DISABILITY DISCRIMINATION IN EMPLOYMENT— A TWO-YEAR REVIEW OF CASES

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This paper represents a survey of ADA employment cases decided in the last two years or so within the Fifth Circuit, plus other published appellate cases and a smattering of district court cases from outside the Circuit. This paper is not intended to be comprehensive, but instead focuses on cases reflecting legal trends, and those clarifying the law or providing useful examples. In general, this paper does not include pro se cases, procedural matters like exhaustion, or those portions of cases that address traditional pretext facts.

I. Definition of Disability

For many years the restrictive definition of disability was one of the greatest barriers to effective enforcement of Title I of the Americans with Disabilities Act. This was ostensibly fixed by the passage of the ADA Amendments Act of 2008 (ADAAA). But as reflected below, problems continue, and some courts still go astray even with very specific and targeted statutory language.

A. "Regarded as" disability

The case law suggests two recurring problems here. First, many courts continue to focus on whether the employer perceived the impairment to substantially limit a major life activity. Courts typically make this mistake by relying on pre-ADAAA case law. *See, e.g., Fink v. St. Bernard Par. Gov't,* No. CV 18-5447, 2019 WL 1275268, at *4 (E.D. La. Mar. 20, 2019); *Tucker v. Unitech Training Acad., Inc*., No. CV 15-7133, 2019 WL 266305, at *5 (E.D. La. Jan. 18, 2019) ("As the Court discussed above, Unitech was aware that Plaintiff was obese and had undergone bariatric surgery, but that was not sufficient for anyone to objectively conclude that Plaintiff's impairment substantially limited any major life activity.").

But the ADA Amendments Act explicitly overruled this standard. Now, a regarded-as disability only requires evidence that an individual was subjected to an adverse action because of an actual or perceived impairment, whether or not the impairment limits or is perceived to limit a major life activity. 42 U.S.C. § 12102(3)(A); 29 C.F.R. §§ 1630.2(g)(1)(iii) and 1630.2(l)(1). The Fifth Circuit continues to correct lower courts on this issue. *See, e.g., Williams v. Tarrant Cty. Coll. Dist*., 717 F. App'x 440, 449 (5th Cir. 2018) ("the court imported a standard expressly rejected by both Congress and the EEOC"); *Drechsel v. Liberty Mut. Ins. Co*., 695 F. App'x 793, 798 n.4 (5th Cir. 2017) ("On appeal Drechsel accurately notes that the district court erroneously applied outdated case law interpreting the 'regarded as' prong."). *See also Nunies v. HIE Holdings,*

Inc., 908 F.3d 428, 434 (9th Cir. 2018) (reversing in relevant part) ("Here, the district court cited the ADAAA definition of regarded-as, but relied on pre-ADAAA caselaw to hold that Nunies did not establish coverage.").

The fact is that under the plain language of the ADAAA, the real or perceived severity of an impairment is irrelevant to a regarded-as disability, as are the concepts of "substantial limitation" and "major life activities." 42 U.S.C. § 12102(3)(A); 29 C.F.R. §§ 1630.2(g)(1)(iii), 1630.2(l)(1); 1630.2(j)(2); *Equal Employment Opportunity Comm'n v. BNSF Ry. Co.*, 902 F.3d 916, 922, 923–24 (9th Cir. 2018), *pet. for cert. filed*; *Cannon v. Jacobs Field Servs. N. Am., Inc*., 813 F.3d 586, 591–92 (5th Cir. 2016).

The second "regarded as" problem occurs when the plaintiff leaves out evidence that the employer knew or believed that the plaintiff had a physical or mental *impairment* (often a medical or psychological diagnosis of some type). *See, e.g., Drechsel v. Liberty Mut. Ins. Co.*, No. 16-11651, 695 F. App'x 793, 798–99 (5th Cir. 2017) (no evidence that plaintiff ever informed employer of diagnosed anxiety and depression; statement that he "was unable to work due to medical necessity," and comment that he was "experiencing serious health issues," were not enough). This has been a particular problem in obesity cases, both pre- and post-ADAAA, in which the plaintiff does not put evidence that the obesity at issue was a "physiological" impairment. *See, e.g., Morriss v. BNSF Ry. Co*., 817 F.3d 1104 (8th Cir.), *cert. denied*, 137 S. Ct. 256 (2016); *EEOC v. Watkins Motor Lines, Inc*., 463 F.3d 436, 442–43 (6th Cir.2006). *But cf. E.E.O.C. v. Res. for Human Dev., Inc*., 827 F. Supp. 2d 688 (E.D. La. 2011) (rejecting "physiological" analysis from other obesity cases, but also reflecting expert testimony indicating the obesity in this case was "physiological").

Although the EEOC's regulatory definition of "impairment" remains unchanged after the ADAAA, the statute now requires that the term be construed broadly. *Equal Employment Opportunity Comm'n v. BNSF Ry. Co*., 902 F.3d 916, 923 (9th Cir. 2018) (citing 42 U.S.C. § 12102(4)(A)), *pet. for cert. filed*. Note, too, that an exact diagnosis is not always required; evidence regarding symptoms and limitations may suffice. *See Kagarice v. Smatresk*, No. 4:17-CV-00509, 2018 WL 3422780 (E.D. Tex. June 25, 2018), *report and recommendation adopted*, 2018 WL 3417876 (E.D. Tex. July 13, 2018), *citing Rizzo v. Children's World Learning Centers, Inc*., 173 F.3d 254, 265 (5th Cir. 1999), *on reh'g en banc*, 213 F.3d 209 (5th Cir. 2000).[1] *See also Baum v. Metro Restoration Services, Inc*., No. 18-5699, ___ F. App'x ___, 2019 WL 1569741, at *3 (6th Cir. Apr. 11, 2019) (employer knew of plaintiff's heart catheterization, CAT scan, trip to the ER, and wearing a heart monitor). Nor is medical evidence always required, per *Mancini v. City of Providence*, discussed on page 4 below.

In the *EEOC v. BNSF* case cited above, the employer required the plaintiff to undergo an MRI, and then argued that it did not perceive the individual to have an impairment, but instead just wanted to be sure. The court rejected this argument (distinguishing earlier case law decided pre-ADAAA) and stated:

[1] The panel in *Rizzo*, quoting 29 C.F.R. Pt. 1630 App., § 1630.2(j), stated: "The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."

> In requesting an MRI because of Holt's prior back issues and conditioning his job offer on the completion of the MRI at his own cost, BNSF assumed that Holt had a "back condition" that disqualified him from the job unless Holt could disprove that proposition. And in rejecting Holt's application because it lacked a recent MRI, BNSF treated him as it would an applicant whose medical exam had turned up a back impairment or disability. BNSF chose to perceive Holt as having an impairment at the time it asked for the MRI and at the time it revoked his job offer.

Id. at 924. The court construed the ADAAA's definition of "'perceived impairment' to encompass situations where an employer assumes an employee has an impairment or disability." *Id*. *See also Mesa v. City of San Antonio,* No. SA-17-CV-654-XR, 2018 WL 3946549 (W.D. Tex. Aug. 16, 2018) (requiring MRI is evidence that employer perceived defendant as having an impairment).

Finally, although less frequently the focus of reported decisions, a perceived-disability claim also requires evidence that the adverse action was taken "because of" the impairment. 42 U.S.C. § 12102(3)(A). This can be shown in various ways. *See, e.g., Baum v. Metro Restoration Services, Inc.*, No. 18-5699, ___ F. App'x ___, 2019 WL 1569741, at *3 (6th Cir. Apr. 11, 2019) (although employer claimed that reason for termination was "excessive absenteeism and failure to perform his job," the plaintiff worked remotely while off, employer failed to explain which job duties he failed to perform, and its stated reason for firing was "health issues and doctor's appointments").

B. "Actual" disability

Although "regarded as" disability is generally the easiest way to prove disability, it is not enough to support a failure-to-accommodate claim; those claims require proof of an "actual" or a "record of" disability. 42 U.S.C. § 12201(h). The ADAAA makes proving an "actual "disability a lot easier, but the plaintiff still has the burden of (a) proving an impairment, (b) identifying the major life activity impacted, and (c) establishing a substantial limitation in at least one such activity. Some of the problem cases may reflect the lack of adequate evidence from the plaintiff.

In *Lewis v. City of Union City*, 877 F.3d 1000, 1010 (11th Cir. 2017), the plaintiff proved that she had an impairment, and it even sounded serious—her heart attack left her with a "permanent injury to her heart and [she] continues to suffer regurgitation of the mitral tricuspid, and aortic heart valves." But the court found insufficient evidence that her "paroxysmal nocturnal dyspnea" substantially limited her breathing or sleeping. According to the court, the only such evidence was the plaintiff's testimony that she had a "periodic ... shortness of breath," and a doctor's statement that this *could*—but not that it *did*—affect plaintiff's sleep. The court criticized the lack of evidence of the severity, frequency, and duration of these episodes.

See also Mancini v. City of Providence by & through Lombardi, 909 F.3d 32, 44–45 (1st Cir. 2018) (conclusory statements without any detail about the manifestations); *Koty v. DuPage Cty., Illinois*, 900 F.3d 515, 519 (7th Cir. 2018) (no allegation that the injury affected any major life activity); *Kitchen v. BASF*, 343 F. Supp. 3d 681, 689 (S.D. Tex. 2018), *report and recommendation adopted*, No. 3:17-CV-00040, 2018 WL 5723147 (S.D. Tex. Nov. 1, 2018) ("Although Kitchen asserts that he is a recovering alcoholic, there are no allegations—nor

evidence—that his alcoholism impaired a major life activity at the time of his termination in October 2015. In fact, Kitchen's own pleadings and testimony actually contradict any claim that his major life activities were substantially impaired at the time of his termination. By way of example, Kitchen's live pleading alleges that he was sober for approximately two years prior to his termination."); *Weems v. Dallas Indep. Sch. Dist*., No. 3:15-CV-2128-L, 260 F. Supp. 3d 719, 728–29 (N.D. Tex. 2017) (insufficient evidence that teacher's knee injury was substantially limiting).

On the other hand, medical evidence is not always required. Whether such evidence is required—to prove an impairment, to show the causal connection between the impairment and the manifestations, or to support a substantial limitation in everyday activities—may depend on whether a lay jury is capable of making such an assessment without it. *Mancini v. City of Providence by & through Lombardi*, 909 F.3d 32, 39–44 (1st Cir. 2018) (plaintiff's testimony was insufficient to establish the technical diagnosis of chondromalacia without medical records, but it was sufficient to prove a "knee injury"; the connection between the injury and problems with standing, walking, and bending; and any substantial limitation in them). *See also Baum v. Metro Restoration Services, Inc*., No. 18-5699, ___ F. App'x ___, 2019 WL 1569741, at *2–3 (6th Cir. Apr. 11, 2019) (plaintiff failed to list a medical expert, and his heart "impairments, unlike more common or less complicated ones, require medical knowledge to understand").

Note that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 854 (6th Cir. 2018), *citing* 42 U.S.C. § 12102(4)(D). District courts still make errors with regard to episodic conditions. In *Trautman v. Time Warner Cable Texas, LLC*, No. A-16-CV-1049-LY, 2017 WL 5985573, at *5 (W.D. Tex. Dec. 1, 2017), the court held that an anxiety disorder that only manifested on occasion could not be a disability. Although the Fifth Circuit affirmed, it did so on other grounds—the employer attempted numerous accommodations, and the plaintiff did not engage in the interactive process. 756 F. App'x 421, 430–31 (5th Cir. 2018).[2]

Courts also err when they cite pre-ADAAA regulations or case law regarding temporary conditions. These courts failed to acknowledge the EEOC's ADAAA guidance, and the case law, indicating that temporary impairments lasting less than six months may still be substantially limiting. For the proper analysis, see 29 C.F.R. § 1630.2(j)(1)(ix); *Mancini v. City of Providence by & through Lombardi*, 909 F.3d 32, 40–41 (1st Cir. 2018); *Summers v. Altarum Institute, Corp*., 740 F.3d 325, 329 n.1, 333 (4th Cir. 2014); *Gogos v. AMS Mechanical Systems, Inc*., 737 F.3d 1170, 1172 (7th Cir. 2013); *Mullenix v. Eastman Chem. Co*., 237 F. Supp. 3d 695, 705 (E.D. Tenn. 2017).[3]

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[2] For a similar case—in which the Fifth Circuit did not adopt the district court's disability analysis involving episodic manifestations, but instead affirmed because of the plaintiff's failure to participate in the interactive process—see *Jackson v. Blue Mountain Prod. Co*., No. 18-60361, ___ F. App'x ___, 2019 WL 927076 (5th Cir. Feb. 21, 2019).

