NAVIGATING POST-ADAAA EMPLOYMENT RELATIONSHIPS: THE INTERACTIVE PROCESS, REASONABLE ACCOMMODATION, AND THE REGARDED-AS DILEMMA

Sheila Engelmeier
Engelmeier & Umanah, P.A.
12 South Sixth Street, Suite 1230
Minneapolis, MN 55402
(612) 455-7723
www.e-ulaw.com

Dana L. Sullivan
Buchanan, Angeli, Altschul & Sullivan, LLP
321 SW 4th Ave., Suite 321
Portland, OR 97212
(503) 974-5015
www.baasemploymentlaw.com

Sheila Engelmeier[1], a co-founder of Engelmeier & Umanah, approaches every legal problem with both considerable intellect and common sense. Her first priority is always avoiding a lengthy legal battle. When proactive planning does not facilitate a swift resolution, Sheila is an aggressive litigator who strongly advocates her clients' positions. Creative and persistent, Sheila was described by one client as "the edge that made the difference" in that company's success in a hard-fought action. After her first few years of practice, she has focused a significant part of her practice on employment matters, malpractice matters and issues facing the early childhood education industry. Sheila has been named a "Super Lawyer" on several occasions, a "Top 50 Woman Super Lawyer" and "Top 40 Employment Super Lawyer" by Minnesota Law & Politics, and was selected by the Business Journal as a "Woman to Watch" in the Twin Cities' business community.

Sheila's tenacity and attention to detail make her extremely successful in handling employment matters. She regularly trains employers on a wide variety of management issues, such as dealing with the disabled employee. She also assists both companies and executives in negotiating intricate employment agreements. She has handled the full panoply of employment litigation matters, from non-competes to discrimination or sexual harassment cases. Sheila is veteran both in administration tribunals and in court handling disputes about workplace worries from "soup to nuts" (sometimes *literally*). She's handled everything from hiring to firing, including employee theft and contract disputes; she litigates post-employment fights about unfair competition and misuse of corporate property; and she assists companies in developing effective selection and performance management programs.

Dana L. Sullivan[2] has developed an excellent reputation representing individuals in employment-related matters. She regularly tries discrimination cases in both federal and state court and also devotes a significant part of her practice to advising executives in the negotiation of employment contracts or separation agreements. Dana has been selected for inclusion in Best Lawyers and, in 2013, was named Lawyer of the Year for the representation of individuals in employment matters. Super Lawyers has listed her among the top 25 women lawyers in Oregon and among Oregon's top 50 lawyers. Dana is a past president of the Oregon Trial Lawyers Association and she currently serves on the Board of the Multnomah Bar Association. In addition to representing individuals in litigation, Dana regularly provides advice to employees faced with challenging workplace issues such as sexual harassment or the need for accommodations for a disability. Dana has also been retained by employers to conduct workplace investigations.

In 2012, Lewis & Clark Law School honored Dana with the Joyce Ann Harpole Award, which is presented annually to an attorney who is dedicated to the pursuit of justice while maintaining a sense of balance among career, family and community. Dana is a frequent speaker at continuing legal education programs and has served as a guest lecturer for classes at Portland State University and Lewis & Clark Law School. Recent topics include family leave and disability laws, sexual harassment claims, the basics of litigating an employment case, proving damages, and issues surrounding expert witness testimony.

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Section I: Introduction

The ADA Amendments Act of 2008 (ADAAA) became effective on January 1, 2009. It expanded the definition of "disability" and thus broadened the scope of protection for employees under the Americans with Disabilities Act (ADA). For example, regulations enacted by the Equal Employment Opportunity Commission (EEOC) to implement the amendments recognize the operation of major bodily functions as major life activities, meaning that a physical or mental impairment that substantially limits a major bodily function (such as Crohn's disease, cancer, or AIDS) may be considered a disability under the ADAAA. Such impairments did not fit well into the former definition of disability under the ADA. The new regulations also clarify that the determination of whether an impairment substantially limits a major life activity must be made without consideration of the ameliorative effects of mitigating measures, such as medication or hearing aids.

The only explicit change made by the ADAAA to the ADA's statutory provisions regarding reasonable accommodation was a clarification that employers need not accommodate individuals "regarded as" having a qualified impairment.[3] The requirement that employers provide reasonable accommodation to the known limitations of a qualified individual with a disability, unless to do so would create an undue hardship, remains the same.[4]

By making it easier for individuals to bring ADA claims for discrimination on the basis of disability, the ADAAA has increased the number of individuals entitled to request and receive reasonable accommodation.[5] In an early ADAAA case, *Jenkins v. National Board of Medical Examiners*, the Sixth Circuit acknowledged that the broader "categorical threshold scope of the ADA's coverage . . . heightens the importance of the district courts' responsibility to fashion appropriate accommodations."[6]

The Washington Law Against Discrimination has always defined "disability" more broadly than federal law. For example, temporary conditions were covered under the WLAD and, unlike the ADA, the WLAD did not expressly current drug use, homosexuality, bisexuality, transvestism, transsexualism, pedophilia and gender identify disorders. While the definition of disability under Washington law remains broader in certain respects than the ADA, the ADAAA brings the definitions more closely in line.

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[3] ADA Amendments Act of 2008, Pub. L. No. 110–325, § 6(a)(1)(h), 122 Stat 3553, 3558 (2008).

[4] *See Sanchez v. Dep't of Energy*, 2011 WL 5902484, at *163 n.5 (M.S.P.B. Nov. 22, 2011) (noting that because the ADAAA did not change the statutory provision regarding reasonable accommodation, the ADAAA and its implementing regulations did not affect the outcome of the case).

[5] The expected increase in accommodation requests will impact employers financially, but according to the EEOC's final regulatory impact analysis, about half of requested reasonable accommodations under the ADAAA will have little or no cost. Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 76 Fed. Reg. 16977, 16992 (March 25, 2011).

[6] 2009 WL 331638, at *4 (6th Cir. Feb. 11, 2009).

Numerous ADA cases were previously disposed of on the question of disability. With the expanded definition in place, more cases will now turn on whether or not the employer complied with its duty to engage in the interactive process to reasonably accommodate the employee.[7] The EEOC's regulations implementing the ADAAA acknowledge that Congress intended this change in the focus of ADA litigation.

The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.[8]

The ADAAA will thus continue to raise new issues for courts interpreting employer obligations to engage in the interactive process and the reasonableness of requested accommodations as more "failure to accommodate" cases are brought under the amended Act.[9]

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[7] Despite the expanded definition of disability, some courts have declined to consider failure-to-accommodate claims in the early stages of ADAAA litigation, finding that the plaintiff did not meet the initial burden to show disability. *See, e.g., Brtalik v. S. Huntington Union Free Sch. Dist.*, 2012 WL 748748, at *4 (E.D.N.Y. Mar. 8, 2012) (finding that an "attempt to characterize a routine, diagnostic, out-patient procedure, or any related minor discomfort, as a disability within the meaning of the ADA is simply absurd," referring to an employee's assertion that his request for light duty work during recovery from a colonoscopy was a request for reasonable accommodation under the ADA); *Brandon v. O'Mara*, 2011 WL 4478492, at *7 (S.D.N.Y. Sept. 28, 2011) ("Congress undoubtedly intended to broaden the scope of the ADA beyond the boundaries recognized in *Toyota,* [but] it remains the case that 'not every impairment will constitute a disability....'") (*citing* 29 C.F .R. § 1630.2(j)(1)(ii)); and *Curley v. City of N. Las Vegas*, 2012 WL 1439060, at *3 (D. Nev. Apr. 25, 2012) (3% whole person impairment for Tinnitus was not "substantially limiting" impairment).

[8] 29 C.F.R. § 1630.1 (2011).

