore, the court concluded that a jury could find a causal connection between the plaintiff's OCD and her attendance problems, and thus, summary judgment was inappropriate.

3. Transfers

Under the ADA, courts have ruled that a transfer to a vacant position may be a reasonable accommodation, but that employers are not required to transfer employees in violation of legitimate, nondiscriminatory policies.

For example, in King v. City of Madison, 550 F.3d 598 (7th Cir. 2008), the plaintiff worked as a bus driver, a position which was governed by a collective bargaining agreement. After a fourteen-month leave of absence for various medical conditions, the plaintiff was cleared to return to work but her doctor prohibited her from working as a bus driver. Under the CBA, employees could demand other positions within their bargaining unit and job classification range, and even bump more junior employees from a position. The plaintiff's seniority and job classification range, however, only allowed her to demand other bus driver positions, a job she could not perform because of medical restrictions. The plaintiff asked to bump into an operations technician position, but under the CBA, she was not eligible to do so because it was in a higher job classification range than her previous position of bus driver. Additionally, she applied for vacant clerical positions but other, more qualified applicants were hired instead. Id. at 599. The plaintiff was finally terminated under the terms of the CBA. She filed an ADA failure to accommodate claim, and the district court granted summary judgment for the defendant. The Seventh Circuit affirmed. According to the circuit court, "the ADA recognizes reassignment to a vacant position as a potentially reasonable accommodation if a disabled employee is unable to perform the essential functions of a job. On the other hand, employers are not required 'to reassign a disabled employee to a position when such a transfer would violate a legitimate, nondiscriminatory policy of the employer.' Nondiscriminatory hiring and reassignment provisions of a collective bargaining agreement qualify as such a policy." Id. at 600 (citations omitted).

Because the defendant complied with the CBA in preventing the plaintiff from bumping into one position and did not hire her for other positions because she was not the most qualified candidate, the defendant did not violate the ADA. Id. at 600-01. Therefore, summary judgment was affirmed.

See also Woodruff v. School Board of Seminole County, 304 Fed. Appx. 795 (11th Cir. 2008) (unpublished) (rejecting plaintiff's ADA claim because (1) accommodation that would violate CBA was not a reasonable accommodation; (2) ADA does not require an employer to promote a disabled employee as a reasonable accommodation; and (3) plaintiff was not as well-qualified as other applicants; noting "the ADA does not require preferential treatment for the disabled over equally or better-qualified individuals").

Similarly, employers generally are not required to transfer employees to a different manager. See, e.g., Maslanka v. Johnson & Johnson, Inc., No. 08-2329, 2008 U.S. App. LEXIS 26269 (3d Cir. 2008) (unpublished) (holding that inability to work for a particular manager was not a substantial limitation on the major life activity of working).

4. Shift Changes

Similarly, shift changes are not a reasonable accommodation if the employer would have to violate a neutral policy, such as a seniority policy, in order for the individual to change shifts. See, e.g., Sicilia v. UPS, 279 Fed. Appx. 936, 939 (11th Cir. 2008) (unpublished) ("Even if [the plaintiff] did qualify for an accommodation, [the defendant] was not required to violate its own seniority system to accommodate him to the day-shift positions for which he applied."). Courts, however, may look to whether the employer made some effort to accommodate the individual's request to avoid working a particular shift. See, e.g., Santacrose v. CSX Transp., Inc., 288 Fed. Appx. 655 (11th Cir. 2008) (unpublished) (holding that allowing employee to use sick leave to avoid overtime shifts was a reasonable accommodation).

