MEDICAL RESIDENTS, STUDENTS and FACULTY: ADA ACCOMMODATION ISSUES and CHALLENGES

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I. Introduction

Title I of the Americans with Disabilities Act of 1990 (ADA) requires employers with fifteen or more employees to provide qualified individuals with disability an equal opportunity to benefit from the full range of employment related opportunities available to others. The Act, also encompasses areas beyond employment, including “housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.” In 2008, the ADA Amendments Act (ADAAA) was enacted to overrule Supreme Court precedent that had resulted in narrowing the definition of disability to the point where many people with epilepsy, diabetes, multiple sclerosis, major depression, and bipolar disorder could not bring disability claims. The pre-ADAAA definition of disability created a body of law in which the merits of disability discrimination claims were often not reached because, as a threshold matter, the plaintiffs were determined to be not “disabled” under the ADA. The ADAAA obliterated this paradigm by changing the analysis of the term “disability” but not changing the basic definition. As a result, disability status will be met more easily and the focus now will be on accommodation issues.

As a general matter, ADA litigation involving hospitals and health care providers will address many of the same issues as litigation involving other entities covered by the ADA. The ADA itself, does not single out health care providers as an employer unit nor do the regulations provide specific guidance to health care providers. Yet, the medical field is unique because of the patient care factor. The reasonable accommodation analysis under the ADA necessarily involves a balancing between the employee’s proposed accommodation and the health care provider’s responsibility for patient care. Courts pay special attention to issues of patient care

1 The author wishes to thank Christopher Kazanowski, a Honigman associate, for his assistance in preparing this paper.

and give deference to hospital judgment about this issue which, in many cases, is outcome determinative especially when an employee’s disability may pose a “direct threat” to third parties.

This paper covers several issues that have become common in ADA litigation against health care providers and seeks to provide current case law and analysis on these issues. First, there is a discussion about the change in how the term “disability” will be interpreted by the courts given the ADAAA and the renewed focus on accommodation. Second, it covers several hot topics of accommodation such as unpaid leave, job restructuring and job reassignment. Third, it discusses various problems hospitals face when dealing with employees who have disabilities that may pose a direct threat to patients. Fourth, it discusses whether hospitals must provide employment accommodations to independent contract providers. Finally, this paper attempts to provide practice tips for health care providers balancing ADA compliance with the responsibility for patient care.

II. The ADA Amendments Act

Under the ADAAA the definition of disability must be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and generally shall not require extensive analysis. The effect of these changes is to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA. In particular, the ADAAA was meant to overturn two Supreme Court cases holding that (1) the terms of the ADA must be interpreted strictly to create a demanding standard for qualifying as disabled,” (2) an impairment is not substantially limiting unless it “prevents or severely restrict the individual from doing activities that are of central importance to most people’s daily lives,”3 and (3) a person whose impairment is corrected by mitigating measures does not have an impairment that “substantially limits” a major life activity. Most relevant to this paper is that the prohibition against discrimination prescribed by the ADA includes a requirement that employers make reasonable accommodation to the known physical or mental limitations of otherwise qualified individuals with disabilities, unless it results in undue hardship to the health care provider.

A discussion of reasonable accommodation must begin with an examination of the threshold issue of determining whether an individual is disabled. Disability is defined as a physical or mental impairment that substantially limits one or more of the major life activities of such individual (“actual” prong); a record of such an impairment (“record of” prong); or being regarded as having such an impairment (“regarded as” prong) (a person can not proceed under this prong when challenging employer’s failure to make reasonable accommodations).4 The determination of disability then requires the consideration of three sub-issues: 1. the existence of a “physical or mental impairment”; 2. a consideration of whether this impairment affects a “major life activity”; and 3. whether the nature of the impact is such that it “substantially limits” such major life activity. In many cases now, various impairments will be considered “disabilities” under the ADAAA. See, Chart in Exhibit A.

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4 42 U.S.C.A. §12102
The EEOC initially proposed guidance classifying example impairments into three categories: impairments that will (1) almost always, (2) sometimes, and (3) never constitute a disability under the ADAAA. In lieu of this approach, the EEOC explained that based on its rules of construction [for determining whether an impairment substantially limits an individual in a major life activity], “it should be easily concluded” that the impairments listed on Table 2 will, “in virtually all cases,” give rise to a substantial limitation of a major life activity. Exhibit A. The EEOC regulations establish nine rules of construction. The rules of constructions do not apply to the “regarded as” prong. See, Chart in Exhibit B.

The intent of the ADAAA to broaden coverage is evidenced by trends emerging in cases decided post-enactment. The cases do not involve health care providers but the analysis equally applies: Gil v. Vortex LLC (monocular vision): even though the Supreme Court has held that courts must conduct “case-by-case” analyses to determine whether individuals with monocular vision have a substantially limiting impairment, the court held that the plaintiff’s failure to describe the exact nature of his substantial limitations should not result in dismissal. The plaintiff satisfied the “relaxed disability standard” of the ADAAA. Lowe v. American Eurocopeter LLC (obesity): The plaintiff alleged that she was disabled because of her weight and that her disability made her “unable to park and walk from the regular parking lot.” The court found the pre-ADAAA guidance that obesity is not generally a disabling impairment irrelevant and held that the plaintiff had stated a claim for relief for purposes of Rule 12(b)(6) by asserting that her obesity affected her major life activity of walking. Cohen v. CHLN Inc. (back pain, sciatica, and ruptured disc): A restaurant general manager who presented evidence that he had suffered for four months from debilitating back and leg pain that prevented him from walking more than 10 to 20 yards at a time and affected his ability to climb stairs and sleep was fired one day after telling his employer that he had an appointment with a surgeon to discuss surgery for his back condition. The court found that the plaintiff had offered sufficient evidence to raise a genuine issue of fact as to whether he was disabled under the ADAAA at the time of his termination. Bliss v. Morrow Enterprises Inc (badly broken arm): The plaintiff in this case had a badly broken arm resulting from a car accident and wore a brace throughout her term of employment with the defendant. For purposes of ruling on the motion for summary judgment, the court stated that it would “assume” that the plaintiff was disabled under the ADAAA “even though it had its doubts.” The court ultimately found that there was no causal connection between the plaintiff’s termination and her broken arm that would enable her to prevail on an ADA claim. Norton v. Assisted Living Concepts Inc (kidney cancer): The plaintiff argued that his kidney cancer was a “disability” under the “actual impairment” prong. Emphasizing that the plaintiff’s kidney cancer qualified as a “disability” under the ADAAA, even if the only “major life activity” it “substantially limited” was “normal cell growth,” the court denied the defendant’s motion for

