

The Challenge of Mental Health and Impairment in the Workplace: Compassion, Accommodation, and Discipline¹

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

Thomas E. Marshall
Engelmeier & Umanah, P.A.
12 South Sixth Street, Suite 1230
Minneapolis, MN 55402
(612) 455-7732
www.e-ulaw.com

Sheila Engelmeier, 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.

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Introduction

Disabilities arising from mental illness present a major issue for the American workforce. Although exact numbers are impossible to ascertain, the National Alliance on Mental Health estimates that nearly 58 million Americans – one adult out of every four – experience a mental health impairment in a given year, while approximately one out of every 17 Americans lives with a serious mental illness like schizophrenia or bipolar disorder.² Mental ailments often amount to legally-recognized disabilities – indeed, mental impairments have been a part of the Americans with Disabilities Act (ADA) since Congress adopted the law in 1990. This broad category of disability presents some unique challenges for employers. For example, mental illnesses may be harder to recognize than physical ones; they may go undiagnosed or unnoticed even by the employees themselves for years. Additionally, when properly recognized, employers face uniquely difficult issues when it comes to accommodating, disciplining and terminating a disabled employee suffering from mental illness or a mental health impairment.

This article examines these challenges under the ADA, select state laws and more. To effectively navigate this treacherous area, employers must be familiar with each of these statutory frameworks, and mindful of a plan to avoid running afoul of any of them. This article discusses three basic issues particularly germane to helping and handling employees who have or may have a mental health disability.

I. Employer notice of employee disability issues in the mental health context and the "regarded as" conundrum.

As an initial matter, employers must understand when their legal obligations to a disabled employee begin. Although the law generally anticipates that the employee will inform their employer of a health problem that may affect job performance, some courts have found that the employer is put on notice simply by certain circumstances, triggering their obligations (and liability) under the law.³

² Beth Loy, *Accommodation and Compliance Series: Employees With Mental Health Impairments*, JOB ACCOMMODATION NETWORK, <http://askjan.org/media/Psychiatric.html> (last visited Mar. 13, 2014).

³ 29 C.F.R. § 1630.9 (a) (“It is unlawful for a covered entity not to make reasonable accommodation to the *known* physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.” (emphasis added); *But see Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296 (3d Cir. 1999), *on remand at* 113 F. Supp. 2d 770 (E.D. Pa. 2000) (School district had a duty to begin interactive process to find accommodation for mentally ill teacher because of the performance issues her illness caused).

A. ADA Basics⁴

Although this article discusses mental illness issues through the lenses of a variety of statutory schemes, we begin with the ADA because it is the most important, the most pervasive, and the most influential.

As a practical matter, the ADA applies to employers who in any way engage in interstate activity. With respect to "size" limitations, its provisions apply to employers who employ 15 or more employees 20 weeks of the calendar year (current or preceding).⁵ The ADA protects qualified disabled employees from discrimination in two basic ways; (1) by prohibiting differential treatment of disabled employees; and (2) by imposing an affirmative duty to reasonably accommodate a qualified employee with a disability, unless doing so would impose an undue hardship on the employer.⁶

Absent direct evidence of discrimination, the initial measuring stick for differential treatment is the same *prima facie* case applicable in any employment discrimination matter. The employee must show: (1) she/he is **disabled**; (2) she/he suffered **adverse employment action**; (3) she/he is a "**qualified individual**"; and (4) non-disabled employees are not subject to such adverse employment action (as a result, a court can infer discrimination).⁷

The ADA contains three separate definitions of "disability." Under the law an individual is disabled if she/he has "a physical or mental impairment that substantially limits one or more major life activities"⁸; has a record of such an impairment;⁹ or is "regarded as" having such an impairment.¹⁰

Traditionally, an "adverse employment action" consists of a discipline, termination of employment, demotion or similar action by an employer. For example, an employee who was reassigned to a more stressful job with additional duties did not experience "adverse employment action."¹¹ Changes in the employee's position must cause a materially significant disadvantage to the employee, such as a change in title, salary or benefits.¹²

Under the ADA, a qualified individual with a disability is a person who can perform the essential functions of the position with or without reasonable accommodation.¹³ The term "essential functions" includes only the fundamental duties of the job, and does not include the

⁴ Portions of this article are taken/adapted from an excellent article by Dana Sullivan, Sheila Engelmeier and their colleagues from the 2013 Pacific Coast Labor and Employment conference, titled *Navigating Post-ADAAA Employment Relationships: The Interactive Process, Reasonable Accommodation, And The Regarded-As Dilemma*. Thanks, Dana, for allowing us to repeat some of that great work here.

⁵ 42 U.S.C. §12111(5); 29 C.F.R. 1630.2(e).

⁶ 42 U.S.C. §12112(a); 42 U.S.C. §12112(b)(5)(A).

⁷ *McDonnell Douglas v. Green*, 411 U.S. 792 (1973); *Price v. S-B Power Tool*, 75 F.3d 362, 365 (8th Cir.), cert. denied, 117 S.Ct. 274 (1996); *Aucutt v. Six Flags Over MidAmerica*, 85 F.3d 1311, 1318 (8th Cir. 1996).

⁸ 42 U.S.C. § 12102(1)(A).

⁹ 42 U.S.C. § 12102(1)(B).

¹⁰ 42 U.S.C. § 12102(1)(C).

¹¹ *Harlston v. McDonnell Douglas Co.*, 37 F.3d 379 (8th Cir. 1994).

¹² *Id.*

¹³ 29 C.F.R. § 1630.2(m).

marginal functions of the position.¹⁴ Functions might be essential if the position exists to perform them, if only a limited number of employees can perform them, or if they are highly specialized.¹⁵ Once the obligation is appropriately triggered (as discussed below), both the disabled employee and his or her employer are expected to engage in a good faith interactive process to identify what accommodation will be reasonable and appropriate.¹⁶

B. Major Changes Under the ADAAA

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 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 any physical or mental impairment that substantially limits a major bodily function (including brain function¹⁷) may now be considered a disability under the ADAAA. Such impairments, due to court decisions limiting the application of the law, did not fit well into the pre-ADAAA definition of disability. 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,¹⁸ psychotherapy or behavioral therapy.¹⁹ In addition, an impairment that is episodic or in remission is still considered a disability if it substantially limits a major life activity when active. Examples of mental health disorders that fall into this category include major depressive disorder, bipolar disorder, posttraumatic stress disorder, obsessive compulsive disorder and schizophrenia.²⁰ 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.²¹

1. 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.”²² 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

¹⁴ 29 C.F.R. § 1630.2(n).

