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THE HIDDEN DISABILITY THAT FINDS PROTECTION UNDER THE AMERICANS WITH DISABILITIES ACT: EMPLOYING THE MENTALLY IMPAIRED

INTRODUCTION

One of your employees suffered a head injury in an automobile accident and now has continual panic attacks that make it impossible for the employee to handle telephone calls. Before the injury, your employee's primary job function was to answer telephone calls from customers, and one of your managers has refused the employee's request for a job transfer to a position that does not involve telephone duties. Another employee, a part-time night shift employee, was denied a transfer to the day shift even though the employee suffers from a bipolar disorder and claims that the disruptive sleeping schedule hinders the medication's stabilizing effect. Finally, another employee was recently terminated "for cause" because the employee possessed a gun on company property; however, the employee claims that a chemical imbalance caused the gun-carrying behavior. All three employees have filed employment discrimination claims under the Americans with Disabilities Act (ADA).¹ Your company's managers thought that they had prepared for compliance with the ADA, but they had spent little time considering mental disabilities. Did your company violate the ADA when it terminated one employee and denied transfers to the other two employees? Does the ADA provide "a shield for mentally unstable" employees?²

Approximately forty-three million Americans have at least one disability,³ and all individuals are potentially one accident away from becoming an individual with a disability. However, society has subconsciously restricted employment pursuits and job retention of people with physical or mental disabilities.⁴

1. 42 U.S.C. §§ 12101-12213 (Supp. V 1993).

2. H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 4, at 81 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 564.

3. 42 U.S.C. § 12101(a) (Supp. V 1993).

4. H.R. REP. NO. 485, *supra* note 1, pt. 2, at 31-33, *reprinted in* 1990

Congress addressed this problem in July 1992 by enacting the ADA, which prohibits discrimination against individuals with physical and mental disabilities.⁵

Even though the ADA has been in effect for over three years, both employers and individuals with a mental or emotional impairment face uncertainties in areas as simple as permissible pre-employment questions⁶ and as complex as mental disorders considered disabilities under the ADA.⁷

To address ambiguities in the ADA, the Equal Employment Opportunity Commission (EEOC), the agency charged with enforcing the ADA, released guidelines on pre-employment disability-related questions under the ADA in May 1994.⁸ Also, the Technical Assistance Manual on the Employment Provisions (Title I) of the ADA provides limited guidance regarding mental impairments that may be classified as disabilities under the ADA.⁹

U.S.C.C.A.N. at 313-15. Testimony before the House Subcommittees on Select Education and Employment Opportunities on July 18, 1989 included a statement from Justin Dart, chairperson of the Task Force on the Rights and Empowerment of Americans with Disabilities, who said:

[S]ociety is still infected by the . . . almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right. The result is massive, society-wide discrimination.

H.R. REP. NO. 485, *supra* note 1, pt. 2, at 31-32, *reprinted in* 1990 U.S.C.C.A.N., at 313. In addition, on September 13, 1989 Arlene Mayerson, who represented the Disabilities Rights Education and Defense Fund, testified before the same committee that: "[T]he major categories of job discrimination faced by people with disabilities include . . . refusal to hire based on presumptions, stereotypes and myths about job performance, safety, insurance costs, absenteeism, and acceptance by others." H.R. REP. NO. 485, *supra* note 1, pt. 2, at 33, *reprinted in* 1990 U.S.C.C.A.N., at 315.

5. 42 U.S.C. § 12101(a) (Supp. V 1993).

6. *EEOC Issues Long-Awaited Guidelines on Pre-Offer Inquiries, Medical Exams*, DISABILITY COMPLIANCE BULL., June 8, 1994, at 1, 4 [hereinafter *EEOC Issues Guidelines*] (discussing general application of pre-offer inquiries).

7. Mark Hansen, *The ADA's Wide Reach*, A.B.A. J., Dec. 1993, at 14, 16. "Any one of us can get a shrink to diagnose us as having a mood disorder The big question in these cases is where you draw the line between what constitutes a disability and what doesn't." *Id.* (statement of attorney Robert Fitzpatrick).

8. *EEOC Issues Guidelines*, *supra* note 6, at 1.

9. Rules Forbidding Discrimination, Empl. Prac. Guide (CCH) ¶ 213A, at 329-5 (1993).

[T]he ADA does not include an exhaustive list of all of the specific conditions, diseases or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list.

. . . [C]ommon personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological

Because the statute is fairly new and because it requires that a discrimination victim first exhaust administrative remedies by filing a charge with the EEOC¹⁰ before suing an employer, ADA litigation has just begun to build momentum.¹¹ The EEOC reports that more than 54,000 employment discrimination charges under the ADA have been filed with the EEOC between July 1992 and the end of September 1995 and the EEOC has filed eighty-nine ADA-based lawsuits.¹² The types of violations reported included unlawful discharge (51%), failure to provide reasonable accommodation (27%), hiring improprieties (10%), and harassment (11%).¹³ Twelve percent of the charges involved emotional or mental disabilities.¹⁴

This Note will review the recent judicial and administrative guidance related to mental impairment under the ADA in three unsettled areas: (1) pre-offer inquiries and medical examinations; (2) mental impairments that constitute a disability under the ADA; and (3) the "direct threat" issue confronting employers. Part I provides ADA background information and definitions. Part II examines the process of hiring the mentally impaired, the EEOC's recent guidelines on pre-offer inquiries, and recent court rulings. Finally, Part III discusses the variety of emotional and psychiatric disability claims filed under the ADA and the recent judicial interpretations.

disorder [are not impairments].

Id. However, the ADA prohibits discrimination because of perceived disabilities; thus, a person does not need to be impaired to be covered by the ADA. *Cook v. Rhode Island Dep't of Mental Health, Retardation, and Hosp.*, 10 F.3d 17 (1st Cir. 1993) (holding that an employer regarded an applicant as having an impairment when the employer refused to hire a nurse that was 5'-2" tall and weighed over 300 pounds because the employer concluded that her morbid obesity would affect the nurse's ability to move patients in emergency situations and to avoid illnesses).

10. *Kent v. Mississippi Dep't of Elementary & Secondary Educ.*, 792 F. Supp. 59, 62 (E.D. Mo. 1992).

11. Compare Mark Hansen, *The ADA's Wide Reach*, A.B.A. J., Dec. 1993, at 14 (reporting that 12,962 ADA charges were filed with the EEOC between July 1992 and July 1993) with *Disability Law Enforcement Statistics Released*, Lab. L. Rep. (CCH), No. 665, at 5 (Aug. 18, 1994) (reporting that 29,720 ADA charges were filed with EEOC between July 1992 and June 1994) and Lisa J. Stansky, *Opening Doors*, A.B.A. J., Mar. 1996, at 66 (reporting that more than 54,000 ADA charges were filed with the EEOC between July 1992 and September 1995).

12. Stansky, *supra* note 11.

13. *Id.* at 68.

14. *Id.*

I. ADA BASICS

An employer may terminate an employee that has a disability without violating the ADA. To understand the recent judicial interpretations of the ADA, it is necessary to understand the ADA's purpose and statutory definitions. Background on the ADA and definitions of the ADA's major terms are provided below.

A. *The ADA's Purpose*

The purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."¹⁵ Because the ADA is a remedial statute, "it must be broadly construed to effectuate its purposes."¹⁶ The ADA's expansive language has been applied to a "range of situations . . . from licensing to health care to insurance coverage and everything in between."¹⁷ Although the ADA "does not guarantee equal results, establish quotas, or require preferences favoring individuals with disabilities over those without disabilities,"¹⁸ if a person's "disability creates a barrier to employment opportunities, the ADA requires employers to consider whether reasonable accommodation could remove the barrier."¹⁹

In summary, the ADA is "an antidiscrimination statute that requires that individuals with disabilities be given the same consideration for employment that individuals without disabilities are given."²⁰

15. 42 U.S.C. § 12101(b)(1) (1988 & Supp. V 1993).