B. Accommodations for mental disabilities

Even before the enactment of the ADAAA, mental impairments qualified as disabilities if they substantially limited an individual's major life activities. The EEOC's proposed regulations implementing the ADAAA would lower the threshold for finding that a psychiatric impairment is a "disability" under the ADA. As discussed above, the proposal includes in the definition of "disability" "[a]ny mental or psychological disorder, such as an intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities." 74 Fed. Reg. 48,440. The proposed regulations also include several mental impairments in its list of examples of impairments that will consistently meet the definition of disability: major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, or schizophrenia. Id. at 48,441. Additionally, the proposed regulations provide the following example:

> An individual with a psychiatric impairment (such as panic disorder, anxiety disorder, or some forms of depression other than major depression), who is substantially limited compared to most people, as indicated by the time and effort required to think or concentrate, the diminished capacity to effectively interact with others, the length or quality of sleep the individual gets, the individual's eating patters or appetite, or the effect on other major life activities, is an individual with a disability.

Id. at 48,442.

These proposed rules likely will make it easier for plaintiffs to establish mental disabilities. The general rules on accommodations described above apply to both physical and mental disabilities. However, employers sometimes find it more difficult to determine what is an appropriate reasonable accommodation for a mental disability.

A court in the Southern District of New York indicated that it may be a reasonable accommodation to allow an employee who had been on leave due to postpartum depression to return to work on a part-time basis and gradually build to a full-time schedule. Reilly v. Revlon, Inc., 620 F. Supp. 2d 524 (S.D.N.Y. 2009). In Reilly, the plaintiff was on a leave of absence for several months, first because of the birth of her child and then because of postpartum depression. When the plaintiff was ready to return to work, she requested that she be allowed to work part time and incrementally increase her hours so that she would be working on a full-time basis within a few weeks of returning. The defendant refused and terminated her employment. The plaintiff sued under the ADA and New York state and city disability laws, alleging in part that the defendant failed to accommodate her disability, depression. The defendant moved for summary judgment. The court denied the summary judgment motion. According to the court, "[m]odified work schedules may constitute a reasonable accommodation in certain circumstances," but employers are not required to eliminate an essential job function as a reasonable accommodation or to grant a particular reasonable accommodation if it would be an undue hardship for the employer. Id. at 542-43. The defendant in Reilly, however, offered no evidence that working full time was an essential job function and did not assert an undue hardship affirmative defense. Rather, it offered two other arguments. First, the defendant argued that the plaintiff's request to work part time was unreasonable because it was actually a request for an indefinite leave, which is not required under the ADA. The court rejected that argument because evidence suggested that the plaintiff intended to have a full-time schedule within weeks of returning to work, and so the leave request was not indefinite. Second, the defendant argued that it did sufficiently accommodate the plaintiff by allowing her to take twelve weeks of leave as required by the Family and Medical Leave Act ("FMLA") and giving her an additional ten weeks of paid disability leave. The court rejected this argument as well. With respect to the plaintiff's FMLA leave, the court stated that "[p]roviding legally-required FMLA leave is not any sort of accommodation; it is a requirement of law." Id. at 543. With respect to the additional paid leave the plaintiff received, the court explained that "[p]roviding paid

disability leave above and beyond the FMLA requirements is commendable, but providing benefits to a person who cannot work is not the same thing as making an accommodation in the workplace so the person can work. The relevant question in this case is whether a part-time schedule for a few weeks would have been a reasonable accommodation to Reilly's disability on the date of her termination." Id. Therefore, a genuine issue of fact existed as to the plaintiff's disability claim, and the court denied summary judgment.