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5 Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 74 Fed. Reg. 48431, 48441–42 (proposed Sept. 23, 2009). The “sometimes” list included high blood pressure, learning disabilities, asthma, to name a few, while the “never” list included the common cold, seasonal or common flue, sprained joints and other relatively minor impairments.
6 29 C.F.R. § 1630.2(j)(3).
10 No. 09-CV-3064C PJS/JJK, 2011 WL 2555365, at *1, d2a & 6 (D. Minn. June 28, 2011)
summary judgment. The court also granted the plaintiff’s motion for partial summary judgment that the renal cancer was a disability as a matter of law under the ADAAA.

Practice Tip – Disability Threshold. The disability threshold will be met in most cases that in pre-ADAAA times would have been dismissed on this basis. In the health care provider context, many impairments suffered by doctors, nurses, medical faculty, residents and students will have to be accommodated through the interactive process. The health care provider still has the responsibility to ascertain whether a disability exists but spending excessive time on this issue is not productive. Guidance provided by the EEOC as it relates to the ADAAA is particularly useful in this regard. In particular, the list provided in Exhibit A, Table 2, can provide a more efficient analysis of whether a medical resident or faculty member’s impairment meets or exceeds the threshold for being classified as a “disability.” In making this analysis, it is important to note that although there are some cases that continue to cite pre-ADAAA cases and find that plaintiffs are not disabled as a matter of law, given the ADAAA’s more relaxed standard, the trend is for courts to focus more on the defendant’s conduct rather than on the plaintiff’s condition.

III. Reasonable Accommodation Issues

According to the ADA, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities. Assuming that an individual is a “qualified” individual with a “disability,” the discussion moves to the concept of “reasonable accommodation.” The term “reasonable accommodation” is defined in the ADA and may include: (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of

12 If an employee doesn’t fully cooperate during the interactive process, the employer may escape liability under the ADA. For example, in Hennenfent v. Mid Dakota Clinic, 164 F.3d 419 (8th Cir. 1998) (diabetes/amputation of both legs): The plaintiff doctor had diabetes and experienced complications that eventually required the amputation of both legs. The clinic provided the doctor with many accommodations, including a reduced work schedule, extends leaves of absence, and backup physicians to assist him with his on call duties. Plaintiff also requested an exemption from all on-call duties as a further accommodation. After the amputation, the clinic requested that the Mayo Clinic re-examine him to determine whether the “exemption from on-call duty” accommodation was necessary. The court decided against the plaintiff because he refused to cooperate with his employer by submitting to the requested examination. The health care provider prevailed again in Jakubowski v. Christ Hosp., 627 F.3d 195 (6th Cir. 2010) (Asperger’s syndrome): Plaintiff, a medical resident sued the hospital and a director of the family practice medical resident program, claiming that he was terminated from his position as a resident because of his Asperger's and that defendants failed to reasonably accommodate his disability. Because the accommodations proposed by plaintiff did not address a key obstacle preventing him from performing a necessary function of a medical resident [effective communication], he did not meet his burden under the ADA of proving he was an otherwise qualified individual for the position. The court also held that there is no dispute that the hospital participated in the interactive accommodations process in good faith because the hospital met with plaintiff, considered his proposed accommodations, informed him why they were unreasonable, offered assistance in finding a new pathology residency, and never hindered the process along the way.

13 29 C.F.R. § 1630.2(o).
examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individual with disabilities.\textsuperscript{14}

The types of accommodations to be discussed are: leave and schedule changes, job restructuring, and reassignment to a vacant position.

A. Leave and Schedule Changes

Leave refers to permitting the use of accrued paid leave, or unpaid leave, as a form of reasonable accommodation. As a general matter, an employer does not have to provide paid leave beyond that which is provided to similarly-situated employees. Employees should, however, allow extended unpaid leave when circumstances permit. Specifically, an employer may not apply a “no-fault” leave policy, under which employees are automatically terminated after they have been on leave for a certain period of time, to an employee with a disability who needs leave beyond the specified period. Instead, if additional unpaid is needed as a reasonable accommodation, the employer must modify its “no-fault” leave policy to provide the additional leave, unless it can show that: (1) there is another effective accommodation that would enable the person to perform the essential functions of his/her position, or (2) granting additional leave would cause an undue hardship.