16. *Kinney v. Yerusalim*, 812 F. Supp. 547, 551 (E.D. Pa. 1993), *aff'd*, 90 F.3d 1067 (3d Cir. 1993). However, "[c]ourts that have addressed the issue have held that the ADA does not apply retroactively." *Larkins v. CIBA Vision Corp.*, 858 F. Supp. 1572, 1579 (N.D. Ga. 1994) (citing *O'Bryant v. City of Midland*, 9 F.3d 421, 422 (5th Cir. 1993); *Verdon v. Consolidated Rail Corp.*, 828 F. Supp. 1129, 1140-41 (S.D.N.Y. 1993); *Davis v. York Int'l, Inc.*, 2 A.D. Cas. (BNA) 1811, 1814-15 (D. Md. 1993); *Morrison v. Detroit-Macomb Hosp. Corp.*, 3 A.D. Cas. (BNA) 45, 49 (E.D. Mich. 1993)); *accord Bishop v. Okidata, Inc.*, 864 F. Supp. 416, 421-22 (D.N.J. 1994) (holding that ADA claims for conduct occurring before the statute's effective date must be dismissed).

17. Hansen, *supra* note 7, at 16 (statement of attorney Chris Bell).

18. 29 C.F.R. § 1630 (app.) (1995).

19. *Id.*

20. *Id.* § 1630.1(a) (app.).

B. *Statutory Definitions*

Within the employment context, subchapter I of the ADA specifically provides that “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees . . . and other terms, conditions, and privileges of employment.”²¹

Not all employers are covered by the ADA. An employer is a “covered entity” within the meaning of the ADA²² if the employer is “engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.”²³

The meaning of the term “discriminate” includes: “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless . . . the accommodation would impose an undue hardship on the operation of the business”;²⁴ and “denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need . . . to make reasonable accommodation to the physical or mental impairments of the employee or applicant.”²⁵

Certain terms within the definition of discriminate are further defined. A “reasonable accommodation” is defined as including “job restructuring, part-time or modified work schedules, reassignment to a vacant position . . . and other similar accommodations.”²⁶ A “qualified individual with a disability” means “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”²⁷

21. 42 U.S.C. § 12112(a) (1988 & Supp. V 1993).

22. *Id.* § 12111(2) (providing that “[t]he term ‘covered entity’ means an employer, employment agency, labor organization, or joint labor-management committee”).

23. *Id.* § 12111(5)(A). The ADA provided a temporary small business exception for two years following July 26, 1992, the effective date of the ADA, in that the employer must have twenty-five or more employees to be a covered entity. *Id.*

24. *Id.* § 12112(b)(5)(A).

25. *Id.* § 12112(b)(5)(B).

26. *Id.* § 12111(9)(B).

27. *Id.* § 12111(8) (providing further that “consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer

A "disability" is: (1) "a physical or mental impairment that substantially limits one or more of the major life activities"; (2) "a record of such an impairment"; or (3) "being regarded as having such an impairment."²⁸ For example, a person is considered an individual with a disability under the ADA when a person's mental impairment substantially limits the major life activity of working.²⁹

Accordingly, a plaintiff establishes a prima facie case under the employment discrimination subsection of the ADA when the plaintiff shows "(1) that he [or she] is a disabled person within the meaning of the ADA; (2) that he [or she] is qualified, that is, with or without reasonable accommodation (which he [or she] must describe), he [or she] is able to perform the essential functions of the job; and (3) that the employer terminated him [or her] because of the disability."³⁰

C. *Statutory Interpretation is Linked to Prior Statute*

Even though there are few cases interpreting the recently enacted ADA, the legislative history indicates that Congress intended that the ADA be construed in a manner consistent with the Rehabilitation Act.³¹ The Rehabilitation Act of 1973

has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job").

28. *Id.* § 12102(2).

29. 29 C.F.R. § 1630.2(i) (1995) (defining major life activities as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working"); *see also id.* § 1630.2(g)(1). "The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." *Id.* § 1630.2(j)(3)(i).

30. *White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995); *see Price v. S-B Power Tool*, 75 F.3d 362, 365 (8th Cir. 1996) (suffering "an adverse employment action"); *Haysman v. Food Lion, Inc.*, 893 F. Supp. 1092 (S.D. Ga. 1995) (citing *White v. York* and changing third prong to "discriminated against because of his disability"); *Pritchard v. Southern Co. Serv., Inc.*, 4 A.D. Cas. (BNA) 465, 470 (N.D. Ala. 1995).

31. H.R. REP. NO. 485, *supra* note 1, pt. 2, at 50, 55 & pt. 3, at 31, *reprinted in* 1990 U.S.C.C.A.N. at 332, 337, 454. "It is the Committee's intent that the analysis of the term 'individual with handicaps' by the Department of Health, Education, and Welfare of the regulations implementing section 504 . . . apply to the definition of the term 'disability' included in this legislation." H.R. REP. NO. 485, *supra* note 1, pt. 2, at 50, *reprinted in* 1990 U.S.C.C.A.N. at 332. The definition of "qualified individual with a disability" is "comparable to the definition used in regulations implementing section 501 and section 504 of the Rehabilitation Act." H.R. REP. NO. 485, *supra* note 1, pt. 2, at 55, *reprinted in* 1990 U.S.C.C.A.N. at 337. In addition, title I, which

(Rehabilitation Act)³² prohibits federal agencies, certain federal contractors, and federal financial assistance recipients from discriminating against persons with disabilities.³³ Although the ADA and Rehabilitation Act use identical language to define the term “individual with a disability,”³⁴ there is a slight difference between the two Acts’ wording of the general discrimination rule. The ADA prohibits discrimination “because of the disability”³⁵ while the Rehabilitation Act prohibits discrimination against an individual “solely by reason of her or his disability.”³⁶ Nonetheless, the Rehabilitation Act Amendments of 1992³⁷ provide that both laws are to be interpreted in the same manner with regard to employment discrimination.³⁸ Further, the EEOC has stated that “[t]he range of employment decisions covered by . . . [the ADA’s] nondiscrimination mandate is to be construed in a manner consistent with the regulations implementing section 504 of the Rehabilitation Act of 1973.”³⁹ Also, courts

“prohibits discrimination in employment against a qualified person with a disability[,] . . . borrows much of its substantive framework from Section 504 of the Rehabilitation Act.” H.R. REP. NO. 485, *supra* note 1, pt. 3, at 31, *reprinted in* 1990 U.S.C.C.A.N. at 454.

32. 29 U.S.C. §§ 701-797 (1994).

33. *Id.* §§ 791-794.

34. *Compare id.* § 706(8)(B) (defining “individual with a disability” as “any person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment”) with 42 U.S.C. § 12102(2) (1994) (defining “‘disability’ with respect to an individual”); *see supra* note 28 and accompanying text.

35. 42 U.S.C. § 12112(a) (1988 & Supp. V 1993).

36. 29 U.S.C. § 794(a) (1994).

37. 59 Fed. Reg. 39,898, 39,903-04 (1994). During the time between the EEOC’s notice of the proposed rule and the publication of the final rule:

the Rehabilitation Act was specifically amended to provide that the standards of title I of the ADA and the provisions of sections 501 through 504, and 510, of the ADA as such sections relate to employment, shall be the standards applied by section 504 agencies in investigating complaints of employment discrimination. See section 506 of the Rehabilitation Act Amendments of 1992, Public Law 102-569, 106 Stat. 4344, 4428.

Id.; *see* 29 C.F.R. § 1640.12 (1995).