In Ekstrand v. School District of Somerset, 583 F.3d 972 (7th Cir. 2009), the plaintiff, a teacher, suffered from seasonal affective disorder, a form of depression stemming from inadequate exposure to natural light. The plaintiff was reassigned to a first-grade classroom lacking exterior windows. The plaintiff explained to the school district that her seasonal affective disorder made it difficult for her to function in a room with artificial light. On that basis, the plaintiff made repeated requests to be transferred to a classroom with natural light. The school district refused, however, even though there was an empty classroom with natural light and another teacher was willing to switch rooms with the plaintiff. The plaintiff's health declined over the first several weeks of the school year, and she began experiencing a range of symptoms including fatigue, anxiety, inability to concentrate, and eventually even thoughts of suicide. In October, her doctor prescribed medication and recommended a leave of absence. In November, the plaintiff notified the district that she was ready to return to work if she could teach in a classroom with natural light. Also in November, her doctor sent the school district a letter explaining that natural light was necessary to accommodate her disability. The district continued to refuse her request and eventually the plaintiff accepted a job elsewhere. She brought suit against the school district, arguing that it failed to accommodate her disability by transferring her to a room with natural sunlight. The district court granted summary judgment in favor of the defendant school district, but the Seventh Circuit reversed. First, the circuit court stated that the plaintiff was responsible for providing the school district with evidence that natural light was necessary to accommodate her disability. Because she did not originally do so and because light therapy is not widely known, the plaintiff lacked evidence that the school district unreasonably denied her request before November. Id. at 976-77 ("An employee's request for reasonable accommodation requires a great deal of communication between the employee and employer. The communication process becomes even more difficult in a case involving an employee with a mental disability, because any necessary accommodation is often nonobvious to the employer. Thus, our cases have consistently held that disabled employees must make their employers aware of any nonobvious, medically necessary accommodations with corroborating evidence such as a doctor's note or at least orally relaying a statement from a doctor. . . ."). In November, however, plaintiff's doctor explained to the school district the importance of natural light, but the district persisted in refusing the transfer. At that point, because it knew plaintiff was willing to return to work and that she needed natural light, "the school district was obligated to provide [the plaintiff's] specifically requested, medically necessary accommodation" unless it would have been an undue hardship. Id. at 977. Assigning the plaintiff to a room with natural light was not an undue hardship, the court concluded, because the costs associated with the transfer to an available room were modest. Id. Therefore, the court concluded that a material issue of

fact existed as to whether the defendant failed to accommodate the plaintiff in violation of the ADA.

C. What's required: Preferential treatment for the disabled or an equal playing field?

The Supreme Court in US Airways, Inc. v. Barnett, 535 U.S. 391, 398 (2002) held that although an employer will sometimes need to give disabled employees preferential treatment to meet the mandate of the ADA, an employer is not required to give a disabled employee super-seniority to retain his job when a more senior non-disabled employee is entitled to the job under the terms of the established seniority program.

Subsequently, courts have been split on the extent to which employers must provide preferential treatment to disabled employees.[5]

Many courts have held that preferential treatment is not required. In Filar v. Board of Education of the City of Chicago, 526 F.3d 1054 (7th Cir. 2008), the plaintiff worked as a "cadre" substitute teacher. As such, on a daily basis she moved from school to school within the city to cover temporary vacancies. Each school's principal chose which cadre substitute teacher filled each vacancy. Because her arthritic hip made walking difficult, the plaintiff requested that she only work at one particular school, which was close to public transportation. The school board denied her request, and the plaintiff brought suit under the ADA. The district court granted summary judgment in favor of the school district and the Seventh Circuit affirmed. The Seventh Circuit acknowledged its own previous rulings that "reassignment to a vacant position can be part of the employer's obligation to reasonably accommodate." Id. at 1067. The court, however, noted that the plaintiff's position as a cadre substitute teacher required, pursuant to a collective bargaining agreement, that she be available at every school in the district. Therefore, the plaintiff's request to substitute at one school only "would have amounted to preferential treatment, which the ADA does not require." Id. The court therefore affirmed the district court's grant of summary judgment to the employer.