¹⁵ 29 C.F.R. § 1630.2(n)(2)(i-iii).

¹⁶ 29 C.F.R. § 1630.2(o)(3).

¹⁷ 29 C.F.R. § 1630.2(i)(1)(ii).

¹⁸ 29 C.F.R. § 1630.2(j)(5)(i).

¹⁹ 29 C.F.R. § 1630.2(j)(5)(v).

²⁰ 29 C.F.R. § 1630.2(j)(3)(iii).

²¹ The increase in accommodation requests impacts 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).

²² *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)).

impairment that is not transitory and minor, whether or not the impairment limits or is perceived to limit a major life activity.²³

As to reasonable accommodation, the only explicit change made by the ADAAA was a clarification that employers need not accommodate individuals “regarded as” having a qualified impairment.²⁴

Coverage under the “regarded as” prong of the definition of disability is not intended to be difficult to establish.²⁵ One case, analyzing “regarded as” claims pre- and post-ADAAA, makes this point quite clear. In that case, the employer perceived its employee as disabled prior to the effective date of the ADAAA, and that perception continued well after the ADAAA’s 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).²⁶ 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.²⁷

Mere awareness of an employee’s problems with depression may be enough to establish “regarded as” disability. In *Lizotte v. Dacotah Bank*, a plaintiff bank executive suffered from depression.²⁸ After a suicidal episode the police took custody of the executive and committed him to a psychiatric inpatient facility for four days.²⁹ His employer, the defendant bank, became aware of this event and placed the executive on leave explaining, in a letter, “the impact of [his] action in the community and on the ability to perform [his] job.”³⁰ The bank later offered him a severance package, which he accepted.³¹

Denying the bank’s motion for partial summary judgment, the district court concluded that a reasonable jury could find that the bank management regarded the executive as disabled. As evidence in support of this finding, the court noted that several employees were aware of the suicidal episode, and others were aware that he was seeking treatment for depression. Therefore,

²³ 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).

²⁴ ADA Amendments Act of 2008, Pub. L. No. 110–325, § 6(a)(1)(h), 122 Stat 3553, 3558 (2008). The requirement that employers provide reasonable accommodation to the known limitations of a qualified individual with a disability, unless doing so would create an undue hardship, remains the same. 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)

²⁵ 29 C.F.R. § 1630.2(l).

²⁶ *Gaus v. Norfolk Southern Rv. Co.*, 2011 WL 4527359 (W.D. Pa. Sept. 28, 2011) (denying summary judgment on the post-ADAAA “regarded as” claims, while granting summary judgment on the pre-ADAAA “regarded as” claims).

²⁷ *Id.* at *19 (stating that the employer’s reliance on the “substantially limited” language relating to post-ADAAA conduct “misses the mark.”)

²⁸ *Lizotte v. Dacotah Bank*, 677 F. Supp. 2d 1155 (D.N.D. 2010).

²⁹ *Id.* at 1160.

³⁰ *Id.*

³¹ *Id.*

the court reasoned, the executive established a genuine issue of material fact as to whether or not he was disabled under the ADA.

a. When Doing “the Right Thing” Goes Wrong

Sometimes an employer’s actions to handle employee complaints or even to help a struggling employee can come back to burn them. For example, in a venerable Ninth Circuit case, an employer’s efforts to help and to discipline a mentally ill employee were later used as evidence that the employer regarded him as disabled. In *Holihan v. Lucky Stores, Inc.*, the plaintiff employee was a grocery store manager who was the subject of numerous harassment complaints by his subordinates.³² The defendant employer grocery chain met several times with the employee, asking initially if he was having any personal problems and encouraging him to seek counseling; the employee denied he was having any problems and also denied the complaints about his behavior.³³ When the complaints persisted, the employer offered the employee a choice between suspension while an investigation was conducted or a leave of absence and counseling.³⁴ The employee chose to take the leave, extended it several times, and sued after the employer terminated him months later.³⁵ The district court granted summary judgment to the employer, finding that the employee was not actually disabled.³⁶

The Ninth Circuit Court of Appeals reversed. Although the court agreed that the plaintiff was not “actually disabled”, the court held that the plaintiff had presented genuine issues of material fact that the employer regarded him as disabled.³⁷ Specifically, the court cited the meetings between the two parties, and in particular the fact that the employer had strongly encouraged the employee to seek counseling as evidence that the employee was regarded as disabled.³⁸

Although *Holihan* is an older case and would likely be analyzed differently today, the same issues continue to threaten employers. Just last year, in a district court case in the Ninth Circuit, an employer’s response to a sexual harassment complaint actually ended up helping the employee who was the subject of the complaint to substantiate a claim that she was “regarded as” disabled.³⁹ The plaintiff in *Kagawa v. First Hawaiian Bank/Bancwest Corp.* was a bank teller described herself as a “mystic” and claimed to hear God’s voice directly.⁴⁰ At a bus stop on the way in to work, the teller told another employee that God told her in a dream that the employee had romantic feelings for her.⁴¹ The other employee complained that he felt harassed by the teller.⁴² The bank took the employee’s complaint seriously and initiated several meetings

³² *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362 (9th Cir. 1996).

³³ *Id.* at 364.

³⁴ *Id.*

³⁵ *Id.* at 365.

³⁶ *Id.*

³⁷ *Id.* at 366.

³⁸ *Id.* The court also cited some doctor’s notes that the employer and the employer’s insurance company received diagnosing the employee with various mental illnesses, including depression. Arguably such notice would today be considered enough to establish the employee as disabled under the any of the three definitions in the ADA.

³⁹ *Kagawa v. First Hawaiian Bank/Bancwest Corp.*, 819 F. Supp. 2d 1125 (D. Haw. 2011).

⁴⁰ *Id.* at 1126.

⁴¹ *Id.*

⁴² *Id.*

between the teller, bank management and the human resources department.⁴³ In one of the meetings, a bank manager wrote down that the teller “hears a voice” and would do whatever the voice told her to do.⁴⁴ The bank ultimately fired the teller, and the teller sued for ADA disability discrimination and several other causes of action.⁴⁵

In response to the bank’s motion to dismiss for failure to state a claim, the teller successfully argued that the manager’s notes showed the bank regarded her as disabled because it failed to take account of her belief that the voice she heard was *God’s* voice, not “just any voice.”⁴⁶ Therefore, the teller argued, the bank regarded her “like ‘some insane person.’”⁴⁷ The court sided with the teller, holding that the notes themselves as well as other elements of the bank’s disciplinary action, was enough to show that the bank regarded the teller as disabled, at least for the purposes of a motion to dismiss.⁴⁸ Thus, the bank’s arguably correct and necessary response to a legitimate harassment complaint ended up being used against them in a suit by the harassing employee.