[9] A number of cases cited in this overview do not explicitly state that they arise under the ADAAA or the ADA "as amended." However, most courts agree that the ADAAA applies to events arising after January 1, 2009. *See, e.g., Becerril v. Pima County Assessor's Office,* 587 F.3d 1162, 1164 (9th Cir. 2009) (relying on pre-amendment ADA, because Congress did not intend the ADAAA to have retroactive effect); *Wega v. Ctr. for Disability Rights, Inc.*, 395 F. App'x 782, 784 n.1 (2d Cir. 2010) (same); *Fredricksen v. United Parcel Serv. Co.*, 581 F.3d 516, 521 n.1 (7th Cir. 2009) (same); *Milholland v. Sumner County Bd. of Educ.*, 569 F.3d 562, 565 (6th Cir. 2009) (same); *EEOC v. Agro Distrib., LLC*, 555 F.3d 462, 469 n.8 (5th Cir. 2009) (same). For purposes of this analysis, unless otherwise stated, it is assumed that courts using the terms "ADA" or "Americans with Disabilities Act" in cases regarding events that occurred after the ADAAA was enacted are applying the ADA as amended rather than the original version of the statute. *See Diaz v. City of Philadelphia*, 2012 WL 1657866, at *14 n.24 (E.D. Pa. May 10, 2012) (applying the ADAAA because, although "events that preceded January 1, 2009 provide the background for Plaintiff's claim," "it is clear that Plaintiff's ADA claim involves events which post-date the ADAAA" and form the "core" of plaintiff's ADA claim), and *Jones v.*

I. Relevant Law.

a. 42 U.S.C. § 12112. Discrimination.

(a) General rule
No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction
As used in subsection (a) of this section, the term "discriminate against a qualified individual on the basis of disability" includes
(5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

b. 42 U.S.C. § 12111. Definitions

(8) Qualified individual
The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation
The term "reasonable accommodation" may include
(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the

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Nationwide Life Ins. Co., 847 F. Supp. 2d 218, 223 (D. Mass. 2012), *aff'd* 696 F. 3d 78 (1st Cir. 2012) (determinative date of when cause of action under the ADA accrues may be when notice of termination is given or when refusal to accommodate first occurs, and this same construction should be applied to the ADAAA).

provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

c. 29 C.F.R. § 1630.2(o)[10]

(1) The term reasonable accommodation means:
(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or
(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2) Reasonable accommodation may include but is not limited to:
(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

(4) A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the "actual disability" prong (paragraph (g)(1)(i) of this section), or "record of" prong (paragraph (g)(1)(ii) of this section), but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the "regarded as" prong (paragraph (g)(1)(iii) of this section).

[10] *See also* 29 C.F.R. Pt. 1630, App. § 1630.2(o), §1630.9 (2011) (providing interpretive guidance).

d. RCW § 49.60.040(7)(a)

(7)(a) "Disability" means the presence of a sensory, mental, or physical impairment that:
(i) Is medically cognizable or diagnosable; or
(ii) Exists as a record or history; or
(iii) Is perceived to exist whether or not it exists in fact.
(b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.
(c) For purposes of this definition, "impairment" includes, but is not limited to:
(i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or
(ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
(d) Only for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process to exist in fact and:
(i) The impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or conditions of employment; or
(ii) The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.

e. OAR 839-006-0205

(1) "Disability" means:

(a) A physical or mental impairment that substantially limits one or more major life activities of the individual.

(b) A record of having a physical or mental impairment that substantially limits one or more major life activities of the individual. An individual has a record of having a physical or mental impairment if the individual has a history of, or has

been misclassified as having, a physical or mental impairment that substantially limits one or more major life activities of the individual.

(c) A physical or mental impairment that the individual is regarded as having.

(A) An individual is regarded as having a physical or mental impairment if the individual has been subjected to an action prohibited under ORS 659A.112 to 659A.139 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 of the individual.

(B) An individual is not regarded as having a physical or mental impairment if the individual has an impairment that is minor and that has an actual or expected duration of six months or less.

The Oregon legislature has stated explicitly that the law protecting disabled individuals in the workplace "shall be construed to the extent possible in a manner that is consistent with any similar provision of the federal Americans With Disabilities Act of 1990, as amended." ORS 659A.139.

Section II – When Must the Employer Start to Engage? - A Practical Approach

As noted previously, the Americans with Disabilities Act Amendments Act (ADAAA) became effective January 1, 2009, and its final regulations became effective in March 2011. Prior to the adoption of the ADAAA, many employers spent an exorbitant amount of time, energy and resources on assessing whether an applicant's or employee's impairment meets the legal definition of a disability under the ADA. The ADAAA changes this. By broadening the definition of "disability," the ADAAA effectively shifts the focus from whether an employee or an applicant is actually "disabled" under the Act to whether that individual can be accommodated. The practical implications of this shift are that savvy employers are not focused on determining whether a "disability" exists, as defined by the Act. Instead, they now focus their resources squarely on whether they can "reasonably accommodate" the *known* "disabilities" of their applicants and employees within the parameters of the workplace.[11] In essence, this allows an employer to focus what it knows – its workplace.

I. When is the Employer on Notice of the Need to Engage in Attempts at Helping a Disabled Employee?

Under the ADAAA, an employer must provide a reasonable accommodation to known [or obvious] physical or mental limitations of a qualified individual with a disability, unless it can show that the accommodation would impose an undue hardship.[12] Consequently, in order for the employer to fully understand its obligations under the ADAAA, it must sufficiently understand when it is legally considered "on notice" of an employee or applicant's need for assistance due to limitations caused by a medical condition such that its duty to provide a reasonable accommodation, if otherwise applicable, is triggered.

a) Employee's Duty to Notify Employer

Where the potential need for an accommodation is not obvious to an employer, the employee must put the employer on notice of the disability and need (or request) for accommodation.[13] The notice does not have to be in writing and the employee only needs to

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[11] While the ADAAA makes clear that the focus of the analysis under the ADA should not be on whether an individual has a "disability," but rather, on whether a "reasonable accommodation" is available, many practical employers focused their resources on the availability of a "reasonable accommodation" even before this clarification in the law.

[12] *EEOC v. UPS Supply Chain Solutions*, 620 F.3d 1103 (9th Cir. 2010); *see also Department of Fair Employment* and *Housing v. Lucent Technologies, Inc.* 642 F.3d 728, 744 (9th Cir. 2011); *Leicht v. Hawaiian Airlines, Inc.*, 15 Fed. Appx. 552, 554 (9th Cir. 2001) (*citing Barnett v. U.S. Air, Inc.*, 228 F.3d 1105,114 (9th Cir.2000), *vac'd on other grounds,* 535 U.S. 391 (2002)) (under ADA, if employee cannot make request for accommodation for disability and company knows of existence of employee's disability, employer must assist in initiating interactive process).

[13] *McElwee v. County of Orange*, 700 F.3d 635 (2nd Cir. 2012)(Post-ADAAA); *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1112 (9th Cir. 2000) (stating "the interactive process is a mandatory rather than a permissive obligation on the part of employers under the ADA and … is triggered

make the request in "plain English" – there are no specific buzz-words or phrases (e.g., "ADA," "disability," "reasonable accommodation," etc.) to trigger the notice on the employer – but the employee must link the request for accommodation to a medical condition.[14] The EEOC provides the following examples:

- An employee asks for time off because he is "depressed and stressed."[15]
- An employee tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of medical treatments I'm undergoing."[16]
- An employee tells his supervisor, "I need six weeks off to get treatment for a back problem."[17]

In all of the above examples, the employee provided sufficient notice to the employer because the employee (1) notified the employer of the need for accommodation and (2) tied that need for accommodation to a medical condition. Importantly, however, in the above examples, it is unlikely that the employees provided the employers with enough information to demonstrate that

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by an employee or an employee's representative giving notice of the employee's disability and the desire for accommodation"),*vac'd on other grounds*, 535 U.S. 391 (2002); *see also Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 315 (3rd Cir. 1999) (holding that the employer's duty to engage in the interactive process is triggered "[o]nce the employer knows of the disability and the employee's desire for accommodations").

[14] *Taylor*, 184 F.3d at 313 (stating that courts are primarily concerned that "the employee or a representative for the employee provides the employer with enough information that, under the circumstances, the employer can be fairly said to know of the disability and the desire for accommodation."); *Stephenson v. United Airlines, Inc.*, 9 Fed.Appx 760 (9th Cir. 2001) (under the ADA, employer is obligated to engage in an interactive process with employees when an employee requests an accommodation for a disability or if the employer recognizes that an accommodation is necessary; employee's request need not take any particular form or invoke magic words to be effective.); *EEOC v Sears*, 417 F.3d 789 (7th Cir. 2005) (noting, "it is sufficient to notify the employer that the employee may have a disability that requires accommodation."); *Barnett*, 228 F.3d at 1112 (stating, "[a]n employee requesting a reasonable accommodation should inform the employer of the need for adjustment due to a medical condition …").