[3] Note that an impairment will not support a regarded-as claim if it is both "transitory"—i.e., lasting six months or less—*and* "minor." 42 U.S.C. § 12102(3)(B). But this transitory concept is inapplicable to claims of actual disability. 29 C.F.R. § 1630.2(j)(1)(ix). And even in regarded-as cases to which it *is* applicable, the fact that a condition is transitory does not mean that it is necessarily minor, and the employer must prove it is both to support the defense. *Nunies v. HIE Holdings, Inc*., 908 F.3d 428, 435 and n.5 (9th Cir. 2018) ("transitory and minor" burden is on the employer, but it offered no evidence; moreover, plaintiff still had lifting restriction more than a year after he left the company); *Hoover v. Chipotle Mexican Grill, Inc*., No. 1:16-CV-810, 2018 WL 3092902, at *4 (S.D. Ohio June 22,

As a general matter, courts are simply off the mark when they cite pre-ADAAA case law for the definition of disability. In *Fink v. St. Bernard Par. Gov't*, No. CV 18-5447, 2019 WL 1275268, at *2 (E.D. La. Mar. 20, 2019), the court quoted the language from *Toyota Motor Mfg., Ky., Inc. v. Williams* (and from pre-ADAAA Fifth Circuit case law) to the effect that disability must be "interpreted strictly to create a demanding standard." But the ADA Amendments Act explicitly overruled that language,[4] and now requires that disability "shall be construed … in favor of broad coverage of individuals … to the maximum extent permitted by the terms of this Act." 42 U.S.C. § 12102(4)(A). *Fink* also improperly cited pre-ADAAA case law in analyzing a lifting restriction. *Id*. at *3. And in *Stockton v. Christus Health Se. Texas*, No. 1:15-CV-333, 2017 WL 1287550, at *11 (E.D. Tex. Feb. 3, 2017), the court held that "restrictions on heavy lifting do not constitute an impairment that limits a major life activity," but exclusively cited pre-ADAAA cases for that (likely incorrect) proposition.[5]

The plaintiff should normally identify the specific major life activities at issue. Failure to do so may lead to an assumption that the activity is "working," which remains the activity of last resort, and one requiring extra proof. *Compare Tinsley v. Caterpillar Fin. Servs., Corp.*, No. 18-5303, ___ F. App'x ___, 2019 WL 1302189, at *4–6 (6th Cir. Mar. 20, 2019); *Mead v. Lattimore Materials Co.*, No. 3:16-CV-0791-L, 2018 WL 807032, at *11 (N.D. Tex. Feb. 9, 2018), *reconsideration denied*, 2018 WL 2971128 (N.D. Tex. Mar. 6, 2018) (finding insufficient evidence of a substantial limitation in working). Litigants and courts should also remember that the ADA lists a new class of major life activities, described in terms of bodily functions. 42 U.S.C. § 12102(2)(B); 29 C.F.R. § 1630.2(i)(1)(ii) (ADA Title I). *See also* 28 C.F.R. § 35.108(c)(1)(ii) (ADA Title II); § 36.105(c)(1)(ii) (ADA Title III). The *Tinsley* case above is instructive. The plaintiff's only argument related to the major life activity of working, and the court found her evidence insufficient. But the EEOC regulations state that PTSD will, "in virtually all cases," substantially limit "brain function," 29 C.F.R. § 1630.2(j)(3)(ii)–(iii), so that might have been an easier path to coverage.

Finally, in *Smith v. Am. Modern Ins. Grp.*, No. 1:16-CV-844, 2018 WL 3549788, at *14 (S.D. Ohio July 24, 2018), besides relying on pre-ADAAA case law, the court appeared to base its no-disability finding at least in part on the plaintiff's testimony that she was "fully capable of performing effectively all of the essential job functions" of her job. But that fact is irrelevant; it is easily possible for a person to have a disability even when the condition does not impact her ability to perform the essential job duties. *See, e.g., Rowlands v. United Parcel Serv. – Fort Wayne*, 901 F.3d 792, 801 (7th Cir. 2018) ("Although UPS would have been entitled to request a doctor's note verifying Rowlands' condition as part of the interactive process, it does not follow that she did not have a disability because her doctor had cleared her to return to work without restrictions."); *Williams v. Tarrant County College District*, 717 F. App'x 440, 448 (5th Cir. 2018); *Summers v. Altarum Institute, Corp*., 740 F.3d 325, 331 (4th Cir. 2014) ("If the fact that a person could work

2018) (denying summary judgment on "transitory and minor" defense because there was sufficient evidence that adjustment disorder was *not* perceived as minor).

[4] Pub. L. 110–325, § 2(b)(4), 122 Stat. 3553 (Sept. 25, 2008).

[5] *See also Mead v. Lattimore Materials Co*., No. 3:16-CV-0791-L, 2018 WL 807032, at *10 (N.D. Tex. Feb. 9, 2018), *reconsideration denied*, 2018 WL 2971128 (N.D. Tex. Mar. 6, 2018), citing pre-ADAAA case law in analyzing substantial limitation.

with the help of a wheelchair meant he was not disabled under the Act, the ADA would be eviscerated."). *See also Nunies v. HIE Holdings, Inc*., 908 F.3d 428, 436 (9th Cir. 2018) (fact that plaintiff continued working through the pain did not prevent a finding of actual disability).

C. Transgender individuals

In *Blatt v. Cabela's Retail, Inc*., No. 5:14-CV-04822, 2017 WL 2178123 (E.D. Pa. May 18, 2017), the court held that the exclusion in 42 U.S.C. § 12211(b)(1), preventing ADA protection for "gender identity disorders," refers to "the condition of identifying with a different gender," but it does not exclude from ADA coverage those "conditions that persons who identify with a different gender may have." In *Blatt* that included gender dysphoria, which substantially limited her major life activities of interacting with others, reproducing, and social and occupational functioning." *See also* Kevin Barry, Jennifer Levi, *Blatt v. Cabela's Retail, Inc. and A New Path for Transgender Rights*, 127 Yale L.J. Forum 373 (2017). Note that the DOJ filed a Statement of Interest in the case supporting the plaintiff, but the case law in this area is developing.[6]

II. "Qualified"

As predicted, after the ADA Amendments Act, it appears that most ADA cases are not resolved on the issue of disability, but instead on the question of whether or not the plaintiff is "qualified." An ADA plaintiff is "qualified" if he or she is able to perform the essential job functions, with or without a reasonable accommodation. 42 U.S.C. § 12111(8).

A. Identifying essential functions

Identifying the essential functions of the job can be critical, because a person is only qualified if he or she can perform those functions, and an accommodation does not have to *permanently* excuse the performance of functions that are essential. "A job function is essential if its removal would fundamentally alter the position. Put another way, essential functions are the core job duties, not the marginal ones." *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 854 (6th Cir. 2018), *citing* 29 C.F.R. § 1630.2(n)(*1*) (citations and internal quotations omitted).

Determining what functions are essential is "a fact-intensive analysis," *Hostettler, supra*, 895 F.3d at 854, and is decided on a case-by-case basis. *Credeur v. Louisiana through Office of Attorney Gen.*, 860 F.3d 785, 792 (5th Cir. 2017). The ADA regulations list various kinds of evidence, *id*., *citing* 29 C.F.R. § 1630.2(n)(3); *Equal Employment Opportunity Comm'n v. Wesley Health Sys., LLC*, No. 2:17-CV-126-KS-MTP, 2018 WL 5986753, at *2 (S.D. Miss. Nov. 14, 2018), and although courts give deference to the employer's judgment, such deference is not absolute. *Gunter v. Bemis Co., Inc.*, 906 F.3d 484, 489 (6th Cir. 2018) (job description not

[6] In *Parker v. Strawser Constr., Inc*., 307 F. Supp. 3d 744, 754–55 (S.D. Ohio 2018), the court rejected coverage for an individual with a gender identity disorder because the plaintiff failed to put on sufficient evidence regarding the cause of her gender dysphoria.

Note, too, that some courts have held that transgender discrimination is actionable as sex discrimination under Title VII. *See, e.g., Equal Employment Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc*., 884 F.3d 560, 577 (6th Cir. 2018). The EEOC has also expressed support for this position. The Fifth Circuit recently considered the issue, but ultimately decided the case on other grounds, leaving the issue in flux. *Wittmer v. Phillips 66 Co*., 915 F.3d 328 (5th Cir. 2019).

dispositive, and there was evidence that some of the listed requirements were not in fact treated as essential); *E.E.O.C. v. LHC Grp., Inc.*, 773 F.3d 688, 697–98 (5th Cir. 2014). *But cf. Credeur v. Louisiana through Office of Attorney Gen.*, 860 F.3d 785, 792 (5th Cir. 2017) (stating that both the statute and regulations "indicate" that courts must give greatest weight to the employer's judgment, although neither source says so, and the court cites inapposite agency guidance).

Although is fact intensive, the question can still be answered as a matter of law if the evidence is one-sided enough. In *Stevens v. Rite Aid Corp*., 851 F.3d 224, 229–30 (2d Cir.), *cert. denied*, 138 S. Ct. 359 (2017), the court rejected the proposed accommodation of avoiding administering immunizations, finding that giving shots was an essential function of the pharmacist's job. The opinion is subject to criticism, because most of the reasons the court gave for this holding relied on the fact that this was the company's standard practice, rather than proof that giving shots was in fact *essential*. On the other hand, the court did not describe much countervailing evidence.

On the other hand, various kinds of evidence can suffice to dispute the employer's assertion of essentiality. For example, the employer's job description may be open to challenge. In *Nall v. BNSF Railway Company*, 917 F.3d 335, 343 (5th Cir. 2019) (5th Cir. 2019), the Fifth Circuit relied on the original 'medical status form' that the employer required be given to the plaintiff's doctor (which "did not include any reference to quick movements, balance, or steadiness"), as well as a manager's testimony that working quickly was not essential to the positions of conductor, switchman, or brakeman. The court also noted that pre-dispute documents may be given more weight than post-dispute job descriptions. *Id*. at 343–44. *See also Noel v. Wal-Mart Stores, E. LP*, No. 18-1139-CV, ___ F. App'x ___, 2019 WL 1110847, at *2–4 (2d Cir. Mar. 11, 2019) (conflicting job descriptions appeared to create a fact issue). In *Presta v. Omni Hotels Mgmt. Corp*., No. 4:17-CV-912, 2018 WL 1737278, at *10 (S.D. Tex. Apr. 4, 2018), the court found a fact dispute as to whether the job description accurately described the essential functions, because the plaintiff worked in the position for many years with satisfactory performance reviews and without discipline. And in *Snead v. Fla. Agric. & Mech. Univ. Bd. of Trustees*, 724 F. App'x 842, 845–46 (11th Cir. 2018), working a 12-hour shift was listed in the job description, but not under the heading of "essential" job functions, and the description also noted that work hours could change. *See also Hull v. Arvest Bank Operations, Inc*., No. CIV-16-69-D, 2017 WL 3471435, at *4 (W.D. Okla. Aug. 11, 2017) (similar); *Valenti v. SleepMed, Inc*., No. 15-CV-1281 (JCH), 2017 WL 2945721, at *5–7 (D. Conn. July 10, 2017) (similar facts, along with others, presented a factual dispute).