C. An Employer’s Obligations Begin When an Impairment is Known or Obvious

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.⁴⁹ 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.

1. 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

⁴³ *Id.* at 1126-1127.

⁴⁴ *Id.* at 1129.

⁴⁵ *Id.* at 1127.

⁴⁶ *Id.* quoting Compl. ¶ 87.

⁴⁷ *Id.*

⁴⁸ *Id.* (Finding there were three grounds on which the plaintiff had plead a sufficient claim under the “regarded as” prong: “First, the Complaint alleges that the Bank ordered Kagawa to go to counseling or else be fired. *See* Compl. ¶¶ 61, 65. Second, Kagawa alleges that her manager’s report, given to the counselor (assumed to be the Bank’s agent for purposes of this motion), stated that Kagawa “hears a voice” and would do whatever the voice told her to do. Compl. ¶ 87. Kagawa alleges that this report was misleading because it failed to explain that Kagawa believed she was a mystic and could hear God’s voice. *Id.* Instead, Kagawa not unreasonably inferred, the report’s implication was that Kagawa heard “just any voice” like “some insane person.” *Id.* Third, the counselor instructed Kagawa to see a doctor, which the court understands to mean a psychiatrist or psychologist. Compl. ¶¶ 88, 90. These facts, taken together, plausibly allege that the Bank regarded Kagawa as having some kind of mental illness.”)

⁴⁹ *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).

accommodation.⁵⁰ The notice does not have to be in writing and the employee only needs to 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.⁵¹ The EEOC provides the following examples:

- An employee asks for time off because he is “depressed and stressed.”⁵²
- An employee tells her supervisor, “I’m having trouble getting to work at my scheduled starting time because of medical treatments I’m undergoing.”⁵³
- An employee tells his supervisor, “I need six weeks off to get treatment for a back problem.”⁵⁴

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 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 an “interactive process” – a topic that is discussed in Section II of this article.⁵⁵

⁵⁰ *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 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”).

⁵¹ *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 ...”).

⁵² 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) (Summary judgment for defendant affirmed where record shows no specific evidence that employee’s limitations were apparent at work, employee repeatedly declined to reveal his diagnosis to his employer, and he expressed doubt about his ability to medically confirm his diagnosis), *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).

⁵³ 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).

⁵⁴ Enforcement Guidance – Undue Hardship, Question 1, Example B.

⁵⁵ 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

2. 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.⁵⁶
- An employee tells his supervisor that he would like a new chair because his present one is uncomfortable.⁵⁷

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

3. 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.⁵⁸ For example, in one case a painter employed by a college maintenance department was experiencing problems related to depression and anxiety.⁵⁹ Although the painter requested an unspecified “mental health leave”, he repeatedly refused to identify his condition specifically and explained only that he had “knots in [his] neck and pains in [his head].”⁶⁰ The painter also expressed doubt about his ability to get confirmation of his condition from a doctor, and did not seek certification for leave under the FMLA.⁶¹ Affirming the defendant’s motion for summary judgment, the Court of Appeals for the 8th Circuit held that the threshold level of specificity to put the employer on notice was not

whether a reasonable accommodation may be facilitated without undue hardship to 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 II of this article.

⁵⁶ Enforcement Guidance, Question 17, Example C.

⁵⁷ Enforcement Guidance – Undue Hardship, Question 1, Example D.

⁵⁸ *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)).

⁵⁹ *Kobus v. College of St. Scholastica, Inc.*, 608 F.3d 1034, 1035 (8th Cir. 2010).

⁶⁰ *Id.* at 1036.

⁶¹ *Id.*

met “where the record contains no specific evidence that the painter’s limitations were apparent at work; where he repeatedly declined to reveal his diagnosis to his employer; [and] where he expressed doubt about his ability to confirm his diagnosis with a doctor...”⁶²

4. Washington State Law – Duty Arises on Notice of a Condition that Interferes with Work

Under Washington law the employer is on notice once it knows of a condition that interferes with the employee’s ability to work.⁶³ However the precise scope of the employer’s obligation is somewhat unclear. In one case an employer was found to be on notice when an employee promised that he would notify the employer “when his condition deteriorated to the point where he could no longer do his job.”⁶⁴ 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 found otherwise, ruling that despite the employee’s statement, the employer had a duty to begin the interactive process by identifying available jobs that the employee could perform.⁶⁵ On the other hand, in another case an employee failed to establish a sufficient “nexus” between her medical condition and a request for accommodation, even though she provided her employer with multiple doctors’ reports and made several inquiries about accommodation in writing.⁶⁶ Analyzing the plaintiff’s evidence, the court held, *inter alia*, that a letter asking for information about possible accommodations was not in itself a sufficiently clear request for accommodation.⁶⁷ Additionally, by the time the employer had received formal notice of the employee’s disability and need for accommodation, the employee had already quit.⁶⁸ The court allowed a jury verdict in favor of the defendant to stand.⁶⁹

5. When a Condition is Obvious

An employee does not need to formally state the medical condition to the employer when it is obvious. For example, an EEOC Guidance hypothetical describes a new employee in a wheelchair requesting a different desk because the wheelchair does not fit under the desk that he is currently using.⁷⁰ There, the medical condition is obvious to the employer as the employee is

⁶² *Id.* at 1039.

⁶³ *Martini v. Boeing Co.*, 945 P.2d 248, 256 (Wa.Ct.App 1997) (finding 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).

⁶⁴ *Downey v. Crowley Marine Services, Inc.*, 236 F.3d 1019, 1023 (9th Cir. 2001) (finding 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).

⁶⁵ *Id.*

⁶⁶ *Wahl v. Bethel Sch. Dist. No. 403*, 2005 WL 590836 (2005) (unpublished).

⁶⁷ *Id.* at *9.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ 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.

impaired such that he needs a wheelchair and that condition underlies the need for the accommodation of a different desk. In a Seventh Circuit case, when an employer knew of the employee's mental illness from previous episodes, the employer was effectively on notice of the illness such that when subsequent episodes arose, the employer had a duty to engage in an interactive process to determine whether accommodations were available.⁷¹ In addition, 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."⁷² The court added, "[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"⁷³ "[A]n employer cannot shield itself from liability by choosing not to follow up on an employee's requests for assistance, or by intentionally remaining in the dark."⁷⁴

6. Notice by Third-Parties

Employers sometimes overlook information received from third-parties when determining whether their duty to engage in the interactive process is triggered. Such an oversight could be devastating. 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:

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).