See also Castro-Medina v. Procter & Gamble Commercial Co., 565 F. Supp. 2d 343, 374 (D.P.R. 2008) ("The ADA is not a mandatory preference act, and thus, an employer is entitled to select better qualified employees for vacant positions instead of a disabled employee."); Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 483 (8th Cir. 2007) ("[T]he ADA does not require Wal-Mart to turn away a superior applicant for the . . . in order to give the position to Huber. To conclude otherwise is 'affirmative action with a vengeance. That is giving a job to someone solely on the basis of his status as a member of a statutorily protected group.'"), cert. dismissed, 552 U.S. 1136 (2008) (citing EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024 (7th Cir. 2000)); Adeyemi v. District of Columbia, 525 F.3d 1222, 1227-28 (D.D.C. 2008) (noting that courts must "respect the employer's unfettered discretion to choose among qualified candidates" and that the superior qualifications of

[5] A chart with additional information on preferential treatment is attached as the Appendix.

candidates actually hired "tends to undermine any suggestion of discrimination" under the ADA), cert. denied, 129 S. Ct. 606 (2009).

On the other hand, other courts hold the preferential treatment may be required for individuals covered by the ADA. See, e.g., Holly v. Clairson Indus., LLC, 492 F.3d 1247 (11th Cir. 2007) (employer was not entitled to summary judgment when it began enforcing new "no fault" attendance policy against employee who was tardy due to his disability, including because employer had excused that employee's tardiness for seventeen years); E.E.O.C. v. Dillon Cos., Inc., 310 F.3d 1271, 1277 (10th Cir. 2002) (holding that "the simple fact that an accommodation would provide a preference – in the sense that it would permit the worker with a disability to violate a rule that others must obey – cannot, in and of itself, automatically show that the accommodation is not reasonable").

IV. CONDUCT AND ATTENDANCE ISSUES

A. Generally

An employer *generally* need not excuse misconduct or performance problems, even if an employee subsequently requests reasonable accommodation for a disability that caused the misconduct.

A fact-specific analysis is necessary to determine whether the general rule applies and to minimize the possibility of liability under the ADA. Several key questions are common to the analysis:

1. Does the employee have a protected disability?
2. If so, is the employee "qualified" for his or her position with or without a reasonable accommodation?
3. Did the employee engage in conduct for which the employer typically would impose discipline?
4. Did the employee notify the employer of the disability before or after engaging in misconduct or performing poorly?
5. Is the conduct rule job-related and consistent with business necessity?

Employers, particularly in the Ninth Circuit, should be aware of case law suggesting a contrary outcome. In Humphrey v. Memorial Hospitals Ass'n, 239 F.3d 1128 (9th Cir. 2001), discussed more fully above, the Ninth Circuit stated that "[i]t would be inconsistent with the purposes of the ADA to permit an employer to deny an otherwise reasonable accommodation because of past disciplinary action taken due to the disability sought to be accommodated." Similarly, in Gambini v. Total Renal Care, Inc., 486 F.3d 1087 (9th Cir. 2007), the plaintiff brought suit under the Washington Law Against Discrimination and the

FMLA. The plaintiff suffered from bipolar disorder and began experiencing performance problems at work. Representatives of the employer met with her to discuss a performance improvement plan. During the meeting, the plaintiff threw the performance plan across a desk and, using several profanities, stated that the plan was unfair and unwarranted. She slammed the door as she left the meeting, and may have told people present that they "will regret this." Later, while in her cubicle, the employee kicked and threw things. The employer finally sent her home after she expressed suicidal thoughts. As a result of this behavior, the employer terminated the plaintiff's employment. The plaintiff argued that her behavior in the meeting was a result of her bipolar disorder. Because the Washington Supreme Court previously relied on the Ninth Circuit's Humphrey decision, the Ninth Circuit relied on that case in analyzing the plaintiff's state law disability discrimination claim. Noting that the "facts in Humphrey are substantially analogous to Gambini's situation," the Ninth Circuit concluded the Gambini trial court erred by not instructing the jury that "a decision motivated even in part by the disability is tainted and entitles a jury to find that an employer violated antidiscrimination laws." Because the jury was entitled to infer that the plaintiff's violent outburst was a result of her bipolar disorder, the Ninth Circuit remanded the plaintiff's state law disability claim.