Although it is clear that unpaid leave is a reasonable accommodation under the ADA. Less clear is how much leave the ADA requires. Unfortunately for employers such as health care providers, the body of law that is developing shows no bright-line test. According to David Fram, director of ADA services for the National Employment Law Institute, “What it looks like to me is that the higher level of skill that a job requires, the less leave you have to give before causing an undue hardship because you have to keep the job open…you’re not just keeping the person in some unpaid leave status.” In 

\textit{Nunes v. Wal-Mart Stores,}\textsuperscript{15} the court concluded that keeping a position open for a long period of time might not be undue hardship because the employer’s policy allowed employees to take up to one year of leave and the employer regularly used seasonal employees. On the other hand, the court ruled in 

\textit{Epps v. City of Pine Lawn,}\textsuperscript{16} that a sixth-month leave of absence for a policeman in a small community was not a reasonable accommodation because of the undue hardship it would impose in reallocating his duties among the small staff.

Although the legal terrain may be unclear regarding the length of unpaid leave required as a reasonable accommodation, various courts have stated employers do not have to offer an employee \textit{indefinite} leave under the ADA because it would create an undue hardship.\textsuperscript{17} But see, 

\textit{Cehrs v. Northeast Ohio Alzheimer’s Research Ctr.,}\textsuperscript{18} where the court stated that upon reflection, it was not sure that there should be a \textit{per se} rule that an unpaid leave of indefinite duration (or for

\textsuperscript{14} Sec.12111(9)(A) and (B).

\textsuperscript{15} 164 F.3d 1234 (9th Cir. 1999).

\textsuperscript{16} 353 F.3d 588 (8th Cir. 2003).

\textsuperscript{17} See, \textit{Boykin v. ATC/VANCOM of Colorado, L.P.}, 247 F.3d 1061, 1064 (10th Cir. 2001)(an employer is not obligated to place an employee on indefinite leave until a position for which he is qualified opens up); \textit{Monette v. Electronic Data Sys. Corp.}, 90 F.3d 1173, 1187 (6th Cir. 1996).

\textsuperscript{18} 155 F.3d 775, 782 (6th Cir.1998).
a very lengthy period, such as one year) could never constitute a “reasonable accommodation” under the ADA.

An important issue courts have faced in determining the reasonableness of an accommodation is the balancing of an employee’s request for leave or scheduling changes against an employer’s responsibility to provide ongoing patient care. Patient care was the basis upon which an employee’s requested accommodation of flexible leave was rejected by the court in *Amato v. St. Luke’s Episcopal Hospital*19 (retinitis pigmentosa leading to poor eyesight). There, plaintiff nursing assistant requested leave as a reasonable accommodation. The plaintiff was able to perform the essential functions of his job within the hospital. However, his attendance record was spotty. Plaintiff claimed that his absences were due to his low vision, which resulted in headaches and caused him to occasionally board the wrong bus. He argued that the hospital should provide him with flexible leave and additional unpaid leave as an accommodation. The court ruled that this accommodation would not be reasonable, finding that allowing the plaintiff to have a flexible leave schedule would require the hospital to hire additional employees to perform the essential functions of the plaintiff’s job when he was absent. “Altering an employer’s general practice of requiring regular attendance would be unduly burdensome to most employers, but is especially onerous for a hospital where the predictability of a certain level of staff is essential for proper patient care.” *Id.*

Modified or part-time schedule accommodations may involve adjusting arrival or departure times, providing periodic breaks, as well as altering when certain functions are performed. These type of accommodations require the employee to be able to perform the essential functions of the position. When a person with a disability is unable to perform the essential functions of her/his position, with or without reasonable accommodation, she/he is not a "qualified" individual with a disability within the meaning of the ADA.20

Flexible scheduling could not save plaintiff’s job when unable to meet employer’s attendance requirements in *Samper v. Providence St. Vincent Medical Center*21 (fibromyalgia and sleep disorders). A neonatal nurse brought an ADA claim against her hospital-employer for failing to accommodate her fibromyalgia, sleep disorders, and anxiety, which caused her to have attendance problems.22 The hospital had a policy allowing for only five unplanned, unscheduled absences per year.23 Nevertheless, the hospital would routinely provide the plaintiff-nurse with non-qualifying medical leave and worked out informal scheduling plans to assist with her absenteeism.24 Inevitably, the hospital allowed the plaintiff-nurse to work part time in the neonatal ward, but discontinued this position inevitably resulting in the nurse’s termination.25 Relying on the holding in *Amato v. St. Luke’s Episcopal Hospital*,26 the court first found the plaintiff-nurse’s attendance was an essential function of her job based on the nature of the

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20 EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities issued on October 17, 2002
23 *Id.* at *2.
24 *Id.* at *4-6.
25 *Id.* at *6-7.
hospital and the nursing job description. The need for regular attendance is especially important for a hospital, where the predictability of a certain level of staff is essential for proper patient care. The court found the plaintiff-nurse was not a qualified individual under the ADA, because she could not perform her essential function of attendance, even when the hospital earlier accommodated her by providing flexible scheduling. Finally, the court found that the plaintiff-nurse’s accommodation request to be exempt from the hospital’s attendance policy would have placed “too much of a burden” on the hospital and dismissed the plaintiff-nurse’s ADA claim.

A similar decision by the court was made in Laurin v. Providence Hospital (seizures): In this case, plaintiff employee was a registered nurse on a maternity ward who suffered from seizures induced by fatigue. She brought action against employer alleging that her discharge for refusal to work evening and night shifts violated the ADA. She had requested the accommodation of working only the day shift which the hospital rejected. The hospital moved for summary judgment. The district court granted the motion. On appeal, the Court affirmed the district court ruling, holding that plaintiff employee failed to establish that employer’s shift-rotation requirement for nurses was not an “essential job function,” as required to establish her ADA claim.