⁷¹ *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).

⁷² *Id.* at 1286.

⁷³ *Id.*

⁷⁴ *EEOC v. Sears*, 417 F. 3d 789, 804 (7th Cir. 2005); *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).

- 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.⁷⁵

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.⁷⁶ At that point, the practical employer should engage the employee to determine what, if any, reasonable accommodations are available for the employee.

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 II.

II. What Are an Employer's Obligations to Reasonably Accommodate an Employee with a Mental Health Disability?

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.⁷⁷ 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. Reasonable Accommodation and the Interactive Process: 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.”⁷⁸ Good faith engagement in this process is a

⁷⁵ 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).

⁷⁶ *Ferguson v. Wal-Mart Stores, Inc.*, 114 F.Supp.2d 1057, 1068 (E.D. Wash. 2000).

⁷⁷ *Humphrey v. Mem’l Hospitals Ass’n*, 239 F.3d 1128, 1137-38 (9th Cir. 2001) (pre-ADAAA case).

⁷⁸ 29 C.F.R. § 1630, App. § 1630.9 at 359.

requirement for employers to avoid liability, unless no reasonable accommodation could have resulted from the process.⁷⁹

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.”⁸⁰ 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.⁸¹

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.⁸² 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.⁸³

Employers have available various resources 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. These resources include accommodation suggestions specific to mental illnesses.⁸⁴

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

⁷⁹ 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))).

⁸⁰ *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).

⁸¹ *Humphrey*, 239 F.3d at 1136.

⁸² 29 C.F.R. § 1630, App. § 1630.9 at 359.

⁸³ See 29 C.F.R. 1630, App. § 1630.9.

⁸⁴ JOB ACCOMMODATION NETWORK, *Accommodation and Compliance Series: Employees with Mental Health Impairments*, <http://askjan.org/media/Psychiatric.html> (last visited Mar. 13, 2014).

to offer the employee.⁸⁵ However, if the employer views the employee's requested accommodation as too burdensome, the employer should offer the employee available alternatives.⁸⁶

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.⁸⁷ This continuing duty has been a point of emphasis in Ninth Circuit cases.⁸⁸ Where there is no 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.⁸⁹

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.⁹⁰ 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.⁹¹ 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.⁹²

⁸⁵ *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)).

⁸⁶ *Barnett*, 228 F.3d 1105, 1115 (9th Cir. 2001) (en banc), *vacated on other grounds*, 535 U.S. 391 (2002).

⁸⁷ *UPS Supply Chain Solutions*, 620 F.3d at 1111.

⁸⁸ *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).

⁸⁹ *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).

⁹⁰ *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)).

⁹¹ 2012 WL 4959444, at *10 (S.D. Ohio Oct. 17, 2012).

⁹² 2013 WL 143453, at *4-6 (D. Colo. Jan. 14, 2013).

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.⁹³

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.⁹⁴ 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."⁹⁵

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

- Readily met with the employee, discussing any reasonable accommodations, and suggesting other possible positions for the employee.⁹⁶
- Communicated 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.⁹⁷
- Proposed counter accommodations.⁹⁸
- Engaged in a "flexible give-and-take" to help the employee determine what accommodation would enable the employee to continue working.⁹⁹

⁹³ 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).

⁹⁴ 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).

⁹⁵ *Lucke v. Multnomah County*, 365 Fed. Appx. 793, 794 (9th Cir. Feb. 12, 2010) (unpublished opinion).

⁹⁶ *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)).

⁹⁷ *Mills v. Temple Univ.*, 869 F. Supp. 2d 609, 624 (E.D. Pa. 2012) (holding 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)).

⁹⁸ *Emch*, 2012 WL 4090794, at *14 (citing *Jakubowski*, 627 F.3d at 203).

- Showed “at least ‘some sign of having considered the employee’s request.’”¹⁰⁰

An employer does not necessarily demonstrate bad faith when:

- The employer refused to propose additional counter-accommodations after the employee turned down reasonable accommodations offered because of preference for a different accommodation.¹⁰¹
- The employer placed the employee on medical leave while actively considering other long-term solutions to accommodate employee’s limitations.¹⁰²
- The employer did not discuss alternative accommodations with the employee after the employer granted the employee’s requested accommodation.¹⁰³
- The employer stopped engaging in the interactive process once an employee’s condition rendered her completely unable to work.¹⁰⁴
- The employer relied on the opinion of a medical professional in determining that the employee’s requested accommodation was not necessary.¹⁰⁵

An employer may be demonstrating bad faith when:

- The employer delayed engaging in the interactive process.¹⁰⁶
- The employer indicated a willingness to consider an accommodation, but impliedly conditioned any reasonable accommodation on improved performance.¹⁰⁷
- The employer forced the employee onto unpaid medical leave until the employee could return to work without restrictions, instead of considering at-work accommodations.¹⁰⁸

⁹⁹ *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 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 to support his request to work part-time) (citing *EEOC v. Sears Roebuck & Co.*, 417 F.3d 789, 805 (7th Cir. 2005)).

¹⁰⁰ *Fleck v. Wilmac Corp.*, 2012 WL 1033472, at *9 (E.D. Pa. Mar. 27, 2012).

¹⁰¹ *Emch*, 2012 WL 4090794, at *16.

¹⁰² *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).

¹⁰³ *Unangst v. Dual Temp Co., Inc.*, 2012 WL 931130, at *8 (E.D. Pa. Mar. 19, 2012).

¹⁰⁴ *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).

¹⁰⁵ *Rodriguez v. Atria Sr. Living Group, Inc.*, 2012 WL 3457718, at *6 (S.D.N.Y. Aug. 13, 2012).

¹⁰⁶ *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).

¹⁰⁷ *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 misconstrued 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.¹⁰⁹

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.¹¹⁰ 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.¹¹¹

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.¹¹²
- 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.¹¹³
- 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.¹¹⁴

¹⁰⁸ *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).

¹⁰⁹ *Eldredge*, 809 F. Supp. 2d at 1035 (plaintiff requested the use of a magnifying glass when needed to read small print in his firefighting job; defendants contended that plaintiff sought to use a magnifying glass in order to see everything around him).

¹¹⁰ *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).

¹¹¹ *Id.*

¹¹² *Aulisio v. Baystate Health Sys., Inc.*, 2012 WL 3947738, at *7 (D. Mass. Sept. 7, 2012).

¹¹³ *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).