[15] EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, EEOC Notice Number 915.002, March 25, 1997 ("Enforcement Guidance"), Question 17, Example A. *Kobus v. College of St. Scholastica*, 608 F.3d 1034 (8th Cir. 2010); *Wolski v. City of Erie*, 773 F. Supp. 2d 577 (W.D. Penn. 2011); *Weaving v. City of Hillsboro*, 2012 WL 526425 (D. Or. Feb. 16, 2012).

[16] EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Notice Number 915.002, rev. Oct. 17, 2002 ("Enforcement Guidance – Undue Hardship"), Question 1, Example A. The Enforcement Guidance – Undue Hardship has still been referenced by courts in Post-ADAAA cases. *See McElwee v. County of Orange*, 700 F.3d 635, 644 (2nd Cir. 2012) (citations omitted).

[17] Enforcement Guidance – Undue Hardship, Question 1, Example B.

a reasonable accommodation is absolutely required – they simply provided sufficient notice to the employers that an accommodation *may be* necessary. Thus, the employer must delve deeper into the circumstances through "interactive process" – a topic that is discussed in Section III of this article.[18]

b) The Requested Accommodation Must be to Address Impairments Resulting from a Disability

When the employee does not link the need for accommodation to a medical condition it is less likely that the employer had sufficient notice to trigger the duty to engage in an interactive process under the ADA. The EEOC provides the following examples of such situations:

- An employee asks to take a few days off to rest after the completion of a major project.[19]

- An employee tells his supervisor that he would like a new chair because his present one is uncomfortable.[20]

According to the EEOC, it is unlikely that either of the above examples would constitute sufficient notice to the employer because the employee does not tie the request for accommodation to a medical condition.

[18] The "interactive process" is the process through which an employer consults the employee to determine the nature and extent of the limitations on an employee's ability to work as a result of the medical condition at issue and whether a reasonable accommodation may be facilitated without undue hardship on the employer. (Of course, an employer also would not be required to accommodate an employee in a way that would result in a direct threat of harm to the employee or others.) The failure by the employer to engage in the interactive process with the employee at this critical stage amounts to a *per se* violation of the ADA, which may result in compensatory damages (e.g., wage loss and mental anguish) and/or punitive damages. *See Gregor v. Polar Semiconductor, Inc.*, 2013 WL 588743 at *4 (citing *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 950 (8th Cir. 1999) for the proposition that "the failure of an employer to engage in an interactive process to determine whether accommodations are available is *prima facie* evidence that the employer may be acting in bad faith"); *Palacios v. Continental Airlines*, 2013 WL 499866 at *2 (S.D. Tex. Feb. 11, 2013) (citing *Griffen v. United Parcel Serv., Inc.*, 661 F.3d 216, 224 (5th Cir. 2011)) (commenting that when an employer's unwillingness to engage in a good faith interactive process leads to a failure to reasonably accommodate an employee, the employer violates the ADA); *Bowman v. St. Luke's Quakertown Hospital*, 2012 WL 6527402 at * 4 (E.D. Pa., Dec. 13, 2012) (noting the phrase "'(f)ailure to accommodate' includes both refusing to provide an employee with a proposed accommodation and failing to engage in an interactive process after the employee requested an accommodation") (citation omitted). The interactive process and the issues related thereto are addressed, in detail, in Section III of this article.

[19] Enforcement Guidance, Question 17, Example C.

[20] Enforcement Guidance – Undue Hardship, Question 1, Example D.

c) Causal Connection

Case law also suggests that some level of specificity is required for an employer to be on notice of the link between a medical condition and a request for accommodation.[21] For example, in one case an insurance representative was required to pass a certification exam within a certain period of time as a condition of his employment.[22] The employee consistently put off taking the exam, in part due to an injury, and failed the exam a number of times. Within a few days of the expiration of the deadline to pass the exam, the employee notified his employer that his a medical condition was making it difficult for him to pass the exam – stating, his "recent medical condition and treatment impacted [him] more than [he] would care to admit" and further stated that his "aggressive treatment," including high doses of morphine and oxycodine, had "drastically hindered [his] academic ability" – and asked for an extension. The employer denied the request. The employee brought suit, alleging, among other things, that his employer failed to engage in the interactive process and failed to reasonably accommodate his medical condition, a nerve disorder. In ruling in favor of the employer, the court found that because the emails sent by the employee never made mention of the nerve disorder, but, instead, simply referenced his medications and pain therapy without drawing a connection between the two, the employer was not on notice of the employee's medical condition so as to trigger the employer's obligation to engage in interactive process and provide a reasonable accommodation.

d) Washington State Law – Duty Arises on Notice of a Condition that Interferes with Work

Under Washington law, it is well-settled that the employer is on notice once it knows of a condition that interferes with the employee's ability to work.[23] In one case decided by the 9th Circuit (interpreting Washington law) an employer argued that it was not on notice of the employee's need for accommodation because the employee told the employer that he would notify the employer "when his condition deteriorated to the point where he could no longer do his job."[24] The employer argued that this statement meant the employee wanted to stay in his current position until he notified the employer of his inability to perform that job. The court

[21] *Hughes v. Southern New Hampshire Services, Inc*., 2012 WL 5904949 at *4 (D. New Hamp. Nov. 26, 2012) (Pre- and Post-ADAAA) (citing *Jones v. Nationwide Life Insurance Company*, 696 F.3d 78 (1st Cir. 2012)).

[22] *Jones v. Nationwide Life Insurance Company*, 696 F.3d 78 (1st Cir. 2012).

[23] *Martini v. Boeing Co.*, 945 P.2d 248, 256 (Wa.Ct.App 1997) (under Washington law knowledge of some level of depression and anxiety was sufficient notice to employer to investigate further into the nature and impact of the disability).

[24] *Downey v. Crowley Marine Services, Inc.*, 236 F.3d 1019, 1023 (9th Cir. 2001) (employer's duty under Washington law to accommodate employee was triggered by notice that employee's multiple sclerosis (MS) interfered with his ability to perform his job as marine operations engineer, notwithstanding employee's failure to formally request an accommodation; once employer knew that employee's condition interfered with his ability to work in that position, it had the duty to identify available jobs that employee could perform and to help employee apply for those jobs) (decided on summary judgment; Pre-ADAAA).

found otherwise. The court ruled that the employer had a duty to begin the interactive process by identifying available jobs that the employee could perform.[25]

e) Obvious Medical Conditions

It is not necessary that the employee state the medical condition when it is otherwise obvious. By way of example, the EEOC provides a hypothetical situation where a new employee in a wheelchair requests a different desk because his wheelchair does not fit under the desk that he is currently using.[26] In such a situation, the medical condition is obvious to the employer – at least to the extent that the employee needs a wheelchair – and that condition is tied to the need for a different desk as a need for an accommodation. Similarly, in a case out of the Seventh Circuit, a court found that where the employer knew of the employee's mental illness from previous episodes, the employer was effectively on notice of the employee's mental illness such that when subsequent episodes (including the episode at issue) arose, the employer had a duty to engage in an interactive process to determine whether accommodations were available.[27] In addition, the court found that – even though the employer did not receive the letter from the employee's doctor requesting an accommodation until after it made the decision to terminate him – "[a] few hours' tardiness should not be the reason for cutting off the interactive process and cutting off a person's rights under the ADA."[28] The court further stated, "[e]ven though the letter came after [the employer] decided to fire him, [the employer] could have used the opportunity it presented to reconsider the decision to terminate his employment …."[29] According to the Seventh Circuit Court of Appeals, "an employer cannot shield itself from liability by

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[25] *Id.*

[26] Enforcement Guidance – Undue Hardship, Question 1, Example C; *see also, Department of Fair Employment and Housing v. Lucent Technologies, Inc.* 642 F.3d 728, 744 (9th Cir. 2011) (California Fair Employment and Housing Act (FEHA) affords disabled employee a right to a reasonable accommodation by employer, regardless of whether employee specifically sought accommodation); *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002) (*citing Barnett v. U.S. Air, Inc.*, 228 F.3d 1105,112 (9th Cir. 2000), *vac'd on other grounds*, 535 U.S. 391 (2002)) (once job applicant requests accommodation for disability, or employer recognizes that applicant needs an accommodation but cannot request it because of a disability, employer must engage in an interactive process with applicant to determine the appropriate reasonable accommodation)(citation omitted); *Leicht v. Hawaiian Airlines, Inc.*, 15 Fed. Appx. 552, 554 (9th Cir. 2001) (*citing Barnett v. U.S. Air, Inc.*, 228 F.3d 1105,114 (9th Cir.2000), *vac'd on other grounds*, 535 U.S. 391 (2002)) (under ADA, if employee cannot make request for accommodation for disability and company knows of existence of employee's disability, employer must assist in initiating interactive process).