38. 29 U.S.C. § 794(d) (1994) (providing that “[t]he standards used to determine whether this section has been violated in a complaint alleging employment discrimination . . . shall be the standards applied under title I of the Americans with Disabilities Act of 1990”); 29 C.F.R. § 1640.12 (1995) (providing that “Section 504 agencies shall consider the regulations and appendix implementing title I of the ADA, set forth at 29 C.F.R. part 1630, and case law arising under such regulation”).

39. 29 C.F.R. § 1630.4 (app.) (1995) (providing explanatory guidance of the rules

have referred to existing case law interpreting the Rehabilitation Act for guidance in applying the ADA.⁴⁰

Although the Rehabilitation Act has been interpreted in numerous cases, a high percentage of ADA employment discrimination charges are being settled.⁴¹ Three experts have offered different reasons for this: (1) because the ADA is still new, charging parties are unsure about coverage, and employers are waiting until a charge is filed before seeking assistance from the EEOC;⁴² (2) "employers want to avoid jury trials";⁴³ or (3) parties involved in ADA disputes may realize that anyone could become disabled, creating a more amicable environment for consideration of settlements.⁴⁴

II. THE HIRING PROCESS: WHAT EMPLOYERS MAY NOT DO

During the two-year period ending June 1994, mental impairments composed eleven percent of the disabilities involved in ADA discrimination charges.⁴⁵ This surprised the EEOC and many employers because they focused their compliance efforts on physical impairments.⁴⁶ When Congress enacted the ADA, it intended to prevent employer discrimination against persons with hidden disabilities, such as mental illnesses, that resulted from the traditional job application process.⁴⁷ Before the ADA, applications and interviewers included questions about an applicant's mental condition. The responses were "often used to exclude applicants with disabilities—particularly those with so-

issued by the EEOC and codified as 29 C.F.R. § 1630 (1995)).

40. See, e.g., *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 676 n.5 (1st Cir. 1995); *White v. York Int'l Corp.*, 45 F.3d 357, 360 n.5 (10th Cir. 1995); *Pritchard v. Southern Co. Serv., Inc.*, 4 A.D. Cas. (BNA) 465, 470 (N.D. Ala. 1995) (explaining that "it is generally conceded that cases decided under the Rehabilitation Act . . . provide[] helpful insight to review of claims arising under the ADA"); *Johnston v. Morrison, Inc.*, 849 F. Supp. 777, 779 (N.D. Ala. 1994); *Weiler v. Household Fin. Corp.*, 3 A.D. Cas. (BNA) 1337, 1339 (N.D. Ill. 1994).

41. *Disabilities Act Case Resolution Outpaces Other Statutes*, Lab. L. Rep. (CCH) No. 623, at 7 (Feb. 7, 1994).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Disability Law Enforcement Statistics Released*, *supra* note 11, at 5.

46. See James H. Coil, III & Charles M. Rice, *The Tip of the Iceberg; Early Trends in ADA Enforcement; Americans With Disabilities Act*, 9 EMPLOYEE REL. L.J. 85 (1994).

47. H.R. REP. NO. 485, *supra* note 1, pt. 3, at 42-43, reprinted in 1990 U.S.C.C.A.N. at 465.

called hidden disabilities . . . before their ability to perform the job was even evaluated.”⁴⁸ Now, the ADA prohibits employers from conducting pre-employment medical exams or asking a job applicant about disabilities such as a mental illness.⁴⁹

Yet, once the employer determines that an applicant’s non-medical qualifications enable the applicant to perform the job, it may make a “job offer that . . . [is] conditioned on the results of medical examinations and/or inquiries.”⁵⁰ However, upon an applicant’s complaint, the EEOC will “closely scrutinize” an employer’s rejection of the applicant when it occurs after a post-offer medical examination or inquiry “to determine whether the applicant was rejected because of a medical component.”⁵¹ Therefore, employers should carefully examine questions posed on application forms and during interviews and any post-offer testing.

A. *What Questions Should Employers Avoid?*

In May 1994, the EEOC issued interim enforcement guidelines that prohibit an employer from asking “about the existence, nature or severity of a disability . . . until it makes a conditional job offer.”⁵² Generally, an employer’s pre-offer questions cannot elicit information about a disability; simply inquiring about the number of sick days a job applicant took during the prior year is not permitted.⁵³ The EEOC’s stated rationale is to enforce the congressional intent to “prevent discrimination against individuals with ‘hidden’ disabilities such as . . . mental

48. *EEOC Enforcement Guidance on Pre-Employment Inquiries Under The Americans With Disabilities Act*, EEOC Compliance Manual (BNA) No. 187, at N:2322 (May 19, 1994) [hereinafter *EEOC Enforcement Guidance*] (citing H.R. REP. NO. 485, *supra* note 1, pt. 2, at 72, reprinted in 1990 U.S.C.C.A.N. at 355).

49. 42 U.S.C. § 12112(d) (1988 & Supp. V 1993). However, if the court determines that a plaintiff is not a “qualified individual with a disability,” the court need not address whether a pre-employment application question such as “Do you have any condition which will prohibit you from performing the essential functions of the job for which you are applying?” would have been a violation. *Johnston v. Morrison, Inc.*, 849 F. Supp. 777, 777 n.1, 780 (N.D. Ala. 1994).

50. *EEOC Enforcement Guidance*, *supra* note 48, at N:2331.

51. *Id.*

52. *EEOC Issues Guidelines*, *supra* note 6, at 1, 4.

53. *Id.*; *EEOC Enforcement Guidance*, *supra* note 48, at N:2322, -26.

illnesses⁵⁴ and to require an employer to evaluate a prospective employee based on nonmedical qualifications.⁵⁵

1. Direct Pre-Offer Inquiries

Direct pre-offer inquiries about disabilities are prohibited under the ADA.⁵⁶ For example, an employer may not ask an applicant if he or she has ever been treated for mental health problems.⁵⁷

Presently, no cases exist outside the re-employment context that address direct pre-offer inquiries about mental disabilities.⁵⁸ However, courts interpreting an analogous section of the ADA⁵⁹ have prohibited entities that offer examinations related to professional licensing and certification from "impos[ing] or apply[ing] eligibility criteria that screen out or tend to screen out any individual with a disability."⁶⁰ In *Ellen S. v. Florida Board of Bar Examiners*,⁶¹ the court denied the defendant's motion to dismiss a claim that challenged the Florida Board of Bar Examiner's practice of asking applicants whether they had ever sought treatment for mental or emotional problems.⁶² Similarly, in *Clark v. Virginia Board of Bar*

54. *EEOC Enforcement Guidance*, *supra* note 48, at N:2322.

55. *Id.*

56. *Id.* at N:2322.

57. *Id.* at N:2323-24.

58. *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667 (1st Cir. 1995). The court reasoned that "[t]he ADA does not require an employer to wear blinders to a known disability at the pre-offer stage, but permits an 'interactive process' beneficial to both the employer and applicant." *Id.* at 675. The employer's familiarity is key. *Id.* at 675 n.4. An employer did not violate the pre-offer inquiry prohibition when it "knew that the applicant had just recently been unable to perform his specific job at [the employer company] as a result of a mental disability for which he was still receiving benefits from [the company] and undergoing psychiatric treatment" and inquired about the employee's "ability to function in the workplace and to get along." *Id.* at 675. "[A]n employer does not violate § 12112(d)(2) of the ADA by requiring a former employee with a recent known disability applying for re-employment to provide medical certification as to ability to return to work with or without a reasonable accommodation, and as to the type of any reasonable accommodation necessary, as long as it is relevant to the assessment of ability to perform essential job functions." *Id.* at 678.

59. 42 U.S.C. §§ 12182(b)(2), 12189 (1988 & Supp. V 1993).

60. *Clark v. Virginia Bd. of Exam.*, 880 F. Supp. 430, 442-43 (E.D. Va. 1995) (alterations in original) (citing 28 C.F.R. § 35.130(b)(8) (1994)).