Other courts, however, continue to apply the general rule that an employer need not excuse misconduct, even if caused by the employee's disability not previously known to the employer. For example, courts have held that employers need not excuse poor attendance or frequent tardiness. See, e.g., Barnes v. GE Sec., Inc., No. 06-1632-AA, 2008 U.S. Dist. LEXIS 34049 (D. Ore. Apr. 22, 2008) (under state law analogous to ADA, plaintiff, who suffered from depression and anxiety, was not a "qualified individual" because of her "numerous unexcused absences and tardies in violation of defendants' attendance policies"), aff'd, No. 08-35486, 2009 U.S. App. LEXIS 13129 (9th Cir. June 18, 2009).

APPENDIX

Preferential Treatment: An Analysis of Federal Case Law

Below are examples of how federal courts have answered the question of whether the ADA requires preferential treatment.

COURT	CASE LAW
U.S. Supreme Court	• US Airways, Inc. v. Barnett, 535 U.S. 391, 398 (2002) (explaining that although an employer will sometimes need to give disabled employees preferential treatment to meet the mandate of the ADA, an employer is not required to give a disabled employee superseniority to retain his job when a more senior non-disabled employee is entitled to the job under the terms of the established seniority program).
1st Circuit	• The First Circuit has stated that "[t]he ADA is not a mandatory preference act, and thus, an employer is entitled to select better qualified employees for vacant positions instead of a disabled employee." Castro-Medina v. Procter & Gamble Commercial Co., Civ. No. 04-2274 (PG), 2008 U.S. Dist. LEXIS 53408, at *78 (D.P.R. June 28, 2008). • Castro-Medina cites a pre-Barnett case for the proposition that the ADA does not mandate affirmative action in favor of individuals with disabilities. Ladenheim v. American Airlines, Inc., 115 F. Supp. 2d 225, 231 (D.P.R. 2000), aff'd, Gelabert-Ladenheim v. American Airlines, Inc., 252 F.3d 54 (1st Cir. 2001).
2nd Circuit	• Several 2nd Circuit courts hold that the ADA "does not authorize a preference for disabled people generally." Felix v. N.Y. City Transit Auth., 324 F.3d 102, 107 (2d Cir. 2003); see also Pender v. State of N.Y. Office of Mental Retardation &d Developmental Disabilities, No. 02-CV-2438 (JFB) (LB), 2006 WL 2013863, at *8 (E.D.N.Y. July 18, 2006) ("A contrary holding that an employer is required to promote an employee as an accommodation, where he is no longer able to perform his current position, would place disabled persons on a higher playing field than non-disabled persons, contrary to the objectives of the ADA."), aff'd, 225 Fed. Appx. 17 (2d Cir. 2006), cert. denied, No. 07-5023, 2007 WL 20052666; Picinich v. United

	Parcel Serv., No. 5:01-CV-01868 (NPM), 2005 WL 3542571, at *23 (N.D.N.Y. Dec. 23, 2005) ("Because the intent of the ADA is not to give disabled employees preferential treatment, reassignment of a disabled employee to another facility is a reasonable accommodation only where it is the regular practice or policy of the employer to transfer employees between facilities or where the employer is contractually obligated to do so."), aff'd in part, vacated in part, 236 Fed. Appx. 663 (2d. Cir. 2007); Hartnett v. Fielding Graduate Inst., 400 F. Supp. 2d 570, 576 (S.D.N.Y. 2005) (in a case outside of the employment context, the court explained that, "[the ADA and Rehabilitation Act] mandate[] reasonable accommodation of people with disabilities in order to put them on an even playing field with the non-disabled; [they] do[] not authorize a preference for disabled people generally."), aff'd, 198 Fed. Appx. 89 (2d Cir. 2006). • In Stamos v. Glen Cove Sch. Dist., 78 Fed. Appx. 776, 778 (2d Cir. 2003), however, the 2d Circuit held that extraordinary circumstances must exist in order for a disabled employee to trump the entitlements of other non-disabled employees.
3rd Circuit	• Shapiro v. Township of Lakewood, 292 F.3d 356 (3d Cir. 2002) (following the two-step analysis set forth in Barnett). • Johnson v. McGraw-Hill Cos., 451 F. Supp. 2d 681, 707 (W.D. Pa. 2006) ("It is clear that an accommodation which requires the displacement of another employee would not be reasonable 'ordinarily or in the run of cases.' In this case, however, Johnson has called the Court's attention to special circumstances which may warrant a finding that his proposed transfer was reasonable."). • O'Dell v. Dep't of Public Welfare of the Commonwealth of Pa., 346 F. Supp. 2d 774, 787-88 (W.D. Pa. 2004) (following Barnett and Shapiro). • Norman v. University of Pittsburgh, No. Civ. A. 00-1655, 2002 WL 32194730, at *17 (W.D. Pa. Sept. 17, 2002) (following Barnett and Shapiro and finding that "special circumstances" may exist to circumvent disability-neutral rule); see also Koteles v. ATM Corp. of Am., No. 05-1061, 2008 U.S. Dist. LEXIS 72280, at *30 (W.D. Pa. Sept. 23, 2008) (granting summary judgment to defendant due to the plaintiff's failure "to present any evidence of a vacant, available position").