[27] *Bultemeyer v. Fort Wayne Comm. Schs.*, 100 F.3d 1281, 1285-86 (7th Cir.1996) (noting "if it appears that the employee may need an accommodation but doesn't know how to ask for it, the employer should do what it can to help."); *see also Walsted v. Woodbury County*, 113 F.Supp.2d 1318, 1337 (N.D. Iowa Sept. 25, 2000) (finding an employee's mental disability to be known or otherwise obvious to the employer; the employee survived summary judgment).

[28] *Id*. at 1286.

[29] *Id*.

choosing not to follow up on an employee's requests for assistance, or by intentionally remaining in the dark." *EEOC v. Sears*, 417 F. 3d 789, 804 (7th Cir. 2005).[30]

f) Notice by Third-Parties

Information received from third-parties is sometimes overlooked by employers when determining whether their duty to engage in the interactive process is triggered. Such an oversight could be devastating. That is, an employer may be put on notice of the potential need for an accommodation by someone other than the individual who has the impairment. The request for accommodation may come from the employee herself or from third parties (e.g., a family member, friend, coworker, health professional, etc.). The EEOC provides the following example:

- An employee submits a note from a health professional stating that he is having a stress reaction and needs a week off. Subsequently, his wife telephones the Human Resources Department to say that the employee is disoriented and mentally falling apart and that the family is having him hospitalized. The wife asks about procedures for extending the employee's leave and states that she will provide the necessary information as soon as possible but that she may need a little time.[31]

In another example, a court held that a return-to-work release from a health care provider stating that the employee is able to perform the essential functions of the job with reasonable accommodation is sufficient to trigger notice to the employer.[32] At that point, the practical

[30] *See also, Department of Fair Employment and Housing v. Lucent Technologies, Inc.* 642 F.3d 728, 744 (9th Cir. 2011) (California Fair Employment and Housing Act (FEHA) affords disabled employee a right to a reasonable accommodation by employer, regardless of whether employee specifically sought accommodation); *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002) (citing *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105,112 (9th Cir. 2000), *rev'd on other grounds,* 535 U.S. 391 (2002)) (once job applicant requests accommodation for disability, or employer recognizes that applicant needs an accommodation but cannot request it because of a disability, employer must engage in an interactive process with applicant to determine the appropriate reasonable accommodation)(citation omitted); *Leicht v. Hawaiian Airlines, Inc.*, 15 Fed. Appx. 552, 554 (9th Cir. 2001) (*citing Barnett v. U.S. Air, Inc.*, 228 F.3d 1105,114 (9th Cir.2000), *rev'd on other grounds,* 535 U.S. 391 (2002)) (under ADA, if employee cannot make request for accommodation for disability and company knows of existence of employee's disability, employer must assist in initiating interactive process).

[31] Enforcement Guidance, Question 17, Example B; *Rowe v. City & County of San Francisco*, 186 F.Supp. 2d 1047 (finding that the employer was on notice of the employee's medical condition, which triggered the employer's duty to engage in interactive process, at a minimum, when the employer received a note from the employee's third-party doctor") (citations omitted); Hoan v. Wells Fargo Bank, NA, 724 F.Supp. 2d 1094 (D. Or. June 29, 2010) (finding a doctor's note triggered notice on the employer, though the employee was responsible for the breakdown in the interactive process).

[32] Ferguson v. Wal-Mart Stores, Inc., 114 F.Supp.2d 1057, 1068 (2000).

employer should engage the employee to determine what, if any, reasonable accommodations are available for the employee.

II. Conclusion About "Notice"

Post-ADAAA, employers should not spend their time and resources on determining whether or not an individual is disabled. Instead, employers should focus on whether or not they can reasonably accommodate the individual. Generally, it is up to the employee (or their representative) to put the employer on notice of a disability and need for an accommodation, but an employer may be considered "on notice" when a medical condition and the need for accommodation is otherwise obvious. When the employer is on notice of a potential disability or need for an accommodation, the employer should act immediately by engaging in the interactive process, as set forth in more detail in Section III hereof.

Section III: The Interactive Process and Reasonable Accommodation Under the ADAAA.

Once on notice of an employee's need for a reasonable accommodation, an employer has an affirmative duty to engage in an interactive process to explore possible methods of reasonable accommodation.[33] In the wake of the ADAAA, one of the issues that courts will continue to grapple with is the question of what actions or communications are required to constitute a legally satisfactory interactive process.

a) Basic Requirements

The EEOC's interpretive guidelines provide that: "Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability."[34] Good faith engagement in this process is a requirement for employers to avoid liability, unless no reasonable accommodation could have resulted from the process.[35]

The interactive process requires "(1) direct communication between the employer and employee to explore in good faith the possible accommodations; (2) consideration of the employee's requests; and (3) offering an accommodation that is reasonable and effective."[36] In the Ninth Circuit, if a plaintiff has requested an accommodation that could *plausibly* enable her to perform the essential functions of her job, the employer's obligations to engage in the interactive process are triggered.[37]

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[33] *Humphrey v. Mem'l Hospitals Ass'n*, 239 F.3d 1128, 1137-38 (9th Cir. 2001) (pre-ADAAA case).

[34] 29 C.F.R. § 1630, App. § 1630.9 at 359.

[35] *See Emch v. Superior Air-Ground Ambulance Serv. of Michigan, Inc.*, 2012 WL 4090794, at *13 (E.D. Mich. Sept. 17, 2012) ("Even though the interactive process is not described in the [ADA's] text, the interactive process is mandatory, and both parties have a duty to participate in good faith." (*quoting Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 871 (6th Cir. 2007))); and *Eldredge v. City of St. Paul*, 809 F. Supp. 2d 1011, 1034 (D. Minn. 2011) ("Although the employer's failure to engage in the process does not amount to a per se finding of liability, such failure can be considered prima facie evidence of bad faith"). *See also Jones*, 696 F.3d at 91 ("[L]iability for failure to engage in an interactive process 'depends on a finding that, had a good faith interactive process occurred, the parties could have found a reasonable accommodation that would enable the disabled person to perform the job's essential functions.'" (*quoting Kvorjak v. Maine*, 259 F.3d 48, 52 (1st Cir. 2001))).

[36] *EEOC v. UPS Supply Chain Solutions*, 620 F.3d 1103, 1110 (9th Cir. 2010); *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1114-15(9th Cir. 2000) (en banc), *vacated on other grounds,* 535 U.S. 391 (2002).

[37] *Humphrey*, 239 F.3d at 1136.

The regulations provide that an employer should analyze the job and determine purpose and essential functions, consult with the employee to ascertain precise job-related limitations imposed by the disability and how the limitations can be overcome with reasonable accommodation, identify potential accommodations and assess effectiveness together with the employee, and consider the employee's preference in selecting accommodation.[38] Notably, the EEOC's interpretive guidance to the amended regulations focuses on a cooperative determination of the precise *limitations* stemming from the employee's disability, not an employer's need for extensive knowledge about the details of the disability itself.[39]

There are resources available to aid in the process of identifying those accommodations that might be appropriate in light of the employee's condition and particular job duties. For example, the Job Accommodation Network (JAN) is a free service offered by the U.S. Department of Labor's Office of Disability Employment Policy and the leading source of guidance in workplace accommodations. JAN's website (www.askjan.org) provides helpful general information for both employers and employees and also allows users to search by disability to find information about typical symptoms and common accommodations.