In addition to *Presta* above, several other cases have found a fact dispute as to whether heavy lifting was actually essential. In *Gunter v. Bemis Co., Inc*., 906 F.3d 484, 488–89 (6th Cir. 2018), the job description had lifting and reaching requirements that were inconsistent with the plaintiff's medical restrictions, but there was evidence that they were not treated as essential—the company encouraged employees not to lift anything over 40 pounds by themselves, employees often assisted each other with lifting, there were lifting devices available as well as ladders to help avoid reaching, and the plaintiff had learned to use one arm to complete other duties. Similarly, in *Equal Employment Opportunity Comm'n v. Wesley Health Sys., LLC*, No. 2:17-CV-126-KS-MTP, 2018 WL 5986753, at *2–3 (S.D. Miss. Nov. 14, 2018), the court found a factual dispute as to whether heavy lifting was an essential function of a nursing position, based on testimony from the

nurse and the nursing director that unit nurses always seek and receive assistance in lifting patients, are not frequently required to lift more than fifty pounds, and can use devices to lift and move patients. And in *Presumey v. Town of Greenwich Bd. of Educ.*, No. 3:15CV278(DFM), 2018 WL 740194, at *3–4 (D. Conn. Feb. 7, 2018), the court upheld a jury verdict for the plaintiff, based in part on her testimony that others were not required to lift children or help with toileting, not all children required it, and in the past she herself had been excused from doing so. The court also found that the jury could have disbelieved the contrary testimony by a co-worker, who claimed that she could and did lift children, but whose own obvious impairments might have undercut that testimony.

Courts have found factual disputes in various other contexts. *See, e.g., Equal Employment Opportunity Comm'n v. McLeod Health, Inc.*, 914 F.3d 876, 881–82 (4th Cir. 2019) (evidence that traveling around campus was a preference rather than essential); *Lincoln v. BNSF Ry. Co*., 900 F.3d 1166, 1195–96 (10th Cir. 2018) (fact issue whether working outside was an essential function, given that shop where 90% of maintenance work was performed was partially sheltered and climate-controlled); *Ponce v. City of Naples*, No. 2:17-CV-137-FTM-99CM, 2018 WL 1393748, at *8–9 (M.D. Fla. Mar. 20, 2018) (fact dispute as to what job plaintiff was performing and therefore what the essential functions were); *Slayton v. Sneaker Villa, Inc*., No. CV 15-0074, 2017 WL 1048360, at *7 (E.D. Pa. Mar. 20, 2017) ("Plaintiff persuasively argues that despite her requests to do so, she never actually traveled to any job fairs during her time working for Defendant.").

The Sixth Circuit made two other important points in *Gunter v. Bemis Co., Inc*., 906 F.3d 484 (6th Cir. 2018). The first relates to the rule that essential functions do not have to be assigned to other workers as an accommodation. In *Gunter* the dispute was whether heavy lifting was an essential function, and the court found sufficient evidence it was not, based in part on the testimony that employees generally helped each other when lifting heavy weights. The employer then argued that an employer need not shift an essential job function onto others. The court rejected that theory because "the argument assumes that these tasks amount to essential functions that a single employee must be able to handle. The jury heard evidence to the contrary—that press workers often ask for and receive help with certain tasks—permitting it to find that this was not an indispensable task for individual employees." *Id*. at 489.[7] The second clarification in *Gunter* is that employer's should not define essential functions as "safely" accomplishing a task, because safety issues are normally part of a defense. Compare the direct-threat defense in Part X below.

Moreover, employers cannot contract away their liability for accurately determining the essential job functions, or understate their own involvement in the process. *Wagner v. Inter-Con Sec. Sys., Inc*., 278 F. Supp. 3d 728, 736 (S.D.N.Y. 2017). *See also id*. at 737.

[7] *See also Ferguson v. Wayne County Airport Authority*, No. 16-11415, 2018 WL 2117796, at *6–7 (E.D. Mich. May 8, 2018) (sufficient evidence that although heavy-labor tasks had to be done, it was not essential for the plaintiff to do them, and the foreman was "generally 'given complete discretion' when determining 'who is assigned to what position or what task for the day.'").

B. Proving "qualified" in non-accommodation cases

Most "qualified" cases deal with reasonable accommodations, but several recent cases found sufficient evidence that the plaintiff could do the job without accommodations.

The employer can often rely on the plaintiff's own doctor as to the plaintiff's abilities, but negative statements may be explainable. In *Stragapede v. City of Evanston, Illinois*, 865 F.3d 861 (7th Cir. 2017), the doctor's statement indicated an inability to do the essential functions, but also stated that it was based on the employer's representations of the job. The court upheld a jury verdict for the plaintiff, finding that the jury may have believed later assessments, and may have questioned whether the information supplied by the employer was accurate or complete. *Id*. at 865–66. There was also conflicting evidence from the plaintiff's supervisors, which the jury could weigh. *Id*. at 866.

In *Reyes v. Texas Dep't of Criminal Justice*, No. A-16-CA-00954-SS, 2017 WL 4979844, at *3 (W.D. Tex. Oct. 31, 2017), the court found sufficient evidence that the plaintiff was qualified for a correctional officer position because he had passed all pre-employment tests and worked successfully in the past. Although he had requested an accommodation, the employer admitted that he would have been allowed to continue working in his position if he had withdrawn his accommodation request.

In *Siewertsen v. Worthington Indus., Inc*., No. 3:11 CV 2572, 2017 WL 4349021, at *2 (N.D. Ohio Sept. 29, 2017) (judgment for plaintiff; appeal pending), the court found sufficient evidence that the plaintiff with deafness could perform the essential functions of a shipper position without accommodation. The plaintiff had operated forklifts and other machinery for ten years without any accidents, and he was recertified on the forklift a few months before the employer's decision to reassign him. The plaintiff also presented expert testimony that while communication is essential to the safe operation of heavy machinery like forklifts, such communication did not necessarily have to be audible, and the plaintiff compensated for his inability to hear by using his other senses. The expert also testified that adopting best practices for workplace safety would also prevent any accidents.

See also Hostettler v. Coll. of Wooster, 895 F.3d 844, 855 (6th Cir. 2018) (testimony by co-worker and by hiring official that plaintiff did her job well on part-time schedule); *Hanson v. N. Pines Mental Health Ctr., Inc*., No. CV 16-2932 (DWF/LIB), 2018 WL 1440333, at *9 (D. Minn. Mar. 22, 2018) (fact issue whether plaintiff could do the required documentation; her direct supervisor noted that although she struggled with documentation, she did her job very well, and she could document when given guidance; plaintiff likewise testified that after working with her supervisor, she was able to do the documentation without problems for the two weeks she remained there, and she had been employed there "for over two years without receiving disciplinary action for her documentation abilities, which suggests she met the basic qualifications for the job."); *Ponce v. City of Naples*, No. 2:17-CV-137-FTM-99CM, 2018 WL 1393748, at *8–9 (M.D. Fla. Mar. 20, 2018) (fact dispute as to what job plaintiff was performing, and therefore whether he could do the essential functions); *Goble v. City of Smyrna, Georgia*, 248 F. Supp. 3d 1351, 1373–77 (N.D. Ga. 2017) (fact dispute based on plaintiff's testimony, certain medical evidence, and the relatively few disciplinary incidents over long career, which were not viewed as important until

disclosure of plaintiff's PTSD); *Wagner v. Inter-Con Sec. Sys., Inc*., 278 F. Supp. 3d 728, 736 (S.D.N.Y. 2017) (uncontested that court security officer with diabetes had good job performance for months, without performance complaints from any supervisor, co-worker, or member of the judiciary); *Hull v. Arvest Bank Operations, Inc*., No. CIV-16-69-D, 2017 WL 3471435, at *4 (W.D. Okla. Aug. 11, 2017) (plaintiff never received an unsatisfactory job evaluation, and employer admitted that he was not terminated for unsatisfactory performance); *Hambright v. Bartow Cty., Georgia*, No. 4:16-CV-236-HLM-WEJ, 2017 WL 6460246, at *17 (N.D. Ga. July 11, 2017) (fact issue based on plaintiff's satisfactory performance over many years, made possible by adjusting his pain medications and using his vacation and sick leave).

Employers continue to argue that an application for Social Security benefits (and the like) operates to estop the plaintiff from arguing that she or he was qualified for the job. But the law is now fairly well established that the two positions are not necessarily inconsistent; instead, under *Cleveland v. Policy Mgmt. Sys. Corp*., 526 U.S. 795 (1999), the plaintiff must come forward with an explanation. For example, in *Mir v. L-3 Commc'ns Integrated Sys., L.P.*, No. 3:15-CV-2766-L, 2017 WL 5177118, at *5 (N.D. Tex. Nov. 8, 2017), the court recognized that the representations to the SSA were made five years before he applied for a job with the defendant, and the plaintiff had had corrective surgery in the meantime. In addition, the plaintiff's statements to the SSA regarding his inability to work were consistent with his claim that he could perform the duties of his job with reasonable accommodations.

C. Failure-to-accommodate claims

1. Making a request

The plaintiff must usually request an accommodation to commence an interactive process, although he or she is excused from doing so if the need for accommodation is known or obvious. *Cannon v. Jacobs Field Servs. N. Am., Inc*., 813 F.3d 586, 594–95 (5th Cir. 2016).

Many cases confirm that a doctor's note is often a sufficient accommodation request. *See, e.g., Ruggiero v. Mount Nittany Med. Ctr*., 736 F. App'x 35, 39–40 (3d Cir. 2018). And most courts to consider the issue hold that the employee does not have to use a particular employer form in requesting an accommodation. *See, e.g., Churchwell v. City of Concord*, No. 1:17-CV-299, 2018 WL 2899735, at *3 (M.D.N.C. June 11, 2018). *See also Ryan v. Shulkin*, 2017 WL 6270209, at *9–10, 12 (N.D. Ohio Dec. 8, 2017).

There is a split in the circuits on whether a request for FMLA leave is sufficient to act as a request for a reasonable accommodation under the ADA, but the Fifth Circuit has said no. *Acker v. Gen. Motors, L.L.C.*, 853 F.3d 784, 791–92 (5th Cir. 2017). It may be possible for plaintiffs to distinguish *Acker* on the facts,[8] and because of the circuit split, it is possible that it may someday be overturned.

[8] In *Acker*, an electrician with anemia asked for intermittent FMLA leave when his condition worsened, but he failed to file several of his requests on a timely basis, and under the union contract he lost pay as a result of disciplinary action. According to the court, the plaintiff "failed to follow GM's absence procedure, was disciplined, and has successfully followed GM's absence procedure since. As a consequence, Acker has not proved how GM denied him any accommodation." *Id*. at 792.

2. Timing of the request

The courts are confused as to how to respond to instances of perceived misconduct or poor performance, when those are because of the disability. A full analysis of this issue is beyond the scope of this paper, but one commonly followed "rule" is that an accommodation request that comes after the employer's decision to terminate is too late. *See, e.g., Guzman v. Brown Cty*., 884 F.3d 633, 642 (7th Cir. 2018) ("The undisputed evidence establishes that Guzman was terminated based on her repeated late arrivals, the last of which occurred on March 8, 2013, prior to her conversation with Panure. After-the-fact requests for accommodation do not excuse past misconduct."); *Dewitt v. Sw. Bell Tel. Co*., 845 F.3d 1299, 1316 (10th Cir. 2017) (rejecting the accommodation of "overlooking a past violation of a workplace rule, regardless of whether that violation was caused by the employee's disability."). But there may be exceptions to this "rule." *Compare Gray v. BMW Mfg. Co. LLC*, No. 7:15-CV-4133, 2017 WL 3530143, at *7 (D.S.C. Aug. 17, 2017) (request for accommodation made at termination meeting was timely; plaintiff had no reason to think he needed an accommodation until he learned at meeting that his prescription Adderall had caused a positive drug test for amphetamines).

The EEOC apparently takes the position that disability-related performance issues should be treated differently from disability-related misconduct, and that "an employer is [not] categorically free to terminate any and all disabled employees at the first instance of any and all disability-related performance deficiencies." But the court in *Dewitt* rejected that position. *Dewitt, supra*, 845 F.3d at 1316–17.

3. Interactive process

Once an employee with a disability requests an accommodation—or the need for one is known or obvious—the parties are supposed to engage in a flexible, interactive process designed to identify a reasonable accommodation. 29 C.F.R. § 1630.2(o)(3); *Cutrera v. Bd. of Sup'rs of Louisiana State Univ.*, 429 F.3d 108, 112 (5th Cir. 2005), *quoting* 29 C.F.R. Pt. 1630 App., § 1630.9. The parties' exact obligations may vary, but the outcome in accommodation cases often depends on which party failed to engage in that process in good faith.