No job restructuring was possible given plaintiff’s job and need to be present on a regular basis in Miller v. University of Pittsburgh Medical Center. The issue of attendance in a health care setting was recently considered by the Third Circuit Court of Appeals. Plaintiff, a surgical technologist, contracted Hepatitis C during her employment with the defendant-hospital. After returning to work after a medical leave, the plaintiff-technologist was inevitably terminated for violating the hospital’s absenteeism policy. Worth noting, the plaintiff-technologist never attributed her absences to her Hepatitis C disease. The Court of Appeals affirmed the trial court’s judgment in favor of the defendant-hospital finding attendance to be an essential function of the job along with being able to take calls and work shifts as required. “Given the nature of [the plaintiff-technologist’s] job, assisting during surgery performed in the hospital, we find it evident that attendance is an essential element of this position. Plaintiff did not provide evidence of a reasonable accommodation that would enable her to perform this essential function.” The court’s conclusion begs the question if any accommodation is possible where attendance is an essential job function.

Related to the issue of modified schedules, there may be certain circumstances in which the ADA intersects with the Family Medical Leave Act (FMLA). For instance, an employee with an ADA disability has taken 12 weeks of FMLA leave. He notifies his employer that he is

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28 Id. at *15.
29 Id.
30 Id. at *16.
31 150 F.3d 52 (July 28, 1998)
33 Id. at 728.
34 Id.
35 Id.
36 Id. at 729.
ready to return to work, but he no longer is able to perform the essential functions of his position without an accommodation. Under the FMLA, the employer could terminate his employment, but under the ADA the employer must consider whether the employee could perform the essential functions with reasonable accommodation (e.g., additional leave, part-time schedule, job restructuring, or use of specialized equipment). If the employee cannot perform the essential functions of his position even with the accommodation, the ADA requires the employer to reassign the employee if there is a vacant position available for which he is qualified, with or without reasonable accommodation, and there is no undue hardship.\textsuperscript{38}

Consider the court’s decision in \textit{Fleck v. Wilmac Corporation}\textsuperscript{39} (chronic ankle condition) involving both FMLA and ADA issues. Plaintiff, who suffered from a chronic ankle condition, took FMLA leave from work in order to undergo surgery on her ankle. The plaintiff claimed that, when she returned from leave, she submitted a note from her doctor indicating that she was able to return to work at a schedule of four hours per day and the number of hours could be gradually increased over a six-week period. When the defendant told her that she was terminated because she could not work eight hours per day, the plaintiff allegedly submitted an alternative order from her doctor stating that she could work an eight-hour day if she had a break every hour. The plaintiff claimed that the defendant had refused to discuss any alternative work schedules. In response to plaintiff’s claim that she had been discriminated against on the basis of disability because the defendant had failed to make reasonable accommodation, defendant argued that plaintiff’s inability to return to full-time employment after surgery during FMLA leave rendered her unqualified for ADA protection. The court rejected this position and held that, although the FMLA does not require an employer to provide reasonable accommodation to an employee to facilitate her return to the same or equivalent position at the conclusion of her FMLA medical leave, the employee may, nevertheless, be able to state a valid claim for accommodation under the ADA because the term “reasonable” accommodation may include “part-time or modified work schedules.” Because the plaintiff had raised fact issues both as to whether she was “disabled” under the ADA as well as whether her requested accommodations were reasonable, the court refused to grant summary judgment on the plaintiff’s ADA claim.

\textit{Practice Tip – Attendance as an Essential Function and Dual Claims.} The courts clearly give deference to a health care providers need to have sufficient staff to care for patients. Where the position is directly related to patient care [nurses and doctors] attendance will be more likely found to be an essential function by the courts. When a health care provider receives a FMLA leave request the provider should almost always consider potential ADA claims. When FMLA leave expires and the employee cannot perform the essential functions of her/his job, the employer should anticipate a request for an accommodation to facilitate the employee’s return to work.

\textbf{B. Job Restructuring}

Job restructuring involves modifications such as: reallocating or redistributing marginal job functions that an employee is unable to perform because of a disability; and altering when

\textsuperscript{38} EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities issued on October 17, 2002

\textsuperscript{39} Civil Action No. 10-05562, 2011 WL 1899198, at *1, 2, 4-7 (E.D. Pa. May 19, 2011)
and/or how a function, essential or marginal, is performed. The key here is determining the employee’s capabilities given the impairment and determining whether the employee can perform the essential functions of the position.

The court looked at the essential function of the position before determining that plaintiff’s accommodation request was unreasonable in *Phelps v. Optima Health, Inc.* 41 (back injury): Plaintiff nurse had a back injury. She worked with her twin sister and worked out a job sharing arrangement so that plaintiff would not be required to lift patients. A managing nurse discovered the arrangement and plaintiff was terminated. The court found that lifting was an essential function of plaintiff’s job and held that the hospital was not obligated to reassign the lifting tasks to anyone—including plaintiff’s sister. The court affirmed the district court’s conclusion that lifting was an essential function of the plaintiff-nurse’s job with the defendant. 42

Turning to the issue of reasonable accommodation, the court found that just because plaintiff had a special working arrangement to assist her with lifting, this did not require the hospital to continue providing it as an accommodation. 43 Moreover, the hospital was not required to move the plaintiff back into a non-lifting specially-created medication nurse position, because the position no longer existed. “An employer is not required by the ADA to create a new job for an employee, nor to reestablish a position that no longer exists.” 44

*Chen v. Galen Hospital Illinois, Inc.* 45 (back injury): This case involved a radiology technician who injured her back, resulting in a fifteen-pound lifting restriction. After the technician’s injury, the hospital accommodated her for several years by asking her co-workers to assist her by pushing the X-ray machine and moving patients who could not move themselves. However, the hospital later withdrew this accommodation, citing a reduction in available staff to assist the plaintiff. The Chen court held that job restructuring was not a reasonable accommodation in this case. The court found that the lifting of patients and moving the X-ray equipment were essential functions of the plaintiff’s job, and concluded that restructuring her job would essentially be the same as hiring someone to do her job, which is not required by the ADA. Also key, the court held that just because the hospital provided this accommodation in the past, that did not make the accommodation reasonable nor bind the employer to it in perpetuity; the court stated that the employer should “not be punished for its generosity by being deemed to have conceded the reasonableness of so far-reaching an accommodation.” On reconsideration, the court reversed itself and held that plaintiff raised a question of fact as to whether lifting patients and moving X-ray machines were essential functions of her job.