61. 859 F. Supp. 1489 (S.D. Fla. 1994).

62. *Id.* at 1491. A question on the Florida bar application asked: "Have you ever consulted a psychiatrist, psychologist, mental health counselor or medical practitioner for any mental, nervous or emotional condition, drug or alcohol use? . . . Have you

Examiners,⁶³ the court concluded that the mental health question posed to bar applicants did not necessarily “‘screen[] out’ potential applicants, [but it] impose[d] an additional burden . . . [, and] [u]nlike other applicants, those with mental disabilities are required to subject themselves to further inquiry and scrutiny.”⁶⁴ Because courts in several jurisdictions that have considered broad mental health questions posed during such licensing processes have held that the inquiries violated the ADA,⁶⁵ courts will probably also defer to the EEOC’s prohibition against an employer’s direct inquiry about an applicant’s mental health.

2. *Disability-Related Inquiries*

An employer may not ask questions at the pre-offer stage that are so nearly associated to a disability that the applicant’s answer may disclose information about his or her disability.⁶⁶ For instance, an employer may not ask an applicant “Do you ever get ill from stress?”⁶⁷ and “Have you ever been unable to ‘cope’ with work-related stress?”⁶⁸ because these combined questions are likely to evoke information about an applicant’s psychological impairment.⁶⁹ However, an employer may ask an applicant “How well can you handle stress?”⁷⁰ and “Do you work better or worse under pressure?”⁷¹ because many people who do not handle stress well do not have a disability.⁷²

3. *Applicant’s Voluntary Disclosure About a Disability*

The EEOC interim guidance provided that even if an applicant mentioned a disability at the pre-offer stage, the employer was

ever been diagnosed as having a nervous, mental or emotional condition, drug or alcohol problem? . . . Have you ever been prescribed psychotropic medication?” *Id.* at n.1.

63. 880 F. Supp 430 (E.D. Va. 1995).

64. *Id.* at 442.

65. *Id.* at 443-44.

66. *EEOC Enforcement Guidance, supra* note 48, at N:2323.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

prohibited from posing disability-related follow-up questions.⁷³ As an illustration, in *Coghlan v. H.J. Heinz Co. and Ore-Ida Foods, Inc.*,⁷⁴ the court denied an employer's motion to dismiss the applicant's ADA claim when the applicant disclosed insulin-dependent diabetes, and the employer made further inquiries and later denied employment.⁷⁵

However, in response to concerns expressed by both employers and advocates for the disabled, the EEOC issued final guidance allowing employers to "ask questions about 'reasonable accommodations' an applicant with a disability would need on the job . . . [i]f the applicant voluntarily discloses a hidden disability [or i]f the applicant asks for some type of reasonable accommodation."⁷⁶

B. When are Psychological Examinations Prohibited?

Congress intended that the ADA's prohibition against pre-offer medical examinations include psychological examinations.⁷⁷ Even though a pre-employment test is not aimed at measuring the "existence, nature, or severity of an applicant's mental impairment, or an applicant's general psychological health," it might be classified as a medical examination.⁷⁸ Employers should analyze each pre-employment test and consider "the purpose of the test, the intent of the employer administering the test, [and] the person who interprets the results of the test."⁷⁹

For instance, if "a test is designed and used to measure only such factors as an applicant's honesty, tastes, and habits, it would not normally be considered a medical examination";⁸⁰ thus, the employer could administer it at the pre-employment stage.⁸¹ On the other hand, if the employer, "with the help of a psychologist, has determined that certain patterns of answers on the test provide evidence that an applicant may have a

73. *Id.*

74. 851 F. Supp. 808 (N.D. Tex. 1994).

75. *Id.*

76. *EEOC Eases Limits on Job Questions*, Lab. L. Rep. (CCH) No. 759, at 7 (Oct. 30, 1995).

77. H.R. REP. NO. 485, *supra* note 1, pt. 3, at 46, *reprinted in* 1990 U.S.C.C.A.N. at 469.

78. *EEOC Enforcement Guidance*, *supra* note 48, at N:2330.

79. *Id.*

80. *Id.*

81. *Id.*

psychological impairment[,] . . . [the] test, as used by . . . [the employer]"⁸² is a prohibited pre-offer medical examination.⁸³

Also, even though polygraph examinations are not considered medical examinations under the ADA, certain inquiries made before and during the examination are prohibited pre-offer inquiries.⁸⁴ As an illustration, the following questions are prohibited during a pre-offer polygraph examination: (1) Do you have "physical impairments that might be adversely affected by the . . . stress of [the] polygraph examination?";⁸⁵ (2) Are you "taking medication or other substances that may skew the results of the examination?";⁸⁶ (3) Have you sought or are you "currently seeking mental health services?";⁸⁷ and (4) "Do you have any mental disorders which would hamper your performance . . . ?"⁸⁸

While the above provisions alter the historical hiring process at many companies, the provisions do not prevent employers from screening out an applicant with a disability that is discovered post-offer:⁸⁹ "Employers may condition the employment offer on the results of an examination/inquiry, as long as: all entering employees . . . are subjected to the examination/inquiry, regardless of disability; and the information obtained is kept confidential"⁹⁰ However, if an employer obtains information regarding a disability and uses it to reject applicants, "the exclusionary criteria must be job-related and consistent with business necessity, and the employer must demonstrate . . . that the essential job functions could not be performed with reasonable accommodation."⁹¹ Further, an employer may reject an applicant that poses a "direct threat," but the ADA imposes a stringent standard that requires a risk assessment using "individualized, objective evidence."⁹² The "direct threat" standard will be discussed in more detail in Part III.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at N:2331.

89. *Id.* at N:2332.

90. *Id.*

91. *Id.*

92. *Id.*

III. ADA CLAIMS OF WRONGFUL DISMISSAL DUE TO
MENTAL DISABILITY: RECENT JUDICIAL AND
ADMINISTRATIVE INTERPRETATIONS

Does an employer violate the ADA if it terminates an employee who has been admitted to a hospital for mental problems or has a psychological profile that suggests a possibility that the employee may murder fellow workers? A few members of Congress expressed concern that the ADA would provide a shield for such mentally unstable people.⁹³

When an employer wants to terminate an individual with a mental impairment, it must engage in at least a three-part analysis: (1) Is the mental impairment a disability under the ADA?⁹⁴ (2) If yes, does the employee possess the position prerequisites such as "educational background, employment experience, skills, licenses, etc?,"⁹⁵ (3) If yes, can the employee "perform the essential functions of the position held or desired, with or without reasonable accommodation"?⁹⁶ Therefore, identification of the employee's essential job functions may affect whether an employee is covered by the ADA.⁹⁷ Further, the employer must determine if a reasonable accommodation would allow the employee to perform the essential job functions without causing the business an "undue hardship."⁹⁸

Also, circumstances may require the employer to assess a fourth factor: Whether the employee poses a "direct threat" to the

93. H.R. REP. NO. 485, *supra* note 1, pt. 4, at 81, 84, *reprinted in* 1990 U.S.C.C.A.N. at 564. Three congressmen questioned whether an employer would "be able to take prudent, prophylactic steps to control an employee whose psychological profile suggests that he wants to murder his fellow workers[.] . . . It is our sincere hope that the ADA does not become a shield for mentally unstable individuals We should not deprive employers of the right to screen employees for character traits that may endanger others." H.R. REP. NO. 485, *supra* note 1, pt. 4, at 81, *reprinted in* 1990 U.S.C.C.A.N. at 564. To illustrate the potential for harm, the congressmen related a "tragic accident." *Id.* An employee who had been admitted to a hospital for mental problems settled a discrimination suit under a Kentucky law, and the employer returned the employee to his old position as a "reasonable accommodation." *Id.* The employee killed seven coworkers with an assault rifle shortly after returning to work. *Id.*

94. 29 C.F.R. § 1630.2(h) (app.) (1995).