4th Circuit	• Fink v. Richmond, No. 07-0714 (DKC), 2009 U.S. Dist. LEXIS 89853, at *28-29 (D. Md. Sept. 29, 2009) ("Employers are generally not required to change a nondiscriminatory company policy to meet the ADA's reasonable accommodation mandate.... Rare exceptions occur when special circumstances demand a finding that the requested accommodation is reasonable despite the existence of a seniority system, but Plaintiff's eating impairment does not provide such a special circumstance.") (citations omitted). • See also Evans v. UDR, Inc., 644 F. Supp. 2d 675 (E.D.N.C. 2009) (holding that plaintiff was not entitled to preferential treatment in housing discrimination case where the requested accommodation required defendant to ignore plaintiff's criminal history, even if the criminal conviction is the result of a mental disability). The court added, however, "Plaintiffs also cite a series of cases in which courts have found that conduct resulting from a disability may form the basis of a reasonable accommodation requirement. However, each of these cases deals with a situation different from the one before the court in that they all apply to non-criminal conduct resulting from a mental disability." Id. at *29, n.16. In support of this proposition, the court cited several cases from outside of the Fourth Circuit.
5th Circuit	• Medrano v. City of San Antonio, Texas, 179 Fed. Appx. 897 (5th Cir. 2006) (citing Barnett to hold "the ADA does not require an employer to take action inconsistent with the contractual rights of other workers under a collective bargaining agreement").
6th Circuit	• Hedrick v. Western Reserve Care Sys., 355 F.3d 444, 459 (6th Cir. 2004) ("Finally, contrary to Hedrick's argument, her disability did not provide her with a preference in WRCS's hiring practices. Although WRCS may have had an obligation to reassign her to a vacant position for which she was qualified, the ADA does not mandate that she be afforded preferential treatment."), cert. denied, 543 U.S. 817 (2004).
7th Circuit	• Hammel v. Eau Galle Cheese Factory, 407 F.3d 852, 867 (7th Cir. 2005) ("In this regard, let us make clear that the ADA 'is not an affirmative action statute in the sense of requiring an employer to give preferential treatment to a disabled employee merely on account of the employee's disability,' . . . Accommodations which require special dispensations and preferential treatment are not