¹¹⁴ *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.¹¹⁵

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.¹¹⁶
- The employer preemptively terminates the employee before an accommodation can be considered or recommended.¹¹⁷
- 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.¹¹⁸
- The employer fails to engage in the interactive process because an employee made a verbal rather than a written request for accommodation.¹¹⁹

D. When Employees Pose a “Direct Threat” to Safety

Under certain circumstances the ADA allows employers to require that a disabled employee not pose a “direct threat” to the health and safety of others (or themselves) in the workplace.¹²⁰ The “direct threat” provision functions as a defense and most courts view it as the employer's burden to prove.¹²¹ While many direct threat cases focus on situations where the

¹¹⁵ *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).

¹¹⁶ *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”).

¹¹⁷ *Chapa*, 2012 WL 3062781, at *12 (citing *Cutrer v. Bd. of Sup'rs of Louisiana State Univ.*, 429 F.3d 108, 113 (5th Cir. 2005)).

¹¹⁸ *Barlow v. Walgreen Co.*, 2012 WL 868807, at *7 (M.D. Fla. Mar. 14, 2012).

¹¹⁹ *Pearce-Mato v. Shinseki*, 2012 WL 2116533, at *11-12 (W.D. Pa. June 11, 2012).

¹²⁰ 42 U.S.C. § 12113 (a-b).

¹²¹ *See for example EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 571 (8th Cir. 2007).

employee's disability poses an incidental threat to others (for example by leading to accidents, or by causing an inability to perform essential job functions safely) the issue can also arise in situations where employers are concerned that a mentally ill employee might harm themselves, commit suicide or act out violently on the job.¹²²

The ADA allows employers to maintain qualification standards, job-selection criteria and tests that may operate to exclude the disabled, but only so as long as the employer can show that the standards are job-related, consistent with business necessity and that performance cannot be achieved with reasonable accommodation.¹²³ One such qualification standard the law specifically allows is a requirement that an individual "not pose a direct threat to the health or safety of other individuals in the workplace."¹²⁴ Federal regulations implementing the law are more precise; the CFR defines a "direct threat" as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."¹²⁵ An alleged direct threat is to be determined based on "an individualized assessment of the individual's present ability to safely perform the essential functions of the job" including "a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."¹²⁶ The factors to be considered include (1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm."¹²⁷

Threats of violence, mass shootings and suicide can all indicate that a mentally ill individual poses a direct threat. *Stebbins v. University of Arkansas* concerned a student at the University of Arkansas who suffered from Asperger's Syndrome, intermittent explosive disorder and other mental impairments.¹²⁸ The student was expelled after making several offensive, profanity-laced statements to school officials; among many transgressions, the student threatened suicide, and threatened that if he did not get his medication, "there could be another Virginia Tech incident."¹²⁹ Multiple school officials became concerned that the student posed a serious threat; the student was suspended and ultimately subjected to a criminal trespass warning.¹³⁰ The student sued, alleging that the school's refusal to re-enroll him was a violation of Section 504 of the Rehabilitation Act.¹³¹

¹²² The "direct threat" concept traces its origins to a Rehabilitation Act case called *Sch. Bd. of Nassau County, Florida v. Arline*, 480 U.S. 273 (1987) in which the plaintiff teacher had a history of recurring tuberculosis and was discharged because of the defendant school board's fear that she would transmit her disease to children in the classroom. In considering her Rehabilitation Act claim, the Supreme Court interpreted the Act not to require the hiring of a person who posed "a significant risk of communicating an infectious disease to others," but held that the Act did protect individuals who did not pose an objectively demonstrable risk from "deprivations based on prejudice, stereotypes, or unfounded fear." When the ADA was enacted, it codified and broadened the "direct threat" concept.

¹²³ 42 U.S.C. § 12113(a).

¹²⁴ 42 U.S.C. § 12113(b).

¹²⁵ 29 C.F.R. § 1630.2(r).

¹²⁶ *Id.*

¹²⁷ *Id.* at 1-4.

¹²⁸ 2012 BL 341202, *9 (W.D. Ark. Dec. 28, 2012).

¹²⁹ *Id.* at *4.

¹³⁰ *Id.* at *6.

¹³¹ *Id.* at *1.

Finding for the defendant, the court held that even if the plaintiff had established a prima facie case of disability discrimination, he could not prevail because the school had proved that the student posed a direct threat under all four factors.¹³² As to the nature of the risk, the court found that the plaintiff's "Virginia Tech" statement went "far beyond" tactlessness; the court noted that the defendant was not required to prove that an actual threat was made, but rather that "those who heard his statements reasonably believed a threat was made."¹³³ Next, as to the duration of the risk, the court found that it could not be ascertained, but that school administrators had noted a pattern of behavior that seemed unlikely to improve.¹³⁴ Furthermore, the court found that the risk was severe because the plaintiff potentially endangered the lives of everyone on campus.¹³⁵ Finally, as to the probability of the risk, the court found that it was reasonable for the defendant to believe that there was a significant probability that the plaintiff would carry out his threats.¹³⁶

Messages by email and Facebook may raise genuine issues of material fact on the question of direct threat. In *Peer v. F5 Networks, Inc.* the defendant technology company knew the plaintiff employee was being treated for depression.¹³⁷ In a Facebook message, the employee told a manager that she was having suicidal thoughts; later, she posted a note to her Facebook profile saying that her job felt "like a war zone" and that she "immediately started puking" upon arriving to work in the morning.¹³⁸ Denying cross motions for summary judgment, the district court held that the plaintiff's suicidal comments on and via Facebook had established genuine issues of material fact over whether or not the employee represented a direct threat.¹³⁹ The court explained that neither party was entitled to judgment as a matter of law because the direct threat question is "precisely the sort of genuine issue that can only be resolved by the trier of fact."¹⁴⁰

III. What Must an Employer Be Careful About in Considering Discipline of an Employee with a Mental Illness or Mental Health Impairment?

Just because an employee suffers from a disability does not mean that they are immune from any disciplinary action or termination. However, there exist a number of issues that employers should be aware of, when it comes to applying disciplinary rules and avoiding later claims of reprisal particularly when dealing with employees with mental illness and mental health disabilities. This section will begin by explaining the basics of disciplining and terminating a non-performing employee with a disability. Next, we will discuss issues of reprisal in the disability context. Finally, we will look at emerging workplace issues related to the newly quasi-legal status of marijuana in Washington, Colorado and elsewhere.

¹³² *Id.* at *8-9.

¹³³ *Id.* at *9.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ 2012 BL 78533, 25 AD Cases 1727, (W.D. Wash., 2012).