95. *Id.* § 1630.2(m) (app.); *Hindman v. GTE Data Servs.*, 3 A.D. Cas. (BNA) 641, 643 (M.D. Fla. 1994).

96. *Hindman*, 3 A.D. Cas. (BNA), at 643-44 (quoting 29 C.F.R. § 1630.2(m) (app.) (1993)).

97. 29 C.F.R. § 1630.2(n) (app.) (1995).

98. *Id.* § 1630.2(p) (app.).

safety of others.⁹⁹ This fourth factor may be used by an employer to challenge whether an employee is a “qualified” individual¹⁰⁰ and will be discussed below.

A. *When is a Mental Impairment a Disability?*

Mental disabilities under the ADA are not thoroughly discussed in the EEOC Compliance Manual, but the manual does provide that “personality traits such as poor judgment or a quick temper” or irresponsible behavior are not disabilities under the ADA.¹⁰¹ Examples of covered mental impairments include manic depression, schizophrenia, organic brain syndrome, emotional or mental illness, and depression.¹⁰² However, even if the employee or job applicant can establish that he or she suffers from a mental impairment, the impairment is a disability under the ADA only if: (1) the mental impairment “substantially limits one or more of the major life activities,” such as working; (2) the applicant has a “record of such an impairment”; or (3) the applicant is “regarded as having such an impairment.”¹⁰³

Courts have held that “[e]motional conditions such as anxiety and depression are disabilities included within the meaning of ‘disabled.’”¹⁰⁴ However, “[the condition] does not rise to the level of a ‘disability’ unless it substantially limits a major life activity.”¹⁰⁵ Several factors should be considered when deciding if the impairment is substantially limiting: (1) the impairment’s “nature and severity,” (2) the impairment’s “duration or expected duration,” and (3) the impairment’s permanent or expected long term impact.¹⁰⁶ Further, this determination “must be made on a

99. Robert L. Levin, *Workplace Violence: Navigating Through the Minefield of Legal Liability*, 11 LAB. LAW. 171, 178 (1995).

100. 42 U.S.C. § 12113(a)-(b) (1988 & Supp. V 1993).

101. 29 C.F.R. § 1630.2(h) (app.) (1995).

102. H.R. REP. NO. 485, *supra* note 1, pt. 2 at 28, 51, *reprinted in* 1990 U.S.C.C.A.N. at 310, 333; BONNIE P. TUCKER, *FEDERAL DISABILITY LAW IN A NUTSHELL* 18 (1994).

103. 42 U.S.C. § 12102(2) (1988 & Supp. V 1993).

104. *Weiler v. Household Fin. Corp.*, 3 A.D. Cas. (BNA) 1337, 1339 (N.D. Ill. 1994); *see also Pritchard v. Southern Co. Servs., Inc.*, 4 A.D. Cas. (BNA) 465, 473-74 (N.D. Ala. 1995) (concluding that depression constitutes a mental impairment under the ADA); *Stradley v. LaFourche Communications, Inc.*, 869 F. Supp. 442, 443 (E.D. La. 1994) (concluding that “[d]epression and other mental illnesses can qualify as disabilities for purposes of the ADA”).

105. *Pritchard*, 4 A.D. Cas. (BNA), at 470 (quoting *Stradley*, 869 F. Supp. at 443).

106. 29 C.F.R. § 1630.2(j) (app.) (1995).

case by case basis, without regard to mitigating measures such as medicines.¹⁰⁷ Also, side effects from medication taken for a mental impairment may indirectly affect and substantially limit a major life activity.¹⁰⁸

In *Weiler v. Household Finance Corp.*,¹⁰⁹ the employee informed her employer that she was diagnosed with Temporal Mandibular Joint Dysfunction (TMJ) and that the TMJ was largely caused by job-related stress.¹¹⁰ When the employee's TMJ treatment was unsuccessful, she underwent psychotherapy.¹¹¹ Her doctor advised her employer that she had increased anxiety and depression due to recent job-related events.¹¹² The court reasoned that "depression is a misleadingly mild term for an extraordinarily debilitating illness"¹¹³ and that emotional conditions like anxiety and depression are disabilities under the ADA.¹¹⁴ The employee claimed that her "TMJ, anxiety and depression substantially limited her ability to work, eat and sleep."¹¹⁵ The court decided that as "a result of her TMJ, anxiety and depression, plaintiff was substantially limited and significantly restricted in the duration, manner or condition under which she could perform major life activities."¹¹⁶ Therefore, the court held that the plaintiff-employee's condition met the ADA definition of a disability and denied defendant's motion to dismiss.¹¹⁷

However, the court later granted defendant's motion for summary judgment¹¹⁸ after discovery in which plaintiff's doctor testified that plaintiff was not disabled from working, and plaintiff testified that she would go back to work if she was

107. *Id.*

108. *Fehr v. McLean Packaging Corp.*, 860 F. Supp. 198, 200 (E.D. Pa. 1994) (finding that question of fact remained regarding substantial limitation when employee's ability to breathe in a hot confined area was limited by side effects of depression medication).

109. 3 A.D. Cas. (BNA) 1337 (N.D. Ill. 1994).

110. *Id.* at 1338.

111. *Id.*

112. *Id.*

113. *Id.* at 1339 (citing *Overton v. Reilly*, 977 F.2d 1190 (7th Cir. 1992)).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 1340.

118. *Weiler v. Household Fin. Corp.*, 1995 WL 452977, at *1 (N.D. Ill. July 27, 1995).

transferred.¹¹⁹ The court reasoned that “[t]he ADA does not protect people from the general stresses of the workplace.”¹²⁰ Further, the court noted that “[b]eing unwilling or even unable to work with a particular individual simply is not the equivalent of being ‘substantially limited’ in the life activity of working.”¹²¹ The court distinguished a personality conflict from a disability, noting that the former is specific to an individual and the latter “is part of someone and goes with her to her next job.”¹²² Because plaintiff “was fully capable of working for another employer,” the court concluded that she was not disabled under the ADA.¹²³

To establish a substantial limitation of the major life activity of working, an employee must show a “significant[] restrict[ion] in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.”¹²⁴ In *Pritchard v. Southern Co. Services, Inc.*,¹²⁵ the court determined that an employee, an engineer who had suffered from depression and anxiety related to nuclear power work, was not disabled at the time of the employment action because the employee admitted that she had recovered from depression and could return to “employment in a non-nuclear capacity.”¹²⁶ The court reasoned that “an impairment that interfered with an individual’s ability to do a particular job, but did not significantly decrease that individual’s ability to obtain satisfactory employment otherwise, was not substantially limiting within the meaning of the statute.”¹²⁷

The employee may not have a mental impairment, but if an employer regards an employee “as suffering from depression or another mental illness that [the employer] believe[s] substantially limit[s] a major life activity,”¹²⁸ then the employee

119. *Id.* at *4.

120. *Id.* at *5.

121. *Id.*

122. *Id.*

123. *Id.* at *6.

124. 29 C.F.R. § 1630.2(j)(3)(i) (1995).

125. 4 A.D. Cas. (BNA) 465 (N.D. Ala. 1995).

126. *Id.* at 467, 471.

127. *Id.* at 472-73 (quoting *Jasany v. United States Postal Service*, 755 F.2d 1244, 1248 (6th Cir. 1985)); see also *Welsh v. City of Tulsa*, 977 F.2d 1415, 1417 (10th Cir. 1992) (holding that under the Rehabilitation Act, the major life activity of working “does not necessarily mean working at the job of one’s choice”).