Plaintiff employee’s accommodation request was determined to be reasonable in *Martyne v. Parkside Medical Services* 46 (depression): the court supported the employee’s proposed accommodation of reducing some assigned duties. In this case, the plaintiff counselor was treating several patients with a dual diagnosis of a substance dependency and a psychiatric

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40 29 C.F.R. § 1630.2(o).
42 Id. at 26.
43 Id.
44 Id. at 27.
disorder, which caused her stress. The plaintiff requested that the employer shift her patient caseload so she would not treat as many dual-diagnosis patients. The court upheld the jury’s finding that this request would be a reasonable accommodation since other counselors were qualified to handle the dual diagnosis patients. In addition, because the employer’s practice was to shift patient caseloads from time to time, the court indicated that the shift requested by the plaintiff would not cause an undue burden.

Plaintiff intern’s reduction of duties request determined unreasonable and created an undue hardship as to patient care in *Shin v. University of Maryland Medical System Corporation*. An ADA claim was brought by a terminated medical resident against the defendant-hospital. The plaintiff-intern routinely received poor performance evaluations of his patient care and organization, including prescribing the wrong medications or providing incorrect and detrimental treatment. Inevitably, the plaintiff-intern was diagnosed with Attention Deficit Disorder and put on rehabilitative leave along with a prescription for Strattera. However, the plaintiff-intern’s problems persisted even with medication. The plaintiff-intern requested fewer patients, additional time to complete his tasks, and a “more compassionate environment” as accommodations for his condition. The defendant-hospital rejected the plaintiff-intern’s requests and terminated him. The court affirmed summary judgment for the defendant-hospital finding the requested accommodations to be unreasonable. The court agreed with the hospital’s position that the fewer patients accommodation would undermine the hospital’s ability function properly by putting the extra work on surrounding staff. The court also rejected the plaintiff-intern’s accommodation request of having a nurse practitioner on staff when he would be on call, because the hospital was not required by the ADA to “hire an additional person to perform an essential function of a disabled employee’s position.” Finally, the court found the plaintiff-intern’s light duty request would overall undermine the training function of the residency program.

The case of *Desmond v. Yale-New Haven Hospital, Inc.*, involved an ADA failure to accommodate claim brought against a hospital by a terminated physician assistant (“PA”). During her employment with the defendant-hospital, the PA suffered a work-related slip-and-fall while six months pregnant, which injured her hands and wrists. The plaintiff-PA’s physicians recommended surgery and further found she suffered from Complex Regional Pain Syndrome. Determining that the PA could no longer perform her job, the defendant-hospital terminated her employment while she was on leave. First, the court determined the plaintiff-PA clearly could not perform the essential functions of her job without the use of her hands and without

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48 Id. at 473-77.
49 Id. at 477.
50 Id.
51 Id. at 477-78.
52 Id. at 478.
53 Id. at 481-82.
54 Id. at 482.
55 Id. (quotation omitted).
56 Id.
57 738 F. Supp. 2d 331 (D. Conn. 2010).
58 Id. at 336.
59 Id. at 336-40.
accommodation. The plaintiff-PA’s argued, however, the defendant-hospital failed to accommodate her by providing either (1) delegation of her hand-use tasks to other medical team members and (2) at-home medical care for her injuries and condition. The court rejected both arguments. First, the court rejected the idea of delegating essential job functions as an unreasonable accommodation and further held “such an accommodation would potentially jeopardize the welfare and safety of the [hospital’s] patients in emergency situations, which customarily occur in hospital settings.” Second, the court rejected the notion the defendant-hospital owed the plaintiff-PA an accommodation in the form of medical treatment to restore her ability to perform her essential job functions; moreover, treatment was in fact provided relating to her worker’s compensation claim stemming from the slip-and-fall.

Practice Tip – Essential Functions and Undue Hardship Intertwined. The term essential function means the fundamental job duties of the employment position the person with a disability holds or desires. Evidence of whether a particular function is essential includes: the employer’s judgment, written job descriptions, amount of time spent on the job performing the function and the consequences of not requiring the incumbent to perform the function. Undue hardship with respect to the provision of an accommodation means significant difficulty or expense by an employer factoring, among other things, the nature, cost, and impact of the accommodation. The Chen case is an example of where the determination of essential functions and undue hardship depends on the viewpoint of the fact-finder. Health care providers must evaluate their job descriptions to confirm that the essential functions of job positions are clearly identified. Job descriptions can be an important piece of evidence in establishing that an employee's proposed accommodation, which would eliminate an essential function of the position, would create an "undue hardship" by altering and disrupting the nature and operations of an employer's business.