¹³⁸ *Id.*

¹³⁹ *Id.* at *5-6.

¹⁴⁰ *Id.*

A. Disciplining a Non-Performing Disabled Employee

Under the ADA, employers are expected to apply the same performance and conduct standards to disabled and non-disabled employees alike.¹⁴¹ However a disciplinary action must be job-related, consistent with business necessity and applied to all employees.¹⁴² According to the EEOC, determining whether or not a conduct rule is “job-related and consistent with business necessity” depends on several factors, including “including the manifestation or symptom of a disability affecting an employee’s conduct, the frequency of occurrences, the nature of the job, the specific conduct at issue, and the working environment.”¹⁴³ The EEOC notes that “[t]hese factors may be especially critical when the violation concerns ‘disruptive’ behavior which, unlike prohibitions on stealing or violence, is more ambiguous concerning exactly what type of conduct is viewed as unacceptable.”¹⁴⁴

If an employee informs her/his employer of a disability in response to a disciplinary action, the employer may still enforce the action. If the standard penalty for the infraction is termination, the employer may terminate the employee without running afoul of the ADA.¹⁴⁵ However, if the penalty is something less than termination, such a notice trigger’s the employer’s responsibility to engage in the interactive process and seek a reasonable accommodation.¹⁴⁶

B. Reprisal (a/k/a Retaliation)

In general terms, the ADA, state and federal disability laws and other statutory frameworks each prohibit retaliation for a disabled person’s exercise of her/his rights.¹⁴⁷ The legal term generally used to refer to such retaliation is “reprisal.”¹⁴⁸

Absent direct evidence of an intent to retaliate, to prove a *prima facie* case of reprisal, the employee must show: (a) that he or she engaged in statutorily protected conduct; (b) an adverse employment action by the employer¹⁴⁹; and (c) a causal connection between the two.¹⁵⁰ that the plaintiff was subjected to an adverse employment action because of his or her involvement in the protected activity.

¹⁴¹ EEOC Enforcement Guidance: The Americans With Disabilities Act: Applying Performance and Conduct Standards to Employees With Disabilities.

¹⁴² *Id.* at Sec. 3 (B) Question 9, *citing* 42 U.S.C. § 12112(b)(6); 29 C.F.R. §§ 1630.10, .15(c).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at Question 10.

¹⁴⁶ *Id.*

¹⁴⁷ *See* 29 C.F.R. §1630.12; 29 U.S.C. §2615; Minn. Stat. §363A.15; and Minn. Stat. § 176.82.

¹⁴⁸ *See, e.g.*, Minn. Stat. §363A.15.

¹⁴⁹ The pendulum has swung materially in favor of employees in the last decade in assessing what is enough to be adverse employment action under the federal law. As Minnesota practitioners, these authors would be remiss if we did not note that Minnesota law on this subject is even broader than federal law. Under the Minnesota Human Rights Act, an act of reprisal includes, but is not limited to, “*any form of intimidation, retaliation, or harassment.*” Minn. Stat. § 363A.15 Arguably, an employee need not show that she/he suffered an “adverse employment action” in a Minnesota state claim as opposed to a federal claim.

¹⁵⁰ *See, e.g., Dietrich v. Canadian Pacific Ltd.*, 536 N.W.2d 319 (Minn. 1995); *Schweiss v. Chrysler Motors Corp.*, 987 F.2d 548, 549 (8th Cir. 1993); *Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1089-90 (8th Cir. 1992); *Womack v. Munson*, 619 F.2d 1292, 1296 (8th Cir. 1980).

1. Adverse Employment Action

The standard for “adverse employment action” courts use for purposes of a reprisal claim is a lesser standard than that used for purposes of a discrimination claim. In *Burlington N. & Santa Fe Ry. v. White*, 126 S. Ct. 797 (2006), the United States Supreme Court ruled that if an employee is: (a) assigned to perform more physically demanding work by being shifted from forklift duty to standard track laborer tasks and (b) suspended for 37 days (even though the suspension was later reversed and back pay was paid for the period of the suspension) those actions are enough to be adverse employment action in the context of a retaliation case.

The *Burlington* decision is important because of two clarifications by the Supreme Court. First, the Court recognized that, unlike the anti-discrimination provision, the anti-retaliation provision of Title VII does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. Therefore, under this standard, an employer could be found to have retaliated against an employee by taking actions not directly related to her/his employment or by causing her/him harm outside the workplace.

Second, the Court noted that Title VII’s anti-retaliation provision applies only to those employer actions that would have been “materially adverse to a reasonable employee or job applicant,” or “harmful to the point that [the employer’s actions] could well dissuade a reasonable worker from making or supporting a charge of discrimination.”¹⁵¹ The Court ruled that what is “materially adverse” and what would “dissuade a reasonable worker” are context-specific and must be analyzed under the facts of a particular situation.

2. How Does An Employee Prove a "Causal Connection?"

Proving causation for a reprisal claim may vary considerably by statute. Last year in *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, the Supreme Court arguably changed the standard for proving a causal connection for purposes of a federal Title VII retaliation claim.¹⁵² The Court held that a Title VII retaliation plaintiff “must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer.”¹⁵³ The Court explained that this standard “requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.”¹⁵⁴ The five-to-four decision was countered by a blistering dissent written by Justice Ginsburg who took the unusual step of reading her dissent from the bench.¹⁵⁵

¹⁵¹ *Burlington N. & Santa Fe Ry. v. White*, 126 S. Ct. 797 (2006).

¹⁵² 133 S. Ct. 2517 (2013).

¹⁵³ *Id.* at 2534.

¹⁵⁴ *Id.* at 2533.

¹⁵⁵ Kevin Russell, *Details: University of Texas Southwestern Medical Center v. Nassar*, SCOTUSblog (Jun. 24, 2013, 11:28 AM), <http://www.scotusblog.com/2013/06/details-university-of-texas-southwestern-medical-center-v-nassar/>

Reaction to *Nassar* has been mixed.¹⁵⁶ It remains to be seen whether or to what degree *Nassar* will impact the overall viability of Title VII retaliation claims. More significantly, circuits may be splitting on how to apply the *Nassar* standard.