128. *Stradley v. LaFourche Communications, Inc.*, 869 F. Supp. 442, 443-44 (E.D.

is disabled under the ADA. Specifically, under the ADA, an employee suffers from a disability when the employee's supervisor accepts a diagnosis, such as acute anxiety, and treats the employee as if the employee is unable to function in any work environment.¹²⁹

Conversely, an employee may have a mental impairment, but the mental disability may not be obvious. The ADA is not violated when the employer does not know about the mental disability.¹³⁰ Moreover, in the absence of any notice from the employee, the employer is not required to determine "whether [the] . . . behavior was the product of a mental disorder."¹³¹ For example, even if an employee with a mental disability, such as a bipolar disorder, can perform the essential functions of the job, the employer can terminate the employee for repeated unacceptable conduct that stemmed from a mental disability unknown to the employer.¹³² Because the employer lacks knowledge of the mental disability, there is no evidence that the disability was the employer's sole reason for the termination.¹³³

B. When Is an Employee with a Mental Disability Unqualified?

If an employee's mental disability prevents the employee from performing an essential job function¹³⁴ with a reasonable

La. 1994) (reasoning that the employer may have regarded the employee as having a disability because the employer understood that the employee was "suffering from 'acute anxiety and depression' . . . [and] believed that [the employee's] condition made him potentially violent and hostile in the workplace"); see also *Partlow v. Runyon*, 826 F. Supp. 40, 45 (D.N.H. 1993).

129. *Stradley*, 869 F. Supp. at 444 n.2.

130. 42 U.S.C. § 12112(b)(5) (1988 & Supp. V 1993) (providing that discrimination occurs when an employer does not make a reasonable accommodation to the known mental limitations).

131. *Stola v. Joint Indus. Bd.*, 889 F. Supp. 133, 136 (S.D.N.Y. 1995).

132. *Landefeld v. Marion Gen. Hosp., Inc.*, 994 F.2d 1178, 1183 (6th Cir. 1993) (Nelson, C.J., concurring) (citing 29 U.S.C. § 794(a), which provides: "No otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .").

133. *Id.*

134. EEOC issued regulations, codified at 29 C.F.R. § 1630, define "essential functions" as follows:

[E]ssential functions means the fundamental job duties of the employment position the individual with a disability holds or desires . . . [and] does not include the marginal functions of the position. . . . Evidence of whether a particular function is essential includes, but is not limited to:

accommodation, the employee is not a qualified individual protected under the ADA.¹³⁵ Thus, if an employee with a mental disability files an employment discrimination claim under the ADA, the employer must identify the essential job functions and explore whether a reasonable accommodation is warranted.¹³⁶

1. Reasonable Accommodation Does Not Require an Employer to Reallocate Essential Job Functions

Although the ADA may require an employer “to have someone assist the disabled individual to perform the job, . . . the employer is not required to have someone perform the job for the disabled individual.”¹³⁷ For example, in *Johnston v. Morrison, Inc.*,¹³⁸ the employer hired the plaintiff as a food server, later learned of the food server’s panic attack disorder, and assigned the food server to the least busy work station.¹³⁹ The employer’s food servers were expected to know and discuss the ingredients, prices, and portions of all menu items.¹⁴⁰

The plaintiff claimed that her disability prevented her from handling the employer’s frequent changes in ingredients and prices and “caused a panic attack all the time.”¹⁴¹ The court stated that the “employer can determine which functions are essential”¹⁴² and has “the right to determine whether changes in matters such as food ingredients, portion sizes, and pricing are necessary in order to stay competitive.”¹⁴³ Further, the court reasoned that if the employee was “not required to perform the essential function of learning and communicating information concerning ingredients, portion sizes, and prices, then she would

(i) The employer’s judgment as to which functions are essential; (ii) Written job descriptions prepared before advertising or interviewing applicants for the job; (iii) The amount of time spent on the job performing the function; (iv) The consequences of not requiring the incumbent to perform the function”

29 C.F.R. § 1630.2(n) (1995).

135. *Johnston v. Morrison, Inc.*, 849 F. Supp. 777, 778 (N.D. Ala. 1994).

136. *See id.*

137. *Id.* at 779 (citing *Coleman v. Darden*, 595 F.2d 533, 540 (10th Cir.), *cert. denied*, 444 U.S. 927 (1979)).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 778-79.

142. *Id.* at 778 (citing 29 C.F.R. § 1630.2(n)(3)(i) (app.) (1993)).

143. *Id.*

be something other than a food server as defined by [the employer]."¹⁴⁴

The plaintiff also stated that even with the accommodation of the least busy work station, she could not "handle the work when the restaurant became crowded."¹⁴⁵ The court, referring to EEOC guidelines, stated that although a "reasonable accommodation may include 'job restructuring,' . . . an employer . . . is not required to reallocate essential functions."¹⁴⁶ The court reasoned that the employee's "food server position required her to serve the customers in her work station . . . [and the employer] was not required to provide another employee to handle the plaintiff's food server duties."¹⁴⁷ The court held that because the plaintiff could not "perform the essential functions of the position, she [was] not a qualified individual for purposes of the ADA."¹⁴⁸

2. Reasonable Accommodation May Include Someone Answering an Employee's Phone

If an employee sleeps on the job because of medication for a disability, preventing the employee's telephone contact with the public, but the employee can still perform the essential functions of the job with the reasonable accommodation of coworkers answering the phones, he may be viewed as a qualified individual.¹⁴⁹ In the Rehabilitation Act case, *Overton v. Reilly*, an employee with personal and emotional problems that prevented him from communicating effectively with the public controlled his problem by taking minimal doses of medication, which made him drowsy.¹⁵⁰ Further, when the employee was hired, the job description did not indicate public contact.¹⁵¹ Although the employer argued that the employee was not qualified because telephone contact with the public was an essential job function,¹⁵² the court concluded that "even if contact is essential, the job does not require much of it . . .

144. *Id.* at 779.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 780.

149. *Overton v. Reilly*, 977 F.2d 1190, 1195 (7th Cir. 1992).

150. *Id.* at 1191.

151. *Id.*

152. *Id.* at 1194.

[because] about five percent of . . . [the employee's] job involved public contact."¹⁵³ Also, the court suggested that the employee might be able to perform the communication function with a reasonable accommodation.¹⁵⁴ The court found that it might be reasonable for the employer to provide the employee with someone to handle telephone calls.¹⁵⁵ The court analogized this accommodation to the example in the EEOC Interpretory Regulations of providing an interpreter for a deaf employee.¹⁵⁶ Also, the court concluded that if the employee's "sleepiness is a function of his disability (or, more properly, of the treatment for his disability) and he can still perform the essential functions of his job, then he may still be viewed as 'qualified' under the Rehabilitation Act."¹⁵⁷ Thus, the court reversed the lower court's decision to grant the employer's summary judgment motion and remanded the case.¹⁵⁸

A different result was reached in *Larkins v. CIBA Vision Corp.*¹⁵⁹ There, the court concluded that an employee could not perform the essential functions of a position because the job required the employee to answer the telephone.¹⁶⁰ After the employee was hired as a customer service representative (CSR), the employee was hit by a drunk driver and the resulting injuries included driving phobia and continual panic attacks.¹⁶¹ The employer agreed that the employee had a disability, but disputed whether the employee was a "qualified individual with a disability."¹⁶² The employer argued that "even with the accommodations given, . . . including allowing [the employee] to work a half-day schedule and take off work time whenever she felt she needed to do so, [the employee] was not able to attend work with any regularity or predictability."¹⁶³ Also, the employer argued that the employee could not "perform the essential function of the CSR position . . . [because] the sole reason the CSR position exists is to handle telephone calls [for]

153. *Id.* at 1195.

154. *Id.*

155. *Id.* (citing 29 C.F.R. § 1613.704(b)(2) (1991)).

156. *Id.*

157. *Id.*

158. *Id.* at 1196.

159. 858 F. Supp. 1572 (N.D. Ga. 1994).

160. *Id.* at 1582.

161. *Id.* at 1574.