C. Job Reassignment

With respect to the job reassignment accommodation, the ADA specifically lists “reassignment to a vacant position” as a form of reasonable accommodation. In general, reassignment should be considered only when accommodation within the individual’s current position would pose an undue hardship. Reassignment is not available to applicants. Employers should reassign the employee to an equivalent position, in terms of pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time. A vacant position, however, does not have to be created. Importantly, an employer may reassign an individual to a lower graded position if there are no accommodations that would allow the employee to remain in the current position and there are no vacant equivalent positions. Finally, an employer is not required to promote an individual with a disability as an accommodation.
The case of *Schneider v. Giant of Maryland, LLC* concerned ADA failure to accommodate claims brought by a pharmacist against his employer. The plaintiff-pharmacist suffered from Type I Diabetes, which resulted in foot ulcers and blackouts. While working as a pharmacy supervisor, the plaintiff-pharmacist suffered from a blackout causing a car accident and resulting in the revocation of his driver’s license. At the time, the pharmacist proposed an arrangement with another employee to switch stores and offered to work nights and weekends to get rides to the stores he would supervise. The defendant-employer rejected this proposal and assigned the plaintiff-pharmacist to a pharmacy manager position at a local store. When the plaintiff-pharmacist regained his driving privileges he began experience weight-bearing issues with his diabetes complicating his ability to work as a pharmacy manager and requested transfer back to his prior position as pharmacy supervisor, which was denied. The court first rejected the plaintiff-pharmacist’s failure to accommodate claim for the alternative work arrangement proposed when he first blacked-out and lost his driving privileges. The court reasoned that the plaintiff-pharmacist failed to make the existence of his diabetes known to the employer at that time, which was a required disclosure for seeking an accommodation under the ADA. The court next rejected the plaintiff-pharmacist’s failure to accommodate claim for his requested transfer back to his prior supervisory position reasoning that the ADA did not require the employer to “bump” another employee out of the job who had subsequently filled the position.

*Donnelly v. St. John’s Mercy Medical Center* involved a plaintiff-nurse suffering from asthma bringing various ADA claims against the defendant-hospital. The plaintiff-nurse’s claims included failure to accommodate by the hospital in not transferring her to an ICU unit outside of a construction zone. The court first ruled against the plaintiff-nurse finding that she was not subject to any “adverse action” on account of her asthma; therefore, accommodation would not have been required. However, the court went further and found that even if the plaintiff-nurse had been subjected to “adverse action,” the defendant-hospital “met its duty to engage in the interactive process with plaintiff in a good faith effort to accommodate her disability.” The court specifically found that the defendant-hospital accommodated the plaintiff-nurse’s asthma by reassigning her to non-construction ICU units upon request, even going so far as moving her mailbox to a different ICU unit and excusing her from meetings in the construction zone ICU units. The court further rejected the plaintiff-nurse’s accommodation claim that she was periodically assigned to different ICU units as opposed to the one she requested and was to be permanently assigned, because these other units were in non-
construction locations.\textsuperscript{81} The court stated, “the ADA does not require [the hospital] to guarantee that plaintiff will never have an asthma attack while at work,” despite her having asthma attacks in these other units.\textsuperscript{82}

**Practice Tip – Identifying Reasonable Accommodations.** It is clear that there are a number of modifications that an employer can make to an employee’s work environment in response to a disability. The real issue is determining whether a requested (or offered) accommodation is “reasonable.” In this regard, case law suggests that an adjustment is reasonable if it “seems reasonable on its face, i.e., ordinarily or in the run of cases;” it if appears to be “feasible” or “plausible.” An accommodation must also be effective in meeting the needs of the individual.\textsuperscript{83} Reasonable accommodation extends to all limitations resulting from a disability, including limitations occurring as a result of the side effects of medication or treatment related to the disability. Furthermore, the duty to provide reasonable accommodation is an ongoing duty. An employer must consider each request for reasonable accommodation and determine: (1) whether the accommodation is needed, (2) if needed, whether the accommodation would be effective, and 3) if effective, whether providing the reasonable accommodation would impose an undue hardship.

IV. Direct Threat Issues

An employer is not required under the ADA to provide accommodation to an employee who poses a “direct threat” to herself/himself or others—including patients in the health care environment—unless the accommodation would eliminate the threat.\textsuperscript{84} Under the ADA, an employee is not “qualified” if he poses a direct threat to others that cannot be eliminated through reasonable accommodation. A direct threat is a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. "Direct threat" cases pose a more intractable problem, especially given the potential consequences to patients who may be harmed by health care workers with disabilities who pose such a threat. In many cases, such as those involving physicians who consistently misuse alcohol or drugs while caring for patients, no accommodation may be possible to remove the possibility of a threat. However, new technologies and techniques may become available to eliminate other threats, such as HIV transmission.\textsuperscript{85}

The first major case involving the direct threat issue was *Bradley v. University of Texas M.D. Anderson Cancer Center*.\textsuperscript{86} In *Bradley*, the plaintiff, a surgical assistant, revealed to the press that he was infected with the Human Immunodeficiency Virus (“HIV”). The center transferred the employee to another position in the hospital’s purchasing department and the employee sued, claiming the transfer violated the ADA and the rehabilitation Act. In *Bradley*, the parties disagreed about the probability that the plaintiff might cause harm. The plaintiff argued that the risk of HIV transmission was low. The hospital argued that plaintiff often came

\textsuperscript{81} Id. at 996-97.
\textsuperscript{82} Id. at 997.
\textsuperscript{84} 29 C.F.R. § 1630.2(r).
\textsuperscript{85} Four Emerging Issues in Americans with Disabilities Act Litigation Involving Hospitals and Other Health Care Providers by Curtis D. Edmonds
\textsuperscript{86} 3 F.3d 922 (5th Cir. 1993).
into contact with both open wounds and sharp instruments. The Court held that HIV infected health care workers should not perform exposure-prone procedures unless they have sought counsel from an expert review panel and been advised of the circumstances of continuing to perform those procedures. The Court found that although the risk of infection was small, “it is not so low as to nullify the catastrophic consequences of an accident.”