For example, in a recent a district court in Arizona reviewed a Title VII retaliation claim in view of both the pre- and post-*Nassar* standards.¹⁵⁷ In that case the plaintiff made both formal and informal complaints to a company vice president about her supervisor's conduct, alleging that the supervisor had subjected her to racial discrimination and sexual harassment.¹⁵⁸ The plaintiff also told the vice president that she was afraid the supervisor would physically harm her.¹⁵⁹ The vice president investigated the plaintiff's complaints and found them to be without merit; additionally, the investigation revealed deficiencies in the plaintiff's own job performance and as a result the plaintiff was instructed to create a plan for improving her performance as well as her relationship with the supervisor.¹⁶⁰ In response, the plaintiff refused to work with the supervisor and demanded that a witness be present whenever the two met.¹⁶¹ The plaintiff was fired three days after being directed to improve her work performance.¹⁶²

The court noted that under the pre-*Nassar* "motivating factor" test, the plaintiff might have survived summary judgment by showing simply that her employer had actual knowledge of her involvement in a protected activity and temporal proximity to her termination.¹⁶³ However, the court reasoned, under *Nassar* actual knowledge and temporal proximity, while relevant, were no longer enough on their own to establish a prima facie case of retaliation.¹⁶⁴ The court reasoned that "to hold otherwise would transmute an employee's preemptive engagement in a protected activity, whether frivolous or not, into a shield against the imminent consequences of poor job performance."¹⁶⁵

In contrast, a district court in the Eighth Circuit recently held that showing actual knowledge and temporal proximity can be enough to survive summary judgment. In *Sutherland v. Shinkseki*, the plaintiff, a Veteran's Administration nurse, missed several days of work in the first few weeks of her employment.¹⁶⁶ The defendant hospital alleged that the plaintiff had failed to complete required orientation sessions and amassed too many unexcused absences during an initial probationary period; the nurse claimed that the absences were caused by an epileptic

¹⁵⁶ See for example, WHISTLEBLOWER LAW BLOG, *After Nassar: Retaliation Claims Are Tougher - Bust Still Viable*, <http://employmentlawgroupblog.com/after-nassar-title-vii-retaliation-claims-are-tougher-but-still-viable/> (last visited Mar. 11, 2014); Jennifer G. Hall, *Are Title VII Retaliation Claims Dead Post-Nassar?*, LEXOLOGY, <http://www.lexology.com/library/detail.aspx?g=6dcba752-cbcd-49ca-b259-504293050f4b> (last visited Mar. 11, 2014); Patrick Dorrian, *Plaintiffs' Lawyer, Management Counsel Say Nassar Hasn't Hindered Retaliation Claims*, Employment Discrimination Report (BNA), Mar. 5, 2014.

¹⁵⁷ *Drott v. Park Electrochemical Corp.*, 2013 BL 329012 (D. Ariz. Nov. 25, 2013).

¹⁵⁸ *Id.* At *3-4.

¹⁵⁹ *Id.* at *4.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at *15.

¹⁶⁴ *Id.* at *16.

¹⁶⁵ *Id.* at *15-16.

¹⁶⁶ *Sutherland v. Shinseki*, 2013 BL 310505, *3 (D. Minn. Nov. 06, 2013).

attack.¹⁶⁷ After being told she would be fired, the nurse contacted the hospital's Office of Resolution Management, triggering the hospital's Equal Employment Opportunity mechanism.¹⁶⁸ The ORM in turn informed the hospital that the plaintiff had contacted them; eight days later the hospital sent the plaintiff a termination letter.¹⁶⁹ In a decision issued a year later, the ORM concluded that the plaintiff's termination was not discriminatory.¹⁷⁰

The nurse sued for disability discrimination, failure to accommodate (both under the Rehabilitation Act) and Title VII retaliation. The district court for the District of Minnesota rejected the defendant's motion for summary judgment on all three claims. As to the retaliation claim, the court held that "at minimum" the plaintiff's complaint to ORM was a protected action, and that its proximity in time to her termination (eight days) was sufficient to prove a prima face case of retaliation under *Nassar*.¹⁷¹

At the state level, causation standards may be less demanding.¹⁷² For example, Washington courts apply an arguably more lenient standard. Under WLAD the causal link is established if the plaintiff can show that participation in a protected activity was a "substantial factor" in the employer's decision to take an adverse employment action.¹⁷³ Although WLAD closely tracks federal law on several points, Washington courts have declined to apply the *Nassar* but-for standard to WLAD retaliation claims.¹⁷⁴

3. Does the Employee's Underlying Discrimination Claim Have to be Valid in Order For the Employee to be Successful in a Claim of Reprisal?

The fact that the employer's position prevails in the underlying claim does not preclude a finding that there was adverse action motivated by retaliation.¹⁷⁵

4. Can an Employer be Charged with Reprisal for Actions Taken Against a Former Employee?

The United States Supreme Court and several state courts have held that, unlike some of the other discrimination laws, the duty to refrain from retaliation does not necessarily end when

¹⁶⁷ *Id.* at *6.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at *3-4.

¹⁷⁰ *Id.* at *4.

¹⁷¹ *Id.* at *11. The court noted that the parties seemed to be focusing on the disability claims, and seemed to imply that neither party had briefed the temporal aspect of the retaliation claim extensively.

¹⁷² See for example *Engstrom v. Frandsen Financial Corp. Inc.*, 2013 WL 7204918, *12 (discussing *Nassar* and concluding that Minnesota's traditional "substantial factor" standard remains unchanged for purposes of proving causation under state reprisal statute).

¹⁷³ *Allison v. Housing Auth. of Seattle*, 821 P.2d 34, 42 (Wash. 1991).

¹⁷⁴ *Ellorin v. Applied Finishing, Inc.*, 2014 BL 47422, 15 (W.D. Wash. Feb. 07, 2014) (noting that Title VII and WLAD retaliation claims are identical except for the causation element, and affirming the standard announced in *Allison*, 821 P.2d 34).

¹⁷⁵ *Heisler v. Metropolitan Council*, 339 F.3d 622 (8th Cir. 2003); See also *Munir v. Thomas*, 2008 BL 306851, fn. 4 (E.D. Cal. 2008) (noting that bringing a retaliation claim does not require proving the underlying claim of discrimination).

the employment relationship ends. In *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997), the Court held that providing a negative reference for a former employee who had filed an EEOC charge of discrimination constituted unlawful retaliation in violation of Title VII.¹⁷⁶

5. Coverage and Individual Liability

The issues of coverage and whether a manager can be held individually liable will be governed by the statute under which the employee alleges she/he asserted her/his rights. Generally, courts have construed Title VII remedies as precluding individual liability.¹⁷⁷ Courts also agree that individual liability is not possible under the ADA.¹⁷⁸ State laws may vary on this point. For example, under the Washington Law Against Discrimination, supervisors or managers may be held personally liable.¹⁷⁹

C. Marijuana Decriminalization and the Workplace

In 2012, voters in Washington and Colorado passed ballot measures providing for the decriminalization of recreational marijuana use. Both states had previously allowed the use of medical marijuana under certain circumstances. Meanwhile, marijuana use and possession remains illegal at the federal level. In Colorado, Washington and elsewhere new questions are emerging about what the quasi-legal status of marijuana will mean in the workplace. Are employers required to condone or “accommodate” on or off the job marijuana use?