The reasonable accommodation offered by the employer need not be the employee's requested or preferred accommodation, and the employer may take into account cost and ease of providing the accommodation in choosing between several effective reasonable accommodations to offer the employee.[40] However, if the employer views the employee's requested accommodation as too burdensome, the employer should offer the employee available alternatives.[41]

The employer's duty to accommodate is a "continuing duty that is not exhausted by one effort," which requires the employer to continue cooperatively problem-solving with the employee to find accommodations that "really work" if initial accommodations fail.[42] This continuing duty has been a point of emphasis in Ninth Circuit cases.[43] Where there is no

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[38] 29 C.F.R. § 1630, App. § 1630.9 at 359.
[39] *See* 29 C.F.R. Pt. 1630, App. § 1630.9.
[40] *UPS Supply Chain Solutions*, 620 F.3d at 1110-11 (*citing* Interpretive Guidance on Title I of the Americans with Disabilities Act, 56 Fed. Reg. 35,726-01, 35,749 (July 26, 1991)).
[41] *Barnett*, 228 F.3d 1105, 1115 (9th Cir. 2001) (en banc), *vacated on other grounds,* 535 U.S. 391 (2002).
[42] *UPS Supply Chain Solutions*, 620 F.3d at 1111.
[43] *See, e.g., Humphrey*, 239 F.3d at 1138 (employee's "attempt to perform her job functions by means of a less drastic accommodation does not forfeit her right to a more substantial one upon the failure of the initial effort"); *UPS Supply Chain Solutions*, 620 F.3d at 1112 (an employer's awareness that an initial accommodation is failing may be enough to continue the employer's duty to accommodate, even if the employee does not explicitly request another accommodation); *Wiederhold v. Sears, Roebuck & Co.*, 2012 WL 3643847, at *14-15 (D. Or. Aug. 23, 2012) (case arising under the ADAAA) (plaintiff raised question of fact about whether Sears had complied with its "continuing duty" to accommodate the plaintiff, who suffered from bone spurs, bursitis, and tendonitis, when better communication between the parties may have prevented plaintiff's resignation).

objective standard by which to measure an accommodation's effectiveness (such as a doctor's time- or weight-based restrictions), the continuing interactive process is especially important, and multiple accommodations should be attempted if initial effectiveness is unclear.[44]

Where the need for an accommodation is not obvious, an employer may require an individual to provide documentation of a need before the employer is obligated to accommodate the need. A reasonable accommodation is "connected to what the employer knows about the employee's precise limitations," and the evidence the employer receives limits what the employer knows.[45] In *Core v. Champaign County Board of County Commissioners*, the employer's conversations with the employee's nurse and subsequent actions based on the nurse's "best recommendation" (notifying other staff about the employee's sensitivity to perfume, allowing employee to work shorter days and providing her with her own office and bathroom) constituted sufficient participation in the interactive process, even though the employee had requested a "fragrance-free workplace" or telecommuting accommodation, which the court found unreasonable.[46] In *Conlon v. City & County of Denver, Colorado*, the employee alleged a failure to accommodate after receiving a negative work review for absenteeism, to which the employer responded by asking for an indication that part time work was medically necessary. The plaintiff's claim failed at the summary judgment stage because he had previously submitted evidence of his ability to work full time and he did not provide any evidence responsive to the employer's request to show that this ability had changed, despite his frequent absences from work.[47]

However, an employee's failure to provide specifically-requested information does not always mean that the employee has not met his or her duty to engage in the process. If the employer and employee engage in an ongoing information exchange, and the employee during that exchange provides the employer with a request for accommodation and information to assist the employer in its determination of reasonableness and undue hardship, the fact that an employee's replies are not always directly responsive to employer requests will not be dispositive.[48]

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[44] *Frisino v. Seattle Sch. Dist. No. 1*, 249 P.3d 1044, 1051 (Wash. App. 2011), *review denied*, 259 P.3d 1109 (Wash. 2011) (pre-ADAAA case arising under the Washington Law Against Discrimination, RCW 49.60) (holding the clean up of mold was not objective standard to address employee's multiple sensitivities to irritants).

[45] *Dentice v. Farmers Ins. Exch.*, 2012 WL 2504046, at *18 (E.D. Wis. June 28, 2012) (quoting *Ekstrand v. Sch. Dist. of Somerset*, 583 F.3d 972, 976 (7th Cir. 2009)).

[46] 2012 WL 4959444, at *10 (S.D. Ohio Oct. 17, 2012).

[47] 2013 WL 143453, at *4-6 (D. Colo. Jan. 14, 2013).

[48] *See Dentice*, 2012 WL 2504046, at *19 (holding a reasonable jury could find that the employee was not responsible for communication breakdown when employee had provided information about the specific voice activated software requested, doctors' opinions, and other information regarding his carpal tunnel and tendonitis).

(b) The Employer's Obligation to Act in Good Faith

Courts will consider whether an employer has made a good faith attempt to provide reasonable accommodation in deciding whether the employer's obligations to engage in the interactive process have been met.[49] In the Ninth Circuit, a plaintiff cannot prevail on a claim that the employer acted in subjective bad faith "without linking some rejection of a requested accommodation to bad faith or showing how an accommodation refused was reasonable on its face."[50]

Evidence that the employer was acting in good faith may include evidence that the employer was:

- Readily meeting with the employee, discussing any reasonable accommodations, and suggesting other possible positions for the employee.[51]
- Communicating with the employee, requesting information about limitations, asking about the employee's desired accommodation, and discussing alternative accommodations if the desired accommodation is too burdensome.[52]
- Proposing counter accommodations.[53]
- Engaging in a "flexible give-and-take" to help the employee determine what accommodation would enable the employee to continue working.[54]

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[49] *See Diaz v. City of Philadelphia*, 2012 WL 1657866, at *11 (E.D. Pa. May 10, 2012) (the interactive process "requires nothing more than that 'employers make a good-faith effort to seek accommodations.'" (*quoting Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 187 (3d Cir. 2009)); *Eldredge v. City of St. Paul*, 809 F. Supp. 2d 1011, 1034 (D. Minn. 2011) (to demonstrate that an employer failed to participate in the interactive process, the employee must prove both that the employer did not make a good faith effort to assist the employee in seeking accommodation and that the employee could have been reasonably accommodated but for the employer's lack of good faith).

[50] *Lucke v. Multnomah County*, 365 Fed. Appx. 793, 794 (9th Cir. Feb. 12, 2010) (unpublished opinion).

[51] *Emch v. Superior Air-Ground Ambulance Serv. of Michigan, Inc.*, 2012 WL 4090794, at *14 (E.D. Mich. Sept. 17, 2012) (private ambulance service entitled to summary judgment based upon evidence that, while denying EMT's initial request of regular, frequent meal breaks due to undue hardship, it proposed numerous reasonable alternatives and repeatedly met with the employee to seek a solution. It was the employee who caused the interactive process to break down by refusing all alternative proposals, often for arbitrary reasons)(*citing Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 203 (6th Cir. 2010), *cert. denied*, —— U.S. ——, 131 S. Ct. 3071 (2011)).

[52] *Mills v. Temple Univ.*, 869 F. Supp. 2d 609, 624 (E.D. Pa. 2012) (holding that summary judgment improper because employer cannot establish that it acted in good faith in offering a secretary whose back condition limited her ability to lift extended unpaid leave in lieu of her requested accommodation, which would have required only modest change in a minor aspect of her job) (*citing Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 317 (3d Cir. 1999)).

[53] *Emch*, 2012 WL 4090794, at *14 (*citing Jakubowski*, 627 F.3d at 203).

[54] *Conlon v. City & County of Denver, Colo.*, 2013 WL 143453, at *4 (D. Colo. Jan. 14, 2013) (finding that employee's claim that employer failed to engage in the interactive process in good

- "Showing at least 'some sign of having considered the employee's request.'"[55]

An employer does not necessarily demonstrate bad faith when:

- The employer refuses to propose additional counter-accommodations after the employee turns down reasonable accommodations offered because of preference for a different accommodation.[56]
- The employer places the employee on medical leave while actively considering other long-term solutions to accommodate employee's limitations.[57]
- The employer does not discuss alternative accommodations with the employee after the employer grants the employee's requested accommodation.[58]
- The employer stops engaging in the interactive process once an employee's condition renders her completely unable to work.[59]
- The employer relies on the opinion of a medical professional in determining that the employee's requested accommodation is not necessary.[60]

An employer may be demonstrating bad faith when:

- The employer delays engaging in the interactive process.[61]
- The employer indicates a willingness to consider an accommodation, but impliedly conditions any reasonable accommodation on improved performance.[62]

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faith fails as a matter of law because the employer invited the employee to request accommodation and engaged in the interactive process once the employee had provided medical verification support his request to work part-time) (*citing EEOC v. Sears Roebuck & Co*., 417 F.3d 789, 805 (7th Cir. 2005)).