In several recent cases, the courts upheld a jury verdict for the plaintiff in part because of miscommunication that the employer could easily have resolved. For example, in *Equal Employment Opportunity Comm'n v. Dolgencorp, LLC*, 899 F.3d 428 (6th Cir. 2018), there was evidence that the employer refused to allow a cashier with diabetes to drink orange juice at the register because of the company's "personal appearance" policy. The employer argued that there were other sources of sugar that the plaintiff could have used that would not have violated its policy, but it failed to explain this to the plaintiff or otherwise participate in an interactive process that might have disclosed this to the plaintiff. The court found that the jury could have reasonably concluded that a policy prohibiting an employee from chewing gum and eating food would also prohibit an employee from consuming items such as glucose tablets, cough drops, candy, and honey packets. *Id*. at 434.

Similarly, the employer in *Snead v. Fla. Agric. & Mech. Univ. Bd. of Trustees*, 724 F. App'x 842, 846–47 (11th Cir. 2018), may have misunderstood the plaintiff's medical restrictions, but there is nothing in the opinion indicating that it ever asked for clarification. And the court found that a reasonable juror could have agreed with the plaintiff that the doctor only meant that the plaintiff should return to his previous schedule, not that he could never work more than eight hours in a shift. And in *Clark v. Sch. Dist. Five of Lexington & Richland Ctys*., 247 F. Supp. 3d 734, 751 (D.S.C. 2017), the employer originally requested that the plaintiff see an independent psychologist, then later claimed that the plaintiff failed to engage in the interactive process because she did not do so. The court rejected that because there was no evidence that the employer renewed its request, and the plaintiff could have reasonably considered the request moot after she had provided the information from her own doctor that the employer was seeking.

In *Gunter v. Bemis Co., Inc*., No. 4:16-CV-37, 2017 WL 6462351, at *4–5 (E.D. Tenn. Aug. 30, 2017), *judgment aff'd in part on other grounds*, 906 F.3d 484 (6th Cir. 2018), the court rejected the employer's argument that the plaintiff's request for something that was not required meant it had no obligation to consider other accommodations. The plaintiff did not understand what an accommodation was, and the employer never explained it. The employer had also decided that no accommodation was available even before its allegedly "good faith" meeting with the plaintiff.[9]

In *McMahon v. Metro. Gov't of Nashville & Davidson Cty., Tennessee*, No. 16-6498, 2017 WL 8217669, at *2 (6th Cir. June 27, 2017), *cert. denied*, 138 S. Ct. 1552 (2018), the plaintiff was running out of paid leave, so she asked for a period of unpaid leave, without specifying the length. Rather than asking if a finite period would suffice, the employer simply fired her. The employer argued "that it should not have been required to propose a definite leave period. But [it] informed [the plaintiff] that she had to return to work at the expiration of her paid leave, when it would have been no more of an imposition for [it] to propose that [the plaintiff] had to return to work no later than the expiration of unpaid leave."

See also Churchwell v. City of Concord, No. 1:17-CV-299, 2018 WL 2899735, at *3–4 (M.D.N.C. June 11, 2018) (denying summary judgment) (regarding the employer's argument that there was no evidence the plaintiff needed 30 days leave, court found that "the onus is on the employer to request documentation" if it is required, and employer did not do so, nor did it engage in the interactive process); *Ferguson v. Wayne County Airport Authority*, No. 16-11415, 2018 WL 2117796, at *7 (E.D. Mich. May 8, 2018) (denying summary judgment in part) ("It appears that the decision to deny Plaintiff the chance to return to work was made very quickly via email, without any meaningful review."); *Reyer v. Saint Francis Country House*, 243 F. Supp. 3d 573, 597 (E.D. Pa. 2017) (denying summary judgment) ("Additionally, if Defendants were uncertain as to the duration of the lifting restriction or his request for leave, a reasonable jury could conclude that Defendants failed to engage in good faith and did not attempt to clarify ambiguous information with [the plaintiff]."). In *Grabowski v. QBE Americas, Inc*., No. 15-12318, 2017 WL 1077667, at *7–8 (E.D. Mich. Mar. 22, 2017), *reconsideration denied*, 2017 WL 3457099 (E.D. Mich. Aug. 11, 2017) (denying defendant's summary judgment motion), the plaintiff sought leave, indicating

[9] On this last point, see also *Slayton v. Sneaker Villa, Inc*., No. CV 15-0074, 2017 WL 1048360, at *12 (E.D. Pa. Mar. 20, 2017).

that he had an appointment with a specialist in six weeks. Rather than waiting, the employer fired the plaintiff 18 days before that appointment.

In *Reyes v. Texas Dep't of Criminal Justice*, No. A-16-CA-00954-SS, 2017 WL 4979844, at *5 (W.D. Tex. Oct. 31, 2017), the employer argued that it was exempt from engaging in the interactive process because the accommodation sought by the plaintiff was unreasonable. But the court found no such exemption, holding that the employer "should have engaged in such a process before preemptively terminating Reyes."[10]

Sometimes there is a factual dispute about what steps the employer took in response to an accommodation request. *See Hostettler v. Coll. of Wooster*, 895 F.3d 844, 857–58 (6th Cir. 2018) (criticizing district court for resolving factual disputes in favor of the summary-judgment movant). For example, in *Reyer v. Saint Francis Country House*, 243 F. Supp. 3d 573, 596 (E.D. Pa. 2017), the HR Director testified that she had consulted with managers to see if the five-pound lifting restriction could be accommodated, but one of the managers (who was most familiar with the plaintiff's job) did not remember such a conversation. Moreover, the HR head could not recall if she spoke to the plaintiff about the issue, and the plaintiff denied that she had. And in *Equal Employment Opportunity Comm'n v. Wesley Health Sys., LLC*, No. 2:17-CV-126-KS-MTP, 2018 WL 5986753, at *4 (S.D. Miss. Nov. 14, 2018), the employer argued that it accommodated the nurse by helping her look for another position that did not require heavy lifting, but there was evidence that the employer could have accommodated her lifting restrictions, but did not want her to return. Of course, different facts can lead to different outcomes. In *Gardea v. JBS USA, LLC*, 915 F.3d 537, 542 (8th Cir. 2019), for example, the court found that the proposed lift-assisting devices would not have worked because of the lack of overhead anchor points and the tight quarters involved.

Note that the failure to engage in the interactive process because of a "100% healed" policy may support an ADA claim. *Harris v. City of Lewisburg, Tennessee*, No. 1:15-CV-00114, 2017 WL 3237780, at *9–10 (M.D. Tenn. July 31, 2017).

On the other hand, the employee must also participate in the interactive process, and the employer will not be liable if the plaintiff is at fault for the breakdown of the process. *See, e.g., Jackson v. Blue Mountain Prod. Co.*, No. 18-60361, ___ F. App'x ___, 2019 WL 927076, at *4 (5th Cir. Feb. 21, 2019) ("When an employee voluntarily retires, he terminates the interactive process, making summary judgment appropriate because it becomes difficult to discern what measures may have been taken had accommodation discussions continued."); *Trautman v. Time Warner Cable Texas, LLC*, 756 F. App'x 421, 430–31 (5th Cir. 2018) (employer attempted numerous accommodations, but plaintiff did not engage in the interactive process). *But cf. Stokes v. Nielsen*, 751 F. App'x 451, 455 (5th Cir. 2018) ("Here, in contrast [to *Loulseged v. Akzo Nobel Inc.*], Stokes offered evidence that she repeatedly requested the specific accommodation, was

[10] *See also Summers v. Altarum Inst., Corp*., 740 F.3d 325, 331 n.4 (4th Cir. 2014) ("an employee's accommodation request, even an unreasonable one, typically triggers an employer's duty to engage in an 'interactive process'").

The court in *Reyes* also stated that the "[d]efendants' failure to engage in the interactive process is itself actionable." That is counter to other authority, and a more accurate statement may be the one cited by the *Reyes* court from *Loulseged v. Akzo Nobel Inc*., 178 F.3d 731, 736 (5th Cir. 1999): "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."

assured it would be provided, and then did not receive it on multiple occasions. A reasonable jury could certainly conclude that any 'breakdown' of the interactive process was not caused by Stokes.").

Note, too, that accommodations are not just to assist in performing job functions; they may also be required to ensure that an employee with a disability can enjoy "equal benefits and privileges" of employment. *Feist v. Louisiana, Dep't of Justice, Office of the Atty. Gen*., 730 F.3d 450, 453 (5th Cir. 2013). Among other things, this could include accommodations to make sure training and meeting materials are made accessible to a blind employee, *Stokes v. Nielsen*, 751 F. App'x 451, 454 (5th Cir. 2018) (either giving materials in large print, or providing in advance so employee could use her workstation magnification equipment); accommodations to lessen the pain at work, *Feist*, *supra* (use of closer parking lot); or accommodations to reduce anxiety and panic in a teacher with PTSD and panic disorder with agoraphobia. *Clark v. Sch. Dist. Five of Lexington & Richland Ctys*., 247 F. Supp. 3d 734, 750–51 (D.S.C. 2017) (fact issue whether allowing use of service animal was required).

4. Proof that accommodation was possible, and would've worked

In *Snapp v. United Transportation Union*, 889 F.3d 1088 (9th Cir. 2018), the court clarified an important point regarding the burdens of proof. At summary judgment, the employer's failure to engage in the interactive process shifts the burden to the employer to prove the unavailability of a reasonable accommodation. But at trial, the plaintiff must prove that a reasonable accommodation was available.

In *Dunlap v. Liberty Nat. Prod., Inc*., 878 F.3d 794 (9th Cir. 2017), the plaintiff put on evidence at trial that she had requested the use of onsite carts and other affordable assistive devices (e.g., scissor-lift table) were "readily available and could have enabled her to perform the essential function of moving objects from one point to another." *Id*. at 799. In response, the employer "discouraged use of the onsite carts, failed to discuss or provide assistive devices, and terminated Dunlap's employment due to her perceived inability to perform the essential job functions of her position. Because the evidence reflected that Liberty had prior notice of Dunlap's limitations, refused to consider or implement her proposed accommodations, and failed to articulate any undue hardship, the district court correctly denied Liberty's renewed motion for JMOL." *Id*. And in *Snead v. Fla. Agric. & Mech. Univ. Bd. of Trustees*, 724 F. App'x 842, 846 (11th Cir. 2018), the verdict was supported by sufficient evidence, based on the plaintiff's testimony that he could do the job functions (with an alternate schedule),[11] and based on his doctor's confirming testimony. *See also Ferguson v. Wayne County Airport Authority*, No. 16-11415, 2018 WL 2117796, at *6–7 (E.D. Mich. May 8, 2018) (sufficient evidence that although heavy-labor tasks had to be done, it was not essential for the plaintiff to do them, and the foreman was "generally 'given complete discretion' when determining 'who is assigned to what position or what task for the day.'"); *Vigil v. New Mexico Pub. Educ. Dep't*, No. 1:16-CV-00047 KG/KK, 2018 WL 1997289, at *11 (D.N.M. Apr. 27, 2018) (employer testified that it could have moved plaintiff to another office if an IME had demonstrated a need for it).

[11] The employer complained that this was "self-serving" testimony, a description the court appeared to find irrelevant. *Id*. This is also a common complaint at the summary judgment stage, but it is irrelevant there as well. *See, e.g., Williams v. Tarrant County College District*, 717 F. App'x 440, 448 (5th Cir. 2018).

Of course, not all accommodation will work. In *Gardea v. JBS USA, LLC*, 915 F.3d 537, 542 (8th Cir. 2019), as noted above, the court found that the proposed lift-assisting devices would not have worked because of the lack of overhead anchor points and the tight quarters involved.