The *Bradley* court adhered to guidance from the U.S. Supreme Court in the Rehabilitation Act case of *School Board of Nassau County v. Arline*, which involved a teacher with tuberculosis. There, the Supreme Court advanced a two-part test for determining whether a person with a disability who could arguably pose a direct threat was qualified to perform a given job. Specifically, the Court stated that a court must first conduct an individualized inquiry to determine whether the individual was qualified, balancing the goals of federal anti-discrimination law against the need for public safety. Four factors were identified for consideration as part of this balancing test: (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk, (c) the severity of the risk and (d) the probabilities that the disease will be transmitted and will cause varying degrees of harm. The Court also stated that courts should defer to the “reasonable medical judgments of public health officials” in evaluating these factors. The second step of this determination involved deciding whether a threat could be eliminated through reasonable accommodation.

For individuals with mental or emotional disabilities, ADA regulations indicate that the employer must identify the specific behavior that would pose the direct threat. The assessment of the risk must be strictly based on valid medical analyses and other objective evidence. Of concern in *EEOC v. Amego* (depression) was the threat to patient care. In this case, plaintiff therapist worked at a residential facility for people with developmental disabilities. The therapist was suspected of stealing medications for her own use and providing patients with either the wrong medication or too much medication. The court found that the therapist posed an “obvious and extreme” threat to patients. Furthermore, there was no way to protect the patients from the threat of ingesting the wrong medication. Here, the EEOC contended that the threat to patients could have been reduced by transferring the therapist to another position. The court found, however, that the therapist would still have access to medication in the new position and would still pose a threat.

The inability to communicate needed medical information resulted in a direct threat to patient care that could not be ameliorated by accommodation in *Jakubowski v. Christ Hospital, Inc.* Plaintiff, a former medical resident suffering from Asperger’s Disorder sued the hospital for failing to accommodate his disability. During his residency, the plaintiff-resident had “trouble communicating his thoughts to people and processing what people communicate[d] to him,”

88 Id. at 287.
89 110 F.3d 1335 (1st Cir. 1997)
90 627 F.3d 195 (6th Cir. 2010), cert. denied, 131 S. Ct. 3071 (2011).
along with “trouble gathering data.”\(^{91}\) The plaintiff-resident’s troubles resulted in distrust by other physicians and dangerous medical orders that could have killed patients if literally followed.\(^ {92}\) Before being terminated for his poor performance, the plaintiff-resident requested an accommodation in the form of informing the hospital staff and physicians of his Asperger’s Disorder.\(^ {93}\) In affirming summary judgment in favor of the defendant-hospital, the court stated, “Because of his disorder, [the plaintiff-resident] has extreme difficulty communicating with colleagues and patients. This difficulty has led to dangerous possibilities in the past . . . . Although he proposed accommodations to help him overcome his disability, they did not address every essential function that a resident must be able to perform.”\(^ {94}\) Worth noting, Judge Cole in his concurring opinion chastised the court’s majority opinion for not considering the additional training accommodations the plaintiff-resident proposed during the discovery phase of the trial. “We have never squarely held, as the majority does today, that the sufficiency of an ADA plaintiff’s showing that he is otherwise qualified must be analyzed exclusively in light of the scope of the accommodation he requested from his employer prior to his termination from his position . . . .”\(^ {95}\)

Threats of workplace violence supported doctor’s termination in Bodenstab v. County of Cook.\(^ {96}\) The case involved a doctor of anesthesiology terminated from his hospital job. While employed by the defendant-hospital, the plaintiff-doctor was diagnosed with a cancerous lesion on his lip.\(^ {97}\) The plaintiff-doctor called a friend and told her he would kill his supervisor and other staff members if the lesion was metastasized.\(^ {98}\) The friend in turn contacted the local police and FBI informing them of the plaintiff-doctor’s threats, which were then relayed to the defendant-hospital.\(^ {99}\) The hospital had the plaintiff-doctor assessed and found he suffered from “paranoid and narcissistic personality features and occupational and interpersonal stressors.” Among the plaintiff-doctor’s claims included being discharged in violation of the ADA for being “regarded as” unable to interact with others.\(^ {100}\) To begin with, the court was highly skeptical of whether “interacting with others” would be considered a “major life activity” the limitation of which would constitute a disability under the ADA, but did not make a finding either way.\(^ {101}\) When the defendant-hospital discharged the plaintiff-doctor it stated that it considered the doctor a “direct threat to the health and safety of other individuals in the workplace.”\(^ {102}\) The plaintiff-doctor challenged this “direct threat” basis for his termination.\(^ {103}\) However, the court declined to determine whether the plaintiff-doctor was a “direct threat” finding his threat standing alone was a legitimate, non-discriminatory reason for his termination.\(^ {104}\) The court further rejected the

\(^{91}\) Id. at 199.  
^{92}\ Id. at 198, 200.  
^{93}\ Id. at 202.  
^{94}\ Id. at 203.  
^{95}\ Id. at 204-05.  
^{96}\ 569 F.3d 651 (7th Cir. 2009), cert. denied, 130 S. Ct. 1059 (2010).  
^{97}\ Id. at 655.  
^{98}\ Id.  
^{99}\ Id.  
^{100}\ Id. at 656.  
^{101}\ Id.  
^{102}\ Id. at 658.  
^{103}\ Id. at 659.  
^{104}\ Id.
plaintiff-doctor’s failure to accommodate claim finding “no legal obligation to accommodate conduct [i.e., threats of violence], as opposed to a disability.”