[55] *Fleck v. Wilmac Corp.*, 2012 WL 1033472, at *9 (E.D. Pa. Mar. 27, 2012).

[56] *Emch*, 2012 WL 4090794, at *16.

[57] *Linebarger v. Honda of Am. Mfg., Inc.*, 870 F. Supp. 2d 513, 521-22 (S.D. Ohio 2012) (court concludes that failure to accommodate claim brought by assembly-line worker whose hypertension medication caused him to urinate frequently fails as a matter of law where employer placed the employee on medical leave while at the same time proposing a more frequent break schedule and other options to address employee's needs. The employee was found responsible for the breakdown in the interactive process because he did not give the facially reasonable accommodation proposal a chance).

[58] *Unangst v. Dual Temp Co., Inc.*, 2012 WL 931130, at *8 (E.D. Pa. Mar. 19, 2012).

[59] *Teague v. Nw. Mem'l Hosp*., 836 F. Supp. 2d 727, 730 (N.D. Ill. 2011), *aff'd*, No. 11–3630, 2012 WL 3608619 (7th Cir. Aug. 23, 2012).

[60] *Rodriguez v. Atria Sr. Living Group, Inc.*, 2012 WL 3457718, at *6 (S.D.N.Y. Aug. 13, 2012).

[61] *Linder v. Potter*, 2009 WL 2595552 (E.D. Wash. Aug. 18, 2009) (court implies that delay in commencing the interactive process is potentially more unreasonable than delays that might occur after the employer formally engaged in the interactive process and denies summary judgment because jury could conclude that five-month delay in engaging in the interactive process was unreasonable).

[62] *Goonan v. Fed. Reserve Bank of New York*, 2013 WL 69196, at *8-9 (S.D.N.Y. Jan. 7, 2013) ("[D]enial of an accommodation on the ground that a non-accommodated, disabled employee is experiencing performance inadequacies turns the rationale for the ADA's rule of reasonable accommodation on its head").

- The employer forces the employee onto unpaid medical leave until the employee can return to work without restrictions, instead of considering at-work accommodations.[63]
- The employer misconstrues the employee's request; for example, by failing to acknowledge the limited scope of the request in determining the employee's ability to perform an essential function with accommodation.

(c) Responsibility for Breakdown in the Interactive Process

Both the employer and the employee have duties to engage in the interactive process, so when it breaks down, courts must attempt to isolate the cause of the breakdown and assign responsibility, which will determine liability.[64] This means that an employee-plaintiff must present evidence showing that the employee attempted to engage in an interactive communication process with the company to determine a reasonable accommodation and that the employer was responsible for any breakdown that occurred in that process.[65]

An employee may be responsible for the breakdown if:

- The employee resigns after a meeting held to discuss an accommodation request at which assurances were made that the employer would process the request.[66]
- The employee fails to follow through with the formal accommodation request requirements of an institution, such as providing information necessary to determine what accommodations might be required.[67]
- The employee does not respond to the employer's request for further medical information when the employer has an objectively reasonable concern that placing the employee in a certain job position would constitute a direct threat to the employee's safety.[68]

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[63] *Molina v. DSI Renal, Inc.*, 840 F. Supp. 2d 984, 1003-04 (W.D. Tex. 2012) (court finds issue of fact exists as to whether employer dialysis clinic acted in good faith in attempting to identify a reasonable accommodation where it required CMA suffering from back pain to take involuntary FMLA rather than considering accommodation for her lifting restrictions, which it had accommodated in the past). *See also EEOC v. Roadrunner Redi-Mix Inc., CIV* No. 1:11-00873 JCH/WPL (D.N.M. 2011) (employee immediately sent home on unpaid leave and eventually terminated after requesting accommodation); *McGregor v. Nat'l R.R. Passenger Corp.*, 187 F.3d 1113, 1116 (9th Cir. 1999) (pre-ADAAA case) ("100% healed" policies are *per se* violations of the ADA because they substitute a fully-healed determination for the required case-by-case assessment of whether a qualified individual can perform his or her job with or without accommodation).

[64] *Dentice v. Farmers Ins. Exch.*, 2012 WL 2504046, at *18 (E.D. Wis. June 28, 2012) (citing EEOC v. Sears Roebuck & Co., 417 F.3d at 797 and *Ekstrand*, 583 F.3d at 976).

[65] *Id.*

[66] *Aulisio v. Baystate Health Sys., Inc.*, 2012 WL 3947738, at *7 (D. Mass. Sept. 7, 2012).

[67] *Bar-Meir v. Univ. of Minnesota*, 2012 WL 2402849, at *6 (D. Minn. June 26, 2012); *Hoppe v. Lewis Univ.*, 692 F.3d 833, 840 (7th Cir. 2012), *reh'g denied* (Sept. 24, 2012).

[68] *Cleveland v. Mueller Cooper Tube Co., Inc.*, 2012 WL 1192125, at *7 (N.D. Miss. Apr. 10, 2012).

- The employee does not identify a reasonable accommodation which would permit her to perform her essential job functions, and rejects out of hand offered accommodations such as alternative positions identified by the employer.[69]

An employer may be responsible for the breakdown if:

- The employer offers an accommodation that is ineffective in light of the particular circumstances or unresponsive to the specific accommodations requested by the employee, without further addressing the employee's concerns, even if the employee does not try out the proposed accommodations.[70]
- The employer preemptively terminates the employee before an accommodation can be considered or recommended.[71]
- The employer does not accommodate the employee on the theory that an employer is not required to reassign essential duties, if the essential functions of the position are disputed.[72]
- The employer fails to engage in the interactive process because an employee made a verbal rather than a written request for accommodation.[73]

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[69] *Chin-McKenzie v. Continuum Health Partners*, 876 F. Supp. 2d 270, 292-93 (S.D.N.Y. 2012) (hospital employee with severe allergies and food sensitivities failed to identify any accommodation that would have permitted her to perform the essential functions of her job that was not provided by the employer; to the contrary employer "vigorously attempted" to identify means of accommodating her condition).

[70] *See Chapa v. Floresville Indep. Sch. Dist.*, 2012 WL 3062781, at *12 (W.D. Tex. July 26, 2012) (employer asserted that it allowed plaintiff short breaks to rest her knee while working at janitorial job, but plaintiff had requested specific accommodation of light duty, with no stairs or lifting over 20 pounds, per her doctor's recommendations) and *Goonan v. Fed. Reserve Bank of New York*, 2013 WL 69196, at *5-9 (S.D.N.Y. Jan. 7, 2013) (*citing EEOC v. UPS Supply Chain Solutions*, 620 F.3d 1103, 1110 (9th Cir. 2010) (Federal Reserve denied telecommuting accommodation to survivor of 2001 World Trade Center attacks who had to walk past Ground Zero to get to new office, triggering flashbacks, extreme anxiety, and depression. Holding that a reasonable juror could find that the employer, not the employee, had cut off the interactive process, the court stated, "Ineffective modifications are . . . not accommodations," and "In light of the Fed's warning that it would not contemplate alternative accommodations, or would consider them only after improved performance, Plaintiff's decision to forgo an inadequate parade of advanced light fixtures, soothing soundtracks, windowless desks, and micro-managed assignments hardly constituted bad faith"). *But see Linebarger v. Honda of Am. Mfg., Inc.*, 870 F. Supp. 2d 513, 522 (S.D. Ohio 2012) (where alternative accommodation is facially reasonable, plaintiff's failure to "give the . . . proposal a chance" is "fatal to his failure to accommodate claim").

[71] *Chapa*, 2012 WL 3062781, at *12 (*citing Cutrera v. Bd. of Sup'rs of Louisiana State Univ.*, 429 F.3d 108, 113 (5th Cir. 2005)).

[72] *Barlow v. Walgreen Co.*, 2012 WL 868807, at *7 (M.D. Fla. Mar. 14, 2012).

[73] *Pearce-Mato v. Shinseki*, 2012 WL 2116533, at *11-12 (W.D. Pa. June 11, 2012).

(d) How Far Must the Employer Go to Reasonably Accommodate?