In reassignment cases, courts often require the plaintiff to prove that vacant positions existed for which the plaintiff was qualified. In *Moss v. Harris Cty. Constable Precinct One*, 851 F.3d 413, 419 (5th Cir. 2017), the plaintiff sought reassignment to a "light duty" position, but failed to present summary-judgment evidence that the position was vacant at the time of his termination. *See also McGuire v. United Parcel Serv., Inc*., No. 17-13258, ___ F. App'x ___, 2019 WL 1418060, at *5 (11th Cir. Mar. 28, 2019) ("there were no full-time positions available on which he could bid based on seniority"); *Audette v. Town of Plymouth, MA*, 858 F.3d 13 (1st Cir. 2017); *Smith v. Sweeny Indep. Sch. Dist*., No. CV G-17-0123, 2018 WL 5437762, at *8 (S.D. Tex. Oct. 29, 2018) (no showing that reassignment position was available); *Ford v. Marion Cty. Sheriff's Dep't*, 270 F. Supp. 3d 1059, 1081 (S.D. Ind. 2017), *reconsideration denied*, No. 1:15-CV-1989-WTL-DML, 2018 WL 419986, at *3 (S.D. Ind. Jan. 16, 2018). Similarly, in *Boyle v. City of Pell City*, 866 F.3d 1280, 1289–90 (11th Cir. 2017), the court found that although the employer allowed the plaintiff to perform foreman duties for several years, there actually was no open foreman position, and such a reassignment would have been a promotion and would have necessitated bumping, neither of which is required.[12] But in *Smith-Jackson v. Chao*, No. 1:15-CV-1688-WSD, 2017 WL 3575003, at *9 (N.D. Ga. Aug. 18, 2017), the court found sufficient evidence of vacant positions for which the plaintiff was qualified. *See also Sanchez v. United States Dep't of Energy*, 870 F.3d 1185, 1200 (10th Cir. 2017) (rejecting motion to dismiss in relevant part, finding that the pleadings identified numerous vacant positions that did not require the certification that the plaintiff was unable to obtain).

Although the general rule is that excusing the performance of an essential function is not a reasonable accommodation, remember that this rule applies to *permanent* changes. By contrast, excusing an essential function *temporarily* may be a reasonable accommodation (just like a reasonable period of leave is, even though it means excusing the performance of *all* functions for a time). *See Caffa-Mobley v. Mattis*, No. 5:15-CV-243-TBR-LLK, 2018 WL 1095810, at *7–8 (W.D. Ky. Feb. 27, 2018); *Reyer v. Saint Francis Country House*, 243 F. Supp. 3d 573, 596–97 (E.D. Pa. 2017) (fact issue whether lifting restriction was indefinite or finite).

III. Types of Accommodations

A. Reasonable periods of leave

1. Length of leave

In *Severson v. Heartland Woodcraft, Inc*., 872 F. 3d 476 (7th Cir. 2017), *cert denied*, 138 S. Ct. 1441 (Mem.) (2018), the court held that "[i]ntermittent time off or a short leave of absence—say, a couple of days or even a couple of weeks—may, in appropriate circumstances, be analogous to a part-time or modified work schedule, two of the examples listed in § 12111(9). But a medical

[12] For another case rejecting a reassignment resulting in a promotion, see *Brown v. Milwaukee Bd. of Sch. Directors*, 855 F.3d 818, 827–28 (7th Cir. 2017).

leave spanning multiple months does not permit the employee to perform the essential functions of his job. To the contrary, the inability to work for a multi-month period removes a person from the class protected by the ADA." *Id*. at 481 (internal quotes and brackets omitted).

On the other hand, many circuits, including the Fifth Circuit, have not imposed such bright-line tests. Despite what would appear to be a circuit split, certiorari was denied in both *Severson* and in another case with a similar result from the same circuit, *Golden v. Indianapolis Hous. Agency*, 698 F. App'x 835 (7th Cir. 2017), *cert denied*, 138 S. Ct. 1446 (Mem.) (2018).

Of course, a jury could reasonably conclude that the leave plaintiff sought was not excessive if other employees were permitted to take comparably lengthy disability leaves of absence. *Buhe v. Amica Mut. Ins. Co*., No. 15 C 5340, 2018 WL 835221, at *9 (N.D. Ill. Feb. 13, 2018).[13] *See also Employer-Provided Leave and the Americans with Disabilities Act*, "Equal Access to Leave Under an Employer's Leave Policy" (EEOC May 9, 2016).[14]

2. Indefinite leave

Courts have repeatedly held that indefinite leave is not a reasonable accommodation, and thus employers do not have to grant it. *See, e.g., Moss v. Harris Cty. Constable Precinct One*, 851 F.3d 413, 418 (5th Cir. 2017). But some recent cases unfairly find leave to be indefinite. In *Punt v. Kelly Servs*., 862 F.3d 1040, 1050–51 (10th Cir. 2017), the plaintiff with breast cancer informed her supervisor of her diagnosis, that she would be out the rest of the week, and that she would need additional time off for "some appointments and tests" and for "five times of radiation." The court found this unreasonable on its face for two reasons. First, the court found it "very vague" as to how much time she would miss, but the court fired the employee without asking for more details. Second, the court relied on the fact that the individual did not inform the employer "of the expected duration of her impairment." But this is both irrelevant, and almost never known—the duration of the leave is important; the duration of the diagnosis is not. The result may be explainable based on the fact that the plaintiff was a temporary employee, but the analysis does not make that clear.

In *Whitaker v. Wisconsin Dep't of Health Servs*., 849 F.3d 681, 685–86 (7th Cir. 2017), the court found that the plaintiff "did not offer any evidence regarding the effectiveness of her course of treatment or the *medical* likelihood of her recovery." That was despite the fact that there were two doctor's notes, one supporting a "leave of absence until 11/17/10," and a follow-up note requesting a one-month extension. The court also criticized the plaintiff's testimony as insufficient to show if, had she received the additional leave, she likely would have been able to return to work on a regular basis. The plaintiff described her treatment, but the court found that she did not explain the effectiveness of it, nor was there evidence of "the medical likelihood that it would enable her to return to work regularly." *See also Williams v. AT&T Mobility Servs. LLC*, 847 F.3d 384, 394 (6th Cir. 2017) ("A physician's estimate of a return date alone does not necessarily indicate a clear prospect for recovery, especially where an employee has repeatedly taken leaves of unspecified duration and has not demonstrated that additional leave will remedy her condition.").

[13] This is consistent with, *e.g.*, *Carmona v. Sw. Airlines Co*., 604 F.3d 848, 859–60 (5th Cir. 2010) ("Even if we assume that attendance was an essential function of Carmona's job, Southwest's own measure of whether or not a flight attendant's attendance was adequate was its attendance policy, which was extremely lenient.") (footnote omitted).
[14] Available online at https://www.eeoc.gov/eeoc/publications/ada-leave.cfm.

But in *Stragapede v. City of Evanston, Illinois*, 865 F.3d 861 (7th Cir. 2017), the court rejected the view that the plaintiff could not sustain regular attendance. To the contrary, "[t]he evidence shows that Stragapede had to return to the office three or four times to seek assistance with his computer login and password. The jury could reasonably conclude that these infrequent and temporary office trips should not count as absences from work." *Id*. at 866. And in *Reyer v. Saint Francis Country House*, 243 F. Supp. 3d 573, 596–97 (E.D. Pa. 2017), the court found there was a factual dispute about whether any required leave was indefinite. The employer pointed to doctor's notes that did not specify the return-to-work date, but the plaintiff testified that he told the employer that he could return sometime in early January. "Additionally, if Defendants were uncertain as to the duration of the lifting restriction or his request for leave, a reasonable jury could conclude that Defendants failed to engage in good faith and did not attempt to clarify ambiguous information with [the plaintiff]."

In other cases, courts have rejected the employer's argument that the request for leave was indefinite. *See, e.g., Branch v. City of Brookshire*, No. CV H-16-1888, 2018 WL 3439636, at *2 (S.D. Tex. July 16, 2018) ("But Branch did not ask for an indefinite amount of time; he asked for a month to wait for his physician return from vacation to certify him to return to unrestricted duty. The court cannot, as a matter of law, find that this was not a request for reasonable accommodation.") (record cite omitted).

B. Teleworking

In *Credeur v. Louisiana through Office of Attorney Gen.*, 860 F.3d 785 (5th Cir. 2017), the Fifth Circuit rejected the accommodation of teleworking or telecommuting under the facts presented. There are several analytical problems with the opinion, and it could be criticized for suggesting that teleworking is only rarely possible, without citing any evidence in support. On the other hand, the result in that case is supported by evidence that the employer had difficulty supervising the plaintiff during past periods of telecommuting, when her work fell behind.

Note that the court in *Credeur* framed the issue as the reasonableness of the accommodation rather than one of undue hardship, as in *E.E.O.C. v. Ford Motor Co*., 782 F.3d 753 (6th Cir. 2015) (en banc). That may have been how the parties framed the issue, but that might be wrong. In *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401–02 (2002), the high court stated that the plaintiff's burden is just to point to an accommodation that is reasonable "on its face" or "in the run of cases." And there are many authorities (not to mention workplace trends) supporting teleworking as an accommodation generally. *Barnett* would seem to require that the appropriateness of teleworking be addressed as part of the job- or workplace-specific "undue hardship" defense. *Barnett* at 402.

In the end, the most important lesson from *Credeur* and most other telework cases is that they are fact-specific, and courts have reached contrary results. *Compare Brunckhorst v. City of Oak Park Heights*, 914 F.3d 1177, 1182–83 (8th Cir. 2019) (no showing that telework was required, and certain physical tasks could only be performed in the office); *Mosby-Meachem v. Memphis Light, Gas & Water Div*., 883 F.3d 595 (6th Cir. 2018) (sufficient evidence that attorney could have been performed job remotely, based on testimony of several co-workers and also on

the tasks that the plaintiff actually performed); *Slayton v. Sneaker Villa, Inc*., No. CV 15-0074, 2017 WL 1048360, at *6, 13 (E.D. Pa. Mar. 20, 2017) (denying summary judgment because attendance was not listed as an essential function, and the plaintiff testified to her normal tasks and that all of them could be done from home with a phone and a computer).

A word about "attendance" as an essential function. Courts continue to repeat the statement that attendance is an essential function of "all," "almost all," or "most" jobs. *E.g., Credeur v. Louisiana through Office of Attorney Gen*., 860 F.3d 785, 793 (5th Cir. 2017). But this seems more "sound bite" than legal analysis. There is typically neither a need, nor the supporting evidence, to make such a broad statement. And it is inconsistent with the recognized accommodations of medical leave or teleworking. The origin of this statement in many circuits is case law concerning indefinite leave, and it may make sense in that context, but courts have drifted from that application. Like other issues regarding qualified and accommodation, the evidence in the individual case is the important determinant. In a recent case, the Sixth Circuit stated:

> [F]ull-time presence at work is not an essential function of a job simply because an employer says that it is. If it were otherwise, employers could refuse *any* accommodation that left an employee at work for fewer than 40 hours per week. That could mean denying leave for doctor's appointments, dialysis, therapy, or anything else that requires time away from work. Aside from being antithetical to the purpose of the ADA, it also would allow employers to negate the regulation that reasonable accommodations include leave or telework. … Wooster may have preferred that Hostettler be in the office 40 hours a week. And it may have been more efficient and easier on the department if she were. But those are not the concerns of the ADA: Congress decided that the benefits of gainful employment for individuals with disabilities—dignity, financial independence, and self-sufficiency, among others—outweigh simple calculations of ease or efficiency. To that end, the ADA requires that employers reasonably accommodate employees with disabilities, including allowing modified work schedules. An employer cannot deny a modified work schedule as unreasonable unless the employer can show *why* the employee is needed on a full-time schedule; merely stating that anything less than full-time employment is *per se* unreasonable will not relieve an employer of its ADA responsibilities.

Hostettler v. Coll. of Wooster, 895 F.3d 844, 857 (6th Cir. 2018) (emphasis in original). *See also Slayton v. Sneaker Villa, Inc*., No. CV 15-0074, 2017 WL 1048360, at *6 (E.D. Pa. Mar. 20, 2017) (denying summary judgment because attendance was not listed as an essential function, and the plaintiff testified to her normal tasks, and that all of them could be done from home with a phone and a computer).

C. Reassignment

The Circuits are split on whether reassignment requires the employer to place the plaintiff in the vacant (or soon to be vacant) position (which is the EEOC's position), or just means that the plaintiff can compete for the job along with all others (and the employer can choose the person it

thinks 'best qualified'). This had been trending in favor of the plaintiffs,[15] but the Eleventh Circuit rejected the EEOC position in *United States Equal Employment Opportunity Comm'n v. St. Joseph's Hosp., Inc.*, 842 F.3d 1333 (11th Cir. 2016). The issue is currently before the Fifth Circuit in *Equal Employment Opportunity Comm'n v. Methodist Hosps. of Dallas*, 218 F. Supp. 3d 495 (N.D. Tex. 2016), *appeal pending*, No. 17-10539 (5th Cir.). One of the defense arguments in that case is that the Supreme Court's decision in *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), favors approving a "best qualified" policy. But this argument was expressly rejected in *Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1204–06 (10th Cir. 2018).