162. *Id.* at 1579.

163. *Id.* at 1581.

eight and one-half hours per day.”¹⁶⁴ The employee agreed that handling telephone calls was her primary job responsibility.¹⁶⁵ However, the employee argued that the employer “should have restructured her job ‘to include primarily non-telephone duties’ or should have ‘transferred her to another position in the company that did not include intense and continual telephone use.’”¹⁶⁶

The court noted that the employer had made several accommodations “including allowing her to work on a part-time basis . . . , providing her with additional breaks, arranging for employees to read the Bible to her . . . , imposing no performance standards on her during the first two weeks . . . [after] short-term disability leave, and permitting her to be absent for doctors’ appointments.”¹⁶⁷ Further, the court held that “an accommodation that eliminates an essential function of the job is not reasonable.”¹⁶⁸ Thus, the court found that the employee was not “a qualified individual under the ADA because she [was] not able to perform the essential functions of the CSR position with or without reasonable accommodation.”¹⁶⁹

3. Job Posting May Not Suffice as a Reasonable Accommodation

Even when an employee’s condition deteriorates to the point to which he or she can no longer work, the employee may still be considered a qualified individual if the employer’s accommodation only allows the employee to post for another position, particularly when the employee’s condition deteriorates while the employee is waiting for a position.¹⁷⁰ In such a case, *Weiler v. Household Finance Corp.*,¹⁷¹ the court rejected the employer’s argument that because the employee was unable to work in any capacity and could not perform her essential job functions with or without a reasonable accommodation, the employee was not a qualified individual protected by the ADA.¹⁷² The court reasoned that the

164. *Id.*

165. *Id.* at 1582.

166. *Id.*

167. *Id.* at 1584.

168. *Id.* at 1583 (quoting *Hall v. United States Postal Serv.*, 857 F.2d 1073, 1078 (6th Cir. 1988)).

169. *Id.* at 1585.

170. *Weiler v. Household Fin. Corp.*, 3 A.D. Cas. 1337, 1340 (N.D. Ill. 1994).

171. *Id.*

172. *Id.* at 1339.

posting accommodation was a close question, but concluded that the employee stated a cause of action and denied the employer's motion to dismiss.¹⁷³ However, the court later determined that because plaintiff ignored the posting accommodation, it had no way to determine how long it would take to effect a transfer.¹⁷⁴ The court concluded that a "short term disability leave until a new position could be found through the posting process was reasonable."¹⁷⁵

4. *Direct Threats to Other Employees*

An employer may fire an employee with a disability if the employee poses a "direct threat" to coworkers.¹⁷⁶ Under the ADA, "direct threat" is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."¹⁷⁷ Not posing a direct threat to the health or safety of other persons in the workplace can be a "qualification standard."¹⁷⁸ The employer may have a defense if it can show that the alleged application of such a qualification standard, which screens out or denies a job or benefit to a person with a disability, is "job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation."¹⁷⁹

If the employee has a mental disability, the employer must point to specific behavior that suggests the anticipated direct threat.¹⁸⁰ This determination must not be based on mere

173. *Id.* at 1340.

174. *Weiler v. Household Fin. Corp.*, 1995 WL 452977, at *7 (N.D. Ill. July 27, 1995).

175. *Id.*

176. H.R. REP. NO. 485, *supra* note 1, pt. 2, at 56, 57, *reprinted in* 1990 U.S.C.C.A.N. at 338.

The determination that an individual with a disability will pose a safety threat to others must be made on a case-by-case basis and must not be based on generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, or pernicious mythologies. . . . The standard to be used in determining whether there is a direct threat is whether the person poses a significant, [sic] risk to the safety of others or to property, not a speculative or remote risk, and that no reasonable accommodation is available that can remove the risk.

Id.; *see also* 29 C.F.R. § 1630.2(r) (1995).

177. 42 U.S.C. § 12111(3) (Supp. V 1993).

178. *Id.* § 12113(b).

179. *Id.* § 12113(a).

180. H.R. REP. NO. 485, *supra* note 1, pt. 2, at 57, *reprinted in* 1990 U.S.C.C.A.N.

generalizations about the disability, but requires a fact-specific individualized inquiry resulting in a "well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives."¹⁸¹ What if the gun-carrying employee claims that the behavior resulted from a mental disability? Recently, two courts that have addressed this question have reached different results.¹⁸²

a. When a Gun-Carrying Employee May Be a Direct Threat

In *Gordan v. Runyon*,¹⁸³ a part-time mail handler was discharged for bringing mace and a stun gun to work.¹⁸⁴ He claimed that he was wrongfully discharged and alleged a violation of the Rehabilitation Act.¹⁸⁵ The employer argued that the mail handler was discharged for several reasons: the stun gun possession violated federal law and postal regulations, the employee had a history of disruptive behavior, and the employee verbally assaulted a nurse and acted in a threatening manner.¹⁸⁶

The EEOC found that the mail handler was a qualified individual with a disability,¹⁸⁷ and the court, for summary judgment purposes, assumed that the mail handler was mentally disabled.¹⁸⁸ However, evidence of prior performance warnings showed that the employer discharged the mail handler because of disruptive conduct¹⁸⁹ and because it believed that the mail handler's possession of a stun gun and mace violated weapons possession laws.¹⁹⁰

at 339.

181. H.R. REP. NO. 485, *supra* note 1, pt. 2, at 57, reprinted in 1990 U.S.C.C.A.N. at 339 (citing *Hall v. U.S. Postal Serv.*, 857 F.2d 1073, 1079 (6th Cir. 1988); see also *Mantolete v. Bolger*, 757 F.2d 1416 (9th Cir. 1985); *Strathie v. Department of Transp.*, 716 F.2d 227 (3d Cir. 1983)).

182. *Gordan v. Runyon*, 3 A.D. Cas. (BNA) 284 (E.D. Pa. 1994); *Hindman v. GTE Data Serv., Inc.*, 3 A.D. Cas. (BNA) 641 (M.D. Fla. 1994), *rev'd*, 4 A.D. Cas. (BNA) 182 (M.D. Fla. 1995).

183. 3 A.D. Cas. (BNA) 284 (E.D. Pa. 1994).

184. *Id.* at 285.

185. *Id.* at 284-85.

186. *Id.* at 285.

187. *Id.* at 286 n.2.

188. *Id.* at 285-86.

189. *Id.* at 285.

190. *Id.* at 287.

Consequently, the court held that the mail handler was not discharged solely due to his mental disability and therefore the Rehabilitation Act was not violated.¹⁹¹ The court also noted that the mail handler had not demonstrated that he was “otherwise qualified” because he could not show that he could meet the reasonable job demands.¹⁹² Finally, the court found that the mail handler’s continued employment would “unduly burden the [d]efendants because [d]efendants’ employees would be exposed to a hostile and potentially threatening work environment.”¹⁹³ Thus, the court concluded that there was no genuine issue of material fact regarding whether plaintiff was “otherwise qualified” and granted the defendants’ summary judgment motion.¹⁹⁴

b. When a Gun-Carrying Employee May Not Be a Direct Threat

A district court judge reached a different result in *Hindman v. GTE Data Services, Inc. (Hindman I)*.¹⁹⁵ The employee brought an ADA claim when he was terminated “for cause” for bringing a firearm onto company property without authorization.¹⁹⁶ The termination occurred after the employee told his employer that he had been diagnosed with a chemical imbalance and was being admitted to the hospital for the condition.¹⁹⁷ The employee alleged that the firearm possession resulted from this mental disability.¹⁹⁸

The employer argued that bringing the gun to work involved poor judgment, not protected by the ADA.¹⁹⁹ The court rejected the employer’s argument because “when poor judgment is a symptom of a mental or psychological disorder it is defined as an impairment that would qualify as a disability under the

191. *Id.*

192. *Id.*

193. *Id.* at 287-88.