It appears the pendulum has swung materially in the last 10+ years regarding what is a reasonable effort by employers to accommodate. Case law suggests courts expect employers to aggressively pursue reasonable accommodation. Consider the follow sample cases:

- The Ninth Circuit has led the way regarding the employer's obligations to reasonably accommodate. As one example, in *Downey v. Crowley Marine Services, Inc.*, 236 F.3d 1019, applying Washington law, the court determined the employer's duty to accommodate the employee was triggered by notice that the employee's multiple sclerosis (MS) interfered with his ability to perform his job as a marine operations engineer, notwithstanding the employee's failure to formally request an accommodation. Once the employer knew that the employee's condition interfered with his ability to work in that position, it had the duty to identify available jobs that the employee could perform and to help the employee apply for those jobs. *Id.* (emphasis added).

- In *EEOC v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012), the Seventh Circuit expressly overruled a decision it had issued in 2002 to make clear that employers' efforts regarding accommodation are more demanding than they were in 2000. In overruling *EEOC v. Humiston-Keeling*, 227 F.3d 1024 (7th Cir. 2000), and deferring to the Supreme Court's reasoning in *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), the court changed its interpretation of the ADA. This is a remarkable shift from a traditionally very employer-oriented circuit court. It reasoned:

> The case turns on the meaning of the word reassignment." The ADA includes "reassignment to a vacant position" as a possible "reasonable accommodation" for disabled employees. 42 U.S.C.§ 12111(9). The EEOC contends that "reassignment" under the ADA requires employers to appoint employees who are losing their current positions due to disability to a vacant position for which they are qualified. However, this court has already held in *Humiston-Keeling*, 227 F.3d at 1029, that the ADA has no such requirement. The EEOC argues that the Supreme Court's ruling in *Barnett*, 535 U.S. at 391, undermines *Humiston-Keeling*. Several courts in this circuit have relied on *Humiston-Keeling* in post-*Barnett* opinions, though it appears that these courts did not conduct a detailed analysis of *Humiston- Keeling*'s continued vitality. The present case offers us the opportunity to correct this continuing error in our jurisprudence. While we understand that this may be a close question, we now make clear that *Humiston- Keeling* did not survive *Barnett*. We reverse and hold that the ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to that employer. We remand with

> instructions that the district court determine if mandatory reassignment would be reasonable in the run of cases and if there are fact-specific considerations particular to United's employment system that would render mandatory reassignment unreasonable in this case.[74]

- In *U.S. Airways, Inc. v. Barnett* , the Supreme Court stated that an accommodation allowing a disabled worker to violate a rule that other employees must obey "cannot, *in and of itself*, automatically show that the accommodation is not 'reasonable.'"[75] Instead, there is a two-step review to assess if an accommodation is reasonable: (1) the employee must show that the accommodation in question would normally be reasonable; and (2) then, the burden of proof shifts to the employer to show special circumstances demonstrating that allowing the accommodation would be an "undue hardship." While the Court notes that, ordinarily, the ADA does not require reassignment in contravention of an established seniority system, the Court leaves open the possibility that the plaintiff might be able to establish that special circumstances exist rendering the requested accommodation "reasonable" in light of the particular facts.[76] In *Barnett*, the Court determined violating the seniority system in question was not ordinarily reasonable, so there was no inquiry on the undue burden issue.

[74] 693 F.3d at 761 (emphasis added) *Petition for Certiorari Filed*, 81 USLW 3340 (Dec 06, 2012) (NO. 12-707).
[75] 535 U.S. 391, 398 (2002).
[76] *Id.* at 405-06.

Section IV: "Regarded As" Issues Under the ADAAA – a Guide for the Practical Employer

Post ADAAA, "Regarded As" Disability Claims Are Easier for Employees

In addition to protecting individuals with a known disability or a record of a disability, the ADAAA also protects individuals who are "regarded as" having a disability – even if the individual does not actually have a disability. The purpose of the "regarded as" section of the ADA is to "combat 'archaic attitudes, erroneous perceptions, and myths' working to the disadvantage of the disabled or perceived disabled."[77] To that end, an individual is "regarded as" disabled under the ADAAA if the individual establishes she was subjected to an action prohibited by the Act (e.g., failure to hire, demotion, refusal to promote, termination, etc.) based on the employer's *belief* that the employee has an actual or perceived physical or mental impairment that is not transitory and minor, whether or not the impairment limits or is perceived to limit a major life activity.[78]

Coverage under the "regarded as" prong of the definition of disability is not intended to be difficult to establish.[79] One case – which analyzes "regarded as" claims pre- and post–ADAAA – makes this point quite clear. In that case, the employer allegedly perceived its employee as disabled prior to the effective date of the ADAAA, and that perception continued well after the effective date. The court separated the employee's "regarded as" claims and the associated conduct that fell before the effective date (pre-ADAAA) from that which occurred after (post-ADAAA).[80] In so doing, the court held that the employee failed to establish that his impairment was (or was perceived as being) "substantially limiting" as applied to the claims arising prior to the effective date of the ADAAA, but found there was sufficient evidence for the employee to satisfy the lesser, post-ADAAA standard for the claims that involved events occurring after the effective date of the ADAAA.[81]

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[77] *Ryan v. Columbus Regional Healthcare System, Inc.*, 2012 WL 1230234 at *8 (E.D. N.C., April 12, 2012) (quoting *Brunko v. Mercury Hosp*., 260 F.3d 939, 942 (8th Cir. 2001)).

[78] ADAAA § 3(3)(A); 29 C.F.R. § 1630.2(l)(1); *Davis v. NYC Dept. of Education*, 2012 WL 139255 (E.D.N.Y. Jan. 18, 2012) (declining to dismiss an employee's claim even though the impairment appeared to be transitory, because it was not apparent from the complaint that the impairment was also minor).

[79] 29. C.F.R. 1630.2(l).

[80] *Gaus v. Norfolk Southern Rv. Co.*, 2011 WL 4527359 (W.D. Pa. Sept. 28, 2011) (denying summary judgment on the post-ADAAAA "regarded as" claims, while granting summary judgment on the pre-ADAAA "regarded as" claims).

[81] *Id*. at *19 (stating that the employer's reliance on the "substantially limited" language relating to post-ADAAA conduct "misses the mark.")

a. The Employer's Motivation Controls

Courts determining whether an employee was "regarded as" disabled focus on the employer's motivation (i.e., the reasoning behind the employer's actions).[82] An employer may be liable for action taken against an employee it regards as disabled even if the employer can establish an alternative facially-legitimate reason for its action. For example, in one case, where an employee was terminated for failure to report time off, the court found that even though the employer had a legitimate reason for terminating the employee (her failure to report time off), the fact that the employer likely only looked at the employee's records because of her perceived disability could be evidence sufficient to support a "regarded as" disability discrimination claim.[83] This can be viewed as an unusual result, but the court's directive is clear – an employer may not avoid "regarded as" liability by simply "papering the file" of an employee it perceives as disabled, especially if the reason they "paper the file" can be attributed to the perceived disability.

In a federal district court case out of Washington, an employee with a diagnosed bipolar disorder was allegedly terminated for using the obscene language on a form.[84] On summary judgment in the ensuing lawsuit brought by the employee, the employer argued against "regarded as" liability on the basis that the supervisor who fired the employee did not know of his bipolar disorder. In determining whether the employee was "regarded as" disabled, the court found that the fact that "[g]iven that the Human Resources termination form … references [the employee's] bipolar disorder and Human Resources had to approve his termination, the Court finds triable questions of fact exist as to whether information about [the employee's] bipolar disorder was relayed to the other supervisors." (citations omitted) The court also found that the employee's use of the [f-word] could be found to be conduct perceived to result from his "regarded as" disability.[85]

i. Actions of Employer Provide Evidence of Motivation

The actions of the employer toward an employee may be evidence of the employer's motives and regarding that employee as disabled:

- In one case, the court looked at the employer's statements to and about an employee – that she "hears a voice," telling her to see a doctor, and ordering her

[82] *See Gil v. Vortex*, 2010 WL 1131642 (D. Mass. Mar. 25, 2010) (declining to dismiss the employee's regarded as disability claim related to the employee's blindness in one eye in that the employee set forth sufficient facts to establish that the employer thought he was disabled and terminated him as a result).

[83] *Hastings v. Papillion-LaVista School Dist.*, 780 F. Supp. 2d 958 (D. Neb. Jan. 25, 2011) (decided on motion for summary judgment; pre-ADAAA).