D. Guidance from Title VII religious-accommodation cases

Although Title VII requires employers to provide reasonable accommodation to their employees' religious observance, the Title VII obligation is much weaker than the accommodation obligation in the ADA. *See, e.g., Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1120 n.10 (9th Cir. 2000), *judgment vacated on other grounds*, 535 U.S. 391 (2002). That means that Title VII cases rejecting a particular accommodation are not very relevant to ADA claims. But the reverse is not true—a type of accommodation considered reasonable under Title VII would seem by necessity to be reasonable under the ADA. Such cases may therefore be a fruitful source for identifying accommodations. *Compare Tabura v. Kellogg USA*, 880 F.3d 544, 556–57 (10th Cir. 2018) ("On the record here, we think a jury could find that, in light of the difficulties Plaintiffs had in arranging shift swaps in this case, Kellogg had to take a more active role in helping arrange swaps in order for that to be a reasonable accommodation of Plaintiffs' Sabbath observance.").

IV. "Because of" Disability in Disparate-Treatment Cases

The typical disparate-treatment case—in which the plaintiff must show that the adverse action was taken because of disability—requires proof that the employer knew about the disability. But that does not require a detailed understanding.

In *Grabowski v. QBE Americas, Inc.*, No. 15-12318, 2017 WL 1077667, at *7 (E.D. Mich. Mar. 22, 2017), *reconsideration denied*, 2017 WL 3457099 (E.D. Mich. Aug. 11, 2017), the court noted that the employer need only know the underlying facts of the condition; the employee need not label his condition as a disability. The court found sufficient evidence that the employer knew of the plaintiff's disability based on his disclosure of memory issues. Moreover, "the fact that his condition [early-onset Alzheimer's] had not been officially diagnosed or labeled a disability is not dispositive." *See also Wagner v. Inter-Con Sec. Sys., Inc.*, 278 F. Supp. 3d 728, 736–37 (S.D.N.Y. 2017) (although disability was not mentioned in the termination document, the court found sufficient evidence that the employer knew of the plaintiff's diabetes, and believed it to have been "uncontrolled," based on various communications it had with the plaintiff).

Nor it is a defense that the employer took adverse action because of the cost of medical treatment; that is still disability discrimination. *Hofmann v. Bethesda Found., Inc.*, No. 1:17-CV-143, 2018 WL 4094810, at *12 (S.D. Ohio Aug. 28, 2018) ("Second, Defendants assert that Hofmann testified that he was fired not because he had cancer, but because of the $470,000 cost of his cancer treatment. However, there is no evidence that Defendants knew the cost of his cancer

[15] *See, e.g., E.E.O.C. v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012).

treatment and terminated Hofmann on that basis. Also, to the extent that Defendants suggest that discrimination based on health care costs is not disability discrimination, case law does not support that argument.").

V. Qualification Standards

A. "Essential functions" vs. "qualification standards"

In *Spencer v. KS Mgmt. Servs., L.L.C.*, 680 F. App'x 311 (5th Cir. 2017), the plaintiff, a medical assistant, had shock treatment for depression, resulting in a learning disability. A clinic reorganization required all assistants to pass a higher-level exam testing knowledge of medications and immunizations. The plaintiff could not pass it, even after certain accommodations were granted. She was fired, although she had been proficient at her (pre-reorganization) job. At trial and on appeal, the court found that administering medicine and vaccines was an essential function of the reorganized position. But the courts also seemed to analyze the *exam itself* as an essential job function. *Id*. at 313–14. An essential function is what the job is created to accomplish. That might be giving shots and medications, but it is not passing a test (unless one is a professional test-taker). *See also Lewis v. City of Union City*, 877 F.3d 1000, 1013 (11th Cir. 2017) (analyzing whether practice exposure to OC spray and Taser shocks are essential job functions, instead of viewing them as qualification standards); *McNelis v. Pennsylvania Power & Light Co*., 867 F.3d 411, 415 (3d Cir. 2017) (referring to the "proposition that 'a legally-defined job qualification is by its very nature an essential function'"). *Compare Rodrigo v. Carle Found. Hosp*., 879 F.3d 236, 241–43 (7th Cir. 2018) (apparently viewing an exam as a "qualification standard," but noting that the plaintiff argued that it should be analyzed under the "essential function" rubric).

Remember that "essential functions" are what an employee does on the job (e.g., lifts and carries packages; sells things; repairs, builds, or assembles things; pursues criminal suspects), while "qualification standards" are requirements that are supposed to predict whether someone can do the job's essential functions. The above cases should have been analyzed under the ADA provision relating to "qualification standards" in 42 U.S.C. § 12112(b)(6).

Failing to include a qualification-standard claim is a frequent mistake, by courts and by counsel. And the distinction can make a big difference, because essential job functions do not have to be waived, but qualification standards may have to be. "It may be a defense to a charge of discrimination … that an alleged application of qualification standards, tests, or selection criteria that screens out or tends to screen out or denies a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity *and such performance cannot be accomplished with reasonable accommodation*, as required in this part." 29 C.F.R. §1630.15(b)(1)(emphasis supplied). Therefore, the employer cannot maintain its business-necessity defense if the applicant or employee can meet the standard, or can perform the job's essential functions, with a reasonable accommodation.

B. Improper use of Title VII standards

Some courts apply Title VII's disparate-impact analysis to ADA claims involving "qualification standards" or "methods of administration." *See, e.g., Reyes v. Texas Dep't of*

Criminal Justice, No. A-16-CA-00954-SS, 2017 WL 4979844, at *4 (W.D. Tex. Oct. 31, 2017). Remember that Title VII has no statutory language on point, so the Title VII case law was created by judges to fill that gap. The ADA, on the other hand, has two separate statutory provisions that are relevant to such claims—42 U.S.C. §§ 12112(b)(3) and 12112(b)(6). Those provisions set out the proper requirements for each claims.

VI. Medical Exams

In *Equal Employment Opportunity Comm'n v. BNSF Ry. Co.*, 902 F.3d 916 (9th Cir. 2018), *pet. for cert. filed*, the plaintiff was screened after a conditional job offer. The employer learned about a history of back surgery, and requested more info. The doctors agreed that the plaintiff was good to go. But the employer's medical director would not approve the hire unless the employee paid for an MRI, which he could not afford.

The court began its analysis by noting that such exams do not have to be justified by business necessity, but they still must comply with the ADA and the non-discrimination mandate in 42 U.S.C. § 12112(a). *Id*. at 922. After finding that the person had a regarded-as disability, the court held that it was not permissible for the employer to condition the job offer on the individual obtaining an MRI at his own expense. The court found that this was "a condition of employment imposed discriminatorily on a person with a perceived impairment." *Id*. at 925.[16]

The court noted that although the ADA authorizes medical entry exams, they must be given to everyone, and this MRI requirement was not. The court also noted that follow-up exams may be permissible, but that "does not support BNSF's position that the prospective employee may be forced to shoulder the cost of such follow-up exams." *Id*. Although the statute is silent as to who must bear the costs of testing, the court held that an employer that "requests an MRI at the applicant's cost only from persons with a perceived or actual impairment or disability … is imposing an additional financial burden on a person with a disability because of that person's disability." *Id*. at 926.[17] The court also recognized a policy reason supporting its holding—"requiring employers to bear the costs of this testing would discourage unnecessary and burdensome testing of persons with disabilities or impairments, and prevent employers from abusing their ability to require tests." *Id*. at 926–27.

The court affirmed summary judgment for the plaintiff on liability, and remanded for further consideration of the injunctive relief the trial court ordered.

The ADA rules regarding medical exams depend on the context. The above case dealt with post-offer entrance exams. But exams of current employees always have to be justified as job-related and consistent with business necessity. In *Equal Employment Opportunity Comm'n v.*

[16] Note that not every request for medical clearance will support a "regarded as" disability. *See, e.g., Voss v. Hous. Auth. of the City of Magnolia, Arkansas*, 917 F.3d 618, 624–25 (8th Cir. 2019) (employer's request for a medical clearance letter after a positive test for [prescription] hydrocodone did not indicate a perceived disability but simply a concern about whether medication interfered with ability to safely perform job). In *EEOC v. BNSF*, on the other hand, the employer rejected the medical clearance.

[17] Although the court noted that the indisputably high cost of MRIs would disqualify many from participating in the process, it also held that its holding "applies regardless of the cost of the medical test at issue, as well as the employee's ability to pay." *Id*. at 926 n.9.

McLeod Health, Inc., 914 F.3d 876, 882 (4th Cir. 2019), the question was whether an exam was justified by a reasonable fear of direct threat, based on the plaintiff's lifelong musculoskeletal condition and a risk of falling. The court denied summary judgment, finding that the plaintiff's past falls (one time with virtually no injury), and one report of looking groggy, were not enough to eliminate a factual dispute. *See also U.S. Equal Employment Opportunity Commission v. Gulf Logistics Operating, Inc.*, No. CV 17-9362, 2019 WL 1499133, at *8 (E.D. La. Apr. 5, 2019) (fact dispute whether EAP referral for employee who had separated from his spouse was enough to trigger a medical exam, given that supervisor's testimony of performance decline was disputed).

VII. Using *McDonnell Douglas* Pretext Analysis Inappropriately

Most of the circuits recognize that the *McDonnell Douglas* formula is inapplicable to claims for failure to accommodate because "failing to provide a protected employee a reasonable accommodation constitutes direct evidence of discrimination." *Equal Employment Opportunity Comm'n v. Dolgencorp, LLC*, 899 F.3d 428, 435 (6th Cir. 2018).[18] As another court explained, *McDonnell Douglas* is applicable to cases in which the employer's reason for the adverse action is unrelated to the employee's disability. But when the parties agree that the employer complains of conduct that is the direct result of the disability, there is no need to evaluate for pretext. Instead, the plaintiff need only demonstrate that, with reasonable accommodations, he or she could have performed the essential job functions. *Presumey v. Town of Greenwich Bd. of Educ.*, No. 3:15CV278(DFM), 2018 WL 740194, at *5–6 (D. Conn. Feb. 7, 2018), *citing McMillan v. City of New York*, 711 F.3d 120, 129 (2d Cir. 2013). *See also Reyer v. Saint Francis Country House*, 243 F. Supp. 3d 573, 595 (E.D. Pa. 2017).[19] Similarly, "termination for no reason other than alleged problems with an already-in-place accommodation" also involves direct evidence. *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 853 (6th Cir. 2018).

In *Spencer v. KS Mgmt. Servs., L.L.C.*, 680 F. App'x 311 (5th Cir. 2017), after a reorganization, the employer required all assistants to pass a higher-level exam testing knowledge of medications and immunizations. Despite certain accommodations, the plaintiff could not pass it and was fired. It seems that the real issues here were whether this qualification standard was justified by business necessity, and if so, whether other accommodations might have helped. Instead, the trial judge concluded that the firing was not because of disability and was not pretextual. *Id*. at 314. But causation was essentially irrelevant in that case.

This is further explained in *Equal Employment Opportunity Comm'n v. BNSF Ry. Co*., 902 F.3d 916 (9th Cir. 2018), *pet. for cert. filed*. In that case the employer administered a medical exam after a conditional job offer, but then required the individual to pay for an MRI. BNSF argued that there was no evidence that its motive was discriminatory or pretextual, but the court rejected that, holding that "where it is clear that an action was taken because of an impairment or perception of

[18] The elements of an accommodation claim are not those in *McDonnell Douglas*, but those in *Feist v. Louisiana, Dep't of Justice, Office of the Atty. Gen*., 730 F.3d 450, 452 (5th Cir. 2013) ("(1) the plaintiff is a qualified individual with a disability; (2) the disability and its consequential limitations were known by the covered employer; and (3) the employer failed to make reasonable accommodations for such known limitations.") (internal quotes omitted).