The short answer is probably not. Generally, the law considers alcohol or drug addiction to be a disability, but allows (and in some cases, requires) employers to discipline chemically-dependent employees for alcohol or drug abuse itself. Indeed, certain employers (contractors to the federal government) are required by law to maintain and enforce drug-free workplace policies.¹⁸⁰ Additionally, Washington has repeatedly refused to recognize the medical use of marijuana to treat a variety of mental illnesses including severe depression and anxiety.¹⁸¹ None of that changed when Washington voters approved the recreational use initiative in 2012.¹⁸² At the federal level, marijuana is still considered a Schedule 1 narcotic, treated the same as cocaine

¹⁷⁶ See also. *State v. Wallin*, 1997 WL 53016 (Minn. Ct. App. 1997) (filing a claim against a former employee is reprisal).

¹⁷⁷ Michael Faillace, *Disability Law Deskbook: The Americans with Disabilities Act in the Workplace* 10 (2009); See also *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995).

¹⁷⁸ See for example *Spiegel v. Schulmann*, 604 F.3d 72, 79 (2d Cir. 2010).

¹⁷⁹ *Washburn v. Gymboree Retail Stores, Inc.*, 2012 BL 226667, *14 (W.D. Wash. Sept. 04, 2012); citing *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 361 (2001).

¹⁸⁰ 41 U.S.C. § 8101 *et. seq.*

¹⁸¹ See generally WASHINGTON STATE DEPARTMENT OF HEALTH, *Medical Marijuana (Cannabis): Petitions to Add Qualifying Conditions*, <http://www.doh.wa.gov/YouandYourFamily/IllnessandDisease/MedicalMarijuanaCannabis/PetitionstoAddQualifyingConditions.aspx> (last visited Mar. 6, 2014).

¹⁸² WASHINGTON STATE DEPARTMENT OF HEALTH, *Medical Marijuana (Cannabis): Healthcare Professionals and Facilities*, <http://www.doh.wa.gov/ForPublicHealthandHealthcareProviders/HealthcareProfessionalsandFacilities/MedicalMarijuanaCannabis.aspx> (last visited Mar. 6, 2014).

or heroin¹⁸³ and medical necessity is not a cognizable defense to a federal criminal marijuana charge.¹⁸⁴

So far courts have shown little sympathy for marijuana users in the employment context. For example in *Roe v. Teletech Customer Care Mgmt. (Colorado) LLC* the Supreme Court of Washington considered the meaning of a 2007 clarifying amendment to the state's Medical Use of Marijuana Act (MUMA).¹⁸⁵ The plaintiff, who suffered from chronic pain, received medical authorization to use marijuana in compliance with MUMA.¹⁸⁶ She was offered a job with the defendant company as a customer service representative, contingent on her passing a background check and drug test (company policy required that all employees have a negative drug test result).¹⁸⁷ Once informed of the company's policy, the employee informed the company of her medical marijuana use and offered to provide them with her MUMA authorization.¹⁸⁸ The company declined.¹⁸⁹ The employee took the drug test, failed and was terminated.¹⁹⁰

The employee then sued, claiming her termination violated MUMA and the clear public policy behind it.¹⁹¹ When originally passed in 1998, MUMA contained language to the effect that employers were not required to accommodate the use of marijuana by their employees.¹⁹² In 2007 an amendment reworded that language such that it subsequently read "Nothing in this chapter requires any accommodation of any *on-site* medical use of marijuana in any place of employment."¹⁹³ The plaintiff argued that the addition of the phrase "on-site" showed that the legislature meant to limit the scope of the non-accommodation provision to on-the-job marijuana use only, and thus off-site accommodation was required.¹⁹⁴

In a long and discursive opinion, the Supreme Court of Washington disagreed, finding that the insertion of the new language did not make any material change in the law.¹⁹⁵ Moreover, the court found that medical marijuana use was not a sufficiently important matter of public policy to justify overruling Washington's default rule of at-will employment.¹⁹⁶ Finally, the court noted that because marijuana use remained illegal at the federal level, which further tipped the scales against the plaintiff's public policy argument.¹⁹⁷ Therefore, the court affirmed the lower

¹⁸³ 21. U.S.C. § 812.

¹⁸⁴ See generally *Gonzales v. Raich*, 545 U.S. 1(2005); see also *U.S. v. Oakland Cannabis Buyers Coop.*, 532 U.S. 483 (2001), (holding that medical need is not a legally recognized defense to charges of violations of federal criminal law prohibiting the manufacture and distribution of marijuana).

¹⁸⁵ 171 Wash.2d 736 (2011).

¹⁸⁶ *Id.* at 743.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 744.

¹⁹² *Id.* at 745.

¹⁹³ *Id.* at 746 (emphasis added).

¹⁹⁴ *Id.* at 752.

¹⁹⁵ *Id.* at 751.

¹⁹⁶ *Id.* at 757.

¹⁹⁷ *Id.* at 759.

court's grant of summary judgment for the defendant. Courts in Colorado, which also allows recreational and medical marijuana use, have reached similar conclusions.¹⁹⁸

Conclusion

Mental illness impairments remain an area of challenge and volatility for employers. Employers start by assessing what matters most. Of course, workplace safety must come first. After that, however, some will value priorities differently than others. Is avoiding litigation the next-most important employer objective? Or, is providing assistance to a troubled employee the next-most important employer objective? And, can it depend on the situation? What about consistency? Employers must answer these questions and take care to navigate these treacherous waters carefully.

¹⁹⁸ See *Beinor v. Industrial Claim Appeals Office*, 262 P.3d 970 (Colo. App. 2011)(unemployment benefits properly denied to former employee terminated due to violation of workplace zero-tolerance policy even though the employee's use of marijuana was legal under Colorado law); *Coats v. Dish Network, LLC*, 303 P.3d 147 (Colo. App. 2013) (medical marijuana user's discharge after positive drug test did not violate employment bias provision of Colorado Civil Rights Act, where statute that prohibits discharge for any "lawful" off-the-job activity does not encompass activity that violates federal law but complies with state law; no legislative intent to extend employment protection to those engaged in federally prohibited marijuana use).