[84] *EEOC v. Cottonwood Financial Washington, LLC*, 2010 WL 5300555 (E.D. Wa. Dec. 20, 2010).

[85] *Id*. at *10. (citing *Gambini v. Total Rental Care Inc.*, 486 F.3d 1087, 1093-94 (9th Cir. 2007)).

to go to counseling or else be fired – and found that these facts were sufficient to plausibly allege that the employer regarded the employee as having a mental illness.[86]

- In a federal district court case out of Virginia, the court found sufficient evidence the employer regarded an employee suffering from visual field blindness as disabled because the employer insisted she was completely unable to work as a result of her vision problem and further required her to apply for disability leave.[87]

- In a federal district court case out of Ohio, a plaintiff underwent gall bladder removal surgery and was prescribed several medications, the side effects of which caused the employee to exhibit erratic behavior in the workplace. The employee was suspended without pay, and, when she returned to work, she was not reinstated to her same unit. In her suit for discrimination based on the "regarded as" prong of the ADAAA, the court found that the employer's reasons for not reinstating her – its fear that she would repeat the behavior – was direct evidence that the failure to reinstate was "because of" plaintiff's actual or perceived impairment.[88]

b. "Transitory and Minor" – A Defense for Employers?

An employer may show that the respective impairment is "transitory and minor" as a defense to "regarded as" coverage.[89] The ADAAA provides that a perceived disability is transitory when it has an actual or expected duration of six months or less,[90] but does not offer a definition of "minor" and, thus, leaves that issue for decision on a case-by-case basis. The following cases shed some light what is not "minor" for as the term is beginning to be interpreted by the courts:

- In a federal district court case out of Maryland, the court found that a blood disorder that the individual had since his adolescence, as alleged, is "more than minor" and was sufficient to support a claim under the "regarded as" prong of the ADAAA.[91]

[86] *Kagawa v. First Hawaiian Bank/Bancwest Corporation*, 819 F. Supp. 2d 1125 (D. Haw. May 4, 2011) (decided on a motion to dismiss; pre-ADAAA).
[87] *Chamberlain v. Valley Health System, Inc*., 2011 WL 560777 (W.D. Va. Feb. 8, 2011).
[88] *Wells v. Cincinnati Children's Hospital Medical Center*, 2012 WL 510913 (S.D. Ohio Feb. 15, 2012).
[89] 29. C.F.R. § 1630.15(f).
[90] ADAAA § 3(3)(A).
[91] *LaPier v. Prince George's County*, 2012 WL 1552780 (D. Md. April 27, 2012) (decided on a motion to dismiss; post-ADAAA)

- In another federal district court case out of Tennessee, in finding that an iron overload condition is not per se "minor" in accordance with the ADAAA, the court interpreted the term "minor" to mean something like a cold or the flu.[92]

- In a federal district court case out of New York, the court found that spine, shoulder and back injuries from a car accident, which caused the employee to be out of work for only three months, may be transitory (because they only lasted three months), but may not be minor.[93]

- Another court found that a hernia that caused an employee to be out of work for two weeks was not necessarily minor.[94]

While it is clear that courts are interpreting the phrase "transitory and minor" tightly – meaning, it is difficult for employers to establish that an impairment is transitory and minor – there are a number of instances where the court has made such a finding:

- In a case out of the Sixth Circuit, the court found that an employee's leg injury resulting from an automobile accident is transitory and minor because the restrictions that were placed upon him were only expected to last a month or two.[95]

- In a federal district court case out of Florida, the court rejected the contentions of four employees that they were "regarded as" disabled by their employer because they were terminated due to their perceived fear that their lives were in danger because of workplace robberies.[96] The court explained that "[a]lthough [the employees'] concern for their safety is not taken lightly, to the extent it constituted an impairment, that impairment was at most minor."[97]

- In another federal district court case out of Arizona, the court granted employer's motion to dismiss finding that neck and back injuries resulting from an automobile accident, on which the employee based his "regarded as" claim, were transitory and minor because he was cleared to return to work in just over three months.[98] However, it is important to note that it is possible that the court

[92] *Saley v. Caney Fork, LLC*, 886 F. Supp.2d 837 (M.D. Tenn. Aug. 10, 2012) (decided on summary judgment; post-ADAAA).
[93] *Davis v. NYC Department of Education*, 2012 WL 139255 (E.D.N.Y. Jan. 18, 2012) (decided on a motion to dismiss; post-ADAAA).
[94] *Davis v. Vermont Dept. of Corrections*, 868 F.Supp.2d 313 (D. Vt. April 16, 2012) (decided on a motion to dismiss; post-ADAAA); 29 C.F.R. § 1630.15(f) (noting that an employee may be "regarded as" having a disability "even if the employer subjectively believes that the employee's disorder is transitory and minor").
[95] *White v. Interstate Distributor Co.*, 2011 WL 3677976 (6th Cir. Aug. 23, 2011).
[96] *Wallner v. MHV Sonics, Inc.*, 2011 WL 5358749 (M.D. Fla. Nov. 4, 2011).
[97] *Id*. at *5.
[98] *Dugay v. Complete Skycap Services, Inc.*, 2011 WL 3159171 (D. Ariz. July 26, 2011).

misapplied the law in this case because it viewed the fact that the injuries were "transitory" (less that 6 months) as an absolute bar to liability without considering whether they were also minor.[99]

c. Objective Standard

The determination of whether a perceived impairment is transitory and minor is analyzed objectively – meaning the key is whether the respective impairment is *actually* transitory and minor – such that what the employer subjectively believes is not factored into the analysis.[100] For example, in a recent case, the court analyzed whether an employee with swine flu – a disease that was widely considered to be more dangerous than it actually was – could be regarded as having a disability by his employer even though the disease is actually both transitory and minor.[101] The court found that the question of whether a perceived impairment is transitory and minor should be viewed on an objective basis and "[b]ecause swine flu is both transitory and minor, it is not a disability under the 'regarded as' prong of the ADA."[102]

d. The Impairment Does not Have to be Substantially Limiting

Prior to the adoption and implementation of the ADAAA, courts generally required an individual who alleged they were "regarded as" having a disability to establish their claim in one of two ways: (1) that a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities.[103] The ADAAA explicitly changes this requirement. Now, under the ADAAA, "[a]n individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under [the ADAAA] because of an actual or perceived impairment whether or not the impairment limits or is perceived to limit a major life activity."[104]

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[99] *Id*. at *4. (stating that "the statute provides an absolute bar to liability for 'regarded as' impairments of six months or less …").

[100] 29 C.F.R. § 1630.15(f) (stating "[a] covered entity may not defeat 'regarded as' coverage of an individual simply by demonstrating that it subjectively believed the plaintiff's impairment was transitory and minor"); *see also, Saley*, 886 F. Supp.2d 837.

[101] *Valdez v. Minnesota Quarries, Inc*., 2012 WL 6112846 (D. Minn. Dec. 10, 2012) (decided on summary judgment; post-ADAAA).

[102] *Id*. at *9 (citations omitted).

[103] *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, 798 (9th Cir. 2001) (citing *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 489 (1999) and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002)).

[104] ADAAA § 3(3)(B).

e. No Duty to Accommodate

Unlike in cases where there is a known disability or a record of disability, the ADAAA makes clear that an employer has no duty to accommodate an individual who is "regarded as" having a disability.[105] Although the ADAAA resolves a prior circuit split in codifying that there is no duty to accommodate a "regarded as" disability, this does not change the established law in the Ninth Circuit.[106]

f. Warning Relating to "Regarded As" Claims – it is Dicey for the Employer!

When an employer is communicating with an employee on interactive process and reasonable accommodation issues, an employee may successfully argue that the employer's conduct shows the employer regards the employee as suffering from an impairment that is not transitory and minor (e.g., discussions about the nature of a medical condition, whether the employee is "disabled" or the issue of a direct threat of harm). The more the employer focuses on the ways to help the employee perform, rather than whatever medical condition from which the employee suffers, the less chance the employer has of losing a "regarded as" disability discrimination case.

[105] ADAAA § 6(h).

[106] *See Kaplan v. City of North Las Vegas*, 323 F.3d 1226, 1232 (9th Cir. 2003) (holding, "[t]o require accommodation for those not truly disabled would compel employers to waste resources unnecessarily, when the employers' limited resources would be better spent assisting those persons who are actually disabled and are in genuine need of accommodation to perform to their potential").