[19] Note that although most courts recognize the inappropriateness of applying the typical *McDonnell Douglas* formula to accommodation claims, they may differ somewhat in their reasoning. *Compare Punt v. Kelly Servs*., 862 F.3d 1040, 1049 (10th Cir. 2017) (rejecting the view that accommodation cases are "direct evidence" cases, finding instead that they are a separate category of cases that require no evidence of discriminatory intent in any form).

an impairment, no further inquiry or burden-shifting protocol is necessary to establish causation." *Id*. at 927.[20]

Summarizing, although pretext may be relevant in cases in which there is an asserted reason for the adverse action that has nothing to do with disability, both *McDonnell Douglas* and pretext are irrelevant to many ADA claims, including those for failure to accommodate. *E.g.*, *Lincoln v. BNSF Ry. Co*., 900 F.3d 1166, 1204 (10th Cir. 2018) ("Because 'any failure to provide reasonable accommodations for a disability is necessarily because of disability,' it follows that a plaintiff need not prove the employer's motivation or intent to discriminate to prevail on a failure to accommodate claim."). But courts are familiar with traditional *McDonnell Douglas*, perhaps overly so,[21] and it is important to explain when it is inappropriate, or should be modified.[22]

There is a related, and important, point in Judge Costa's special concurrence in *Nall v. BNSF Ry. Co.*, 917 F.3d 335, 351–52 (5th Cir. 2019): *McDonnell Douglas* is inappropriate when the employer admits that disability was the basis for the allegedly adverse action. Judge Costa stated:

> To be sure, Nall also tried to prove discrimination with direct evidence. But in doing so, he relied on the comments of certain supervisors, which itself requires recourse to another complicated multipart test. . . . There is a simpler and more convincing direct evidence route. To use a modern phrase, the firing "is what it is": the railroad has all along acknowledged that it fired Nall because of concerns about his Parkinson's. That's discrimination on the basis of a disability.[23]

VIII. "Honest Belief"

In *Clark v. Boyd Tunica, Inc*., 665 F. App'x 367 (5th Cir. 2016), the plaintiff was terminated after testing positive for alcohol, and her claim failed because she presented no evidence that the alcohol in her sample was attributable to her use of a diabetes drug. More troubling, the court's dicta suggested that even if there had been such evidence, the employer may

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[20] *Compare Tanner v. BD Laplace, LLC*, No. CV 17-5141, 2019 WL 1382302, at *5 (E.D. La. Mar. 27, 2019) (claim was that medical exam was not justified by business necessity, but court added a paragraph about *McDonnell Douglas* burden-shifting, seemingly out of the blue).

[21] *See, e.g., Coleman v. Donahoe*, 667 F.3d 835, 863 (7th Cir. 2012) (concurring opinion by J. Wood) ("I write separately to call attention to the snarls and knots that the current methodologies used in discrimination cases of all kinds have inflicted on courts and litigants alike. The original *McDonnell Douglas* decision was designed to clarify and to simplify the plaintiff's task in presenting such a case. Over the years, unfortunately, both of those goals have gone by the wayside."); *Adeyemi v. District of Columbia*, 525 F.3d 1222, 1226 (D.C. Cir. 2008) (explaining that "the prima-facie-case aspect of *McDonnell Douglas* is irrelevant when an employer has asserted a legitimate, nondiscriminatory reason for its decision").

[22] *Compare Lincoln*, *supra*, at 1204 ("Under the first step of the modified framework [applicable to accommodation cases], a plaintiff must demonstrate that (1) he is disabled; (2) he is otherwise qualified; and (3) he requested a plausibly reasonable accommodation. If the plaintiff makes a showing on all three elements, the burden shifts to the employer to present evidence either (1) conclusively rebutting one or more elements of plaintiff's prima facie case or (2) establishing an affirmative defense, such as undue hardship or one of the other affirmative defenses available to the employer.") (cites, quotes, and brackets omitted).

[23] Judge Elrod, writing for the majority, did not disagree, but pointed out that the plaintiff did not make this argument below. *Id*. at 341 n.3.

have been able to claim the "honest belief" defense. There is some doubt whether such medical-exam claims should be analyzed under the pretext formula, although *Clark* relies on a Sixth Circuit case for its analysis, *Ferrari v. Ford Motor Co*., 826 F.3d 885, 894–97 (6th Cir. 2016).

But the facts in *Ferrari* were different. First, the stipulated medical evidence indicated that the plaintiff was still using opioid pain medication, and although he denied it, there was no independent medical evidence to the contrary. The "honest belief" rubric is a better fit for those facts. There was also a dispute about whether the opioid use would put him at risk when climbing ladders or working at heights, but again no independent evidence to the contrary. The better analysis for that claim would have been whether the employer had established the "direct threat" defense (likely yes), but the plaintiff's challenge was that this testimony about opioid use and impact was merely a pretext. Given that framing, the Court's reliance on "honest belief" is perhaps understandable.

The "honest belief" defense may be persuasive in certain circumstances involving alleged misconduct, if the belief is in fact honest, and if there were in fact misconduct. *Compare Rowlands v. United Parcel Serv. – Fort Wayne*, 901 F.3d 792, 802 (7th Cir. 2018) ("Additionally, Rowlands has provided evidence that could allow a reasonable juror to infer that tasers were not explicitly prohibited under the policy, and that Gropengieser's claim that she threatened him was not credible. … A reasonable jury could also find that Rowlands' statement to Gropengieser was not a threat at all, or that even if UPS properly construed it as such, its decision to terminate Rowlands was a disingenuous overreaction to justify dismissal of an annoying employee who asserted her rights under the ADA.'") (internal quotes and brackets omitted).[24]

But regardless of whether the defense applies in misconduct cases, the defense should be inapplicable to cases in which the employer claims to rely on its "honest but mistaken" belief that an employee could not perform the job because of a disability. That argument would insulate the employer from liability for uninformed stereotyping, which the ADA is designed to combat.[25]

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[24] Note that it may not be error to omit an "honest belief" jury instruction even in misconduct cases, depending on the facts and other instructions. *See Equal Employment Opportunity Comm'n v. Dolgencorp, LLC*, 277 F. Supp. 3d 932, 950–51 (E.D. Tenn. 2017), which the Sixth Circuit affirmed, stating: "Dollar General also challenges the district court's neutral-explanation jury instruction. But we may set aside jury instructions only if they prejudice someone. That did not happen in view of our earlier conclusion that Dollar General failed to provide Atkins a reasonable accommodation." 899 F.3d 428, 436 (6th Cir. 2018) (cite omitted).

Of course, there may be other reasons to reject the application of the "honest belief" defense, for example (a) in "cat's paw" cases (in which the decisionmaker relies on the input of another who has a discriminatory motive), (b) in cases in which the decisionmaker personally observed the alleged misconduct, or (c) if the employer otherwise had reason to doubt the factual basis for the alleged misconduct.

[25] *See, e.g., Gillen v. Fallon Ambulance Service, Inc*., 283 F.3d 11, 29 (1st Cir. 2002) ("Of course, an employer cannot insulate itself from liability under the ADA merely by asserting its belief that a prospective employee's known disability will limit her ability to perform a particular job to such an extent as to disqualify her from employment. Even if the employer's belief is honestly held, on particular facts a jury still might conclude that it rested on an unfounded stereotype (and, therefore, constituted discrimination)."); *Parker v. Sony Pictures Entertainment, Inc.*, 260 F.3d 100, 106 (2d Cir. 2001) (it is no defense to liability that the employer holds a good faith, but erroneous, belief that the law permits taking an adverse job action on the basis of a prohibited factor; ADA's goal would be stymied by a blanket rule protecting employers that inaccurately believe that an employee's limitations cannot be surmounted by reasonable accommodations); *Smith v. Chrysler Corp*., 155 F.3d 799, 806–09 (6th Cir. 1998).

IX. Retaliation Claims

Of course, a finding that the plaintiff did not have an ADA disability does not foreclose a retaliation claim. *E.g., Rowlands v. United Parcel Serv. – Fort Wayne*, 901 F.3d 792, 798 (7th Cir. 2018). And causation is often supported by a finding of temporal proximity, *id*. at 802, but it can be based on other things as well. *See, e.g., id*. (sufficient evidence of causal connection based on fact that: "(1) her employee ID was never reinstated; (2) she was 'put under a microscope' and subjected to new rules that applied only to her; (3) she attempted to discuss her limitations with Liskey, but was rebuffed repeatedly; (4) Liskey complained that she 'has been a constant pain in my butt' and 'that management has been on me continually about this'; (5) she alone was prohibited from moving her car closer to the building during her breaks; (6) she was denied access to the first-floor bathroom; and (7) Gropengieser violated the Policy by threatening Harms in front of Liskey, and suffered no adverse action as a result."). *See also Johnson v. City of Tyler, Texas*, No. 6:17-CV-00143-JDL, 2018 WL 2183194, at *6 (E.D. Tex. May 10, 2018) (temporal proximity, evidence of good performance, and failure to follow progressive discipline); *Reyes v. Texas Dep't of Criminal Justice*, No. A-16-CA-00954-SS, 2017 WL 4979844, at *6 (W.D. Tex. Oct. 31, 2017) ("As stated above, the TDCJ acknowledged Reyes could have withdrawn his request for a workplace accommodation, and had he done so, he would have been allowed to continue working in his position without an accommodation. From this evidence, a reasonable jury could conclude Reyes would not have been separated or terminated but for his request for a workplace accommodation.").

In a recent case, *Stokes v. Nielsen*, 751 F. App'x 451 (5th Cir. 2018), the court found sufficient evidence to support a retaliation claim, stating:

> Admittedly, Stokes's primary evidence rebutting her alleged poor performance is her own assertions that the descriptions in the performance review are incorrect. In support of its own position, however, DHS similarly offers only the performance review itself and deposition testimony from the supervisor who prepared it stating that it is accurate. Stokes was never provided the supporting documentation she repeatedly requested and, moreover, that documentation was not included in the summary judgment or appellate record. Stokes also offers additional evidence challenging this supervisor's credibility and indicating his potential hostility towards her based on her disability and requests for accommodations. She demonstrates, for instance, that he claimed she never informed him of her visual impairments even after she sent him multiple memos explaining her disability and requesting accommodations. … Because deciding whether to credit Stokes's assertions that the performance review is unsupported versus her supervisor's testimony that it is accurate is a question for the fact-finder, the district court erred in granting summary judgment on Stokes's retaliation claim.

Id. at 456.

The great weight of authority states that requesting an accommodation is protected activity under the ADA. *See, e.g., A.C. ex rel. J.C. v. Shelby Cnty. Bd. of Educ*., 711 F.3d 687, 698 (6th

Cir. 2013) ("Both this circuit and most others agree that requests for accommodation are protected acts."); *Haley v. Tiger Trailers, Inc.*, No. 5:18CV16-RWS-CMC, 2018 WL 1722394, at *2 (E.D. Tex. Mar. 19, 2018), *report and recommendation adopted*, 2018 WL 1718559 (E.D. Tex. Apr. 9, 2018) (collecting authorities). Note, too, that the ADA also prohibits interference with accommodations, 42 U.S.C. § 12203(b),[26] as well as adverse actions taken because of the need for accommodation. 42 U.S.C. § 12112(b)(5)(B); 29 C.F.R. Part 1630 App. §1630.9(b).

In *Moss v. Harris Cty. Constable Precinct One*, 851 F.3d 413, 419–20 (5th Cir. 2017), the plaintiff argued that, unlike in ADEA case, ADA retaliation claims do not require an employee to be qualified for the job. The court disagreed. On the facts there (as described by the panel), the outcome seems correct, in that there is usually an absence of harm from a retaliatory firing if the individual would have been fired anyway for being unqualified. But that may not always the case. If the harm resulting from a retaliatory act is the loss of a job, it may be necessary to prove that the plaintiff remained "qualified" for the job (i.e., able to perform the essential job functions). But if the harm is something else (e.g., mental anguish resulting from harassment or disclosure, etc.), *Moss* (and the ADEA cases it relies on) may be distinguishable.