	reasonable under the ADA . . ..”), cert. denied, 546 U.S. 1033 (2005). • Mays v. Principi, 301 F.3d 866, 872 (7th Cir. 2002) (citing Barnett to support its conclusion that, even if the plaintiff was qualified for a position, the employer did not violate the ADA by hiring better qualified applicants). • EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1028 (7th Cir. 2000) (“The contrary rule would convert a nondiscrimination statute into a mandatory preference statute, a result which would be both inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and coworkers of disabled employees. A policy of giving the job to the best applicant is legitimate and nondiscriminatory. Decisions on the merits are not discriminatory.”). • King v. City of Madison, No. 07-cv-295-bbc, 2008 U.S. Dist. LEXIS 19311, at *10 (W.D. Wis. Mar. 11, 2008) (“Defendant’s obligations under the [ADA] do not extend to overriding the terms of the governing labor contract and treating plaintiff *more* favorably than it would be required to treat individuals without disabilities.”). • Germano v. International Profit Association, Inc., No. 06 CV 5638, 2007 U.S. Dist. LEXIS 80940 (E.D. Ill. Nov. 1, 2007) (plaintiff failed to state a *prima facie* case under the ADA when defendant decided to pursue more qualified candidates). • Cohen v. Ameritech Corp., No. 02-C-7378, 2003 WL 23312801, at *5 (N.D. Ill. Dec. 23, 2003) (“An employer is not required to give a disabled employee preferential treatment over other employees . . . In accommodating an employee, an employer must consider the feasibility of assigning an employee to a different job in which his or her disability will not be an impediment to full performance, and if the reassignment is feasible and does not require the employer to turn away a superior applicant, the reassignment is mandatory.”).
8th Circuit	• Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 483 (8th Cir. 2007) (“We agree and conclude the ADA is not an affirmative action statute and does not require an employer to reassign a qualified disabled employee to a vacant position when such a

	reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate . . . the ADA does not require Wal-Mart to turn away a superior applicant for the router position in order to give the position to Huber. To conclude otherwise is 'affirmative action with a vengeance. That is giving a job to someone solely on the basis of his status as a member of a statutorily protected group.'"), cert. dismissed, Huber v. Wal-Mart Stores, Inc., 128 S. Ct. 1116 (2008); citing EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024 (7th Cir. 2000), which states "the ADA does not mandate a policy of 'affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled person be given priority in hiring or reassignment over those who are not disabled.'" • Peebles v. Potter, 354 F.3d 761, 769 (8th Cir. 2004) (following Barnett). • Willnerd v. First Nat'l of Nebraska, Inc., No. 8:05-CV-482, 2007 WL 2746866, at *15 (D. Neb. Sept. 19, 2007) ("In light of the recent decision in Huber, the court finds that First National had no duty to accommodate plaintiff by automatically awarding him a position for which he met the minimum requirements. As to the positions for which plaintiff was actually interviewed, First National has provided evidence that other candidates were hired because first National determined they were more qualified for the jobs. . . In any event, the ADA does not require First National to turn away superior applicants in order to award any particular position to the plaintiff, and it is the employer's role-not the court's role-to identify the strengths that constitute the best qualified applicant."). • Chapple v. Waste Mgm't, Inc., Civ. No. 05-2583 (ADM) (JSM), 2007 WL 628361, at *10 (D. Minn. Feb. 28, 2007) ("The Eighth Circuit Court of Appeals has yet to hold that an employer's policy of hiring the most qualified applicant for a job must give way when a disabled employee seeks reassignment to that job."). • Wood v. Crown Redi-Mix, Inc., 218 F. Supp. 2d 1094, 1106 (S.D. Iowa 2002) ("An employer is not required to accommodate a handicapped individual in a manner that would violate the rights of other employees under a legitimate collective bargaining agreement.") (quoting Mason v. Frank, 32 F.3d 315, 319 (8th Cir.