**Practice Tip – Direct Threat Implications of Employee Conduct.** The courts will likely defer to the “reasonable medical judgments of public health officials” in evaluating the direct threat risk factors especially when the threat is obvious, significant and immediate. The courts will also defer to a health care provider’s judgment as to whether a threat could be eliminated through reasonable accommodation. However, health care providers should be mindful to consider the accommodation issue before taking adverse action against the employee.

**V. Title III Employment Issues**

The case of *Menkowitz v. Pottstown Memorial Medical Center* was a case of first impression where an independent contractor doctor brought suit against the hospital he worked for under Title III of the ADA. Traditionally, Title I of the ADA provides the remedy to employees for disability discrimination in the employment setting. However, because the plaintiff-doctor was not an “employee,” this avenue of redress was not available. Title III concerns disability discrimination on the basis of goods, services, facilities, advantages or accommodations at places of “public accommodation.” The court framed the question as whether Title III “prohibits disability discrimination against a medical doctor with ‘staff privileges’ at a hospital.” In reversing the trial court, the Third Circuit engaged in statutory interpretation of Title III and its interplay with Title I and the Rehabilitation Act. The court concluded that Title III covers “individuals” and is not restricted to guests, patrons, clients, customers, or members of the public; therefore, the plaintiff-doctor was covered by Title III. The court rejected the argument that Title III was not intended to cover employment-related discrimination not otherwise covered by Title I, because the plaintiff-doctor would theoretically have no means to seek a redress of his claimed disability discrimination. The court further found that the doctor-plaintiff’s suspension from the medical staff was a denial of a privilege available at a physical place of public accommodation (i.e., the hospital) satisfying Title III’s requirement of a nexus between the claimed discrimination and a physical location. As a result, the court held that the plaintiff-doctor had standing to maintain his Title III ADA claim against the defendant-hospital.

District courts in the Third Circuit continue to follow the *Menkowitz* decision as is the case in *Lewis v. UPMC Bedford*. In *Lewis*, a plaintiff-doctor brought suit under the ADA and Rehabilitation Act against a defendant-hospital. The plaintiff-doctor was an independent contractor for the hospital. The plaintiff-doctor had been diagnosed with Attention Deficit

105 Id. (internal quotation marks and citation omitted).
106 154 F.3d 113 (3d Cir. 1998).
107 Id. at 115.
108 Id. at 118-20.
109 Id. at 121.
110 Id. at 122.
111 Id.
112 Id.
114 Id. at *1.
115 Id.
Disorder and requested to see patients in “batches” as an accommodation, which the hospital denied. Following this diagnosis, the hospital instituted a “shadowing” program and followed the plaintiff-doctor eventually resulting in his probation and eventual termination. The plaintiff-doctor brought a claim under Title III of the ADA for discrimination on the account of his ADHD. The defendant-hospital argued that the plaintiff-doctor never became part of the “medical staff” and lacked standing under Title III. The court rejected this argument and held that the plaintiff-doctor had standing because there was no doubt he enjoyed staff privileges. “The holding in Menkowitz do[es] not refer to membership on the medical staff. Rather, [it] refer[s] to physicians with staff privileges.” Turning to the merits of the plaintiff-doctor’s claims, the court first found a dispute over whether the plaintiff-doctor was discriminated against on account of his ADHD, which undermined summary judgment for the hospital. The court also flatly rejected any argument that the hospital could not be liable for the conduct of another physician who may have “regarded” the plaintiff-doctor as disabled. Relying on the Menkowitz decision, the court next found the plaintiff-doctor was denied medical staff privileges supporting his claim. The court concluded its Title III analysis finding there was no dispute that the defendant-hospital operated a place of public accommodation. The court denied the defendant-hospital summary judgment finding the plaintiff-doctor had standing and set-out a prima facie case under Title III. In the same vein, the court also held that the plaintiff-doctor could maintain his Rehabilitation Act § 504 claim, because an employment relationship is not a required element as suggested by Menkowitz.

The holding in Menkowitz is ripe for application in other circuits, and some appellate courts have suggested such as is the case in Judge Jones’ dissenting opinion in Krasnopolsky v. Appalachian Regional Healthcare, Inc. In Krasnopolsky, the Sixth Circuit affirmed summary judgment for the defendant-hospital against the ADA and RA claims of the plaintiff-doctor who worked for the hospital as an independent contractor finding the plaintiff failed to preserve his ADA Title III and RA claims on appeal. In his dissent, Judge Jones hinted that the Third Circuit’s decision in Menkowitz may have been cause to reverse the trial court’s “dubious grant of summary judgment” in favor of the defendant-hospital as to Title III.

Practice Tip – Title III ADA Claims. Once a physician is given staff privileges, the safe approach is to assume that Title I type protections apply to that individual. At this time, the Third Circuit Court theory of ADA liability under Title III appears to be growing.

116 Id. at *2.
117 Id. at *3-4.
118 Id. at *5.
119 Id.
120 Id.
121 Id. at *6.
122 Id. at *6-7.
123 Id. at *7.
124 Id.
125 Id.
126 Id.
127 Id. at *9.
129 Id. at *1.
130 Id.
VI. Conclusion

The theme throughout the various court decisions involving health care providers is the either explicit or implicit concern for patient care, protecting the quality of medical services and the desire to limit or reduce disruption to the provider’s operations. Once the employee’s disability status is discerned, the provider should actively participate in the interactive process, obtain and then fairly evaluate proposed accommodations, and assess and verify, if any, undue hardship and direct threat issues. If done in the spirit of the ADA’s enactment, a health care provider can significantly limit liability in employee ADA claims.