X. Direct Threat Defense

In *Nall v. BNSF Ry. Co.*, 917 F.3d 335, 342 (5th Cir. 2019), the Fifth Circuit confirmed that direct threat depends on the objective reasonableness of the employer's actions, and those actions "must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence, and upon an expressly individualized assessment of the individual's present ability to safely perform the essential functions of the job." (internal quotes and brackets omitted). The Court found sufficient evidence that the employer did not meet this standard, based on statements made by supervisors, factual disputes about the outcome of the fitness-for-duty exam, and dueling experts. *Id.* at 344. But the Court refused to address which party has the burden of proof in such cases,[27] finding that regardless, the plaintiff survived summary judgment. *Id.* at 343 n.5.[28]

Regarding disputes among experts, in *Gunter v. Bemis Co., Inc.*, No. 4:16-CV-37, 2017 WL 6462351 (E.D. Tenn. Aug. 30, 2017), *aff'd in part and rev'd in part on other grounds*, 906 F.3d 484 (6th Cir. 2018), the court observed that "while employers often justifiably rely on the opinions of medical experts in making such determinations, the law does not mandate that an employer's determination regarding an employee's abilities, or lack thereof, be upheld so long as

[26] For more discussion about the ADA's retaliation and interference provisions, see the *EEOC Enforcement Guidance on Retaliation and Related Issues* (Aug. 25, 2016), https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm. This guidance is also applicable to claims under Sec. 504.

[27] According to the majority in *Nall*, 917 F.3d at 343 n.5, this was an issue that the en banc court refused to resolve in *Rizzo v. Children's World Learning Ctrs., Inc.*, 213 F.3d 209, 213 & n.4. (5th Cir. 2000) (en banc).

[28] On a related point, in *Equal Employment Opportunity Comm'n v. McLeod Health, Inc.*, 914 F.3d 876, 881 n.6 (4th Cir. 2019), the court rejected the employer's framing that an essential job function was to "safely" navigate the company's campuses. According to the Fourth Circuit, "adding the qualifier 'safely' to the job function at issue muddles the analysis." It also places the burden on the plaintiff to disprove the defense of direct threat. Instead, the correct analysis "is to begin by asking: does the relevant job function (here, navigating to and within McLeod's campuses) qualify as essential? If the answer is yes, we then ask whether the employee is medically capable of performing the function without posing a direct threat to herself or others—i.e., whether the employee can perform the function safely."

it has *some* medical support behind it. Therefore, it does not follow that an employer's reliance on a medical opinion, any medical opinion, *necessarily* defeats evidence suggesting the contrary." *Id*. at *3 n.2 (emphasis in original). In *Gunter*, the functional-capacity exam was open to question because it was administered at the end of an eight-hour shift (which could have affected the results), the evaluator refused to allow the plaintiff to use his workarounds, and it was based on the written job description that may have inaccurately represented the work. *Id*. at *4.

And in *Stragapede v. City of Evanston, Illinois*, 865 F.3d 861 (7th Cir. 2017), the court rejected a version of the honest belief defense in the direct-threat context:

> The City's primary argument is that it does not matter whether Stragapede actually posed a direct threat to health or safety; it's enough that the City thought he was a direct threat. The Supreme Court disagrees: The ADA's direct threat provision stems from the recognition of the importance of prohibiting discrimination against individuals with disabilities while protecting others from significant health and safety risks. *Bragdon v. Abbott*, 524 U.S. 624, 649, 118 S. Ct. 2196, 141 L.Ed.2d 540 (1998). *Bragdon* holds that an employer's belief that a significant risk existed, even if maintained in good faith, would not relieve him from liability. *Id*. Rather, a direct threat defense is based solely on medical or other objective evidence.

Id at 867 (internal quotes and ellipsis omitted).[29]

XI. Undue Hardship

The ADA requires reasonable accommodations unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business." 42 U.S.C. § 12112(b)(5)(A). "Undue hardship" is generally treated as an affirmative defense, so the burden of proving it is on the employer. *Snead v. Fla. Agric. & Mech. Univ. Bd. of Trustees*, 724 F. App'x 842, 847 (11th Cir. 2018). In *Snead*, the court affirmed a jury finding rejecting the argument that allowing the plaintiff police officer to work an 8-hour shift rather than a 12-hour one would be an undue hardship. First, much of the manager's testimony was based on the employer's misunderstanding of the plaintiff's medical restrictions, which it never sought to clarify. Second, the jury could have disregarded the testimony "wholesale in light of several bits of less plausible testimony [the manager] gave," including his overstating the cost to the department of a single employee working an 8-hour shift. "A reasonable jury could have heard Calloway's implausible testimony here and chosen to disregard the rest of what he said, too." Plus, the plaintiff pointed out that the department would avoid the need to pay him overtime.

See also Lincoln v. BNSF Ry. Co., 900 F.3d 1166, 1196 (10th Cir. 2018) (employer suggested that reassigning non-essential duties would violate terms of the collective bargaining agreement, but it failed to put on any evidence of that); *Peters v. Univ. Bank*, No. 16-12066, 2018 WL 1570630, at *7 (E.D. Mich. Mar. 30, 2018) (denying summary judgment because of evidence that shift change would not be an undue burden, and may even have been a benefit); *Ford v. Marion*

[29] *See also Zamora v. GC Servs., LP*, No. EP15CV00048DCGRFC, 2018 WL 1937088, at *6 (W.D. Tex. Apr. 24, 2018) (although plaintiff had a past history of aggravated assault, and had serious problems resulting in a stay at a psychiatric hospital, there was a fact issue as to direct threat based on an FFD report and the hospital discharge orders).

Cty. Sheriff's Dep't, 270 F. Supp. 3d 1059, 1083–84 (S.D. Ind. 2017), *reconsideration denied on other grounds*, No. 1:15-CV-1989-WTL-DML, 2018 WL 419986 (S.D. Ind. Jan. 16, 2018) (change from a rotating to a fixed shift); *Green v. Teddie Kossof Salon & Day Spa*, No. 13-CV-6709, 2017 WL 3168995, at *5 (N.D. Ill. July 26, 2017) (fact issue whether modified schedule for massage therapist could have limited number of missed appointments); *Goble v. City of Smyrna, Georgia*, 248 F. Supp. 3d 1351, 1379–80 (N.D. Ga. 2017) ("Finally, although no specific objection was made, the Court further finds that the Magistrate Judge clearly erred in determining that Plaintiff failed to show that excusing him from overtime was a reasonable accommodation because it would have necessarily forced Defendant to shift this burden disproportionately on all other firefighters. … [T]he purported 'unfairness' of accommodations entailing reassignment of a minor portion of the duties of a disabled employee where many employees are available to perform such duties does not as a matter of law mean that the accommodation is per se unreasonable."); *Slayton v. Sneaker Villa, Inc.*, No. CV 15-0074, 2017 WL 1048360, at *13 (E.D. Pa. Mar. 20, 2017) (denying summary judgment because evidence contradicted defendant's argument that the accommodation of partial telework would have meant more work for co-workers).

In *Equal Employment Opportunity Comm'n v. Dolgencorp, LLC*, 277 F. Supp. 3d 932, 944 (E.D. Tenn. 2017), *aff'd*, 899 F.3d 428 (6th Cir. 2018), there was evidence rebutting a hardship defense based on the testimony of another manager that he would have permitted the accommodation plaintiff sought (drinking orange juice at register of necessary to manage diabetes). *See also Vigil v. New Mexico Pub. Educ. Dep't*, No. 1:16-CV-00047 KG/KK, 2018 WL 1997289, at *11 (D.N.M. Apr. 27, 2018) (employer failed to show why moving the plaintiff to a non-basement office with fresh air would be an undue hardship, and it had permitted it before without apparent hardship).

One other point should be made. The Supreme Court has held that the plaintiff's burden is to put on some evidence that the accommodation sought was facially reasonable, and the employer has the burden of showing any "case-specific" evidence that it would pose an undue hardship. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401–02 (2002). But as noted above in Part D.6 above, courts (and litigants) sometimes confuse these burdens. For example, in *Gardea v. JBS USA, LLC*, 915 F.3d 537, 542 (8th Cir. 2019), the court found that the lift-assisting devices at issue were not a reasonable accommodation because of the lack of overhead anchor points and the tight quarters involved. But that would seem to be the kind of "case-specific" facts that should be part of the undue-burden defense under *Barnett*, rather than a part of the plaintiff's burden to prove reasonableness. Facial (or "run of cases") reasonableness would seem to be satisfied, especially given the statutory definition that includes the "acquisition or modification of equipment or devices." 42 U.S.C. § 12111(9)(B). For another example, see *Poston v. Massillon City Sch.*, No. 5:16-CV-3013, 2018 WL 3222648, at *7 (N.D. Ohio July 2, 2018), *appeal pending*. In *Poston*, the court found that the plaintiff failed to show that her request for large-print training and other materials seemed reasonable on its face. But the basis for that was testimony about the diversity of materials this particular employer used, as well as the variety of their sources. Again, that appears to be based on "case-specific" facts, which should be part of the undue burden defense.

And "facial" reasonableness seems particularly clear in cases in which the accommodation sought is one listed in the statute. *See* 42 U.S.C. § 12111(9)(B) (modification of training materials).[30]

XII. Remedies

In two different cases the court upheld a jury award of $250,000 in compensatory damages, despite the fact that it was supported only by the plaintiff's own testimony. *See Equal Employment Opportunity Comm'n v. Dolgencorp, LLC*, 277 F. Supp. 3d 932, 952–53 (E.D. Tenn. 2017), *aff'd*, 899 F.3d 428 (6th Cir. 2018); *Van Rossum v. Baltimore Cty., Maryland*, No. GJH-14-0115, 2017 WL 4023342, at *4 (D. Md. Sept. 11, 2017).

Sometimes the plaintiff does not have actual damages, and also does not have standing to seek injunctive relief. Regardless, the prevailing plaintiff may still be able to recover nominal damages and costs, *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853 (9th Cir. 2017), and in some circumstances, attorney's fees as well. In *Shelton v. Louisiana State*, 919 F.3d 325 (5th Cir. 2019), the court held that even an award of nominal damages may justify a fee award, in special circumstances. *Shelton* is a non-employment case (involving disability discrimination against a deaf inmate), but the court cited a similar example in the employment context, *Picou v. City of Jackson, Miss.*, 91 F. App'x 340, 342 (5th Cir. 2004).

Note that there is a case going to the Fifth Circuit that is expected to decide whether mental-anguish damages are available under § 504, *Cummings v. Premier Rehab, P.L.L.C.*, No. 4:18-CV-649-A, 2019 WL 227411 (N.D. Tex. Jan. 16, 2019) (non-employment), *appeal pending*, No. 19-10169 (5th Cir.). Although many cases support the recoverability of such a remedy, there are a few cases rejecting it.

XIII. ADA Enforcement Via § 1983

Courts continue to hold that the ADA cannot be enforced via § 1983. *See, e.g., Williams v. Pennsylvania Human Relations Comm'n*, 870 F.3d 294 (3d Cir. 2017). Thus, plaintiffs cannot use § 1983 as a way around the statutes of limitations applicable to ADA Title I, nor can they use § 1983 as a way to get individual supervisory liability. On the other hand, a plaintiff "may maintain both a Section 1983 claim and a disability discrimination claim under the ADA in the same action." *Olford v. City of Houston*, No. CV H-17-3421, 2018 WL 3208196, at *4 n.49 (S.D. Tex. June 29, 2018). *See also Bullington v. Bedford Cty.*, 905 F.3d 467 (6th Cir. 2018).

XIV. Survival of Claims

In *Guenther v. Griffin Construction Company, Inc.*, 846 F.3d 979 (8th Cir. 2017), the court followed the weight of authority in holding that a claim for compensatory damages under the ADA

[30] Moreover, public schools, like the employer in *Poston*, already have to provide "auxiliary aids and services" to participants and members of the public, 28 C.F.R. § 35.160(b)(1), which aids are defined to include large print. 28 U.S.C. § 35.104.

survived the employee's death.[31] Note, however, that the courts are not all in agreement as to the legal standard applicable to such survival actions. *See, e.g.*, *Arce v. Louisiana State*, No. CV 16-14003, 2017 WL 3438338, at *1–2 (E.D. La. Aug. 10, 2017) (collecting authorities).

[31] Although the issue of the survival of claims was not addressed in *Nall v. BNSF Ry. Co*., 917 F.3d 335 (5th Cir. 2019), that is an example of claim that continued after the plaintiff's death, when the wife was substituted in as the representative of the estate.