	1994)), aff'd, 339 F.3d 682 (8th Cir. 2003).
9th Circuit	• *Gambini v Total Renal Care*, 486 F.3d 1087, 1095 (9th Cir. 2007) (addressing plaintiff's argument that her misconduct was protected because it was caused by her disability, the court noted that "the law often does provide more protection for individuals with disabilities" and "identical treatment is often not equal treatment with respect to disability discrimination"). • Giebeler v. M & B Assocs., 343 F.3d 1143 (9th Cir. 2003) (applying Barnett to the Fair Housing Amendments Act). • Angelone v. Seyfarth Shaw LLP, No. Civ. S-05-2106 (FCD) (JFM), 2007 WL 1033458, at *15 (E.D. Cal. Apr. 3, 2007) ("[R]equiring defendant to violate its stated policy against transferring employees with performance problems would not be reasonable in this case.").
10th Circuit	• Roberts v. Cessna Aircraft Company, Civ. No. 07-3133, 2008 U.S. App. LEXIS 17645, *1228 (10th Cir. Aug. 14, 2008) (holding that employer does not have to give a disabled employer a vacant position if, under a collective bargaining agreement, other employees have a right to the vacant position), aff'd 289 F. App'x 321, 326–27 (10th Cir. 2008). • E.E.O.C. v. Dillon Cos., Inc., 310 F.3d 1271, 1277 (10th Cir. 2002) (quoting Barnett, the court held that "the simple fact that an accommodation would provide a preference – in the sense that it would permit the worker with a disability to violate a rule that others must obey – cannot, in and of itself, automatically show that the accommodation is not reasonable"). • Dilley v. SuperValu, Inc., 296 F.3d 958 (10th Cir. 2002) (interpreting Barnett narrowly). • Smith v. Midland Brake, Inc., 180 F.3d 1154, 1169 (10th Cir. 1999) (en banc) ("[R]equiring the reassigned employee to be the best qualified employee for the vacant job, is judicial gloss unwarranted by the statutory language or its legislative history."). • Roberts v. Cessna Aircraft Co., Civ. No. 05-1325 (MLB), 2007 WL 1100206, at *6 (D. Kan. Apr. 11, 2007) ("The ADA does not require an employer to provide an accommodation that would

	violate a CBA.") (citing Dilley v. SuperValu, Inc., 296 F.3d 958, 963 (10th Cir. 2002)).
11th Circuit	• Holly v. Clairson Indus., L.L.C., 492 F.3d 1247, 1263 (11th Cir. 2007) (in a case addressing whether the employer had to treat a disabled employee preferentially under a "no fault" attendance policy, the court noted "preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal. The Act requires preferences in the form of 'reasonable accommodations' that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy. By definition any special 'accommodation' requires the employer to treat an employee with a disability differently, *i.e.,* preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach.") (citing US Airways, Inc. v. Barnett, 535 U.S. 391, 397-98 (2002)). • Galloway v. GA Technology Authority, 182 Fed. Appx. 877, 881 (11th Cir. 2006) (finding that employer articulated legitimate reason for not promoting disabled employee: he was not as qualified as the individual who received the promotion). • Woodruff v. School Board of Seminole County, No. 6:06-cv-1937-Orl-22KRS, 2008 U.S. Dist. LEXIS 22179 (M.D. Fla. Mar. 20, 2008) (rejecting plaintiff's ADA claim because (1) accommodation that would violate CBA was not a reasonable accommodation; (2) ADA does not require an employer to promote a disabled employee as a reasonable accommodation; and (3) plaintiff was not as well-qualified as other applicants; noting "the ADA does not require preferential treatment for the disabled over equally or better-qualified individuals").
DC Circuit	• Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1304-05 (D.C. Cir. 1998) (en banc) ("[T]he ADA's reference to reassignment would be redundant if permission to apply were all it meant . . . ."). • Alston v. Washington Metropolitan Area Transit Authority, Civ. No. 07-0122 (ESH), 2008 U.S. Dist. LEXIS 58020, at *9-10 (D.D.C. July 31, 2008) (holding that the hiring of a more qualified candidate is not a defense to claims under the ADA or Rehabilitation Act).

	• But see Adeyemi v. District of Columbia, 525 F.3d 1222, 1227-28 (D.D.C. 2008) (noting that courts must "respect the employer's unfettered discretion to choose among qualified candidates" and that the superior qualifications of candidates actually hired "tends to undermine any suggestion of discrimination" under the ADA).