194. *Id.* at 288.

195. 3 A.D. Cas. (BNA) 641 (M.D. Fla. 1994), *rev’d*, 4 A.D. Cas. (BNA) 182 (M.D. Fla. 1995).

196. *Id.*

197. *Id.* at 644. *But see* *Hindman v. GTE Data Serv. (Hindman II)*, 4 A.D. Cas. (BNA) at 184 (concluding that termination decision was made prior to the employee communicating any information about a disability to the employer).

198. *Hindman I*, 3 A.D. Cas. (BNA) at 641.

199. *Id.* at 642-43.

ADA.²⁰⁰ The court reasoned that the employer may have terminated the employee for poor judgment caused by the employee's chemical imbalance.²⁰¹ However, the court also stated that an employer does not "rely" on the disability when it justifies firing on behavior that "is not causally related to that handicap."²⁰² The court concluded that whether the employee's misconduct was caused by his mental disability was a question of fact to be determined by a jury.²⁰³

The employer further argued that the employee was not qualified because he could not perform the essential job functions of adhering to company policies concerning firearms and of using good judgment.²⁰⁴ The court rejected this argument because the judgment issue was causally connected to the employee's mental disability.²⁰⁵ The court also decided that the employer did not consider making reasonable accommodations.²⁰⁶ Rather, the employer ignored the employee's notification that he was suffering from a chemical imbalance and made no further inquiries.²⁰⁷

Finally, the employer argued that the employee was not qualified "because he posed a 'direct threat' to the health and safety of others."²⁰⁸ This argument also failed.²⁰⁹ The court stated that the factors that should be considered when assessing whether an individual poses a direct threat include: "(1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm."²¹⁰ The court noted that the employer did not evaluate the medical evidence offered by the employee.²¹¹ Finally, the court concluded that "the question of whether a person is a direct threat is a factual issue

200. *Id.* at 643.

201. *Id.*

202. *Id.* (quoting *Hogarth v. Thornburgh*, 833 F. Supp. 1077 (S.D.N.Y. 1993)).

203. *Id.*

204. *Id.* at 644.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 645.

210. *Id.* at 644.

211. *Id.*

for the jury²¹² and denied the employer's motion for summary judgment.²¹³

GTE's motion for summary judgment was subsequently granted after a rehearing (*Hindman II*) because the court concluded that "a loaded weapon in the work place presents a threat," the termination decision was made before any information was communicated to the employer regarding the disability, and the employee's conduct violated a company rule.²¹⁴ Although the court in *Hindman II* granted the employer's summary judgment motion, it did not address whether the result would have been different if the employer had learned of the disability prior to the termination decision.²¹⁵

c. Are the Gun-Carrying Cases Distinguishable?

The differing opinions reflect the degree of uncertainty employers face. Although the court in *Gordan* assumed, for purposes of its decision, that the employee was mentally disabled, it did not relate the employee's conduct to the mental disability.²¹⁶ In contrast, the court in *Hindman I* reasoned that the mental disability might be causally connected to the behavior and that the matter should be left to a jury.²¹⁷

The different results turned on the judicial interpretation of the direct threat defense, which countered the allegation that an employee was qualified to perform the essential functions of the job with a reasonable accommodation. The court in *Gordan* found that the employee had a history of disruptive behavior and combined an undue burden analysis, which primarily addresses the financial burden of providing an accommodation, with the direct threat defense.²¹⁸ In contrast, the court's reasoning in *Hindman I* reflected both congressional intent²¹⁹ and the EEOC Compliance Manual guidance.²²⁰ According to the manual, any

212. *Id.* at 645.

213. *Id.*

214. *Hindman II*, 4 A.D. Cas. (BNA) 182, 183 (M.D. Fla. 1995).

215. *Id.*

216. *Gordan v. Runyon*, 3 A.D. Cas. (BNA) 285-86 (E.D. Pa. 1994).

217. *Hindman I*, 3 A.D. Cas. (BNA) at 645.

218. *Gordan*, 3 A.D. Cas. (BNA) at 287-88.

219. H.R. REP. NO. 485, *supra* note 1,, pt. 2, at 56, *reprinted in* 1990 U.S.C.C.A.N. at 338 (stating that determining whether a person poses a direct threat must not be based on speculation and generalizations).

220. 29 C.F.R. § 1630.2(r) (app.) (1995).

assessment of "a high probability of substantial harm . . . must be strictly based on valid medical analysis and/or on other objective evidence."²²¹

In both *Gordan* and *Hindman I*, the employers presented no objective evidence of a direct threat.²²² Further, neither employer investigated whether a reasonable accommodation could reduce the perceived direct threat.²²³ Finally, each employee's conduct may have been caused by the mental disability.²²⁴ The court in *Hindman I* took the approach that corresponds with the textual language of the ADA,²²⁵ EEOC regulations, and legislative history²²⁶ when it denied the employer's summary judgment motion because of the lack of objective evidence of a direct threat.²²⁷ Conversely, the courts in *Gordan* and *Hindman II* did not consider only the employers' direct threat defenses.²²⁸ These decisions illustrate that "employers must exercise caution before taking adverse actions against an employee who claims 'my disability made me do it.'"²²⁹

CONCLUSION

The stated purpose of the Americans With Disabilities Act is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."²³⁰ Yet, this mandate suffers from lack of clarity when an employer considers action that involves an employee or applicant with a mental disability. Although the ADA is broadly construed because of its remedial nature, the EEOC and courts must continue to temper their interpretation with the realities of the work environment.

221. *Id.*

222. *Gordan*, 3 A.D. Cas. (BNA) 284; *Hindman I*, 3 A.D. Cas. (BNA) 641.

223. *Gordan*, 3 A.D. Cas. (BNA) 284; *Hindman I*, 3 A.D. Cas. (BNA) 641.

224. *Gordan*, 3 A.D. Cas. (BNA) at 285-86; *Hindman I*, 3 A.D. Cas. (BNA) at 643.

225. 42 U.S.C. § 12113(a) (1988 & Supp. V 1993).

226. H.R. REP. NO. 485, *supra* note 1, pt. 2, at 56, *reprinted in* 1990 U.S.C.C.A.N at 338.

227. *Hindman I*, 3 A.D. Cas. (BNA) 641, 644-45 (M.D. Fla. 1994).

228. *Gordan*, 3 A.D. Cas. (BNA) at 284, 286; *Hindman II*, 4 A.D. Cas. (BNA) 182, 184-85.

229. Levin, *supra* note 98, at 179.

230. 42 U.S.C. § 12101(b)(1) (1988 & Supp. V 1993).

The direct threat defense needs to be further refined to address the fear of workplace violence. For example, should an employee's possession of a loaded gun in the workplace, standing alone, be treated as a direct threat? An employer should be able to establish a company rule that prohibits loaded guns on its property and terminate an employee that violates the rule, even if that employee points to some mental disability that caused the gun-carrying behavior.

Further, although employers should not discriminate, employers should not be expected to assume an "undue" financial burden of caring for the mentally disabled. Both the EEOC guidelines and judicial interpretations have correctly established some limits. First, the ban on pre-offer inquiries has been relaxed in the rehiring context; an employer is not expected to ignore a known mental disability that prevented a former employee from performing his or her job. Second, an essential job function may include the ability to get along with others. The ADA does not protect individuals from general stresses of the workplace or personality conflicts. Third, even though the ADA forces employers to consider more creative accommodations for the mentally disabled, this duty to provide a reasonable accommodation does not encompass the reallocation or elimination of essential job functions.

While many claims have survived employers' summary judgment motions, employers are gaining experience with ADA compliance. Unfortunately, the contours of the ADA will probably evolve over many years because employers must weigh the expense of litigation and risk of jury awards against the uncertain definitions of essential job function, reasonable accommodation, and undue burden.

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